

Ninth Circuit Judges' Trial Manual

2025 Edition



*NINTH CIRCUIT JUDGES’
TRIAL MANUAL*

2025

PREFACE

This NINTH CIRCUIT JUDGES' TRIAL MANUAL is the Sixth Edition in a series produced by the Ninth Circuit to assist trial judges. Earlier editions were titled, A MANUAL ON JURY TRIAL PROCEDURES. With this Sixth Edition, in addition to updating the law, new topics and information have been provided, and the scope has been expanded to all civil and criminal trials, bench as well as jury. The First Edition was produced in 1990 by the Ninth Circuit Jury Management and Utilization Committee and later updated by the Ninth Circuit Jury Instructions Committee in 1998, 2000, 2004, and 2013. For this 2025 edition, the Chief Judge of the Ninth Circuit, the Honorable Mary H. Murguia, appointed an ad hoc committee of judges to update and revise this work.

As with previous editions, this Manual focuses on the law, procedure, and practice in the Ninth Circuit governing trials in federal court. It continues the previous practice of citing primarily Supreme Court and Ninth Circuit case law when available. Consistent with the current practice in the Ninth Circuit, this Manual also provides practical suggestions to assist judges in conducting trials.

The Ninth Circuit Judges' Trial Manual Committee expresses its appreciation to the Office of the Circuit Executive for its support and for publishing this new edition of the Manual. The Committee also thanks the many law clerks who provided significant assistance in this update. Finally, the Committee acknowledges the pioneering work of the late U.S. District Judge John M. Roll of Tucson, Arizona in gathering and providing the benefits of collective judicial trial experience. Judge Roll chaired the 1998 committee that first revised the 1990 edition of this Manual, and he was the sole author of several editions of the NINTH CIRCUIT'S JUDGES' BENCHBOOK ON PRETRIAL CRIMINAL PROCEEDINGS. He exemplified the model of "paying it forward."

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Chapter One: Pretrial Matters

This chapter discusses pretrial matters that may arise in criminal and civil trials, including the right to trial by jury trial, pretrial filings and motions, and disclosure of pretrial and trial documents, among other things. Because pretrial procedures in criminal matters are substantially different from pretrial procedures in civil cases, this chapter discusses each in separate sections. Section 1.1 addresses pretrial matters in criminal cases, and Section 1.2 discusses pretrial considerations in civil cases. Finally, rules relating to expert witnesses are discussed in Section 1.3, with Section 1.3.1 focusing on criminal-specific rules, Section 1.3.2 focusing on civil-specific rules, and Section 1.3.3 discussing expert witness issues common to both criminal and civil cases.

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1.1 Criminal Cases

1.1.1 Initial Appearances

After an arrest, a defendant's initial appearance before a magistrate judge must occur "without unnecessary delay." Fed. R. Crim. P. 5. "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger the Sixth Amendment right to counsel." *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 213; see also Fed. R. Crim. P. 44(a).

1.1.1.1 Right to Counsel

At the defendant's initial appearance, a judge will inform the defendant of the charges and ask if the defendant has an attorney. If the defendant does not have an attorney, the judge may appoint counsel to represent him. This is typically done to ensure that the defendant has legal representation, as the right to counsel is guaranteed by the Sixth Amendment to the United States Constitution. The appointed counsel typically will be a public defender or another attorney who has been appointed to represent indigent defendants. The purpose of appointing counsel at the initial appearance is to ensure that the defendant has legal representation and a fair opportunity to defend against the charges. When a court "finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney." 18 U.S.C. § 3006A(f).

1.1.1.2 Right to Self-Representation

A defendant has the right to waive the defendant's right to counsel and choose self-representation (also known as proceeding pro se). *Faretta v. California*, 422 U.S. 806 (1975);

United States v. Farias, 618 F.3d 1049, 1051 (9th Cir. 2010). To exercise the right of self representation, the defendant must make a timely, unequivocal, voluntary, and intelligent request to proceed pro se. *United States v. Maness*, 566 F.3d 894, 896 (9th Cir. 2009). “Once a defendant makes an unequivocal request to proceed pro se, the court must hold a hearing—commonly known as a *Faretta* hearing—to determine whether the defendant is knowingly and intelligently forgoing his right to appointed counsel.” *Farias*, 618 F.3d at 1051-52. In the Ninth Circuit, a *Faretta* hearing must make the defendant aware of “(1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation.” *United States v. Farhad*, 190 F.3d 1097, 1099 (9th Cir. 1999) (per curiam). A timely request, made before the jury is empaneled, “must be granted so long as it is not made for purposes of delay and the defendant is competent.” *Farias*, 618 F.3d at 1052. As discussed below, the right of self-representation does not apply to non-natural defendants, e.g., corporations.

The right to self representation is not absolute and a court may deny a defendant’s request to proceed pro se or revoke the right in certain circumstances. *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984). Generally, abusive, threatening, obstructionist or uncooperative behavior, dilatory behavior, failure to follow or defiance of the rules, issues of mental competency, and orders of the court have been grounds for revocation of the self-representation right. *See, e.g., United States v. Dujanovic*, 486 F.2d 182 (9th Cir. 1973); *United States v. Kelm*, 827 F.2d 1319 (9th Cir. 1987).

1.1.1.3 Non-Natural Defendants

Corporations, partnerships, and limited liability companies can be charged with federal criminal offenses but must be represented by attorneys in court. *Reading International, Inc.*

v. The Maululani Group, Ltd., 814 F.3d 1046, 1053 (9th Cir. 2016).

1.1.1.4 Appointing Stand-by Counsel

If a defendant's request to proceed pro se is granted, the trial court will commonly appoint "stand-by" or "shadow" counsel. *Faretta*, 422 U.S. at 834 n.46. Stand-by counsel is a lawyer who is assigned to assist a self-representing defendant in a criminal trial. Stand-by counsel is not the primary lawyer for the defendant and does not take over the defense but offers assistance and guidance as needed. The role of stand-by counsel is to ensure that the defendant's rights are protected and gives access to legal counsel if needed. Stand-by counsel can provide advice on legal matters, assist with the preparation and filing of legal documents, and help the defendant understand the legal proceedings. Stand-by counsel can also step in to take over the defense if the defendant is unable to continue self-representation or if the court determines that it is in the best interest of the defendant. Stand-by counsel can play an important role in helping a defendant who is acting pro se navigate the legal system and protect their rights.

Appointing stand-by counsel is often advisable, both to protect the defendant and to facilitate trial proceedings; however, there is no right to have stand-by counsel appointed. If the defendant does not make an explicit request, stand-by counsel is waived. *United States v. Salemo*, 81 F.3d 1453, 1460 (9th Cir. 1996). The defendant does not have a right to their stand-by counsel of choice. *United States v. Webster*, 84 F.3d 1056, 1062-63 (8th Cir. 1996).

Sometimes, a defendant may decline the services of stand-by counsel or even ask that one not be seated next to the defendant during trial. In those circumstances, the trial court may still decide that stand-by counsel should be appointed and direct stand-by counsel to remain in the public

section of the courtroom until called upon. This will reduce the risk of a mistrial or other problems if stand-by counsel is needed during trial, either at the request of the defendant or if the defendant's conduct requires the judge to remove the defendant from the courtroom. If a financially eligible pro se defendant agrees to be represented, at least in part, by stand-by counsel, or if a defendant declines stand-by counsel and the court nevertheless assigns one, compensation may still be provided under the Criminal Justice Act. For further guidance under these circumstances, *see Guide to Judiciary Policy*, Vol. 7, § 220.55.20.

1.1.1.5 *Brady* Admonishment

Rule 5(f) of the Federal Rules of Criminal Procedure requires district courts to issue an order at the outset of a federal criminal prosecution confirming the federal prosecutor's obligations to disclose exculpatory evidence to the defense. Generally, magistrate judges will advise the government of the requirements at the initial appearance.

1.1.2 Joinder and Severance

Fed. R. Crim. P. 8 allows joinder of two or more defendants and two or more offenses in the same indictment or information. Fed. R. Crim. P. 14(a), in turn, permits a court to grant a severance if the joinder of offenses or defendants, or a consolidation for trial, "appears to prejudice a defendant or the government." To warrant severance, the defendant bears the heavy burden of demonstrating that a joint trial is so manifestly prejudicial that the trial judge is required to exercise discretion "in but one way, by ordering a separate trial." *United States v. Jenkins*, 633 F.3d 788, 807 (9th Cir. 2011). "There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. United States*, 506 U.S. 534, 537 (1993). The "district court

should grant a severance only when there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent a jury from making a reliable judgment about guilt or innocence.” *Id.* at 539.

The admission of a co-defendant’s out-of-court confession at a joint trial, where the co-defendant does not testify and is not available for cross-examination, violates a defendant’s Sixth Amendment right to confront the witnesses against him. *Lilly v. Virginia*, 527 U.S. 116 (1999); *Gray v. Maryland*, 523 U.S. 185 (1998); *Bruton v. United States*, 391 U.S. 123 (1968). The Confrontation Clause guarantees the right of a criminal defendant to confront the witnesses against him and to cross-examine those witnesses. To address *Bruton* issues, the court may allow the statement to be admitted but instruct the jury not to consider it against the other defendant. Alternatively, the court may sever the trial and try the defendants separately or may redact the statement to remove any references to the other defendant.

1.1.3 Petty Offenses

Although the Sixth Amendment guarantees the accused’s right to a jury trial “in all criminal cases,” the Supreme Court has limited the right to serious offenses, excluding petty offenses. *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). Thus, there is no right to a jury trial for a petty offense. If the maximum punishment for a crime is incarceration for 6 months or less, “there is a very strong presumption that the offense is petty, and defendant is not entitled to a jury trial.” *United States v. Ballek*, 170 F.3d 871, 876 (9th Cir. 1999); *Lewis v. United States*, 518 U.S. 322 (1996). Punishment other than incarceration, such as a very large fine, especially when it is added to a sentence of incarceration, may make a punishment so severe that the crime is not a petty offense. *Ballek*, 170 F.3d at 876. Defendants have a right to counsel in

any petty offense if the crime is punishable by incarceration for any length of time. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

1.1.4 Misdemeanor Trials Conducted by a Magistrate Judge

Under 18 U.S.C. § 3401, a magistrate judge may be designated by the district court to preside over a trial for misdemeanor charges. If the misdemeanor is classified as a petty offense, the defendant's consent is not required for the trial to be conducted by a magistrate judge. However, if the misdemeanor is not considered a petty offense, the defendant has the option to request that the trial be conducted by a district judge instead of a magistrate judge.

1.1.5 Preindictment Delay

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

The Ninth Circuit employs a two-part test to determine if preindictment delay violated the Fifth Amendment. *United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007). The court asks: (1) whether the defendant suffered actual, nonspeculative prejudice from the delay; and (2) whether the delay, when balanced against the prosecution's reasons for it, “offends those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions.’” *Gilbert*, 266

F.3d at 1187. A defendant must satisfy the first prong of the test before the court even considers the second prong. *United States v. Huntley*, 976 F.2d 1287, 1290-91 (9th Cir. 1992). Establishing prejudice is a “heavy burden” that is rarely met. *Id.*

1.1.6 Post-Indictment Delay that Violates Due Process

Lengthy delays have been found to violate due process. See, e.g., *United States v. Hay*, 122 F.3d 1233, 1235 (9th Cir. 1997) (48-day delay between close of evidence and closing arguments held to have violated defendant’s due process rights); *United States v. Andrews*, 790 F.2d 803 (10th Cir. 1986) (two and one-half months); *United States v. Fox*, 788 F.2d 905 (2d Cir. 1986) (five and one-half months). A delay of greater than one year is presumptively prejudicial. *United States v. Gregory*, 322 F.3d 1157, 1162 (9th Cir. 2003).

1.1.7 Waiver of Jury Trial by Defendant

Fed. R. Crim. P. 23(a) provides that, if the defendant is entitled to a jury trial, the trial must be by jury unless:

1. the defendant waives a jury trial in writing;
2. the government consents; and
3. the court approves.

In addition, the waiver must be made voluntarily, knowingly, and intelligently. *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997). To ensure that the waiver meets this requirement, the judge should engage in a colloquy with the defendant regarding the waiver. *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994) (in-depth colloquy required for waiver when court has reason to suspect

defendant may suffer from mental or emotional instability). In all cases, the district court “should inform the defendant that: (1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial [and the court] should question the defendant to be sure he understands the benefits and burdens of a jury trial and freely chooses to waive a jury.” *Duarte-Higareda*, 113 F.3d at 1002.

Because a defendant has no Sixth Amendment right to waive a jury trial, the government is not required to give reasons if it refuses to consent to a waiver. *United States v. Reyes*, 8 F.3d 1379, 1390 (9th Cir. 1993) (citing *Singer v. United States*, 380 U.S. 24, 37 (1965)) (“We need not determine in this case whether there might be circumstances where a defendant’s reasons for wanting to be tried by a judge alone are so compelling that the Government’s insistence on trial by jury would result in the denial to a defendant of an impartial trial.”).

1.1.8 Stipulations Regarding Elements of a Crime

“A stipulation is valid and binding if the defendant understands the contents of the stipulation, the nature of the stipulated-facts trial, and the likelihood of a guilty finding.” *Adams v. Peterson*, 968 F.2d 835, 844 (9th Cir. 1992) (en banc). Although a defendant’s tactical decision not to contest an element of the crime charged does not relieve the government of its burden to prove that element, *Estelle v. McGuire*, 502 U.S. 62, 69 (1991), a defendant’s stipulation to the existence of his prior felony conviction must be accepted to the exclusion of proof of the conviction by the government in a trial of a felon in possession of a firearm charge. *Old Chief v. United States*, 519 U.S. 172 (1997).

1.1.9 Venue

A defendant has a right to be tried in a forum where the crime was committed. *See* Article III, Section 2, Constitution of the United States; Sixth Amendment, Constitution of the United States; Fed. R. Crim. P. 18. In *Smith v. United States*, 599 U.S. 236 (2023), the Supreme Court held that a violation of the Constitution’s Venue Clause does not necessitate dismissal; rather, it warrants a new trial. *Accord United States v. Fortenberry*, 89 F.4th 702, 713 (9th Cir. 2023) (reversing defendant’s conviction obtained in wrong venue “so that he may be retried, if at all, in a proper venue”). *See also* Section 4.11. Rule 21 of the Federal Rules of Criminal Procedure addresses transfer of venue for trial. Further, some districts contain separate “divisions” which should be considered when determining the proper venue.

1.1.10 Double Jeopardy

1.1.10.1 Protections

The Fifth Amendment’s Double Jeopardy Clause, which provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb,” U.S. CONST. amend. V, protects against a second prosecution for the same offense after acquittal or conviction as well as multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (multiple punishment); *Gavieres v. United States*, 220 U.S. 338, 342 (1911) (successive prosecutions).

The Clause embodies the principle that “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense

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and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” *Yeager v. United States*, 557 U.S. 110, 117-18 (2009) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

1.1.10.2 Attachment

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

1.1.10.3 Termination

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

A district court’s decision to set aside a verdict convicting a defendant because the government’s evidence was insufficient to support a guilty verdict causes a judgment of acquittal that bars retrial for the same offense. *Burks v. United States*, 437 U.S. 1, 10-11 n.5 (1978) (citing *Fong Foo v. United States*, 369 U.S. 141 (1962)). The same rule applies when an appellate court overturns a verdict convicting a defendant and directs a judgment of acquittal because the government’s evidence was insufficient to support a guilty verdict. *Id.* at 18 (holding that “the Double Jeopardy Clause precludes a second trial after the reviewing court has found the evidence legally insufficient”). This is “an exception to the general rule that the Double

Jeopardy Clause does not bar the retrial of a defendant who has succeeded in getting his conviction set aside for error in the proceedings below.” *Lockhart v. Nelson*, 488 U.S. 33, 39 (1988).

The Double Jeopardy Clause’s issue-preclusion component prohibits a second trial on an issue of fact or law that was raised and resolved by a previous judgment. *Ashe v. Swenson*, 397 U.S. 436 (1970). It is the defendant’s burden to show that the issue the defendant is trying to bar from subsequent prosecution was decided by a prior acquittal. *Schiro v. Farley*, 510 U.S. 222, 233 (1994). If the jury acquits a defendant of an offense, the verdict functions as an implied acquittal that bars retrial of the defendant for any other offense that shares a required element of that offense. *Yeager*, 557 U.S. at 118-23 (“the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury’s acquittal in a prior trial”). However, if the same jury returns conflicting verdicts on the same issue, the defendant cannot meet their burden to show that double jeopardy applies, and the acquittal will not bar subsequent prosecution. *United States v. Powell*, 469 U.S. 57, 68-69 (1984). That said, if the same jury in the same proceeding fails to reach a verdict on a different count involving the same ultimate issue of fact, the acquittal does have preclusive effect. *Yeager v. United States*, 557 U.S. at 121-122.

Jeopardy does not necessarily terminate, and a retrial of the defendant before a new jury does not violate the Double Jeopardy Clause, when a district court, based on manifest necessity, declares a mistrial because the jury could not reach a verdict on a charged offense. *Renico v. Lett*, 559 U.S. 766 (2010); *Richardson v. United States*, 468 U.S. 317, 323-24 (1984); *see also* § 5.5. But if there was no manifest necessity for the district court to declare the mistrial, the Double Jeopardy Clause bars retrial of the offense on which the district court

improperly declared a mistrial. *See United States v. Carothers*, 630 F.3d 959, 964 (9th Cir. 2011) (permitting retrial on greater offense on which jury was hopelessly deadlocked and prohibiting retrial on lesser included offense on which district court refused to receive verdict). Note, however, that a split verdict by a jury that acquits on some counts and hangs on others may require a more nuanced analysis of whether the Double Jeopardy Clause permits retrials. *See Yeager v. United States*, 557 U.S. 110, 117-25 (2009) (“[A]cquittals can preclude retrial on counts on which the same jury hangs.”).

1.1.11 Speedy Trial Act Issues—18 U.S.C. § 3161, *et seq.*

1.1.11.1 Basis

The right to a speedy trial derives both from the Sixth Amendment and federal statute. The Speedy Trial Act, 18 U.S.C. § 3161, *et seq.*, provides time limits within which criminal proceedings, including trial, must take place, as well as exclusions from those time limits. The Speedy Trial Act reflects congressional dissatisfaction with the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), and is designed to safeguard a criminal defendant’s right to a swift trial and serve the public’s interest in quickly resolving criminal cases. However, the Act does allow for some flexibility by excluding certain periods of time to accommodate reasonable delays that may occur during pretrial proceedings.

1.1.11.2 Charging

Under 18 U.S.C. § 3161(b), any information or indictment charging an individual with an offense must be filed within 30 days from arrest or service of summons. However, the issuance of a violation notice does not trigger the 30-day rule of § 3161(b). *United States v. Boyd*, 214 F.3d 1052, 1056 (9th Cir. 2000) (holding that issuance of violation notice for class

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A misdemeanor, even following brief detention, cannot be considered “complaint” issued at time of “arrest”).

1.1.11.3 Calculations

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

In certain circumstances, the speedy trial clock resets upon the filing of a superseding indictment that adds a new defendant. *King*, 483 F.3d at 973. Factors to consider in determining whether the clock is restarted include the “reasonableness of the delay” and “absence of bad faith on the part of the government.” *Id.* at 974 (concluding that if delay is reasonable and there is no bad faith, application of defendant-specific Speedy Trial Act timelines would frustrate efficiency rationale that underlies rules of joinder).

In determining the expiration of the 30 days, the day of the arrest is excluded, but weekends and holidays are included. *United States v. Arellano-Rivera*, 244 F.3d 1119, 1123 (9th Cir. 2001).

1.1.11.4 The 70-Day Rule for Trial

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

1.1.11.5 Excludable Time

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

The most common grounds for delay and exclusion are:

1. Motions and other proceedings concerning defendant —§ 3161(h)(1). This exclusion typically encompasses mental competency proceedings, interlocutory appeals, and the pendency of pretrial motions. The excludability under subsection (h)(1) is “automatic” in the sense that a district court must exclude such delay from a Speedy Trial Act calculation without any further analysis as to whether the necessity of the delay outweighs the benefit of a speedy trial. *Bloate*, 559 U.S. at 199 n.1. For delays resulting from proceedings under subsection (h)(1), Congress already has determined that the benefit of such delay outweighs to the interest in a speedy trial, regardless of the specifics of the case. *Id.* The time a motion is pending is excludable even when the pendency of the motion causes no actual delay in the trial. *United States v. Tinklenberg*, 563 U.S. 647, 654-60 (2011); *United States v. Vo*, 413 F.3d 1010, 1015 (9th Cir. 2005). If a pretrial motion does not require a hearing, the period from the date the motion was taken under

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advisement until the court rules on the motion, but no more than 30 days, may be excluded. *Henderson v. United States*, 476 U.S. 321, 329 (1986); *United States v. Medina*, 524 F.3d 974, 978-79 (9th Cir. 2008).

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

An interlocutory appeal tolls the Speedy Trial Act but does not restart the clock. *United States v. Pitner*, 307 F.3d 1178, 1183 (9th Cir. 2002). The time between the district court’s order and the filing of an interlocutory appeal is not excludable. *Pete*, 525 F.3d at 849 n.5 (9th Cir. 2008). The excludable time for interlocutory appeals ends when the mandate issues. *Id.*

To toll the Speedy Trial Act, a continuance of a pending discovery motion must be to a date certain or to the happening of an event certain, and the parties must have a real dispute or the possibility of a real dispute. *United States v. Sutter*, 340 F.3d 1022, 1028, 1031-32 (9th Cir.), *opinion amended on denial of reh’g*, 348 F.3d 789 (9th Cir. 2003).

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2. Deferred prosecution pursuant to a written agreement—§ 3161(h)(2).
3. Absence or unavailability of the defendant or an essential witness—§ 3161(h)(3)(A).
4. Joinder of defendant with an unsevered codefendant as to whom the Speedy Trial Act has not run—§ 3161(h)(6). For a court to attribute a codefendant's excludable delay under § 3161(h)(7) to a defendant, the delay must meet the reasonableness requirement of § 3161(h)(6). *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010).
5. Ends of Justice—§ 3161(h)(7)(A). Upon motion of the judge or a party for continuance, any period of delay is excludable from the Speedy Trial Act, provided the continuance is based upon findings "that the ends of justice served by [the action taken] outweigh the best interests of the public and the defendant in a speedy trial."

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

- a. whether failure to grant a continuance would result in a miscarriage of justice;
- b. whether the case is so unusual or complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or trial within the time limits of the Speedy Trial Act;

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- c. whether certain circumstances concerning the indictment justify the continuance; and
- d. whether failure to grant a continuance would otherwise “deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.”

The Ninth Circuit has stated that the “ends of justice” exclusion should “not be granted as a matter of course”; rather it should “be used sparingly” and “may not be invoked in such a way as to circumvent” the time limitations of the Speedy Trial Act. *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1155 (9th Cir. 2000) (internal quotations omitted).

A district court must satisfy two requirements when it grants an “ends of justice” continuance under § 3161(h)(7): “(1) the continuance must be specifically limited in time; and (2) it must be justified on the record with reference to the facts as of the time the delay is ordered.” *Lewis*, 611 F.3d at 1176 (quoting *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997)). The court must conduct an appropriate inquiry to determine whether the various parties want and need a continuance, how long a delay is required, what adjustments can be made with respect to the trial calendars or other plans of counsel, and whether granting the requested continuance would “outweigh the best interest of the public and the defendants in a speedy trial.” *Id.* After making this inquiry, the trial court should ensure that the factual circumstances for finding an “ends of justice” exclusion are clearly stated on the record.

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The 70-day limit under subsection (h)(1) does not automatically exclude the time given to prepare pretrial motions. This time may only be excluded if a district court grants a continuance based on appropriate findings under subsection (h)(7). *Bloate v. United States*, 559 U.S. 196 (2010).

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

1.1.11.6 Plea Negotiations

Time devoted to plea negotiations is not excluded. *See Ramirez-Cortez*, 213 F.3d at 1155. But when the defendant notifies the court that negotiations have resulted in an agreement and the court sets a change of plea hearing, the time until the hearing is held may be excluded either under § 3161(h)(1)(G) because it is “delay resulting from consideration by the court of a proposed plea agreement” or under § 3161(h)(1)(D) as a “pretrial motion.” *United States v. Alvarez-Perez*, 629 F.3d 1053, 1058 (9th Cir. 2010).

1.1.11.7 Time Limits for New Trials

If a defendant becomes entitled to a new trial (by an order of the trial court, remand by an appellate court, or after a successful collateral attack), the new trial must commence within 70 days from the date the action that occasions the retrial becomes final. 18 U.S.C. § 3161(e). Because long-delayed retrials can present logistical difficulties, the court may extend the period up to 180 days from that date if the retrial follows an appeal or collateral attack and circumstances, like the unavailability of witnesses, make trial within 70 days

impractical. *Id.* The clock begins to run when the appellate court issues the mandate, not when the district court receives it. *Pete*, 525 F.3d at 853 (Speedy Trial Act's focus is on when district court obtains or regains jurisdiction).

1.1.11.8 Voir Dire Stops the Speedy Trial Clock

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

1.1.11.9 Dismissal for a Violation of the Speedy Trial Act

If trial does not begin within the requisite time period and the defendant moves for dismissal before trial, the court must dismiss the indictment, either with or without prejudice. 18 U.S.C. § 3162(a)(2). In determining whether to dismiss the case with or without prejudice, the district court shall consider, among others, the following factors: the seriousness of the offense; the facts and circumstances of the case that led to the dismissal; and the impact of a reprosecution on the Speedy Trial Act and the administration of justice. *Id.*; *United States v. Alvarez-Perez*, 629 F.3d 1053, 1062 (9th Cir. 2010). In addition, the court should consider prejudice to the defendant from the delay as well as whether the government intentionally delayed the trial to harass the defendant or otherwise acted in bad faith. *Id.* at 1062-63.

1.1.11.10 Defendants May Not Opt Out

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

1.1.11.11 Stipulations to Exclude Time

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

1.1.11.12 Defendant's Objections to Excludable Delay

If a defendant objects to a court's determination of excludable delay, the court should state with specificity the factual and legal bases for the court's findings and conclusions.

1.1.12 Managing Pretrial Discovery

1.1.12.1 Rule 16

Rule 16 of the Federal Rules of Criminal Procedure governs discovery and inspection of evidence in federal criminal cases. Rule 16 entitles the defendant to receive, upon request, the following information: statements made by the defendant; the defendant's prior criminal record; documents and tangible objects within the government's possession, custody, or control that "are material to the preparation

of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant"; reports of examinations and tests that are material to the preparation of the defense; and written summaries of expert testimony. Rule 16 also imposes on the government a continuing duty to disclose additional evidence or materials subject to discovery under the rule if the government discovers such information before or during trial. Further, Rule 16 grants the court discretion to issue sanctions or other orders "as are just" in the event the government fails to comply with a discovery request made under the rule. In addition, Rule 16 imposes reciprocal discovery obligations on a defendant if the defendant has requested Rule 16 discovery from the government. *See* Fed. R. Crim. P. 16(b).

1.1.12.2 Expert Witnesses and Testimony

See Section 1.3.

1.1.12.3 Jencks Act

The Jencks Act (18 U.S.C. § 3500) provides that statements of a government witness are discoverable by a defendant after the witness has testified on direct examination at trial if the statements are in the government's possession and relate to the subject matter of the testimony. Production of statements covered by the Jencks Act is not automatic; the defendant must invoke the statute in a timely manner. There is no bar to the early production of the Jencks material, and the practice of some U.S. Attorney's Offices is to provide disclosure before trial as a matter of course.

Although a court may not compel the government to disclose Jencks material before trial, a court may suspend trial for a reasonable amount of time after a government witness testifies on direct examination to allow the defendant

sufficient time to review that material. The court may also explain to the jury why this suspension is needed. Many trial judges encourage prosecutors to provide early Jencks material to defense counsel before trial to avoid repeated interruptions during trial, and most prosecutors agree to do so.

1.1.12.4 Subpoenas to Third Parties

Rule 17 of the Federal Rules of Criminal Procedure governs subpoenas to third parties. These can be for witness testimony or documents, data, or other objects.

In general, the clerk of court must issue a blank subpoena—signed and sealed—to the party requesting it, and that party fills in the blanks before the subpoena is served. Fed. R. Crim. P. 17(a). When however, the defendant is unable to pay, the court must order that a subpoena be issued for a named witness if the defendant shows inability to pay and the necessity of the witness's presence for an adequate defense. Fed. R. Crim. P. 17(b). Defendants qualifying for appointed counsel fall under this section. The inability to pay and necessity for the witness for the defense are shown by ex parte application. *Id.*

The purpose of the subpoena duces tecum in a criminal case is to expedite the trial by providing a time and place for inspection of subpoenaed materials books, papers, documents, data or other objects. *See United States v. Nixon*, 418 U.S. 683, 698-99 (1974) To require production before trial, the party requesting the production must show:

1. that the documents are evidentiary and relevant;
2. that they are not otherwise reasonably procurable in advance of trial by exercise of due diligence;
3. that the party cannot properly prepare for trial without

such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and

4. that the application is made in good faith and is not intended as a general fishing expedition.

Id. Rule 17(c) should not be employed as a discovery device. *Nixon*, 418 U.S. at 68; *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951).

On occasion, requests are made to seal the ex parte application and the subpoenas to protect defendant's "confidential defense strategy." The provision in Rule 17(b) for ex parte applications was added in 1966 in response to the inequity foisted upon indigent defendants forced to disclose their theory of defense in order to obtain the issuance of a subpoena at government expense, while the government and defendants able to pay could obtain subpoenas "in blank" under Rule 17(a). *See* Fed. R. Crim. P. 17(b) advisory committee's note to 1966 amendment; *Smith v. United States*, 312 F.2d 867, 871 (D.C. Cir. 1962) (Skelly Wright, J., concurring in part and dissenting in part) ("Rule 17(b) apparently presents an indigent with a Hobson's choice: either make no defense or disclose his whole case to the Government before his trial.")

On the general requirements for sealing court documents, *see Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006). The legal standard in the Ninth Circuit is: if a court decides to seal judicial documents and records in either a civil or criminal case, the court must identify the compelling interest and articulate the factual basis for its finding "without relying on hypothesis or conjecture." *Id.* at 1179. There is a strong presumption in favor of public access to judicial records and against sealing. *Id.* *See also Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978);

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Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 603 (1982); *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002). A defendant must demonstrate the compelling interest in the ex parte application.

Note: A defendant also may need to disclose witness names or evidentiary exhibits before trial under a judge's standing order for trial.

1.1.13 Numerous Defendants in a Single Case

Sometimes the government indicts numerous defendants in a single case. Whether to sever the trials to group the defendants into manageable trial cohorts under Rule 14(a) of the Federal Rules of Criminal Procedure, and how large each cohort should be, depends on many factors, including: the type of case; the size of the courtroom; the availability and input of the marshals; and, critically, the ability of the jurors to consider the evidence individually for each defendant. Given the possibility of pleas during the pretrial process, it makes sense to wait until the case has matured sufficiently before identifying which defendants belong in the different trial cohorts. The input of counsel for all parties also should be solicited.

1.1.14 Final Pretrial Conference

See Appendix I for a Sample Order for a Final Pretrial Conference in a Criminal Case. In addition, some matters the court can cover during a final pretrial conference in a criminal case include the following.

1.1.14.1 Timing

Although not required, many courts use final pretrial conferences to address motions in limine, scheduling issues,

and any other issues to ensure a streamlined presentation of evidence before the jury. Ideally these conferences should be held at least one week before trial (or earlier) so that the parties have time to structure their cases with the benefit of the court's rulings or preferences.

1.1.14.2 Honorifics and Pronouns

The court may wish to inquire of the prospective jurors, parties, counsel, and witnesses about their preferred honorifics (e.g., Mr., Ms., or Mx.) and pronouns. Typically, trial judges do not allow adults to be called only by their first names in court proceedings.

In some courts, jury administrators request that prospective jurors provide their preferred honorifics and pronouns to be included on the jury list that the judge and parties receive for jury selection. When a court directs that jurors may only to referred to by juror number, however, this may not be necessary. *See* Section 2.11.

1.1.14.3 Motions in Limine

Parties often file motions in limine seeking to admit or exclude certain evidence or witnesses at trial. Addressing these motions well in advance of trial will allow for a more streamlined presentation of evidence at trial. The court has discretion to limit the number of motions in limine or the number of pages devoted to the motions. *See also* Section 1.2.9.

1.1.14.4 Trial Procedures

Each judge has individual preferences for courtroom procedure. For example, some judges prefer that counsel remain at the podium during questioning; other judges permit

counsel to move throughout the well of the courtroom. Whatever the preference, addressing the matter before trial will help counsel conform to the court's directions.

1.1.14.5 Setting Trial Time Limits

Setting time limits in criminal trials is strongly discouraged, but if a trial judge decides to do so, the judge should be especially cautious to ensure the defendant's constitutional rights are safeguarded. District courts have "considerable discretion in restricting cross-examination" so long as the restriction does not limit relevant testimony and prejudice the defendant. *See United States v. Marbella*, 73 F.3d 1508, 1513 (9th Cir. 1996); *but see United States v. Jones*, 982 F.2d 380, 383-86 (9th Cir. 1992) (reversing conviction when damaging testimony was elicited during redirect examination and trial court appeared to impose a blanket ban on recross-examination).

1.1.14.6 Sealing Exhibits or Proceedings

Sometimes in a criminal case it may be necessary to seal certain exhibits, prevent the public from seeing certain exhibits shown to the jury, or even to seal the courtroom. When these circumstances can be anticipated, the judge should consider discussing these issues with the parties during the final pretrial conference. *See* Section 3.31.

1.2 Civil Cases

1.2.1 Cases with a Right to Jury Trial

1.2.1.1 Generally

The Seventh Amendment preserves the right to a jury trial in actions at common law. A jury trial is also available in actions to enforce statutory rights when the statute provides for a jury trial, or the statutory “claim is ‘legal in nature.’” *Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024). To determine whether a jury trial is available in a statutory action that does not specifically address the topic, it is necessary to compare the nature of the statutory action with actions at common law, and to examine the nature of the remedy sought. The second inquiry is more important. *Tull v. United States*, 481 U.S. 412, 421 (1987). There is a constitutional right to a jury trial in an action brought by the government to recover a civil penalty if the civil penalty is “designed to punish or deter the wrongdoer,” as opposed to being solely intended to “restore the status quo.” *Jarkesy*, 603 U.S. at 123 (citing *Tull*, 481 U.S. at 421).

1.2.1.2 Money Damages

Generally, there is a constitutional right to a jury trial in actions that seek relief in the form of money damages unless the money damages are incidental to or intertwined with a claim for equitable relief. *See Smith v. Barton*, 914 F.2d 1330, 1337 (9th Cir. 1990). Thus, a party seeking damages in an action brought pursuant to 42 U.S.C. § 1983 has a right to a trial by a jury. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1426-27 (9th Cir. 1996). Similarly, a party to an action presenting a claim for lost wages under the Age Discrimination in Employment Act has a right to a jury trial, *Lorillard v. Pons*, 434 U.S. 575 (1978), unless the

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

1.2.1.3 Patent Cases

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

1.2.1.4 *Bivens* actions

A claim for money damages in an action brought pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), gives rise to a right to a jury trial. *Nurse v. United States*, 226 F.3d. 996, 1005 (9th Cir. 2000).

1.2.2 Non-Natural Person Defendants, Minors, and Incompetents

Corporations, partnerships, and limited liability companies must be represented by attorneys in federal court. *Rowland v. California Men's Colony*, 506 U.S. 194, 202 (1993). The same is true when a party is a minor or an incompetent person. Indeed, a court must appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. *See*

Fed. R. Civ. P. 17(c). Note that a non-attorney guardian ad litem cannot bring a lawsuit or defend an action on behalf of a minor in federal court. Counsel is required. *Johns v. Cnty. of San Diego*, 114 F.3d 874 (9th Cir. 1997).

1.2.3 Cases with No Right to a Jury Trial

1.2.3.1 Equitable Remedies

Generally, when the remedy sought is equitable in nature, there is no right to a jury trial. Thus, there is no right to a jury trial in an ERISA case because the remedies are equitable in nature. *Thomas v. Or. Fruit Products Co.*, 228 F.3d 991, 997 (9th Cir. 2000). Similarly, there is no right to a jury trial for a retaliation claim brought under the Americans with Disabilities Act because such claims seek equitable relief. *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1270 (9th Cir. 2009). Nor is there a right to a jury trial on equitable defenses to trademark claims or counterclaims seeking a declaration of trademark invalidity and noninfringement. *Toyota Motor Sales U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1183-84 (9th Cir. 2010). Because an action for disgorgement of profits is equitable in nature, it does not give rise to a right to a jury trial even though it is a claim for payment of money. *SEC v. Rind*, 991 F.2d 1486, 1492-93 (9th Cir. 1993).

1.2.3.2 Claims against the United States

The United States enjoys sovereign immunity and may be sued only when it has waived its immunity. However, a waiver alone is not enough to give rise to a jury trial right. 28 U.S.C. § 2402. Thus, there is no right to a jury trial in a federal tort claim lawsuit. *Nurse v. United States*, 226 F.3d 996, 1005 (9th Cir. 2000). Even when a statute does not say there is no right to a jury trial, there must be an explicit indication that the United States has consented to have its rights determined by a jury. See *Lehman v. Nakshian*, 453 U.S. 156 at 160.

1.2.3.3 Waiver of Jury Trial; Timely Demand

The Seventh Amendment and statutory rights to a jury trial in civil actions are recognized in Fed. R. Civ. P. 38(a). However, Rule 38(b) requires that a timely demand for a jury trial be made within 14 days after the last pleading directed to an issue triable to a jury, and Rule 38(d) establishes that without a timely demand, the right to jury trial is waived. *Solis v. Cnty. of Los Angeles*, 514 F.3d 946, 954 (9th Cir. 2008). Rule 81(c) addresses demands for jury trial in cases removed from a state court to a federal court.

1.2.4 Delegation of Responsibilities to Magistrate Judges

With the consent of all parties, a magistrate judge may conduct a civil trial. *United States v. Gamba*, 541 F.3d 895, 902 (9th Cir. 2008) (citing 28 U.S.C. § 636(a)); see also *Peretz v. United States*, 501 U.S. 923, 933 (1991).

1.2.5 Case Management Conferences

1.2.5.1 Initial Scheduling Conferences

Rule 16 authorizes a pretrial conference at any point during the case to facilitate the just, speedy, and inexpensive disposition of a case. In most cases, setting an initial case management conference—often interchangeably referred to as the initial “scheduling conference,” or “Rule 16 conference”—to discuss the parties’ Rule 26(f) report or case management statement will provide a better understanding of the disputed issues, scope of discovery, anticipated motions, and settlement potential. A scheduling (or, case management) order is required in every case unless exempted by local rule. Fed. R. Civ. P. 16(b)(2). Under Rule 16(b)(2), the judge must issue the scheduling order “as soon as practicable” after

receiving the parties' Rule 26(f) report or holding an initial pretrial conference, but absent good cause for delay, no later than the "earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." The scheduling order controls the course of the action unless modified by subsequent order. Fed. R. Civ. P. 16(d).

Practices regarding initial scheduling conferences vary widely. Some judges hold them by telephone or video conference. The primary advantage of this is that it reduces the expense and burden on parties and their counsel. Other judges hold them in person, either in the courtroom or judicial chambers. This enables the judge to set the tone for the litigation moving forward in a more personal and direct way. Opposing counsel might not be familiar with each other, so guaranteeing that they meet in person may be more conducive to setting a cooperative and professional relationship as the case proceeds. Still other judges provide a standard questionnaire to be completed by the parties and their counsel before the Rule 16 conference and typically include a question about what form and frequency of pretrial conferences the parties would like. In addition, during the initial pretrial conference (or in standing orders), some judges order that no contested discovery motions may be filed without first having a conference with the court, *see* Fed. R. Civ. P. 16(b)(3)(B)(v), and some order that no motions for summary judgment may be filed without first having such a conference. *See* Fed. R. Civ. P. 16(c)(2)(E).

1.2.5.2 Additional Case Management Conferences

Many courts find that periodic case management conferences are an effective way to ensure that the litigation stays on track. In some districts, litigants are required to

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submit status reports every six months or so. Some judges also require an in-person or virtual status conference periodically to discuss outstanding issues with the parties.

1.2.5.3 Final Pretrial Orders (Claims, Defenses, Stipulations)

Most districts have a local rule that directs the parties to submit pretrial statements to allow the presiding judge to issue a final pretrial order framing the issues for trial. Courts have broad discretion to determine the preclusive effect of a final pretrial order regarding issues of law and fact at trial. *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir. 1985).

1.2.5.4 Expert Witnesses and Testimony

See Section 1.3.

1.2.6 Late Discovery Issues (as Trial Approaches)

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

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A way to minimize last minute discovery issues is to set a firm discovery cutoff and a deadline to raise discovery disputes early in the case. This leaves only “new matters” that could not have been addressed earlier despite the exercise of reasonable diligence for any last-minute consideration.

1.2.7 Trial Memoranda

Many districts have local rules that require parties to file and serve trial memoranda that contain: (1) a short statement of facts; (2) all admissions and stipulations not recited in the final pretrial order; and (3) a summary of points of law, including reasonably anticipated disputes concerning admissibility of evidence, legal arguments, and supporting citations of authority.

1.2.8 Proposed Jury Instructions

See Chapter 4.

1.2.9 Motions in Limine

A motion in limine, broadly defined, means “any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *Luce v. United States*, 469 U.S. 38, 40, n.2 (1984); *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009) (stating that a motion in limine is a “procedural mechanism to limit in advance testimony or evidence in a particular area”). As with other motions raised before trial, motions in limine “are useful tools to resolve issues which would otherwise clutter up the trial.” *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1070 (9th Cir. 2017) (quotation marks omitted); *see also Luce*, 469 U.S. at 41 n.4 (explaining that a court may rule in limine “pursuant to the district court’s inherent authority to manage the course of trials”). Further, “a ruling on a motion

in limine is essentially a preliminary opinion that falls entirely within the discretion of the district court. The district court may change its ruling at trial because testimony may bring facts to the district court's attention that it did not anticipate at the time of its initial ruling." *Pomona*, 866 F.3d at 1070 (quotation marks omitted).

In many instances, rulings may be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in proper context. To exclude evidence on a motion in limine, the evidence must be inadmissible on all potential grounds. Thus, denial of a motion in limine to exclude certain evidence does not mean that all evidence contemplated by the motion will be admitted, only that the court is unable to make a comprehensive ruling to exclude the evidence in advance of trial.

1.2.10 Pretrial Admission of Exhibits

As noted above, the Final Pretrial Order governs the admission of trial exhibits, and generally trial exhibits not listed in the Pretrial Order should not be admitted unless the parties stipulate or upon a showing that the Final Pretrial Order should be modified to prevent "manifest injustice." In addition, some judges require that if an exhibit that has been preadmitted in evidence before trial but is never used during trial, then it may not be used during closing arguments and will not be available to the jury during deliberations. In other words, it then loses its status as "preadmitted." The rule is designed to avoid "sandbagging" an opposing party.

1.2.11 Final Pretrial Conference

Most courts hold a final pretrial conference with the parties at least a week before trial is set to begin, and sometimes as early as two or three weeks before the trial begins. The

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conference allows the judge to confirm with the parties that the trial will be starting as planned and resolve any remaining issues that appropriately can be resolved before trial.

See Appendix II for a Sample Order for a Final Pretrial Conference in a Civil Case.

In addition, some matters the court can cover during a final pretrial conference in a civil case include:

1.2.11.1 Setting Trial Schedule

See Section 3.1.1 for a discussion of trial setting.

1.2.11.2 Setting trial time limits

There is no specific federal rule addressing a federal district court's authority to set time limits in trials, but several rules of evidence support that authority. *See* Fed. R. Evid. 102 (“These rules should be construed so as to . . . eliminate unjustifiable expense and delay”); Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . undue delay, wasting time”); Fed. R. Evid. 611(a) (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . avoid wasting time”). Further, in a civil case the Ninth Circuit recognized that “[t]rial courts have discretion to place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence.” *Monotype Corp. PLC v. Int’l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994).

Many judges routinely set time limits in civil cases, which is helpful for judicial economy, trial efficiency, and showing respect for jurors in that they can gauge how long their jury

service will last. That said, rigid time limits are disfavored even in civil trials. *See Monotype*, 43 F.3d at 450. However, when a trial court imposes reasonable time limits in a civil case and has shown flexibility in those limits, the Ninth Circuit has generally held that the court did not abuse its discretion. *See Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1077 (9th Cir. 2020) (en banc) (holding that trial court did not abuse its discretion by establishing witness examination time limits and then granting more time at counsel's request); *Gen. Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1508-09 (9th Cir. 1995) (holding district court's 14-day trial limit was reasonable when lack of time at the end of trial was largely due to a party's mismanagement of its case-in-chief and the court added an extra day to ensure the party had time to finish its cross-examinations); *Amarel v. Connell*, 102 F.3d 1494, 1513-14 (9th Cir. 1996) (concluding district court's imposed time limits, based on parties' estimates of trial length and that the court extended at plaintiff counsel's request, were reasonable).

For one academic's perspective of the shortcomings of time limits, see Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 GEO. L.J. 933, 970-81 (2018) (arguing that time limits are difficult to administer, can be susceptible to inequitable application, may impair procedural justice, can be inconsistent and arbitrary, and may "represent a worrisome transfer of power from the advocate to the adjudicator and from the jury to the judge.")

1.2.11.3 Honorifics and Pronouns

See Section 1.1.14.2.

1.2.11.4 Sealing Exhibits or Proceedings

Sometimes in a civil case, it may be necessary to seal certain exhibits, prevent the public from seeing certain exhibits shown to the jury, or even to seal the courtroom. When these circumstances can be anticipated, the judge should consider discussing these issues with the parties during the final pretrial conference. *See* Section 3.31.

1.3 Expert Witnesses and Testimony

1.3.1 Pretrial Disclosure

1.3.1.1 Criminal Cases

Rule 16 of the Federal Rules of Criminal Procedure requires courts to set a deadline for disclosures of expert testimony sufficiently before trial to allow a fair opportunity for each side to meet the other's evidence. Fed. R. Crim. P. 16(a)(1)(G) and (b)(1)(C). These deadlines may be set by local rule, by a judge's standing order, or in a case-specific order. The disclosures must be in writing, covering any testimony to be used in either side's case-in-chief or the government's rebuttal to counter testimony disclosed by the defense. With limited exceptions, the disclosures must be signed by the expert witness, and must include:

1. a complete statement of all opinions;
2. the bases and reasons for the opinions;
3. the witness's qualifications, including all publications authored in the previous ten years; and
4. a list of all other cases during the previous four years in which the expert has testified by deposition or trial.

Id. There also is a continuing duty to supplement or correct these disclosures, and the court may prohibit a "party from introducing the undisclosed evidence." Fed. R. Crim. P. 16(d)(2)(C).

1.3.1.2 Civil Cases

Rule 26(a)(2) of the Federal Rules of Civil Procedure similarly requires disclosure of expert witnesses and

testimony in civil cases. Here, the rules distinguish between experts who are “retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony” from all others who may be asked to provide expert testimony (such as treating physicians). The former must provide:

1. a complete statement of all opinions;
2. the facts or data considered;
3. the witness’s qualifications, including all publications authored in the previous ten years;
4. a list of all other cases during the previous four years in which the expert has testified by deposition or trial; and
5. a statement of compensation.

Fed. R. Civ. P. 26(a)(2)(B). For all other testifying experts, counsel for the propounding party must provide a disclosure of the subject matter on which the witness is expected to testify and a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(C). There is also a continuing duty to supplement or correct each side’s disclosures. Fed. R. Civ. P. 26(a)(2)(E).

1.3.2 Challenging the Admissibility of Expert Testimony

All expert witnesses face scrutiny by the trial court under Rule 702 of the Federal Rules of Evidence, as well as under *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. The scrutiny is the court’s general gatekeeping duty to ensure that the proffered expert testimony

“both rests on a reliable foundation and is relevant to the task at hand” as a condition of admissibility. *Daubert*, 509 U.S. at 597. The proponent of the evidence must prove its admissibility by a preponderance of proof. *Id.* at 593 n.10. This is a preliminary finding under Fed. R. Evid. 104(b) made by the court and may be heard outside the presence of the jury when warranted. Fed. R. Evid. 104(c) describes the circumstances when a preliminary determination must be made outside the presence of the jury.

In the Ninth Circuit, “a district court abuses its discretion when it either abdicates its role as gatekeeper by failing to assess the scientific validity or methodology of an expert’s proposed testimony, or delegates that role to the jury by admitting the expert testimony without first finding it to be relevant and reliable.” *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1189 (9th Cir. 2019) (internal quotations and brackets omitted). Relatedly, a court abuses its discretion when it fails to hold a Daubert hearing or otherwise preliminarily fails to determine the relevance and reliability of expert testimony. *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 460 (9th Cir. 2014). Care must be taken, however, when an expert report contains matter some of which is admissible and some of which is not. *See Hyer v. City and County of Honolulu*, 118 F.4th 1044, 1055-59 (2024) (holding that a court errs by excluding “wholesale” an expert report that contains both admissible and inadmissible material).

After an expert’s opinions are established as admissible to the judge’s satisfaction, the fact finder decides how much weight to give to the testimony. *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010). A district court should not make credibility determinations that are reserved for the jury. *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807 (9th Cir. 2014). The propounding party does not have to demonstrate that the expert testimony is correct, only that it

is more likely than not that the testimony is reliable. Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

1.3.3 Avoiding the Word “Expert” in the Jury’s Presence

Some judges avoid using the word “expert” to describe a witness in the presence of the jury and instruct counsel similarly to avoid using that label in the presence of the jury. If the court refrains from informing the jury that the witness is an “expert,” this will “ensure[] that trial courts do not inadvertently put their stamp of authority” on a witness’s opinion and will protect against the jury’s being “overwhelmed by the so-called ‘experts.’” Fed. R. Evid. 702 advisory committee’s note to 2000 amendment (quoting Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994)).

Chapter Two: Jury Selection

This chapter addresses events that occur from the identification of the jury pool through the swearing in of the jury. The procedures for jury selection are quite similar in criminal and civil cases, except for the number of jurors and peremptory challenges required. The discussion that follows is applicable to both types of cases unless specifically noted. In addition, a trial judge should understand the jury selection plan that is used in the judge’s district, including selection methodology and the tools and options available to the district’s jury coordinator. It also would be useful for a trial judge to be familiar with what prospective jurors are being told and shown during juror orientation.

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CHAPTER TWO: JURY SELECTION

2.1 Jury Pool

The provisions of 28 U.S.C. § 1865(b) establish the qualifications to serve as a member of a grand jury or trial jury. A person is qualified to serve as a juror if that person:

1. is a citizen of the United States who has resided for one year or more within the judicial district;
2. is at least 18 years of age;
3. is able “to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form”;
4. is able to speak the English language;
5. is mentally and physically capable of rendering satisfactory jury service;
6. does not have “a charge pending against him for the commission of a crime punishable by imprisonment for more than one year”; and
7. has not been convicted of a crime punishable by more than one year in prison unless the prospective juror’s civil rights have been restored.

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

2.2 Jury Questionnaires

2.2.1 Generally

Well-designed questionnaires are increasingly recognized as a useful source of information for jury selection. Types of questionnaires vary. Some simply seek common background information and screen for hardship and trial length. Others include case-specific questions. In addition to providing critical background information, questionnaire responses can introduce important legal concepts and expose biases and issues worth exploring during voir dire. If the responses are provided in advance of the day jurors are summoned, they can be used to exclude jurors who would be disqualified because of a hardship not considered by the jury office or for bias, and can also be used to further investigate prospective jurors from public sources. The court should discuss with counsel the limits on such investigation (*see* Section 2.2.5) and the minimum amount of time before trial necessary to make the questionnaires most useful.

2.2.2 Counsel's Participation in Drafting

It is advisable to allow counsel to participate in drafting the questionnaire, and to review the answers to prescreening questionnaires with them before deciding whether to excuse any juror or class of jurors because of the answers. *See United States v. Layton*, 632 F. Supp. 176, 177 (N.D. Cal. 1986). When allowing counsel to participate in drafting the questionnaire, pay careful attention that common English and no legal jargon are used and that the questions do not indoctrinate jurors into any view of the case. As part of the questionnaire, the court may wish to discuss with the parties whether to allow jurors to identify their preferred pronouns both for juror comfort and to obtain a fair cross-section. It is within the trial court's discretion to reject supplemental questions proposed by counsel if the

voir dire is otherwise adequate to test the prospective jurors for bias or partiality. *Paine v. City of Lompoc*, 160 F.3d 562, 564-65 (9th Cir. 1998).

2.2.3 Using Questionnaires to Prescreen Jurors

After a review of responses to the questionnaire, in consultation with the parties, the court may excuse those prospective jurors whose responses are sufficient to show hardship or prejudice. See *United States v. Mitchell*, 502 F.3d 931, 955 (9th Cir. 2007) (holding that district court did not abuse its discretion in dismissing prospective juror for cause based on prescreening questionnaire answers regarding juror's views of death penalty); *United States v. Candelaria-Silva*, 166 F.3d 19, 31 (1st Cir. 1999) (determining that district court did not abuse its discretion in dismissing jurors because their pretrial questionnaires indicated that jury service would have caused undue hardship).

If the court provides questionnaires to be filled out before prospective jurors report to the courthouse, including using an online questionnaire, the court should consider requiring a signed, sworn statement that indicates the juror has personally filled out the questionnaire or whether anyone assisted the juror in doing so. The court also should consider including a conspicuous statement in the questionnaire that directs prospective jurors not to perform any research or conduct any investigation about the case, the parties, or any related issues.

Prescreening should not exclude a discernible class of prospective jurors or result in a jury unrepresentative of a cross-section of the community. But there are benefits to prescreening. Excusing prospective jurors by prescreening spares prospective jurors the inconvenience of coming to court, allows for more efficient voir dire, and avoids exposing the jury pool to views that could negatively impact the pool.

2.2.4 Confidentiality of Questionnaire Responses

Confidentiality of the answers to questionnaires is not guaranteed. *See, e.g., Copley Press, Inc. v. San Diego Cnty. Superior Court*, 228 Cal. App. 3d 77, 84, 278 Cal. Rptr. 443 (1991) (press is constitutionally entitled to have access to at least some of the information contained in such questionnaires, although access is not absolute). *See also United States v. King*, 140 F. 3d 76, 81 (2d Cir. 1998) (stating that “[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to serve higher values and is narrowly tailored to serve that interest” (quoting *Press-Enterprise Co. v. Superior Ct. of Cal., Riverside Cnty.*, 464 U.S. 501, 510 (1984) (“*Press-Enterprise I*”))). In evaluating a request to unseal juror questionnaires, the court must consider whether a narrowly tailored, compelling governmental interest outweighs the public’s right of access. *See United States v. Holmes*, 572 F. Supp. 3d 831, 834 (N.D. Cal. 2021) (citing *Press-Enterprise I*, 464 U.S. at 509-10 and noting that neither the Supreme Court nor the Ninth Circuit has extended the presumption of access to juror questionnaires). Public access to a potential juror’s completed questionnaire may turn on whether the potential juror has been called to the jury box for oral voir dire. The court may redact certain information such as juror names in high profile cases, at least while trial is ongoing. The court may also consider juror safety, privacy, and impartiality in protecting portions or all of questionnaire responses. *See Holmes*, 572 F. Supp. 3d at 835-40. Even if not made available to the public, questionnaires should be retained for possible use by parties whose appeals include challenges to the way in which the jury was selected.

2.2.5 Disclosing Prospective Jurors to Parties before Voir Dire

Screening jurors before the date of jury selection necessarily discloses the identity of the prospective jurors to counsel. This provides valuable information for counsel to investigate before jury selection. There are ethical prohibitions regarding the gathering of such information, such as not interacting with prospective jurors or attempting to obtain non-public information about them, which a judge may wish to emphasize at the final pretrial conference. The court should discuss with the parties what limits should be placed on juror research, including what social media platforms and websites cannot be used for juror investigation. *See Mitchell v. United States*, 958 F.3d 775, 787 (9th Cir. 2020) (discussing the “long imposed restrictions on lawyers seeking access to jurors” and rules that protect jurors from annoyance and harassment). For example, it may be considered an improper ex parte contact if an attorney viewed a website that allowed the prospective juror to know the attorney viewed their profile or if an attorney asked for access to view a juror’s private profile. *See Am. Bar Assoc.*, Model Rules of Prof. Conduct 3.5.

2.3 Researching Jurors on Social Media and Elsewhere

Because of the prevalence of social media, all trial participants (including jurors) should be advised early and often about their responsibilities. As discussed in Section 2.2.5, lawyers may review public social media postings by or about prospective jurors, but they may not contact them or attempt to obtain information that jurors have attempted to restrict by settings on their social media accounts. Some judges limit lawyers and parties to reviewing only publicly available information that will not notify someone that a search about them has been conducted. For a sample Order, see Appendix III.

2.4 Number of Jurors

2.4.1 Number of Jurors in Criminal Trials

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

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

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

2.4.2 Number of Jurors in Civil Trials

A court may not seat a jury of fewer than six or more than twelve in a civil matter. *See* Fed. R. Civ. P. 48. It is highly advisable to seat more than six jurors to meet the minimum in case of unexpected juror absence. A commonly accepted rule of thumb is to seat one or two additional jurors for every week the trial is expected to last, which both protects against a mistrial if jurors need to be excused and limits the burdens on citizens called for jury service. Some judges, however, see advantages for the system of justice in always seating twelve jurors in civil trials.

2.4.3 Alternate Jurors in Criminal Trials

Before jury selection, the judge should consider how many alternates will be selected, if any. Avoiding a mistrial because of jurors' emergencies, illness, or irresponsibility by having alternates is important. A rule of thumb in criminal cases, is to have two alternates for a trial of two weeks or less, and four alternates for a trial of four weeks or less, and six for longer trials. Although it is obviously disappointing for alternates to sit through a trial but not deliberate, avoiding a mistrial is the judge's higher priority. The court may wish not to disclose (or even to determine, if that is an option) which jurors will be alternates until the jury is about to begin deliberation. This can mitigate potential disinterest from jurors who have been told they are alternates in advance. Care should be taken, however, to comply with Rule 24(c) of the Federal Rules of Criminal Procedure. Waiting until the end of the trial to determine who will be the alternate jurors may violate this rule. At least without the consent of all parties at the outset, it is best to determine who will be the alternate jurors when the jury is first selected. In addition, regarding the court's ability to retain alternate jurors after the jury retires to deliberate, see Rule 24(c)(3). *See also* Section 2.9.3.2.

2.4.4 Alternate Jurors in Civil Trials

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

2.5 Juror Unanimity

In all federal trials (whether civil or criminal) a jury's verdict must be unanimous (except in civil trials, where the parties may stipulate to a nonunanimous verdict). Fed. R. Civ. P. 48. The Sixth Amendment's guarantee to a fair trial by an impartial jury requires a unanimous verdict to convict a defendant of a serious offense—a requirement that applies to State convictions through the Fourteenth Amendment. *See Ramos v. Louisiana*, 590 U.S. 86 (2020).

2.6 Voir Dire

Judges have discretion in how voir dire is conducted, including whether lawyers may ask questions. *See* Fed. R. Crim. P. 24; Fed. R. Civ. P. 47 (“Court may permit parties or their attorneys to examine the jurors” and must let them follow up on the court’s questions.). Some judges do all the jury questioning themselves, allowing lawyers only to submit written requests for follow-up questions. Other judges conduct the bulk of the jury questioning but then allow the lawyers a limited amount of time (perhaps 15 to 20 minutes per side) to ask follow-up or additional questions. Few judges allow the lawyers to do all the jury questioning (a practice more common in state courts), but that is within the discretion of the court. The court’s practice should be discussed with the parties during the final pretrial conference.

Some judges read a neutral statement of the case to the prospective jurors. The parties can be directed to propose neutral statements, which the judge can then discuss with the parties during the final pretrial conference. In addition, some judges tell prospective jurors at the beginning of voir dire not to conduct their own investigation about the case or the parties. This is intended to reduce the risk of a prospective juror researching about the case or the parties during the jury selection process itself or during a recess in that process.

Jury selection practices vary. The “Jury Box System” involves filling the jury box with the number of prospective jurors needed for voir dire and directing questions to these people. The panel is often randomly assigned to a numerical order. When a prospective juror is challenged for cause and excused, another prospective juror is selected from the audience to take their seat, and the newly seated prospective juror is questioned. The process continues in this way until all sides pass for cause. The peremptory challenges proceed

in the same fashion with alternating challenges. The required number of jurors remaining in the box will constitute the jury. Some judges will question the entire panel, but still limit peremptory challenges to those in the box. The peremptory challenges are made orally and in rotation between the sides.

The “Struck System” involves questioning the entire panel, who have been randomly placed in numerical order. Then cause and preemptory challenges are exhausted as to the entire panel. Some judges allow the parties to exercise their peremptory challenges one at a time, alternating back and forth by passing a sheet where the challenges are made. Some judges will have the peremptory challenges made orally. Other judges use a “double blind system” where each side exercises all their challenges at once, “blind” to what the other side has done until the process is complete. After the challenges have been exercised, the number of required jurors remaining and required for the case, in the order in which they were originally seated, will constitute the jury.

In addition, there are many hybrids of both the “Jury Box System” and the “Struck System.”

2.6.1 Alternative Methods

“No hard-and-fast formula dictates the necessary depth or breadth of voir dire.” *Skilling v. United States*, 561 U.S. 358, 386 (2010). Voir dire in criminal cases developed under the common law as a natural component of the Sixth Amendment’s impartial jury guarantee. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Because there is no constitutional right to peremptory challenges, *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988), questioning originally served to disclose actual bias. Now that the federal rules grant participants peremptory challenges, the scope of voir dire is broadened considerably to help parties intelligently exercise these challenges. *See Swain*

v. Alabama, 380 U.S. 202, 220-21 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986). Regardless of the questions posed or challenges made to prospective jurors by the parties, however, the ultimate responsibility for impaneling an impartial jury rests with the trial judge, who retains significant discretion in crafting questions appropriate for the case at hand. *United States v. Tsarnaev*, 595 U.S. 302, 312-13 (2022); *Skilling*, 561 U.S. at 386; *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981). But this discretion is not unyielding. “Without an adequate voir dire the trial judge’s responsibility to remove prospective jurors who will not be able impartially to follow the court’s instructions and evaluate the evidence cannot be fulfilled.” *Rosales-Lopez*, 451 U.S. at 188. Many of the considerations in criminal cases also apply to civil cases.

2.6.2 Open Versus Closed Panels

Voir dire is part of the trial process that is open to the public pursuant to the First and Sixth Amendments. *Presley v. Georgia*, 558 U.S. 209 (2010); *Weaver v. Massachusetts*, 582 U.S. 286, 297 (2017) (examining contours of right to a public trial). Whether or not a party has asserted a right to have the public in attendance, a trial court is required to take all reasonable measures to accommodate public attendance during voir dire. *See Presley*, 558 U.S. at 215.

Generally, a court may not close criminal voir dire to the public. *Press-Enterprise Co. v. Superior Ct. of Cal., Riverside Cnty.*, 464 U.S. 501 (1984). Courts may consider the right of the defendant to a fair trial and the right of prospective jurors to privacy in determining whether or not to close voir dire proceedings. Because trials are presumptively public proceedings, civil voir dire should not be closed either, absent the concerns described below.

To close the proceedings, a court must make specific findings that open proceedings would threaten either a defendant's right to a fair trial or the privacy of prospective jurors and that less restrictive alternatives to closure are inadequate. *Press-Enterprise I*, 464 U.S. at 510-11 (noting that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"). When there are legitimate privacy concerns, judges should inform the potential jurors of the general nature of sensitive questions to be asked and allow individual jurors to make affirmative requests to proceed at sidebar or in chambers. *Id.* at 512. Before a closure order is entered, members of the press and the public must be afforded notice and an opportunity to object to the closure. *Unabom Trial Media Coal. v. U.S. Dist. Court*, 183 F.3d 949, 951 (9th Cir. 1999); *United States v. Brooklier*, 685 F.2d 1162, 1167-68 (9th Cir. 1982).

2.6.3 Juror Veracity

Honesty is a critical criterion for a juror. A new civil trial is justified when a party demonstrates that (1) a juror failed to answer honestly a material question on voir dire, and (2) a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (in product liability trial, juror's failure to reveal that his son had been injured when truck tire exploded did not justify new trial); *Warger v. Shauers*, 574 U.S. 40, 44-45 (2014) (reaffirming *McDonough* and holding that Fed. R. Evid. 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during voir dire). The same applies in a criminal trial. Failure to answer a question because of simple forgetfulness does not indicate a lack of impartiality and is not within the scope of dishonest answers

under *McDonough*. *United States v. Edmond*, 43 F.3d 472, 474 (9th Cir. 1994). To ensure accuracy of the questionnaires, the court may wish to ask the jurors whether they personally filled out and signed the juror questionnaire, especially if they were submitted in advance of trial via mail or email.

2.6.4 Responses Infecting the Panel

Caution should be exercised to ensure that the responses of a prospective juror do not infect the panel. Individual jurors may be questioned at sidebar to avoid this problem. *See also* Section 2.6.5.

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

2.6.5 Areas to be Addressed

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors." *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc). "The bias of even a single juror would violate [the defendant's] right to a fair trial." *United States v. Hayat*, 710 F.3d 875, 885 (9th Cir. 2013) (quoting *Estrada v. Scribner*, 512 F.3d 1227, 1239 (9th Cir. 2008)). A juror's lying during voir dire may warrant an inference of implied bias. *Dyer*, 151 F.3d at 979. But simple forgetfulness does not fall within the scope of dishonesty. *United States v. Edmond*, 43 F.3d 472, 474 (9th Cir. 1994). "Whether a juror intentionally conceals or gives a misleading response to a question on voir dire about relevant facts in his or a relative's background may shed light on the ultimate question of that juror's ability to serve impartially." *Fields v. Woodford*, 309 F.3d 1095, 1105-06 (9th Cir. 2002) (juror's

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omission of key facts during voir dire required hearing to determine whether juror had been intentionally misleading).

When confronted with a colorable claim of juror bias, a district court must investigate the circumstances. *Pope v. Man-Data, Inc.*, 209 F.3d 1161, 1163 (9th Cir. 2000); *see also Skilling*, 561 U.S. at 394-95 (discussing a trial court's adequate steps to investigate juror bias). And there can be both actual bias and implied bias. "Actual bias exists when, as the term suggests, a juror is in fact biased for or against one of the parties, thereby precluding her from rendering a fair and impartial verdict." *United States v. Gonzalez*, 906 F.3d 784, 796 (9th Cir. 2018). Implied bias "is a legal doctrine under which bias will be conclusively presumed in certain circumstances even if the juror professes a sincere belief that she can be impartial." *Id.* at 797; *see also United States v. Kvashuk*, 29 F.4th 1077, 1092 (2022) (examining implied bias).

"[A] defendant is entitled to a voir dire that fairly and adequately probes a juror's qualifications" *United States v. Toomey*, 764 F.2d 678, 683 (9th Cir. 1985). Specific questioning probing particular topics is required when the topic involves a real possibility of prejudice. *United States v. Anekwu*, 695 F.3d 967, 979 (9th Cir. 2012). There are:

three instances in which there is a real possibility of prejudice and a consequent need for specific voir dire questioning:

1. When the case carries racial overtones . . . ;
2. when the case involves other matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact; or

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3. when the case involves other forms of bias and distorting influence that which have become evident through experience with juries.

Toomey, 764 F.2d at 682 (citation and quotation omitted).

When a party suggests questions that do not involve such topics, the proposing party must show that the questions are calculated to uncover actual and likely sources of prejudice. *United States v. Payne*, 944 F.2d 1458, 1474 (9th Cir. 1991).

Juror responsibilities. Most courts play a video describing the role of jurors to orient them. Some courts include a video explaining the role of implicit bias. *See* United States Court of Appeals for the Ninth Circuit, “We the People: The Honor of Jury Service (Unconscious Bias Update),” available at [youtube.com/watch?v=vGNQHpj0cj4](https://www.youtube.com/watch?v=vGNQHpj0cj4); United States District Court for the Western District of Washington, “Unconscious Bias Juror Video” available at wawd.uscourts.gov/jury/unconscious-bias. It is important during voir dire to underscore the importance of the orientation video(s) that the prospective jurors watched (or will watch), jury service, fundamental concepts with which jurors will need to be familiar, the need to take time in considering the evidence before them, waiting until the end of the case to deliberate and then to do so with an open mind to the perspectives of others, and the effects of implicit (or unconscious) biases in decision-making and evaluating witness credibility.

Knowledge of the case. The topic of pretrial publicity is addressed in Chapter 8 (“High Profile Cases”), but it is always important to ask whether a juror has heard about the case from any source or knows or has information about any of the trial participants. If the answer is affirmative, the judge must explore whether the knowledge would impact the ability of the juror to be impartial.

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Law enforcement officers. When important testimony is anticipated from a law enforcement officer, the court should inquire whether any prospective juror would be inclined to give either more or less weight to an officer's testimony because of the officer's position. *United States v. Contreras-Castro*, 825 F.2d 185, 187 (9th Cir. 1987).

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

Case participants. It is appropriate to inquire whether any prospective juror is acquainted with counsel, parties or any other prospective juror, or has any financial interest in a business involved in the trial. Because bias is presumed only in extraordinary cases, there are no categories of relationships that mandate dismissal of a prospective juror. *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990) (holding that bias is presumed only "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances"); *Fields v. Brown*, 503 F.3d 755, 770 (9th Cir. 2007) (noting that bias is also presumed "where repeated lies in voir dire imply that the juror concealed material facts to secure a spot on the particular jury").

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

Bias or prejudice relating to crime charged. A prospective juror's bias concerning a crime is not grounds for that individual to be excused, so long as the bias is such that "those feelings do not lead to a predisposition toward the prosecution or accused." *Lincoln v. Sunn*, 807 F.2d 805, 816 (9th Cir. 1987) (citation omitted); see *Fields*, 503 F.3d at 766.

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

Willingness to follow law/jury nullification. When it appears that a prospective juror disagrees with the applicable law, the court should inquire whether the juror is nevertheless willing to follow the law. See *United States v. Padilla-Mendoza*, 157 F.3d 730, 733 (9th Cir. 1998). The issue of potential jury nullification is especially sensitive. Some judges ask the prospective panel if anyone has heard the phrase "jury nullification" and then follow up privately with individual jurors who answer in the affirmative. Other judges prefer not to discuss that topic at all. Still others treat the issue on a case-by-case basis. In any event, a judge should consider discussing concerns about jury nullification with a prospective juror outside the presence of the other prospective jurors.

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Supplemental questions. “It is wholly within the judge’s discretion to reject supplemental questions proposed by counsel if the voir dire is otherwise reasonably sufficient to test the jury for bias or partiality.” *United States v. Powell*, 932 F.2d 1337, 1340 (9th Cir. 1991).

2.6.6 Sensitive Conferences with Prospective Jurors

At the outset of the voir dire process, the court may wish to notify prospective jurors that if a question calls for a response that might be a source of embarrassment, the prospective juror may approach the sidebar and answer the question or be questioned in open court outside the presence of any other jurors but with the parties present. Such procedures are especially helpful when questioning about arrests, convictions, involvement with drugs and/or other life experiences involving the jurors and/or their families, and such jurors’ (and their families’) prior experiences as victims of crime or sensitive health conditions/medications that may affect a juror’s ability to remain seated and pay attention for long periods of time.

The trial judge has several options available to guarantee that the defendant is appropriately apprised of any discussions with potential jurors that may occur outside the presence of the jury panel in open court. In criminal trials, the trial judge must be mindful of the defendant’s constitutional right to be present at the court proceedings and the requirement of Federal Rule of Criminal Procedure 23(a)(2) that, unless provided otherwise, a defendant must be present at “every trial stage, including jury impanelment.” *See United States v. Cazares*, 788 F.3d 956, 967-68 (9th Cir. 2015) (discussing contours of the right to be present during jury selection).

2.6.6.1 Individual Juror Inquiries

One option is for the trial judge to keep track of those jurors who identify having a sensitive answer to a voir dire question that they do not wish to discuss in front of the other jurors. The trial judge should allow the juror not to answer in front of the other jurors but make a note of the question and juror. After voir dire questioning has completed, the court may excuse the prospective jurors and summon back individually each juror who identified a sensitive answer. This allows for individual questioning in open court before the parties including a criminal defendant, but outside the presence of the other members of the jury pool.

2.6.6.2 Sidebar Conferences During Voir Dire

Another option available to the trial judge is to speak with the prospective juror at a sidebar conference attended by respective counsel. A defendant has the right to be present during the selection of the jury. Fed. R. Crim. P. 43. But a “meeting between counsel and the court at which the participants discuss whether jurors should be excused for cause, exercise peremptory challenges, or decide whether to proceed in the absence of prospective jurors are all examples of ‘a conference or hearing on a question of law’ from which the defendant may be excluded at the district court’s discretion.” *United States v. Reyes*, 764 F. 3d 1184, 1190-91 (9th Cir. 2014). Another option is to provide a headset to the defendant so that the defendant can hear what is being discussed during a sidebar conference.

2.6.7 Attorney Participation in Voir Dire

Under both the criminal and civil rules (Fed. R. Crim. P. 24(a) and Fed. R. Civ. P. 47(a)), direct attorney participation in the voir dire examination is discretionary with the court. *See*,

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e.g., *United States v. Howell*, 231 F.3d 615, 628 (9th Cir. 2000). Many courts permit some amount of attorney-conducted voir dire. The extent of attorney participation varies greatly from court to court, and sometimes even from case to case. Some courts permit attorneys to participate orally in voir dire, some permit attorney participation via written questions, and others use a combination of the practices. *See, e.g.*, *Csiszer v. Wren*, 614 F.3d 866, 875 (8th Cir. 2010). Some trial judges will ask “sorting questions” prepared by the parties and approved by the court, and then permit each side an appropriate amount of time to follow up. *See also* Section 2.6.

2.7 Excuses for Hardship

Excuses for juror hardship begin with the court's jury plan and prescreening process (*see* Section 1.10). *See United States v. Calaway*, 524 F.2d 609, 616 (9th Cir. 1975) ("Ordinarily it falls to the jury clerks or commissioners to excuse jurors for hardship, a practice that has been approved by the courts"); 28 U.S.C. § 1866(c). The screening process can miss a legitimate ground for excuse and the court should assess potential juror hardships during voir dire and jury selection.

Prospective jurors are commonly asked whether there is anything that would make it difficult for them to participate as a juror. In response, a prospective juror may claim a disability, such as impaired vision or hearing; a physical limitation, such as an inability to sit for prolonged periods of time; or undue financial hardship. *See* 28 U.S.C. § 1866(c) (persons summoned for federal juries may be excused on a showing of "undue hardship or extreme inconvenience"); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224 (1946) ("It is clear that a federal judge would be justified in excusing a daily wage earner for whom service would entail an undue financial hardship."); *but see United States v. Bonas*, 344 F.3d 945, 950 (9th Cir. 2003) (noting that "[f]inancial hardship is not always an adequate basis for being excused from jury service" and that the financial hardship must be "severe" to excuse a member of venire).

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

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If an otherwise qualified prospective juror claims a disability, then the court should explore whether it can make a reasonable accommodation to address the situation. However, the court should ensure that the disability, even with the accommodation, will not materially affect the ability of any juror to fulfill the necessary obligations of a juror. With respect to financial hardship, the court may wish to examine whether a juror claiming financial hardship can perform their job duties outside of normal hours to accommodate participation in the trial.

Some judges ask prospective jurors about hardship issues early in the voir dire process. This may improve the efficiency of that process. Other judges, however, wait to ask about hardship issues until much later in the process. The nature of the case may prompt some prospective jurors who otherwise might have expressed hardship into deciding that they would prefer to remain and serve on the jury if selected.

2.8 Challenges for Cause

2.8.1 Standards

Federal law governs challenges for cause. Sustainable challenges for cause include:

1. a showing of undue hardship or extreme inconvenience;
2. a showing that the juror may be unable to render impartial jury service;
3. a showing that the juror is likely to disrupt the proceedings; and
4. a showing that the juror's service is likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

See 18 U.S.C. § 1866(c). A “motion to excuse a venire member for cause . . . must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve.” *Gray v. Mississippi*, 481 U.S. 648, 652 n.3 (1987). The trial court has discretion in determining whether to excuse a juror for cause. *See United States v. Mitchell*, 502 F.3d 931, 955 (9th Cir. 2007). Even in diversity cases, federal law and not state law applies to challenges for cause. *Nathan*, 116 F.3d at 424.

If a defendant in a criminal case, by exercising a peremptory challenge, cures the erroneous denial of a challenge for cause, the defendant has not been deprived of a rule-based or constitutional right. *See United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000).

2.8.2 Alternative Methods

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

Some judges receive challenges for cause in the presence of the entire jury panel. Others receive such challenges outside the presence of the panel. Also, the timing of when a judge will hear a challenge for cause varies from court to court.

2.8.3 Judicial Rehabilitation

Upon hearing a response from a prospective juror that might indicate a lack of impartiality on the part of that prospective juror or some other possible basis for a challenge for cause, a judge may inquire further with that prospective juror. This is sometimes referred to as “judicial rehabilitation.” A judge has discretion to inquire further to learn whether a juror might not be qualified to sit as a juror in a specific case, but care should be taken to avoid coercing a particular response from the prospective juror that would enable that person to remain. Although a judge has a fair amount of discretion, this is an area of some sensitivity.

2.9 Peremptory Challenges

2.9.1 Alternative Methods

Peremptory challenges (also called “peremptory strikes”) are not guaranteed by the federal Constitution. They are created exclusively by statute. *Rivera v. Illinois*, 556 U.S. 148, 157 (2009). There is no required procedure for making peremptory challenges. Many courts allow lawyers to exercise their challenges by passing a list back and forth silently until all challenges are recorded. The judge then reviews the list and announces who has been excused. This avoids the awkwardness of calling out individual jurors as challenged. Other courts proceed challenge by challenge, refilling the jury box each time someone is excused. Other judges require that the parties disclose all peremptory challenges simultaneously, potentially to reduce the number of jurors being excused. Finally, some judges receive peremptory challenges in the presence of the entire jury panel, while others receive such challenges outside their presence.

2.9.2 Civil Peremptory Challenges

Rule 47(b) of the Federal Rules of Civil Procedure refers to 28 U.S.C. § 1870 as establishing the number of civil peremptory challenges. That section specifies that each party is entitled to three peremptory challenges. When there are several defendants or plaintiffs in a case, for purposes of determining each side’s peremptory challenges, the court may allow additional peremptory challenges to each side and permit the challenges to be exercised separately or jointly. Because judges do not seat “alternate jurors” in civil cases, there is no provision for additional peremptory challenges against alternates.

2.9.3 Criminal Peremptory Challenges

2.9.3.1 Number of Peremptory Challenges

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

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

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

2.9.3.2 Additional Challenges for Alternate Jurors

A federal criminal jury consists of twelve jurors, absent stipulation to less. To reduce the risk of a mistrial if a juror is unable to remain on the jury, courts often seat alternate jurors in criminal cases, with the number of alternates chosen typically related to the anticipated length of the trial. Most judges will seat one or two alternate jurors for trials expected to last a week or less. Many judges use a rule of thumb that seats one (or two) alternate jurors for every week that the trial is expected to last. Fed. R. Crim. P. 24(c) specifies the number of peremptory challenges to prospective alternate jurors:

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<u>Number of Alternates To Be Impaneled</u>	<u>Number of Peremptory Challenges</u>
1 or 2	1 peremptory challenge for each side, in addition to those otherwise allowed
3 or 4	2 peremptory challenges for each side, in addition to those otherwise allowed
5 or 6	3 peremptory challenges for each side, in addition to those otherwise allowed

The additional peremptory challenges may be used against alternate jurors only. Fed. R. Crim. P. 24(c)(4). If all parties consent, however, a court may allow more than twelve jurors to be seated during a trial with the alternates determined immediately before the case is submitted to the jury at the end of trial.

2.9.3.3 Multiple Defendants

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

2.10 *Batson* Challenges

2.10.1 Generally

2.10.1.1 Prosecution

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

2.10.1.2 Criminal Defense

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

2.10.1.3 Standing

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

2.10.1.4 Suspect Classifications

In addition to those based on race, peremptory challenges based on gender violate the Equal Protection Clause. *J.E.B.*

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v. Alabama, 511 U.S. 127, 130-31 (1994); *De Gross*, 960 F.2d at 1437-43. Similarly, peremptory challenges based on a juror's sexual orientation are impermissible. *See SmithKline Beecham Corp. v. Abbott Lab'ys*, 740 F.3d 471, 486-87 (9th Cir. 2014).

Peremptory challenges based on religion may also be improper, although there is no consensus. *Compare United States v. Brown*, 352 F.3d 654, 668 (2d Cir. 2003) (extending *Batson* to religion), with *Fisher v. Texas*, 169 F.3d 295, 305 (5th Cir. 1999) (no precedent exists dictating extension of *Batson* to religion).

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

2.10.2 Civil Trials

The Supreme Court extended *Batson*'s prohibition against the racially discriminatory use of peremptory challenges to civil actions in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-31 (1991). *See SmithKline Beecham Corp. v. Abbott Lab'ys*, 740 F.3d 471, 477 n.2 (9th Cir. 2014).

2.10.3 Procedure

2.10.3.1 Three-Step Process

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

1. the party bringing the challenge must establish a prima facie case of impermissible discrimination;
2. after the moving party establishes a prima facie case, the burden shifts to the opposing party to articulate a neutral, nondiscriminatory reason for the peremptory challenge; and
3. the court then determines whether the moving party has carried the ultimate burden of proving purposeful discrimination.

See Davis v. Ayala, 576 U.S. 257, 270 (2015); *see also McDaniels v. Kirkland*, 839 F.3d 806, 809 (9th Cir. 2016).

2.10.3.2 Prima Facie Case

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

1. the prospective juror is a member of a protected group;
2. the opposing party exercised a peremptory challenge to remove the juror; and
3. the facts and circumstances surrounding the exercise of the peremptory challenge raise an inference of discrimination.

United States v. Hernandez-Quintania, 874 F.3d 1123, 1127 (9th Cir. 2017). If the moving party fails to establish a prima facie case, the opposing party is not required to offer an explanation for the exercise of the peremptory challenge. *Id.*

2.10.3.3 Opposing Party's Burden

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

2.10.3.4 Court's Duty

The trial court has the duty to determine whether the party objecting to the peremptory challenge has established purposeful discrimination. This finding turns largely on the court's evaluation of the credibility of the justification offered for the peremptory challenge. *Davis v. Ayala*, 576 U.S. 257, 270 (2015); *Sifuentes v. Brazelton*, 825 F.3d 506, 515 (9th Cir. 2016). A court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Stevens v. Davis*, 25 F.4th 1141, 1150 (9th Cir. 2022) (quoting *Batson*, 476 U.S. at 94). When a challenger offers mixed motives (both permissible and impermissible reasons for exercising a peremptory challenge), the challenger must show the same decision would have been made absent improper motivation. *Kesser v. Cambra*, 465 F.3d 351, 373 (9th Cir. 2006) (applying preponderance of the evidence standard).

2.10.3.5 Timeliness

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

2.10.3.6 No Specific Findings Required

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

2.10.3.7 Sanctions for Sustained Challenge

If the court sustains the challenge, the subject juror is seated and the losing party loses the peremptory strike. The Supreme Court has also suggested that the trial court has discretion to determine whether to “discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.” *Batson*, 476 U.S. at 99 n.24.

2.11 Anonymous Juries

The provisions of 28 U.S.C. § 1863(b)(7) authorize the district court's plan for random jury selection to "permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names [of prospective jurors] confidential in any case where the interests of justice so require." The decision to use an anonymous jury is committed to the sound discretion of the judge. *See United States v. Mikhel*, 889 F.3d 1003, 1031 (9th Cir. 2018); *see also United States v. Fernandez*, 388 F.3d 1199, 1244 (9th Cir. 2004), *modified*, 425 F.3d 1248 (9th Cir. 2005).

The First Amendment, however, may confer a presumptive right to obtain the names of both jurors and prospective jurors before the jury is impaneled. *See United States v. Wecht*, 537 F.3d 222, 235 (3d Cir. 2008) (relying on *Press-Enter Co. v. Superior Court of Cal., Riverside Cnty.*, 478 U.S. 1, 8-9 (1986)); *see also Holmes*, 572 F. Supp. 3d at 838-39. Therefore, a court that decides to keep the identity of jurors confidential should clearly state the interests it is protecting and its findings warranting confidentiality. *See Wecht*, 537 F.3d at 242 (concluding that district court had not sufficiently articulated how the presumptive right was overcome).

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

In determining whether to keep information from the public, a trial judge should consider not only First Amendment

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issues, but also a defendant's Sixth Amendment right to a public trial and the privacy interests of prospective jurors. *See Presley v. Georgia*, 558 U.S. 209 (2010); *Press-Enterprise I*, 464 U.S. at 510-13; *Visciotti v. Martel*, 862 F.3d 749, 767 (9th Cir. 2016).

There are five nonexclusive factors to be considered to determine if the identity of jurors should be protected:

1. a party's involvement in organized crime;
2. a party's participation in a group with the capacity to harm jurors;
3. a party's past attempts to interfere with the judicial process;
4. the potential that, if convicted, a criminal defendant will suffer lengthy incarceration and substantial monetary penalties; and
5. extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.

Fernandez, 388 F.3d at 1244; *Shryock*, 342 F.3d at 971; *Edmond*, 52 F.3d at 1091; *see also United States v. Martinez*, 657 F.3d 811, 818 (9th Cir. 2011).

The court must take reasonable precautions to minimize prejudicial effects on a defendant in a criminal case and to ensure that the defendant's fundamental rights are protected. To minimize prejudicial effects, the court should provide the jurors with an explanation for the use of the anonymous jury. *United States v. Fernandez*, 388 F.3d 1199, 1245 (9th Cir. 2004); *see United States v. Warman*, 578 F.3d 320, 344 (6th Cir.

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

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

2.12 Seating and Swearing-in the Jury

When the jury is first impaneled and sworn, it is recommended that the court instruct jurors concerning their conduct during trial. *See* 9TH CIR. CRIM. JURY INSTR. 1.8; 9TH CIR. CIV. JURY INSTR. 1.15. They should be advised not to conduct their own investigation or visit the scene of events involved or undertake any research, such as use of the Internet. *Id.* At appropriate times during the trial the court should remind the jurors not to discuss the case among themselves or allow anyone to discuss the case with them or read or listen to any media reports of the trial. *See* 9TH CIR. CRIM. JURY INSTR. 2.1; 9TH CIR. CIV. JURY INSTR. 1.15.

Indeed, some judges tell prospective jurors at the beginning of jury selection not to conduct their own investigation about the case or the parties. This is intended to reduce the risk of a prospective juror researching about the case or the parties during the jury selection process itself or during a recess in that process.

2.13 Counsel's Use of Jury Consultants

Some counsel will want to use consultants to assist in jury selection and voir dire. The trial court has discretion on whether they are allowed to sit at counsel table and how they are introduced to the jury.

2.14 Bias in Jury Verdict

There are various grounds to set aside a verdict where there is evidence of jury bias. And in some states within the Ninth Circuit, standards have changed in analyzing juror bias, including as to civil trials. *See, e.g., Henderson v. Thompson*, 200 Wash.2d 417, 518 P.3d 1011 (2022) (establishing standards and framework to assess claim of racial bias infecting a jury's verdict in a civil trial).

2.15 Delegation to Magistrate Judges

2.15.1 Caution Regarding Delegation in Criminal Cases

Any delegation to a magistrate judge of trial-related tasks in a criminal felony trial should be made only in those cases in which there is clear authority to do so. For an analytical approach to identifying additional duties a magistrate judge may perform under 28 U.S.C. § 636(b)(3) (Magistrate Judges Act) that are not inconsistent with the Constitution or laws of the United States, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1120-21(9th Cir. 2003) (en banc); *see also Flam v. Flam*, 788 F.3d 1043, 1046 (9th Cir. 2015).

2.15.2 Felony Jury Trials

A magistrate judge may conduct voir dire, but only with the parties' consent. *Peretz v. United States*, 501 U.S. 923 (1991); *Gomez v. United States*, 490 U.S. 858 (1989). Consent from an attorney will suffice; the defendant's express consent is not required. *Gonzalez v. United States*, 553 U.S. 242, 253 (2008); *see also United States v. Gamba*, 541 F.3d 895, 900 (9th Cir. 2008).

2.15.3 Civil Trials

With the parties' consent, a magistrate judge may conduct a civil trial (including voir dire). *Gamba*, 541 F.3d at 903 (citing 28 U.S.C. § 636(a)); *see also Peretz*, 501 U.S. at 933.

Chapter Three: Trials

This chapter provides an overview of many common issues that arise during a jury trial, as well as some special challenges that may arise. Although it covers both criminal and civil trials, certain parts are specific to only criminal or only civil trials and have been identified as such either in the text or as a heading. It is organized by the general order of events during a trial.

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3.1 Trial Scheduling Considerations

3.1.1 The Trial Day

The schedule of the trial day is up to the discretion of the judge, but it is helpful to consult with the parties about witness availability or special needs. Most judges strive to ensure at least five hours of court time per day. Some courts begin trial at 8:00 or 8:30 a.m., and end at 1:30 or 2:00 p.m., with regular recesses. Such a schedule provides the court with approximately five and one-half to six hours of court time each trial day, while still affording the court, attorneys, witnesses, and jurors time to attend to other professional and personal matters during business hours. Other judges may start trial a bit later and end the trial day somewhere between 4:00 p.m. and 5:00 p.m. These decisions may depend on the convenience and availability of jurors, counsel, parties, and witnesses. They also may depend in criminal cases on whether a defendant is in custody and, if so, on the convenience and availability of the U.S. Marshals Service. For extended trials, some judges hold longer trial days four days per week with no trial set one day each week.

3.1.2 Setting Time Limits

See Sections 1.1.13.5 (criminal cases) and 1.2.11 (civil cases) for a discussion of this topic.

3.2 Defendant's Presence at a Criminal Trial

3.2.1 Generally

A person charged with a felony has the constitutional right to be present at all critical stages of the trial, as protected by the Fifth Amendment's Due Process Clause and the Sixth Amendment's Confrontation Clause. The Supreme Court has held that the defense does not have a constitutional right to be present at every interaction between a judge and juror; rather, the defendant has the right to be present at proceedings that significantly impact the ability to defend themselves against the charges. *United States v. Gagnon*, 470 U.S. 522, 526 (1985). The right to be present at all critical stages can be waived if the waiver is voluntarily, knowingly, and intelligently made. *Campbell v. Wood*, 18 F. 3d 662, 672 (9th Cir. 1994) (en banc). The scope of the right under Federal Rule of Criminal Procedure 43, is broader than the scope of the constitutional right to be present. *United States v. Reyes*, 764 F.3d 1184, 1189 (9th Cir. 2014).

In addition, "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

3.2.2 Pre-Trial Conferences and Sidebars

When a hearing or sidebar conference involves only a question of law, a defendant's presence is not required. *United States v. Reyes*, 764 F. 3d 1184, 1191 (9th Cir. 2014) (defining a question of law as referring to an issue to be decided by the judge concerning the application or interpretation of the law); Fed. R. Crim. P. 43(b)(3).

3.2.3 Voir Dire

See Section 2.6.6.2.

3.2.4 Defendant's Presence—Jury Instructions

“The judge’s decision to discuss jury instructions with counsel in the absence of the defendant [i]s not error.” *United States v. Romero*, 282 F.3d 683, 690 (9th Cir.), *cert. denied* 537 U.S. 858 (2002).

3.2.5 Jury Questions

The Fourth Circuit has held that the defendant does not have to be present when the court, prosecution, and counsel for the defendant formulate an answer to a question from the jury during deliberations. *United States v. Rhodes*, 32 F.3d 867, 873 (4th Cir.1994). However, the Ninth Circuit has held that a district court’s failure to consult with defense counsel before responding to a mid-deliberations jury note violated Rule 43(a) and defendant’s Sixth Amendment right to counsel. *United States v. Martinez*, 850 F. 3d 10977, 1100 (9th Cir. 2017).

3.2.6 Readbacks

The Ninth Circuit has held that a defendant has a right to be present during readbacks to the jury, and the right cannot be waived by counsel. *United States v. Kupau*, 781 F.2d 740, 743 (9th Cir. 1986). In addition, it is “error to permit the replay without a [court] reporter present to make a record.” *Id.*

3.3 Rule 104(c) Hearings During Trial

Pursuant to Federal Rule of Evidence 104(c), the court “must conduct any hearing on a preliminary question so that the jury cannot hear it if:

1. the hearing involves the admissibility of a confession;
2. a defendant in a criminal case is a witness and so requests; or
3. justice so requires.”

The rule thus permits a sidebar with the jury present in the courtroom for most Rule 104 hearings during trial. However, when the issue is the voluntariness of a confession, Rule 104(c) is superseded by 18 U.S.C. § 3501(a), which requires that determination to be made “out of the presence of the jury.”

3.4 Sidebars

Juries do not like sidebars. Addressing issues that should not be heard by the jury at a morning conference 15 or 30 minutes before the jury arrives will reduce or eliminate the need for sidebars during trial.

3.5 Preliminary Instructions and Instructions During Trial

After the jury has been sworn and before the presentation of opening statements, the court should give the jury preliminary instructions. These instructions may cover such topics as informing the jury about what constitutes evidence, how to assess credibility of witnesses, and how the trial will be conducted. Jurors should also be instructed on the rules governing their conduct during trial. Preliminary instructions may also address the burden of proof, the fact that statements by the court and counsel are not evidence, and other basics of trial evidence and procedure. They can also provide helpful information to the jurors concerning their service and how to communicate with the court if necessary. In short, preliminary instructions are an effective way for the court to answer many common juror questions and to make jury service a more effective and positive experience. *See* 9TH CIR. CRIM. JURY INSTR. 1.1-1.16; 9TH CIR. CIV. JURY INSTR. 1.1-1.22.

In addition, some judges include substantive law specific to the trial in their preliminary instructions. These can include informing the jury of the elements of a charge (or charges) in criminal cases or the elements of a claim (or claims) in civil cases. Some judges provide preliminary instructions to the jury in writing; other judges give the preliminary instruction orally and reserve distributing written instructions for the final jury instructions given at the end of the trial.

Preliminary jury instructions can be a basis for appeal. *United States v. Hegwood*, 977 F.2d 492, 495 (9th Cir. 1992) (holding that when challenged instruction is given at the beginning of trial, reversal is unwarranted unless the defendant can prove prejudice or that the jury was materially misled); *see also United States v. Ruiz*, 462 F.3d 1082, 1087 (9th Cir. 2006) (holding that reasonable doubt jury instruction, which

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advised proof beyond all possible doubt was not required and that prosecution was not required to present DNA evidence to meet its burden, was not plain error).

During trial, issues may arise or evidence may be admitted that warrants a mid-trial instruction to the jury. Chapter 2 of the Ninth Circuit Manuals of Model Jury Instructions contains several such instructions, addressing such topics as stipulations of fact, judicial notice, foreign language testimony, and the jury's consideration of evidence admitted for a limited purpose.

It is recommended that the jury be admonished at the beginning and end of each day not to discuss the case among themselves or with anyone else and not to do any research about the case. *See* 9TH CIR. CRIM. JURY INSTR. 2.1; 9TH CIR. CIV. JURY INSTR. 2.0.

3.6 Opening Statements

3.6.1 Generally

An opening statement should explain the evidence that the party expects to be introduced at trial. While counsel may describe how the evidence leads to the conclusion that their client should prevail, extensive argument on the merits of the case is inappropriate. In criminal cases, the defense is entitled to make an opening statement immediately after the government, but the defense may instead elect to make an opening statement at the close of the government's case, or not at all. *See United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985); *see also United States v. Stanfield*, 521 F.2d 1122 (9th Cir. 1975) (reversing and remanding for new trial when trial judge prohibited counsel from making opening statements and instead judge delivered statement).

It may be beneficial to permit each party to present a brief mini-opening statement before voir dire, particularly in cases with complex facts or legal issues, in addition to opening statements after the jury is empaneled. *Cf. United States v. Goode*, 814 F.2d 1353, 1355 (9th Cir. 1987) (upholding district court order requiring the parties to make their opening statements before voir dire to all prospective jurors and recognizing that “familiarizing prospective jurors with a case before voir dire could benefit a defendant by enabling prospective jurors to assess knowledgeably whether they are fit to sit as fair and impartial jurors in the case at hand”).

The court should be vigilant as it listens to opening statements to ensure that neither party makes any improper statements. Whenever possible, the court should anticipate and address such issues on the record with counsel before opening statements. In addition, the court should give the jury a limiting instruction that appraises the jury that an opening

statement is neither evidence nor argument; rather, it is a prediction of what the evidence will be. And if an improper statement is made during an opening statement, a prompt and specific curative instruction may be warranted. *See Abromson v. Am. Pac. Corp.*, 114 F.3d 898, 903 (9th Cir. 1997) (holding that an improper remark made only once during opening statements that was immediately objected to, which objection was sustained, was harmless); *United States v. Barragan*, 871 F.3d 689 (9th Cir. 2017) (“A curative instruction can neutralize the harm of a prosecutor’s improper statements if it is given ‘immediately after the damage [is] done’ and mentions ‘the specific statements.’” (brackets and internal quotation marks in original)).

In a criminal case, a defendant may reserve making an opening statement until the end of the government’s case-in-chief. In a criminal case with multiple defendants with separate counsel, defendants may elect to present all opening statements at the beginning of trial or have one or more defendants reserve their opening statements until the end of the government’s case-in-chief.

Remarks made during opening statements may open the door for the opposing party to present otherwise inadmissible evidence. *See Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1130 (9th Cir. 2010) (quoting *United States v. Chavez*, 229 F.3d 946, 952 (10th Cir. 2000)) (“It is widely recognized that a party who raises a subject in an opening statement ‘opens the door’ to admission of evidence on that same subject by the opposing party.”).

3.6.2 Illustrative Aids and Trial Evidence

It is helpful to inquire of the parties before opening statements whether there are PowerPoint presentations, other illustrative aids, or exhibits that a party expects to show

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to the jury during opening statement, and to resolve any objections in advance. The court may also remind counsel that illustrative aids should be used in opening statements only as aids in explaining the facts to the jury and not as devices for argument. *See* Section 3.20; *see also* Rule 107 of the Federal Rules of Evidence.

3.7 Improper Comments During Opening Statements

Many kinds of improper comments sometimes are made by counsel during opening statement. If there is not a timely objection, some judges simply let them pass. Other judges, however, intervene *sua sponte* and offer an immediate curative instructive.

Sua sponte intervention is important in criminal cases when the improper comment is made by a prosecutor. In some cases, the trial judge even has a duty to act *sua sponte* regarding improper argument or other misconduct, especially by a prosecutor. *See United States v. Sanchez*, 659 F.3d 1252, 1258 (9th Cir. 2011); *see also Igo v. Coachmen Indus., Inc.*, 938 F.2d 650, 654 (6th Cir. 1991) (“A trial court cannot sit quietly while counsel inflames the passions of the jury with improper conduct, even if opposing counsel does not object.”).

Appendix IV contains a non-exhaustive list of some of the more egregious types of improper comments or arguments made by counsel during opening statements or closing arguments.

3.8 Juror Notebooks and Notetaking

“A district court has very broad discretion in deciding whether to allow notetaking.” *United States v. Scott*, 642 F.3d 791, 797 (9th Cir. 2011) (upholding district court’s decision to prohibit juror notetaking).

If notetaking is permitted, the jurors should be given a preliminary instruction on taking notes. The court should also instruct the jurors to leave their notes in the jury room or courtroom when the court is not in session, where they will be kept secured. *See* 9TH CIR. CRIM. JURY INSTR. 1.10; 9TH CIR. CIV. JURY INSTR. 1.18.

In addition, some judges have a photograph taken of each witness when the witness arrives in the courtroom to testify and then distributes copies of the photograph for inclusion in each juror’s notebook.

3.9 Juror Questions

3.9.1 Questions for the Court

It is frequently the case that a jury or a juror will desire contact with a trial judge to inquire of both administrative and substantive aspects of jury service. In replying to such inquiries, the judge should:

- A. consult counsel before responding to any jury communication; and
- B. respond only in the presence of all parties in open court or in a writing after giving all parties prior notice. Notably, Federal Rule of Criminal Procedure 43(a) requires that a defendant be present at every stage of the trial, unless one of the exceptions in Rule 43(b) or 43(c) applies.

More particularly, the court should not answer questions from the jury informally in the form of a colloquy between the court and the foreperson, but rather should respond in a formal way so that the parties have an adequate opportunity to evaluate the propriety of the proposed response or supplemental instruction, formulate objections, or suggest a different response. *United States v. Martinez*, 850 F. 3d 1097, 1102 (9th Cir. 2017) (citing *United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979) (holding it was plain error for the trial court to respond to inquiries from the jury foreman without consulting counsel before giving supplemental instructions)).

Only the trial judge should respond to a jury inquiry that involves the exercise of judicial discretion. This is particularly true in a criminal case, in the absence of the affirmative consent of the defendant. *United States v. Gomez-Lepe*, 207 F.3d 623, 629-30 (9th Cir. 2000) (holding that a magistrate judge could

not preside over polling of jury absent defendant's consent, where a juror's response called into question the unanimity of the verdict, as the polling was a "critical stage" of criminal proceedings).

When an ex parte communication occurs between a trial judge and a juror that relates to some aspect of the trial, "the trial judge generally should disclose the communication to counsel for all parties." *Rushen v. Spain*, 464 U.S. 114, 119 (1983).

3.9.2 Juror Questioning of Witnesses

There may be occasions when a juror desires to ask a question of a witness. The court may permit jurors to submit limited questions for witnesses or may prohibit it altogether. *United States v. Lynch*, 903 F.3d 1061, 1082 (9th Cir. 2018) (citing *United States v. Huebner*, 48 F.3d 376, 382 (9th Cir. 1994); see also *United States v. Gonzales*, 424 F.2d 1055, 1056 (9th Cir. 1970) (holding no error by trial judge in allowing juror to submit question to court)).

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

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

Practical Suggestions

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

1. The preliminary instructions should describe the court's policy on juror-submitted questions, including an explanation of why some questions may not be asked. All juror-submitted questions should be retained by the clerk as part of the court record whether or not the question was asked. *See* 9TH CIR. CIV. JURY INSTR. 1.19.
2. At the conclusion of each witness's testimony, if a juror has a written question it is brought to the judge.
3. Outside the presence of the jury, counsel are given the opportunity to make objections to the question or to suggest modifications to the question by passing the written question between counsel and the court during a side-bar conference or by excusing jurors to the jury room.
4. Counsel or the judge asks the question of the witness.
5. Counsel are permitted to ask appropriate follow-up questions.
6. The written question is made part of the record.

3.10 Judge Questioning of Witnesses

3.10.1 Criminal Trials

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

A trial judge deprives the parties of a fair trial when the record reflects actual bias on the part of the judge or if the judge's questions project an appearance of advocacy or partiality to the jury. *Scott*, 642 F.3d at 799. The court's discretion to supervise trials is broad, however, and reversal will occur only when it abuses that discretion. *United States v. Marks*, 530 F.3d 799, 806 (9th Cir. 2008). If questioning by the judge occurs, the judge may deflect prejudice by instructing the jury not to infer any opinion from its questioning and reminding the jurors that they are the judges of the facts. *Parker*, 241 F.3d at 1119; see also *Swinton v. Potomac Corp.*, 270 F.3d 794, 808 (9th Cir. 2001).

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

3.10.2 Civil Trials

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

3.11 Exclusion of Witnesses (Fed. R. Evid. 615)

Federal Rule of Evidence 615 provides for the exclusion of witnesses so that they cannot hear other witnesses' testimony. The court may do so on its own and must do so when a party requests it. However, Rule 615 does not authorize excluding:

1. a party who is a natural person;
2. an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
3. a person whose presence a party shows to be essential to presenting the party's claim or defense; or
4. a person authorized by statute to be present.

"The purpose of this rule is to prevent witnesses from 'tailoring' their testimony to that of earlier witnesses." *United States v. Seschillie*, 310 F.3d 1208, 1212 (9th Cir. 2002). In a criminal trial, Rule 615 "applies to both pretrial evidentiary hearings and to the guilt phase of the trial." *United States v. Robertson*, 895 F.3d 1206, 1214 (9th Cir. 2018). Further, Rule 615 extends to rebuttal witnesses, not just witnesses testifying in a party's case-in-chief. *United States v. Ell*, 718 F.2d 281, 292 (9th Cir. 1983).

A testifying government agent falls under the second exception as an officer on behalf of the prosecution in criminal cases. *United States v. Valencia-Riascos*, 696 F.3d 938, 941 (9th Cir. 2012). A potential expert witness can often, though not always, fall under the third exception as an essential party to presenting a claim or defense. *See United States v. Seschillie*, 310 F.3d 1208, 1213-14 (9th Cir. 2002) (holding that the defense made a fair showing that their expert's presence was

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essential for the management of the case and that the trial court abused its discretion in excluding the expert).

It is a violation of a witness exclusion order to read a transcript of the testimony of another witness, in addition to hearing the testimony in the courtroom. *Robertson*, 895 F.3d at 1215. Should a witness intentionally violate a court's order of sequestration, prohibiting the witness from testifying is one possible sanction. *Taylor v. United States*, 388 F.2d 786, 788 (9th Cir. 1967). However, disqualification of a defense witness in a criminal trial as a sanction for violating a sequestration order, absent intentional misconduct by the defense, is ordinarily an abuse of discretion because of the defendant's constitutionally based right to present relevant testimony. *United States v. Torbert*, 496 F.2d 154, 158 (9th Cir. 1974). Instead, the Ninth Circuit has "long recognized cross-examination [about the witness's exposure to the prior testimony] as a suitable remedy for a Rule 615 violation at least where . . . the violation of the rule was not deliberate." *Robertson*, 895 F.3d at 1216.

3.12 Witness Oaths (Fed. R. Evid. 603 and 604)

Federal Rule of Evidence 603 provides that any witness who offers testimony must give an oath or affirmation to testify truthfully, “in a form designed to impress that duty on the witness’s conscience.” The advisory committee’s note to the rule explains that the rule is intended to accord flexibility that may be needed when “dealing with religious adults, atheists, conscientious objectors, [people with mental deficiencies], and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.” It is reversible error for a district court to prevent a party from testifying solely on the basis of the party’s religiously based objections to the form of the oath. *United States v. Ward*, 989 F.2d 1015, 1019 (9th Cir. 1993).

Note that when a witness requires the aid of an interpreter to testify in court, the interpreter is required to take an oath as well. That oath is controlled by Rule 604.

3.13 Interpreters

3.13.1 Right of Criminal Defendant to Interpreter

Under the Court Interpreters Act, a defendant in a criminal case has a statutory right to a qualified court-appointed interpreter when the defendant's comprehension of the proceedings or ability to communicate with counsel is impaired. 28 U.S.C. § 1827(d)(1). "While the general standard for interpreters requires continuous word-for-word translation, occasional lapses in the standard will not necessarily contravene a defendant's constitutional rights." *United States v. Long*, 301 F.3d 1095, 1105 (9th Cir. 2002) (citing *United States v. Lim*, 794 F.2d 469, 470-71 (9th Cir. 1986)).

"When a court becomes aware of a criminal defendant's potential difficulties in understanding or speaking the English language, it has a mandatory duty to make a determination on the record whether an interpreter is required, and if so, to appoint a certified individual." *United States v. Murguia-Rodriguez*, 815 F.3d 566, 570 (9th Cir. 2016) (holding that the defendant did not validly waive the defendant's right to an interpreter when the defendant requested to proceed in English but made no express desire to waive right to interpreter). The court must appoint a certified interpreter, or, if one is not "reasonably available," then an "otherwise qualified interpreter." 28 U.S.C. § 1827(d)(1). The court should request assistance of the court clerk to locate a qualified interpreter consistent with the current guidance from the Administrative Office of the United States Courts, including in the *Guide to Judicial Policy*, Vol. 5 § 330. See *Identifying, Locating and Selecting the Most Reasonably Available Qualified Interpreter* § 1 (updated Dec. 3, 2021), available at <https://jnet.ao.dcn/court-services/district-clerks-offices/court-interpreting/contract-court-interpreters/reasonably-available/identifying-locating-and-selecting-most-reasonably-available-qualified-interpreter>.

3.13.2 Availability of Interpreter in Civil Actions

Federal Rule of Civil Procedure 43(d) provides for the appointment of a court interpreter, with the determination of interpreter's fees and assessment of fees as costs in a civil action. In many civil actions the parties provide their own interpreters. Further, in civil cases instituted by the United States, the Court Interpreters Act requires the court to appoint a certified interpreter, or, if one is not "reasonably available," then an "otherwise qualified interpreter." 28 U.S.C. § 1827(d) (l). As in criminal cases, the court should request assistance of the court clerk to locate a qualified interpreter consistent with the current guidance from the Administrative Office of the United States Courts, including in the *Guide to Judiciary Policy*, Vol. 5 § 330. See *Identifying, Locating and Selecting the Most Reasonably Available Qualified Interpreter* § 1 (updated Dec. 3, 2021), available at <https://jnet.ao.dcn/court-services/district-clerks-offices/court-interpreting/contract-court-interpreters/reasonably-available/identifying-locating-and-selecting-most-reasonably-available-qualified-interpreter>.

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

3.13.3 Qualifications of Interpreter

A certified interpreter must have passed the Federal Court Interpreter Certification Examination. See *Guide to Judiciary Policy*, Vol. 5 § 320.10(a). "Otherwise qualified interpreters" include "professionally qualified interpreters," who must satisfy one of five prerequisites set forth in the *Guide to Judiciary Policy* with sufficient documentation and authentication.

Guide to Judiciary Policy, Vol. 5 § 320.20.20(a). “Otherwise qualified interpreters” also include “language skilled or ad hoc” interpreters, who are individuals that do not qualify as certified or professionally qualified interpreters, “but who can demonstrate to the court’s satisfaction the ability to interpret court proceedings from English to a designated language and from that language into English, will be classified as a language skilled/ad hoc interpreter.” *Guide to Judiciary Policy*, Vol. 5 § 320.20.30(a). When determining whether to use a language skilled or ad hoc interpreter, the court should use a “precisely structured voir dire process” to determine whether the individual “can be deemed competent to handle simultaneous and/or consecutive interpretation and/or sight translation with sufficient language proficiency in both English and the target language.” *Id.* § 320.20.30(b). The court “may need to take extra time and make special accommodations to ensure that the proceedings can be conveyed through the language skilled/ad hoc interpreter.” *Id.* § 320.20.30(c). Further, when an interpreter cannot simultaneously interpret, the court may “instruct the parties to speak slowly to allow the interpreter time to interpret consecutively,” “simplify the language” the court and parties use, and/or “explain the meaning of some legal terms, so that the interpreter may understand what the parties are saying and transmit it to the non-English speaker.” *Id.*

In a civil case not brought by the United States, the court may qualify an interpreter using Federal Rule of Evidence 604 if a professionally qualified interpreter is not available. *United States v. Bailon-Santana*, 429 F.3d 1258, 1261 (9th Cir. 2005) (holding that a lawyer, who professed fluency in Spanish, was not qualified as an interpreter because the trial court did not employ Fed. R. Evid. 604 methodology used for qualifying expert witness (*see* Fed. R. Evid. 702)). The court should also consult with the Clerk of Court, who may be able to locate a certified or qualified interpreter. *See Identifying, Locating and Selecting the Most Reasonably Available Qualified Interpreter*

§ 1 (updated Dec. 3, 2021), available at <https://jnet.ao.dcn/court-services/district-clerks-offices/court-interpreting/contract-court-interpreters/reasonably-available/identifying-locating-and-selecting-most-reasonably-available-qualified-interpreter>.

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

3.13.4 Competence of Interpreter

Any determination as to the competence of an interpreter rests with the trial judge. In making that determination, the court should consider whether the interpreter is federally certified by the Administrative Office of the U.S. Courts. During trial, counsel and the court should be informed of any difficulty with an interpreter. The judge must then decide whether to retain or replace the interpreter. *See United States v. Angulo*, 598 F.2d 1182, 1184 (9th Cir. 1979). Complaints directed toward an interpreter by a party may require that the trial court conduct an evidentiary hearing. *Chacon v. Wood*, 36 F.3d 1459, 1465 (9th Cir. 1994) (involving claims the interpreter deliberately mistranslated court proceedings), superseded by statute on other grounds as stated in *Hall v. City of Los Angeles*, 697 F.3d 1059, 1070 (9th Cir. 2012). In criminal and civil cases brought by the United States, “[i]f any interpreter is unable to communicate effectively with the presiding judicial officer, the United States attorney, a party (including a defendant in a criminal case), or a witness, the presiding judicial officer shall dismiss such interpreter and obtain the services of another interpreter in accordance with this section.” 28 U.S.C. § 1827(e)(1).

3.13.5 Identifying and Approving Interpreters

There are several ways of identifying certified and qualified interpreters. The judge should consult with the court clerk to find out whether there are certified or qualified interpreters in the target language. Judges should be aware that the Administrative Office keeps a list of certified and qualified interpreters in the National Court Interpreter Database that cover many languages. *See* <https://jnet.ao.dcn/court-services/district-clerks-offices/court-interpreting/contract-court-interpreters/national-court-interpreter-database>. A judge considering the use of an interpreter should also be aware of the *Guide to Judiciary Policy*'s rules and recommendations for interpreters set out in Volume 5.

When using a non-certified interpreter, it is recommended that the judge question the interpreter on the record to establish their ability to provide interpreting services. Voir dire questions should include questions on the topics as follows:

- how the interpreter learned the target language;
- how long the interpreter has spoken the target language;
- confirmation that the interpreter has spoken to the witness and confirmed that they speak the same dialect in the target language;
- the method of interpreting the interpreter will use—simultaneous or consecutive;
- identification of any conflicts with the parties or issues; and
- confirmation that the interpreter understands the interpreter's ethical obligations.

Additionally, the court should swear the interpreter to the following oath: Do you solemnly affirm that you will interpret faithfully and accurately in this matter now before the court? *See Guide to Judiciary Policy*, Vol. 5 § 350.

3.13.6 Translations of Disputed Documents

When the translation of a document is disputed, qualified translators may give their respective translations and explain their opinions about what the words mean, and the jury will decide which translation is appropriate. This type of opinion testimony is subject to Rules 104 and 702 of the Federal Rules of Evidence.

3.13.7 Necessity of Oath

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

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

3.13.8 Cautionary Instruction to Bilingual Jurors

There are model instructions regarding the obligation of bilingual jurors to accept the translation given by the federally certified or otherwise qualified court interpreter. *See* 9TH CIR. CRIM. JURY INSTR. 1.12; 9TH CIR. CIV. JURY INSTR. 2.8.

3.14 Special Issues Involving Multiple Plaintiffs or Defendants

3.14.1 General considerations

A trial involving multiple plaintiffs or defendants can be considerably more challenging than in the typical case and will benefit from early and consistent case management. Many of these cases on the civil side will involve complex litigation, mass torts, or class actions. In high-profile cases, additional consideration should be given to the handling of security, media relations, crowd control, inquiries by the public, and jury selection. Such trials will inevitably take longer, and courts must take this into scheduling considerations. In a civil case with multiple plaintiffs, the trial judge should be cautious of prejudice to a defendant when multiple cases are presented.

Federal Rule of Evidence 403 permits a court to restrict a party from presenting cumulative evidence or wasting time. *See United States v. Marbella*, 73 F.3d 1508, 1513 (9th Cir. 1996) (holding that district courts have “considerable discretion in restricting cross-examination” so long as the restriction does not limit relevant testimony and prejudice the defendant); *Mitchell v. Keith*, 752 F.2d 385, 392 (9th Cir. 1985) (holding the trial court did not abuse its discretion by prohibiting defendants from introducing evidence that “might well have confused the issues, misled the jury, and wasted time”).

See also Chapter 8 (“High Profile Cases”).

3.14.2 Special Considerations in Criminal Trials

3.14.2.1 Trial Management

When there are multiple defendants in a criminal trial, the court should address the order of presentation in advance of trial, with respect to opening, closings, and the examination of witnesses. Evidence Rule 403, which allows the court to restrict the needless presentation of cumulative evidence, is a primary tool for the court to manage these proceedings.

3.14.2.2 Antagonistic Defenses

An adversarial stance by a codefendant does not, alone, require trials to be severed, particularly where the defenses are “not mutually exclusive at their core or essence.” *United States v. Cardascia*, 951 F.2d 474, 484-85 (2d Cir. 1991) (affirming conviction when court allowed rebuttal closing argument by one defendant after another defendant’s antagonistic closing but before prosecutor’s rebuttal). The court has discretion to allow a rebuttal closing argument by a defendant who closed before another defendant with an antagonistic defense. The government, however, must always be allowed to have the final rebuttal argument. Fed. R. Crim. P. 29.1.

3.14.2.3 Confession of a Co-Defendant

In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that the Confrontation Clause of the Sixth Amendment was violated when the confession of one defendant, implicating another defendant, was placed before the jury at the defendants’ joint trial, and the confessing defendant did not take the witness stand and was therefore not subject to cross-examination. This was a violation even though the court gave the jury a cautionary instruction that the confession was to be considered only as evidence against

the confessing defendant. *Bruton* applies only to testimonial out-of-court statements by a non-testifying codefendant. *Lucero v. Holland*, 902 F.3d 979, 988 (9th Cir. 2018). It is a *Bruton* violation when a codefendant's confession is redacted by substituting the defendant's name with "deleted," where the confession "involve[d] statements, that, despite redaction, obviously refer[red] directly to someone, often obviously the defendant." *Gray v. Maryland*, 523 U.S. 185, 186 (1998). In *Samia v. United States*, 599 U.S. 635 (2023), the Court held it was not a *Bruton* violation to replace the defendant's name in the confession with "other person," as then the confession did not directly implicate the defendant, and "the *Bruton* rule applies only to 'directly accusatory' incriminatory statements, as distinct from those that do 'not refer directly to the defendant' and 'bec[o]me incriminating statements only when linked with evidence introduced later at trial.'" *Id.* at 2017.

If the non-testifying codefendant's confession is introduced in rebuttal to impeach a testifying defendant's explanation of that defendant's own confession, and the jury is properly instructed that the non-testifying codefendant's confession is not to be considered for its truth, the Confrontation Clause is not violated and *Bruton* does not apply. *Tennessee v. Street*, 471 U.S. 409, 413-14 (1985).

In cases with multiple defendants, the court should explore with counsel the possibility of a *Bruton* problem before the potential jurors are sworn in, by asking the government whether it plans to offer in evidence a pretrial confession by one of the codefendants.

In a joint trial, a defendant may not call as a witness a codefendant who has not pled guilty and who has indicated an intention to assert the privilege against self-incrimination. *United States v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974). When a codefendant who has pled guilty appears as a

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government witness in a defendant's trial, the codefendant may be examined by defense counsel concerning all aspects of the person's own involvement in the crime, as well as the disposition of any charges entered against that person. *United States v. Halbert*, 640 F.2d 1000, 1004-05 (9th Cir. 1981).

In addition, the trial court must make a preliminary finding by a preponderance of the evidence that the co-conspirator's statements fall within the scope of the hearsay exception for statement of co-conspirators. In *United States v. Ehmer*, 87 F.4th 1073, 1127-28 (9th Cir. 2023), one of the defendants contended that another co-conspirator's statements, which were made after the defendant had withdrawn from the conspiracy, were hearsay and erroneously admitted. The Ninth Circuit agreed and held that the trial court erred in not making a preliminary finding on the "threshold question" whether the co-conspirator's statements were made when the defendant was part of the conspiracy. *Id.* at 1127 (rejecting the government's argument that "the hearsay exception continues to apply, even as to persons who have withdrawn from the conspiracy, so long as the declarant remains in the conspiracy").

3.15 Defendant's Testimony in a Criminal Trial

3.15.1 Right to Testify

Although a defendant's constitutional right to testify is well established, *Rock v. Arkansas*, 483 U.S. 44, 51 (1987), a defendant must assert the right to testify before the jury has reached a verdict. See *United States v. Pino-Noriega*, 189 F.3d 1089, 1095-96 (9th Cir. 1999). The right is personal to the defendant, and thus may be relinquished only by the defendant. If a defendant wants to testify against the advice of his attorney, "he can reject his attorney's tactical decision by insisting on testifying, speaking to the court, or discharging his lawyer." *United States v. Joelson*, 7 F.3d 174, 178 (9th Cir. 1993).

If the defendant does not testify, use 9TH CIR. CRIM. JURY INSTR. 3.3. If the defendant testifies, use 9TH CIR. CRIM. JURY INSTR. 3.4.

The trial court has no obligation to inquire into whether the defendant knowingly and intelligently waived the right not to testify inherent in the privilege against compelled self-incrimination. *United States v. Wagner*, 834 F.2d 1474, 1483 (9th Cir. 1987). Indeed, the Ninth Circuit has recognized that a "decision by the court to advise a defendant of his right to testify is not without its costs. Among these are concerns that 'by advising the defendant of his right to testify, the court could influence the defendant to waive his right not to testify,' and that 'a court so advising a defendant might improperly intrude on the attorney-client relation, protected by the Sixth Amendment.'" *United States v. Edwards*, 897 F.2d 445, 447 n.* (9th Cir. 1990) (citing *United States v. Martinez*, 883 F.2d 750, 760 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991)).

3.15.2 Potential Perjury by a Defendant

Because a defense lawyer has an ethical responsibility not to present testimony in court that the lawyer knows is false, a defense lawyer may be permitted to call a defendant who wants to testify to the stand and then ask an open-ended question, such as “I understand that you have something you wish to say; you may proceed.” This is a recognized exception to the traditional question-and-answer format. It is viewed as a reasonable way to accommodate a defendant who wishes to testify with a lawyer’s ethical obligations to the court.

3.15.3 Defendant’s Refusal to Answer Questions on Cross

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

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

3.16 Witness Testimony

3.16.1 Competency Generally (Fed. R. Evid. 601)

Federal Rule of Evidence 601 states that all witnesses are competent to testify unless the rules provide otherwise. If a defendant “raises a colorable objection to the competency of a witness, the trial court must perform ‘a reasonable exploration of all the facts and circumstances’ concerning competency.” *Walters v. McCormick*, 122 F.3d 1172, 1176 (9th Cir. 1997) (quoting *Sinclair v. Wainwright*, 814 F.2d 1516, 1523 (11th Cir. 1987)). The court is advised to set a hearing to determine competence when issues of witness competency are apparent. *United States v. IMM*, 747 F.3d 754, 769-70 (9th Cir. 2014) (concluding that seven-year-old child was competent to testify when examination by prosecutor, defense counsel, and court demonstrated the child’s ability to answer questions and his understanding of the difference between truth and falsity). If “state or federal law provides that a competency determination must be made, failure to conduct an appropriate hearing implicates a defendant’s due process rights.” *Walters*, 122 F.3d at 1176. Minor competency issues should not be ignored, but they affect the credibility of the witness rather than the witness’s competence to testify under Rule 601. *IMM*, 747 F.3d at 770; *Silva v. Brown*, 416 F.3d 980, 987-88 (9th Cir. 2005) (recognizing that evidence calling into question a witness’s competence can be used as impeachment material).

In civil cases, state law governs the witness’s competency when state law supplies the rule of decision. Fed. R. Evid. 601; *Liebsack v. United States*, 731 F.3d 850, 855 (9th Cir. 2013). Therefore, state competency rules often govern in diversity cases. *Jerden v. Amstutz*, 430 F.3d 1231, 1235 (9th Cir. 2005) (holding that out-of-town medical experts must follow Oregon competency rule demonstrating knowledge of proper conduct of practitioners in the community).

If a minor or incompetent person is a party in the action, then certain representatives may sue or defend on that party's behalf. Fed. R. Civ. P. 17(c). The court must appoint a guardian ad litem to protect a minor or incompetent person when unrepresented in the action. *Id.*

3.16.2 Children

The presumed competency of witnesses under Rule 601 also applies to children. *See* 18 U.S.C.A. § 3509(c)(2) (“A child is presumed to be competent.”). There is no specific age at which a child is deemed competent to testify; rather, the court considers the intelligence and capacity of each specific child. *Kentucky v. Stincer*, 482 U.S. 730, 741 n.11 (1987). Similarly, the court may conduct a hearing to ensure the child can testify in a lucid manner, can be fairly cross-examined, and understands the difference between truth and falsity and the duty to tell the truth. *United States v. IMM*, 747 F.3d 754, 769-70 (9th Cir. 2014).

The procedure by which a child victim or child witness can testify outside the physical presence of the defendant is set forth in 18 U.S.C. § 3509. A criminal “defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” *Maryland v. Craig*, 497 U.S. 836, 850 (1990). The public policy of protecting “the physical and psychological well-being” of a child witness “may be sufficiently important to outweigh” a defendant’s right to face-to-face confrontation. *Id.* at 853. One alternative to live in-court testimony is testimony by two-way, closed-circuit television. 18 U.S.C. § 3509(b)(1)(D); *see also* Fed. R. Civ. P. 43(a) (“For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony

in open court by contemporaneous transmission from a different location.”); *Parkhurst v. Belt*, 567 F.3d 995, 1003 (8th Cir. 2009) (stating that a child’s testimony by closed circuit television in a civil case is permissible under Rule 43 of the Federal Rules of Civil Procedure). Further, 18 U.S.C. § 3509 requires that the defendant’s televised image be transmitted into the room in which the child is testifying. 18 U.S.C. § 3509(b)(1)(D). The Ninth Circuit has held that the television monitor does not have to be in the child’s direct field of vision when the child faces forward. *United States v. Etimani*, 328 F.3d 493, 501 (9th Cir. 2003). “[I]t is sufficient (1) if the presence of the monitor has been called to the child’s attention, (2) if the child can see the monitor, if she wishes, with little effort from where she is seated while testifying, and (3) if the jury is able to observe whether or not the child looks at the monitor during her testimony.” *Id.*

3.16.3 Mental Impairment

The preceding sections on witness competency under Federal Rule of Evidence 601 apply if the witness is a young child or possibly displays a mental impairment. In both cases, a presumption of witness competency exists. The district court has broad discretion in deciding whether to grant a request for mental examination of a witness and in determining whether the witness is competent to testify. *Gilpin v. McCormick*, 921 F.2d 928, 931 (9th Cir. 1990). If the district court permits a witness with a mental impairment to testify, the jury may consider the impairment as a factor in the witness’s credibility. *United States v. Brown*, 770 F.2d 768, 770 (9th Cir. 1985) (holding that the competency of a witness is a question for the court, but witness credibility is a question for the jury).

3.16.4 Invoking the Fifth Amendment

The Fifth Amendment to the United States Constitution provides that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. To establish a Fifth Amendment violation, a person must prove “(1) that the testimony desired by the government carried the risk of incrimination . . . and (2) that the penalty he suffered amounted to compulsion[.]” *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005). Fifth Amendment protections extend to both the sentencing phase of the criminal case and to separate criminal proceedings. *United States v. Bahr*, 730 F.3d 963, 965-66 (9th Cir. 2013). However, the Fifth Amendment protections only apply to testimonial evidence and not real or physical evidence. *See, e.g., Pennsylvania v. Muniz*, 496 U.S. 582, 590-92 (1990) (holding that a DUI suspect’s slurred speech was not testimonial evidence requiring a Miranda warning to be admissible at trial); *Baltimore City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 554-56 (1990) (concluding that the Fifth Amendment protections apply to incriminating testimonial communications, but not to production of an incriminating item or document unless the act of production amounts to testimony); *United States v. Lincoln*, 494 F.2d 833, 839 (9th Cir. 1974) (stating that handwriting examples are not protected by the Fifth Amendment). Requiring a defendant to provide a voice exemplar is not compelled speech. *Gilbert v. California*, 388 U.S. 263, 266-67 (1967). Even compelled use of a defendant’s fingerprint to unlock a mobile phone does not necessarily constitute compelled speech, although the inquiry is highly fact dependent. *United States v. Payne*, 99 F.4th 495, 513 (9th Cir. 2024).

In civil cases, “the invocation of the [Fifth Amendment] privilege is limited to those circumstances in which the person invoking the privilege reasonably believes that his disclosures could be used in a criminal prosecution, or could

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lead to other evidence that could be used in that manner.” *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000) (citing *United States v. Bodwell*, 66 F.3d 1000, 1001 (9th Cir. 1995)). It is the party’s obligation to decide whether to invoke the privilege on a question-by-question basis. *Bodwell*, 66 F.3d at 1001. Although there are no adverse inferences from the invocation of the privilege in criminal cases, adverse inferences, but not sanctions, can be drawn from a party’s invocation of the Fifth Amendment privilege in civil proceedings. *Glanzer*, 232 F.3d at 1264.

If a witness is likely to be asked questions that may tend to incriminate the witness, the judge may intervene to ensure that the witness has had an opportunity in advance to consult counsel. It also may be appropriate for the judge to appoint counsel for an indigent witness in this circumstance.

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3.17 Expert Witnesses

See Section 1.3.

3.18 Direct Examination

Direct examination provides the parties an opportunity to present evidence favorable to their case. The Sixth Amendment provides that the accused “have compulsory process for obtaining witnesses in his favor.” U.S. CONST. amend. VI. Therefore, a defendant has a constitutional right to obtain witnesses in his favor and can compel those witnesses’ attendance if necessary. *Soo Park v. Thompson*, 851 F.3d 910, 919 (9th Cir. 2017). “Leading questions should not be used on direct examination except as necessary to develop the witness’s testimony,” or “when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.” Fed. R. Evid. 611(c).

3.19 Cross Examination

The Confrontation Clause guarantees to criminal defendants the right to cross-examine adverse witnesses. U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004); *Gibbs v. Covello*, 996 F.3d 596, 600-01 (9th Cir. 2021). In *Smith v. Arizona*, the Supreme Court held that if a forensic-testing expert called by the prosecution conveys an out-of-court statement in support of the testifying expert's opinion and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts and the Confrontation Clause has been violated when the defendant could not question the maker of the out-of-court statement. 602 U.S. 779, 795 (2024).

In criminal cases, a restriction on the scope of a defendant's cross-examination can run afoul of the Confrontation Clause if it "limits relevant testimony and prejudices the defendant and denies the jury sufficient information to appraise the biases and motivations of the witness." *United States v. Urena*, 659 F.3d 903, 907-08 (9th Cir. 2011). As a rule, repetitive cross-examination on the same subject matter should not be allowed. In addition, limits can be placed on repetitive cross-examination in multi-defendant trials. *United States v. Cruz*, 127 F.3d 791, 801 (9th Cir. 1997), abrogated on other grounds by *United States v. Jimenez Recio*, 537 U.S. 270 (2003). The court should caution counsel at the onset that although some repetition is allowed, exhaustion of subject matter by each counsel is not. The court may require defense counsel in multi-defendant trials to designate a main cross-examiner for a particular witness. *Id.* at 801-02. In the absence of agreement, the court may designate the appropriate order by which each counsel cross-examines witnesses in multi-defendant trials.

Rule 611(b) of the Federal Rules of Evidence limits the scope of cross-examination to the subject matter of direct

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examination and matters affecting the witness's credibility. *See United States v. Brown*, 936 F.2d 1042, 1048 (9th Cir. 1991). Additionally, "[t]he court may allow inquiry into additional matters as if on direct examination." Fed. R. Evid. 611(b). In instances where the court allows the examiner to expand the scope beyond direct examination, the examiner must ask non-leading questions as if direct examination were occurring. *Lis v. Robert Packer Hosp.*, 579 F.2d 819, 822 (3d Cir. 1978).

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

3.20 Exhibits

3.20.1 Generally

Under Federal Rule of Evidence 401, evidence, including physical exhibits, is only admissible if relevant in making a fact of consequence either more or less probable than it would be without the evidence. Additionally, the physical exhibit must be properly authenticated and identified to prove that the piece of evidence is what the proponent is claiming it is. Fed. R. Evid. 901.

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

3.20.2 Summary Exhibits

Oftentimes an exhibit is so voluminous that the exhibit cannot be conveniently examined in court. In these circumstances, the Federal Rules of Evidence provide that the proponent may use a summary, chart, or calculation to prove these writings. Fed. R. Evid. 1006. However, the proponent must make available the originals or duplicates for examination by the other party, and the court may still order the proponent to produce the originals or duplicates in court. *Id.* For the summary to be admissible, the underlying writings or records on which the summary is based must also be admissible. *United States v. Anekwu*, 695 F.3d 967, 981 (9th Cir. 2012) (citing *United States v. Johnson*, 594 F.2d 1253, 1257 (9th Cir. 1979)).

When considering “summary of evidence” documents, it is important to distinguish between summary exhibits or

charts to be admitted or received in evidence and summary exhibits or charts to be used only as illustrative aids. *See United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991). Charts summarizing trial testimony or documents already in evidence are merely illustrative aids and are not evidence themselves. *Id.* Illustrative aids (formerly known as “demonstrative exhibits”) should not be admitted into evidence, permitted in the jury room, or otherwise used by the jury during deliberations. *Id.* at 1053-54 (citing *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984); *United States v. Abbas*, 504 F.2d 123, 125 (9th Cir. 1974)); see also *United States v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980). The court may consider informing the jury that such illustrative aids will not be available during deliberations. In addition, the court should give cautionary instructions to the jury when summaries and charts are used for illustrative or demonstrative purposes. These instructions may be given when the summary materials are first presented to the jury, during final instructions, or both. *See Soulard*, 730 F.2d at 1300; *Abbas*, 504 F.2d at 125; 9TH CIR. CIV. JURY INSTR. 2.12; 9TH CIR. CRIM. JURY INSTR. 4.15. The court may wish to include in the pretrial order a requirement that illustrative aids be produced in advance of trial and for counsel to avoid using the term “exhibit” when referring to an illustrative aid.

3.20.3 Summary Witnesses

Summary witnesses are often used by the prosecution in criminal cases. A summary of oral testimony as opposed to documentary evidence, whether by an expert or a nonexpert, is disfavored. However, such a summary may be permissible in exceptional cases under Fed. R. Evid. 611(a). The court should give a limiting instruction informing the jury that the summary testimony is not admissible as substantive evidence. *See United States v. Olano*, 62 F.3d 1180, 1203-04 (9th Cir. 1995) (holding that the government agent’s testimony as a summary witness is admissible under Rule 611(a)); *United*

States v. Baker, 10 F.3d 1374, 1412 (9th Cir. 1993), *abrogated on other grounds by Apprendi v. New Jersey*, 530 U.S. 466 (2000) (same); *see also United States v. Baker*, 923 F.3d 390, 398 (5th Cir. 2019) (allowing summary witness “to show how the documents related to each other and to the charges in the indictment”); *see generally* Brandon L. Bigelow, “Summary and Expert Witnesses: A Distinction with a Difference,” 9 Suffolk J. Trial & App. Advoc. 1 (2004); Emilia A. Quesada, “Summarizing Prior Witness Testimony: Admissible Evidence, Pedagogical Device, or Violation of the Federal Rules of Evidence?” 24 Fla. St. Univ. L. Rev. 161 (1996).

3.20.4 Photographic, Video, and Audio Exhibits

Federal Rules of Evidence 401 and 901 apply to photographs, video, and audio exhibits in that these exhibits must be relevant and authenticated to be admissible. *See United States v. Espinoza*, 880 F.3d 506, 516-17 (9th Cir. 2018) (holding that a social media account and related photographs are relevant when identifying an individual responsible for transporting drugs); *United States v. Matta-Ballesteros*, 71 F.3d 754, 768 (9th Cir. 1995), *opinion amended on denial of reh’g*, 98 F.3d 1100 (9th Cir. 1996) (holding audiotape recordings of torture and interrogation were properly admitted when government displayed evidence that the tapes were untampered with); *United States v. Hobson*, 519 F.2d 765, 776 (9th Cir. 1975) (confirming the admissibility of photographs of guns under the Rule 401 analysis). Additional concerns oftentimes arise due to the graphic nature of these exhibits. The trial judge is left to exercise discretion in balancing prejudicial effect with the probative value for these types of exhibits under Fed. R. Evid. 403. *United States v. Goseyun*, 789 F.2d 1386, 1387 (9th Cir. 1986) (*per curiam*). When appropriate, the court may order redactions of the image or video to reduce prejudice. An original document is generally required but a copy or other evidence of the existence of the

document may be permissible as outlined in Federal Rule of Evidence 1004.

3.20.5 Juror Access to Trial Exhibits During Deliberations

“Jurors are generally entitled to examine documents properly admitted into evidence.” *United States v. DeCoito*, 764 F.2d 690, 695 (9th Cir. 1985); *see also United States v. Chadwell*, 798 F.3d 910, 914 (9th Cir. 2015) (“Jurors generally may examine all or part of any exhibit received into evidence and determine the weight to give that evidence during deliberations in the privacy of the jury room.”) Ultimately, the decision on whether to send the exhibits to the jury room during deliberations is within the discretion of the trial court. *DeCoito*, 764 F.2d at 695. Similarly, the trial court has discretion to send technology to the jury room to allow the jurors to view videos or other exhibits requiring the use of technology in the same way they would view physical exhibits. *Chadwell*, 798 F.3d 914.

The court should avoid sending certain admitted exhibits into the jury deliberation room, such as flammable, toxic, or other dangerous things or substances, contraband (including drugs or child pornography), firearms, and currency. These exhibits can be viewed in the courtroom before or during deliberations, or in the jury room pursuant to court direction. Firearms, ammunition clips or cylinders should be examined by the firearms expert, a Court Security Officer, or a United States Marshal to assure it is rendered safe or inoperable for trial. If toxic exhibits must be handled by the jury, protective garments, such as surgical-type, disposable gloves can be provided, or the exhibits can be placed in sealed containers.

The trial court usually should not send a transcript of testimony into the jury room. If it decides to do so, great

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caution should be exercised. “To avoid the possibility of this undue emphasis, the preferred method of rehearing testimony is in open court, under the supervision of the court, with the defendant and attorneys present.” *United States v. Hernandez*, 27 F.3d 1403, 1408-09 (9th Cir. 1994) (reversing because court allowed witness transcript into jury room without adequate precautions).

3.21 Illustrative Aids

Illustrative Aids, formerly called “Demonstrative Exhibits” before Rule 107 of the Federal Rules of Evidence was adopted, “contrasts from real evidence in that it has no probative value itself but is rather used as a pedagogical device to assist the jury in comprehending the testimony of a witness or other evidence. *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991). Summary witnesses may use charts and summary exhibits for illustrative purposes if the proposing party lays a foundation, the opposing party has an opportunity to review the demonstrative exhibits and cross-examine the summary witness on these illustrative exhibits, and the court gives a limiting instruction. *United States v. Olano*, 62 F.3d 1180, 1204 (9th Cir. 1995). The trial court should carefully examine the demonstrative evidence presented by a witness and determine that it is supported by proof before allowing its use as a visual aid. *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984). Additionally, when evidence underlying an illustrative aid is received in evidence, the illustrative aid should be used merely as a visual aid during trial and not provided to the jury as substantive evidence for use during deliberations unless all parties consent. *Wood*, 943 F.2d 1053; *see also* Fed. R. Evid. 107(b).

Note: Writings, objects, charts, or other presentations that are used during the trial to provide information to the trier of fact fall into two categories. The first category is exhibits that are offered by a party to prove a disputed fact. The admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually, the jury is permitted to take this substantive evidence, which has been received in evidence, into the jury room during deliberations and use it to help determine the disputed facts, and the jury should be so instructed. *See id.* advisory committee’s note to 2024 amendments.

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The second category is “demonstrative evidence,” which refers to substantive evidence offered to prove a fact at issue by demonstration. *Id.* As substantive evidence, the admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. When applicable, this should also be explained to the jury.

3.22 Mini-Summations

Typically, summations are allowed only in closing argument after all evidence has been presented. *United States v. Yakobowicz*, 427 F.3d 144, 149 (2d Cir. 2005). The court is afforded discretion to manage the course of the trial, including whether to allow interim summation comments at the conclusion of each witnesses' testimony or at other points during the trial. *Id.* However, a defendant is denied his constitutional right to a fair trial when the government makes a summation at the end of each witness's testimony in a criminal trial that is neither lengthy nor complex. *Id.* at 151-54.

3.23 Undisclosed Impeachment Evidence

Undisclosed impeachment evidence can result in a material *Brady* violation if certain elements are met. *Benn v. Lambert*, 283 F.3d 1040, 1052-54 (9th Cir. 2002); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Undisclosed impeachment evidence violates *Brady* if:

1. it is favorable to the accused;
2. the prosecution suppressed the evidence; and
3. prejudice resulted from the failure to disclose.

Lambert, 283 F.3d at 1052-53.

Suppressed evidence is material or prejudicial only if it “undermines confidence in the outcome of the trial,” *id.* at 1053, or “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,” *Strickler v. Greene*, 527 U.S. 263, 280 (1999). Exculpatory evidence must be disclosed if it is “material either to guilt or to punishment.” *Brady*, 373 U.S. at 87. The defense need not specifically request the evidence for non-disclosure to be prejudicial. *Lambert*, 283 F.3d at 1053.

3.24 Disruptive Defendant

Courts have a fundamental interest in preserving the “dignity, order, and decorum” of courtroom proceedings. *Illinois v. Allen*, 397 U.S. 337, 343 (1970). “[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.” *Id.* A disruptive defendant can regain the right to be present by conduct that shows proper decorum and respect. *Id.*

A defendant may be shackled during trial where “there is a serious threat of escape or danger to those in and around the courtroom, or where disruption in the courtroom is likely if the defendant is not restrained.” *King v. Rowland*, 977 F.2d 1354, 1357 (9th Cir. 1992). “The inherent risk of prejudice is not as great from the use of armed security personnel as it is from shackling[.]” *Id.* at 1358.

If a judge removes or excludes a defendant from the courtroom during trial or takes other action against a disruptive defendant, the judge should make specific findings on the record about why that action was necessary and what steps have been taken to ensure that the defendant is aware of the trial proceedings and has a meaningful opportunity to consult with counsel. In addition, outside the presence of the jury, the judge should check in with the defendant from time to time to determine whether the defendant is ready and willing to rejoin the proceeding in person without further disruption.

3.25 Closing Arguments

3.25.1 Generally

Closing argument is a basic element of the adversary factfinding process in a criminal trial. *Herring v. New York*, 422 U.S. 853, 858 (1975). Any limitations on the duration or scope of the argument ordered by the trial judge should avoid any infringement of the due process rights of the parties. That said, the trial judge has “great latitude in controlling the duration and limiting the scope of closing summations.” *Id.* at 862. Arguments and statements made by lawyers during closing argument are not evidence, and trial courts should instruct the jury accordingly. *United States v. Moreland*, 622 F.3d 1147, 1162 (9th Cir. 2010). Closing arguments proceed in a specified order. The Government argues, then the defense argues, and the Government rebuts. Fed. R. Crim. P. 29.1.

To preserve the integrity of the trial, the trial judge has a duty to take prompt and affirmative action to stop professional misconduct. Although counsel bears responsibility to object when necessary, “even in the absence of objections . . . , a trial judge should be alert to deviations from proper argument and take prompt corrective action as appropriate.” *United States v. Sanchez*, 659 F.3d 1252, 1258 (9th Cir. 2011) (internal quotation marks omitted). “[T]he overriding interest in the evenhanded administration of justice requires that [the appellate court] accord the highest degree of respect to the trial judge’s evaluation of the likelihood that the impartiality of one or more jurors may have been affected by [an] improper comment.” *Arizona v. Washington*, 434 U.S. 497, 511 (1978).

Trial courts have discretion to prevent attorneys from arguing incorrect statements of law during closings. *United States v. Doe*, 705 F.3d 1134, 1149 (9th Cir. 2013); *United States v. Moreland*, 622 F.3d 1147, 1162 (9th Cir. 2010). Courts

also may preclude closing arguments on “theories that are not supported by the evidence,” though counsel permissibly may argue reasonable inferences from the evidence. *United States v. Miguel*, 338 F.3d 995, 1001-02 (9th Cir. 2003). Neither side may interject “personal beliefs into the presentation of his case” or “make unfounded and inflammatory attacks on the opposing advocate.” *United States v. Young*, 470 U.S. 1, 8-9 (1985). Vouching for the credibility of witnesses based on evidence outside the record is impermissible in both criminal and civil cases. *Draper v. Rosario*, 836 F.3d 1072, 1084 (9th Cir. 2016). It is also improper to express personal opinions about witness credibility, *id.*, or the merits of the case, *Stemmons v. Mo. Dep’t of Corrs.*, 82 F.3d 817, 822 (8th Cir. 1996). Appealing to the racial biases of the jury is unacceptable. *Draper*, 836 F.3d at 1084 (citing *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1148-52 (9th Cir. 2001)). Except when punitive damages are in issue, counsel may not comment on the relative size or wealth of the parties. *Garcia v. Sam Tanksley Trucking, Inc.*, 708 F.2d 519, 522 (10th Cir. 1983). Some degree of emotionally charged language is acceptable. *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 518 (9th Cir. 2004).

Litigants must meet a “high threshold” in making claims of “improper closing arguments in civil cases raised for the first time after trial.” *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002). This rule is based on the reasoning that the trial judge is in the best position to evaluate the effect of the misconduct and to fashion an appropriate remedy. *Id.* For example, a judge may admonish counsel or issue a curative instruction. *Id.* Claims of improper closing arguments in civil trials are reviewed for plain error, which requires a showing that the improper remarks were prejudicial and fundamentally unfair. *Id.*

For criminal cases with multiple defendants with antagonistic defenses, see Section 3.14.2.2.

3.25.2 Improper Closing Arguments by Government

A prosecutor “may not imply that the government has taken steps to assure the veracity of its witnesses.” *United States v. Berry*, 627 F.2d 193, 198 (9th Cir. 1980); *see also United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005) (prosecutorial vouching improper); *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1191 (9th Cir. 2015) (same). Furthermore, prosecutors may not make comments calculated to arouse the passions or prejudices of the jury, suggest the consequences of a particular verdict, or point to a particular crisis in our society and ask the jury to make a statement. *See United States v. Sanchez*, 659 F.3d 1252, 1256 (9th Cir. 2011) (prosecutors may not argue for a conviction to “protect community values, preserve civil order, or deter future lawbreaking”).

Curative instructions and admonishment of counsel from trial courts play a crucial role in correcting objectionable closing arguments. “When prosecutorial conduct is called in question, the issue is whether, considered in the context of the entire trial, that conduct appears likely to have affected the jury’s discharge of its duty to judge the evidence fairly.” *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990); *see also United States v. Wright*, 625 F.3d 583, 613 (9th Cir. 2010) (the question is “whether it is more probable than not that the prosecutor’s conduct materially affected the fairness of the trial”). “To determine whether prosecutorial misconduct has deprived a defendant of a fair trial, [courts] look to the substance of any curative instructions, and the strength of the case against the defendant absent the misconduct.” *Sanchez*, 659 F.3d at 1257. To warrant a mistrial, a prosecutor’s closing argument must rise to the level of plain error. *United States v.*

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Bagley, 772 F.2d 482, 495 (9th Cir. 1985); *see also Simtob*, 901 F.2d at 806 (prosecutorial misconduct invites reversal if it appears more probable than not that alleged misconduct affected jury’s verdict).

See also Appendix IV (Objectionable Comments in Openings and Closings).

3.25.3 Improper Closing Arguments by Criminal Defense Counsel

Defense counsel’s right to make a closing argument to the jury is fundamental under the Sixth Amendment. *United States v. Doe*, 705 F.3d 1134, 1149 (9th Cir. 2013). However, “this right is not unlimited, and a court may limit closing arguments to ensure that they do not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial.” *Id.* (internal quotation and alteration marks omitted). Counsel may not rely on evidence outside the record. *Draper v. Rosario*, 836 F.3d 1072, 1083-84 (9th Cir. 2016) (suggesting that information not presented to the jury supports a witness’s testimony is improper vouching).

See also Appendix IV (Objectionable Comments in Openings and Closings).

3.26 Special Issues Involving Self-Represented Litigants

A criminal defendant has a constitutional right to self-representation. *Faretta v. California*, 422 U.S. 806, 832 (1975). A trial judge may appoint “standby counsel,” even over a defendant’s objection, to “relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of [his] achievement” of his goals. *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984). A court “may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct or who is unable or unwilling to abide by rules of procedure and courtroom protocol.” *United States v. Engel*, 968 F.3d 1046, 1050 (9th Cir. 2020) (internal citation and quotation marks omitted). A defendant who “elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel.’” *Faretta*, 422 U.S. at 834 n.46. *See* Section 1.1.1.2.

Regarding civil cases, see Chapter 7.

3.27 Motion for Judgment of Acquittal

Fed. R. Crim. P. 29 governs motions for judgment of acquittal. The Rule provides that, after the close of evidence and on the defendant's motion, the court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "The court may reserve decision on the motion . . . submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict." Fed. R. Crim. P. 29(b). "If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved." *Id.* A defendant may move for judgment of acquittal, or renew such motion, within 14 days of conclusion of trial. Fed. R. Crim. P. 29(c). "If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed." Fed. R. Crim. P. 29(d)(1). "A district court is afforded wide discretion in determining whether to allow the government to reopen and introduce evidence after it has rested its case." *United States v. Suarez-Rosario*, 237 F.3d 1164, 1167 (9th Cir. 2001) (citation omitted).

In civil cases, a party may "move for judgment as a matter of law after the opposing party has been fully heard and before the submission of the case to the jury." *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003); *see also* Fed. R. Civ. P. 50(a). If a motion made at the close of evidence is denied, "Rule 50(b) allows the moving party to 'renew' its motion within ten days after the court's entry of final judgment in the case." *Freund*, 347 F.3d at 761; *see also* Fed. R. Civ. P. 50(b). A party cannot raise arguments in a post-trial motion under Rule 50(b) that it did not raise in a pre-verdict Rule 50(a) motion. *Freund*, 347 F.3d at 761. Judgment

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as a matter of law “is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury’s verdict.” *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed and stating the grounds for the conditional grant or denial. Fed. R. Civ. P. 50(c)(1).

3.28 Motion for Mistrial

Upon a defendant's motion in a criminal case, "the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment." Fed. R. Crim. P. 33(a). Where a mistrial is declared at the defendant's request, the Double Jeopardy Clause does not bar retrial "unless the defendant can show that the conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial." *United States v. Lun*, 944 F.2d 642, 644 (9th Cir. 1991) (internal quotation marks omitted).

In civil cases, a court may grant a new trial on some or all of the issues "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). Because Rule 59 does not specify the grounds on which a motion for a new trial may be granted, courts are bound by historically recognized grounds. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007). These grounds include, but are not limited to, a verdict that is against the clear weight of the evidence; excessive damages; a verdict based on false or perjurious evidence; or to prevent a miscarriage of justice. *Id.* A trial court may not grant a new trial simply because the court would have arrived at a different verdict. See *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001).

3.29 Juror Misconduct During Trial

“[A] defendant has a right to a tribunal both impartial and mentally competent to afford a hearing,” and upholding this right may involve a post-trial evidentiary hearing to determine whether a mistrial occurred due to jury misconduct. *Tanner v. United States*, 483 U.S. 107, 126 (1987) (internal quotation marks omitted). Fed. R. Evid. 606(b)(1) provides that, upon inquiry into the validity of a verdict or indictment, a juror may not testify about, and the court may not receive a juror’s affidavit or evidence of a juror’s statement about, “any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.” A juror, however, may testify regarding a mistake made on the verdict form, “extraneous prejudicial information” brought to the jury’s attention, or “an outside influence improperly brought to bear” on the jury. Fed. R. Evid. 606(b)(2). Furthermore, where a juror clearly states that the juror “relied on racial stereotypes or animus to convict a criminal defendant,” the trial court may consider evidence of the juror’s statement and any resulting denial of the jury trial guarantee. *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 225 (2017).

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

When examining jurors individually, the trial judge should bear in mind that repeated questioning could itself be prejudicial in causing jurors to become curious about the subject matter of the inquiry. Each juror should be admonished not to discuss the content of such inquiries with the other jurors.

3.30 Juror Unable to Continue

A jury in a civil case “must begin with at least 6 and no more than 12 members,” and unless the parties stipulate otherwise, a unanimous verdict “must be returned by a jury of at least 6 members.” Fed. R. Civ. P. 48(a)-(b).

Unless provided otherwise in Federal Rule of Criminal Procedure 23, a jury in a criminal case consists of 12 persons. Fed. R. Crim. P. 23(b)(1). At any time before the verdict (even after the beginning of deliberations), upon stipulation of the parties in writing and with the court’s approval:

- A. the jury may consist of fewer than 12 persons, or
- B. a jury of fewer than 12 persons may return a verdict if a juror is excused by the court for good cause after the trial begins.

Fed. R. Crim. P. 23(b)(2)(A), (B). After the jury begins deliberations, a court may allow a jury of 11 persons to return a verdict (even without a stipulation by the parties) if a juror is excused for good cause. Fed. R. Crim. P. 23(b)(3).

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

“As a general matter, the Sixth Amendment does not prohibit the mid-deliberation dismissal of jurors who are unable to serve or who engage in misconduct.” *Williams v. Cavazos*, 646 F.3d 626, 642 (9th Cir. 2011), *rev’d sub nom.*, *Johnson v. Williams*, 568 U.S. 289 (2013). The court must have an adequate basis for finding good cause to excuse a juror.

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Good cause “generally focuses on sickness, family emergency, or juror misconduct.” See *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998). Good cause may arise when the length of a juror’s absence is unknown, such as from sickness. Good cause may also exist when a prolonged absence would result in dulled memories during a lengthy and complex trial. Compare *United States v. Tabacca*, 924 F.2d 906, 914-15 (9th Cir. 1991) (excusing a juror who could not attend one day of a two-and-one-half-day trial was reversible error) with *United States v. Stratton*, 779 F.2d 820, 832 (2d Cir. 1985) (excusing juror who notified court of upcoming religious holiday was not abuse of discretion because jury would have been forced to wait four and one-half days). Where jurors are dismissed for illness or for falling asleep due to intoxication and are replaced with alternates, no constitutional violation occurs. *Miller v. Stagner*, 757 F.2d 988, 995 (9th Cir.), *amended*, 768 F.2d 1090 (9th Cir. 1985). However, if there is “any reasonable possibility that the impetus for a juror’s dismissal stems from the juror’s views on the merits of the case, the court must not dismiss the juror.” *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) (emphasis omitted).

3.31 Sealing Exhibits or Proceedings

“Essential to the rule of law is the public performance of the judicial function.” Robert Timothy Reagan, *SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 1* (Federal Judicial Center 2010). Under both the First Amendment and the common law, “[t]he public in general and news media in particular have a qualified right of access to court proceedings and records.” *Id.*; see generally *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 580 n.17 (1980) (plurality opinion) (holding that public access to criminal trials is “implicit in the guarantees of the First Amendment” and noting that “historically both civil and criminal trials have been presumptively open”); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (footnotes omitted) (stating that under the common law, “the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents”) (footnotes omitted).

The Ninth Circuit has explained:

As to the First Amendment, the test to determine whether a right of access attaches to a particular kind of hearing is a two-part test known as the “experience and logic” test. The test also applies to documents generated as part of a judicial proceeding[.] The “experience” prong of the test questions whether the place and process have historically been open to the press and general public. The “logic” element inquires whether public access plays a significant positive role in the functioning of the particular process in question. If a proceeding fulfills both parts of the test, a qualified First Amendment right of access arises, to be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.

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As to the common law, there is a strong presumption in favor of access to court records. A party seeking to seal a judicial record can overcome this presumption only by showing a compelling reason.

United States v. Sleugh, 896 F.3d 1007, 1013 (9th Cir. 2018) (cleaned up); *see also Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092 (9th Cir 2016); *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 946 (9th Cir. 1998). In addition, the Sixth Amendment expressly grants a criminal defendant a “public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. CONST. amend. VI (emphasis added).

Criminal cases involving national security issues often present special challenges regarding the sealing of certain exhibits or portions of a proceeding. *See generally* Robert Timothy Reagan, KEEPING GOVERNMENT SECRETS: A POCKET GUIDE FOR JUDGES ON THE STATE-SECRETS PRIVILEGE, THE CLASSIFIED INFORMATION PROCEDURES ACT, AND COURT SECURITY OFFICERS (Federal Judicial Center 2007). In cases involving child pornography, although a jury may need to view certain evidence of an explicit nature, courts typically do not allow that evidence to be seen by the public. Similarly, juror or witness identities may need to be kept from the public in certain cases, including cases involving juveniles, as well as certain mental health issues when the court considers witness competency.

In civil cases, the need to keep certain information confidential may arise in cases involving trade secrets, patent royalties, or other competitively sensitive matters. To preserve an open courtroom to the greatest extent reasonably possible, the court and the parties should consider using (and having witnesses use) shorthand expressions, code words, or code names. This will allow the public to observe the testimony and arguments in open court without information that should

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be kept confidential being publicly disclosed. When that is done, the record should also contain a sealed document that provides a “decryption key.”

In addition, motions to seal should be publicly disclosed and docketed, and the reasons for granting or denying any such motion should be stated publicly on the record. Members of the news media and public should be afforded an opportunity to be heard on motions to seal. Indeed, courts typically allow non-parties to intervene for the limited purpose of challenging or supporting a motion to seal. Finally, sealing records or closing proceedings should be no more extensive than necessary.

3.32 Special Considerations in Bench Trials

3.32.1 Generally

We think of bench trials and jury trials as being roughly the same, except for the absence of the jury. However, there are differences that should be considered, including scheduling, pretrial procedures, evidentiary rules, and documenting the result. Although not an exhaustive list, below are a few important notes.

3.32.2 Role of the Judge

In a bench trial, the judge is the factfinder in addition to presiding over and controlling the proceedings, receiving the evidence, and determining the applicable law. Under Rule 611(a) of the Federal Rules of Evidence, the judge has wide discretion in controlling the proceedings. In addition, unlike the jury members, the court has reasonable familiarity with the case before the trial starts and may actively ask questions during the bench trial. By contrast, the jury exercises a more passive role until they begin deliberations.

3.32.3 Scheduling

In handling a bench trial, courts often vary the scheduling of the presentation of evidence, such as convening on consecutive days, a couple of hours per day, or perhaps even on separate days. This is within the court's discretion and is helpful to the court and the parties where witness logistics are difficult, or the court itself does not have a sufficient block of time to try the case "straight through."

3.32.4 Remote Proceedings

In civil bench trials, some courts use Zoom or other platforms for a remote trial. This may be used for the entire proceeding, rather than just for select testimony. *See* Fed. R. Civ. P. 43. This allows cost savings and efficiency for the court, counsel, and the parties. The District Court for the Western District of Washington has been active in this area and has manuals available for further information. *See Remote Hearing Information for Attorneys*, UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON, wawd.uscourts.gov/attorneys/remotehearings (last visited Aug. 14, 2024).

3.32.5 Preliminary Matters

Because the court will be sitting without a jury, the need for motions in limine is limited. A motion in limine's primary purpose is to avoid the obviously futile attempt to "unring the bell" when highly prejudicial or controversial evidence is offered and then stricken at a jury trial. *McEwen v. City of Norman, Okla.*, 926 F.2d 1539, 1548 (10th Cir. 1991). In bench trials and judicial hearings, judges generally do not exclude evidence for unfair prejudice or confusion. *United States v. Preston*, 706 F.3d 1106, 1117 (9th Cir. 2013), *rev'd on other grounds*, 751 F.3d 1008 (9th Cir. 2014) (en banc) ("Rule 403 is inapplicable to bench trials."). Judges are known to determine the issues on the relevant and admissible evidence. *See* Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 4.9, at 178 (5th ed. 2012) (suggesting judges exclude unfairly prejudicial evidence in bench trials "to ensure the integrity of the factfinding process and to make clear for the parties and the appellate court the basis for the trial court's decision"). There is no need to make pre-trial evidentiary rulings on matters that could unduly prejudice the jury because no jury is involved. *See generally* Section 1.2.10.

Courts may still find it useful to resolve preliminary matters of evidence before trial. Indeed, some rulings might alter the parties' positions and invite further settlement discussions. However, there is generally no reason that the evidentiary issues could not be fully argued and ruled upon during the bench trial itself. In fact, it can be helpful to hear the evidence in the trial context and rule on the objection as necessary thereafter.

3.32.6 Expert Witness Challenges

As with in limine motions, challenges to the expert witness testimony (i.e., “*Daubert*” challenges under *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)), need not be held before trial in a case to be determined by the court. However, courts often find it to be the better practice to resolve expert issues before trial because many of the motions are outcome determinative or otherwise helpful to the parties' settlement considerations, and could lead to avoidance of trial altogether.

Although many courts hear these challenges at earlier pretrial proceedings, including at the time of dispositive motions (e.g., summary judgment), last minute challenges do occur.

All expert witnesses face scrutiny by the trial court under Federal Rule of Evidence 702, *Daubert*, and its progeny. The scrutiny required is the court's general gatekeeping duty to ensure that the proffered expert testimony “both rests on a reliable foundation and is relevant to the task at hand” as a condition of admissibility. *Daubert*, 509 U.S. at 597. This scrutiny is part of the court's role under Federal Rule of Evidence 104. In a jury trial, a *Daubert* challenge is heard outside the presence of the jury. However, in a bench trial, a party may attempt to qualify and lay the foundation for the

expert testimony on the record and during trial. The court may then address the admissibility, as well as the evidentiary value, of that evidence.

Note, a court abuses its discretion when it fails to hold a *Daubert* hearing or otherwise preliminarily fails to determine the relevance and reliability of expert testimony. *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 460 (9th Cir. 2014) (overruling *Mukhtar v. Cal. State Univ. Hayward*, 299 F.3d 1053 (9th Cir. 2002) in this regard).

See also Section 1.3.

3.32.7 Findings of Fact and Conclusions of Law

Under Rule 52 of the Federal Rules of Civil Procedure, a court must find the facts specially and state its conclusions of law in an action tried on the facts without a jury. This may be oral pronouncements on the record, a memorandum order, or findings of fact and conclusions of law.

Three purposes are ascribed to this requirement. First, the court is required, in precise words, to set out the facts as the court finds them. This has been found to be the best way to avoid carelessness in the discharge of the duty of the trial court. *United States v. Forness*, 125 F.2d 928, 942-43 (9th Cir. 1942). The second purpose is to serve other courts where the issues of estoppel by judgment or res judicata are involved. *Id.* at 942. The third is to inform the courts of appeal of the basis for the judgment. Courts have stated that the finding should be so exclusive as to give the appellate court a clear understanding of the basis of the trial court's decision and to enable it to determine the grounds on which the court reached its decision. *Irish v. United States*, 225 F.2d 3, 7 (9th Cir. 1955).

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As noted, Rule 52 allows the court the ability to state the findings of fact and conclusions of law orally on the record, or in an opinion or memorandum decision. Based upon the findings and conclusions, judgment must be entered under Federal Rule of Civil Procedure 58.

The appellate court's standard of review of a trial court's findings of fact and conclusions of law is the "clearly erroneous" standard, and an appellate court must give due regard to the trial court's opportunity to judge a witness's credibility. Fed. R. Civ. P. 52(a)(6).

Courts vary as to drafting the findings and conclusions. Many judges request that counsel submit proposed findings and conclusions before trial for the court to refer to during the presentation of the evidence or after trial as part of the argument and submission of the matter.

Chapter Four: Jury Instructions And Verdict Forms

This chapter contains information applicable to both civil and criminal cases, using subheadings where civil and criminal application diverge. Whether in a criminal or a civil case, a jury instruction is a direction or guideline that a judge gives a jury concerning the law of the case. “Correctly and effectively instructing juries is one of the most important—and challenging—responsibilities of a trial judge. Instructions should provide jurors with understandable and accurate explanations of the law and their duties as jurors. Instructions also should be presented in a neutral, even-handed manner.” 9TH CIR. CRIM. JURY INSTR. Introduction at V. Jury instructions explain the points of law relevant to the case, explain certain aspects of the evidence presented, and assist the jurors in understanding their duties in reaching a verdict. Unless appropriately instructed, jurors cannot issue proper verdicts, and mistrials and retrials can occur. It is important that jury instructions be understandable, with clear, unambiguous, simple statements.

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4.1 Duties and Roles of Judge Versus Jury

4.1.1 In General

“The district court must formulate jury instructions so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading.” *Abromson v. Am. Pac. Corp.*, 114 F.3d 898, 901 (9th Cir. 1997); *United States v. Tham*, 960 F.2d 1391, 1399 (9th Cir. 1991). Nonetheless, the district court has substantial latitude in tailoring jury instructions and will not be reversed absent abuse of discretion. *See Josephs v. Pac. Bell*, 443 F.3d 1050, 1065 (9th Cir. 2006); *United States v. Christensen*, 828 F.3d 763, 785-86 (9th Cir. 2015). Thus, a party is not entitled to any particular form of instruction, *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1051-52 (9th Cir. 1998), or to the precise wording of a proposed instruction, *Pavon v. Swift Transp. Co., Inc.*, 192 F.3d 902, 907 (9th Cir. 1999); *see also Christensen*, 828 F.3d at 786.

In addition, the Ninth Circuit has explained that when a party’s proposed jury instructions misstate the law, a district court does not abuse its discretion by refusing to deliver them. “Of course, the fact that the proposed instructions were misleading does not alone permit the district judge to summarily refuse to give any instruction on the topic.” *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 906 (9th Cir. 2024) (quotation marks and citation omitted). “Where a proposed instruction is supported by law and not adequately covered by other instructions, the court should give a non-misleading instruction that captures the substance of the proposed instruction.” *Id.* at 907 (quoting *Merrick v. Paul Revere Life Ins.*, 500 F.3d 1007, 1017 (9th Cir. 2007)). A party is not entitled to a jury instruction that is unsupported by the evidence. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1064 (9th Cir. 2008).

4.1.2 Criminal Cases

It is the court's responsibility to ensure that the instructions adequately present the defendant's theory of the case. *United States v. Munoz*, 233 F.3d 1117, 1130 (9th Cir. 2000). A defendant is entitled to instructions on the defendant's theory of the case so long as: (1) "there is any foundation in the evidence" and (2) "the instruction is supported by law." *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014); *see also United States v. Washington*, 819 F.2d 221, 225 (9th Cir. 1987) ("[A] defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility."). A failure to give such an instruction is reversible error, but the court may refuse a defendant's proposed instruction if other instructions adequately cover the defense theory. *United States v. Del Toro Barboza*, 673 F.3d 1136, 1147 (9th Cir. 2012).

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

4.2 Parties' Submission of Proposed Instructions

Fed. R. Civ. P. 51 and Fed. R. Crim. P. 30 govern instructions to juries in civil and criminal cases, respectively. Both rules provide that, at the close of the evidence or at an earlier time that the court reasonably sets, a party may file a written request that the court instruct the jury on the law as specified in the request. Fed. R. Civ. P. 51(a)(2) also allows a party to file requests for instructions after the close of the evidence on issues that could not reasonably have been anticipated at an earlier time set for requests, or, with the court's permission, on any issue. Although Fed. R. Crim. P. 30 does not include language expressly permitting requests for instructions during trial, "[t]he rule does not preclude the practice of permitting the parties to supplement their requested instructions during trial." Fed. R. Crim. P. 30 advisory's committee note to 2002 amendments. In any trial, civil or criminal, the court should be careful to consider instructions submitted at any time during trial.

Whenever a request that the court give a jury instruction is made, the requesting party must furnish copies to every other party. *See* Fed. R. Crim. P. 30; Fed. R. Civ. P. 51. After proposed instructions are submitted, the court should hold a hearing to settle the final instructions. *See* Section 4.4 for developing the record on instructions.

Practical Suggestions

Manner of Submission of Instructions

1. The trial court should require that counsel submit proposed instructions before the commencement of trial. Fed. R. Civ. P. 51(a)(1). Notwithstanding any deadline set by the court, the court in a criminal trial is obligated under Fed. R. Crim. P. 30 to consider any instructions submitted by counsel during trial.

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2. The trial court may wish to direct counsel for each party to meet before trial and develop a joint set of agreed-upon instructions. To the extent counsel are unable to agree on a complete set of instructions, the court may still require the parties to submit one set of instructions. Each party can thereafter separately submit a set of supplemental proposed instructions.
3. The court may find it helpful to request that counsel submit proposed nonpattern instructions in an editable electronic format.
4. Judges are encouraged to use final pretrial conferences to review attorney submitted jury instructions. Some judges use the pretrial conference to settle preliminary jury instructions.
5. The court may consider instructing the jury as to the elements of the claims or offenses before opening statements so that the jury may better understand the legal framework for the case.

4.3 Ninth Circuit Model Jury Instructions

The Ninth Circuit Jury Instructions Committee has prepared both civil and criminal Manuals of Model Jury Instructions. These instructions are continually reviewed by the Committee and updated on a regular basis. In addition to a hard-copy format, the model instructions, and revisions thereto, are available online by accessing the “Attorneys” area of the Ninth Circuit’s website. All references below are to the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS—CIVIL (2017) AND THE NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS—CRIMINAL (2022), as well as the online revisions. When requesting instructions relating to state law, counsel should be instructed that, if possible, they should use model jury instructions approved in that state.

As the introductions to the Ninth Circuit model instructions note, the instructions are models that must be carefully reviewed for use in a particular case. They do not substitute for the individual research and drafting that may be required in a particular case, nor are they intended to discourage judges from using their own forms and techniques for instructing juries. *McDowell v. Calderon*, 130 F.3d 833, 840-41 (9th Cir. 1997) (en banc), *implicitly overruled on other grounds by Calderon v. Coleman*, 525 U.S. 141, 146 (1998). Model jury instructions are not “blessed with any special . . . precedential authority.” *Id.* at 840. For that reason, “the use of a model jury instruction does not preclude a finding of error.” *United States v. Bachmeier*, 8 F.4th 1059, 1065 (9th Cir. 2021); *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011).

4.4 Record on Instructions

4.4.1 Generally

Both the civil and criminal rules provide that the court must inform counsel of its proposed action on the requested instructions before closing arguments. Fed. R. Crim. P. 30(b); Fed. R. Civ. P. 51(b). “The object of the rule is to require the district court to inform the trial lawyers in a fair way what the instructions are going to be in order to allow counsel the opportunity to argue the case intelligently to the jury.” *United States v. Gaskins*, 849 F.2d 454, 458 (9th Cir. 1988). A failure to inform counsel of the disposition of their requested instructions is reversible error if it prejudicially affects closing argument. *Id.*

Both the civil and criminal rules require the court to provide an opportunity for counsel to make objections on the record out of the hearing of the jury, and, in criminal cases, if requested, out of the presence of the jury. Fed. R. Crim. P. 30(d); Fed. R. Civ. P. 51(b). It is customary for the court to have an in-chambers conference with counsel in which the instructions are discussed and settled.

A party must object to instructions with adequate specificity; an objection must distinctly state the matter to which the party objects as well as “the grounds for the objection,” and it must be made before the jury retires to deliberate. Fed. R. Crim. P. 30(d); Fed. R. Civ. P. 51(c)(1); *see also United States v. Peterson*, 538 F.3d 1064, 1070 (9th Cir. 2008).

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

4.4.2 Criminal Cases

Although the defendant in a criminal case need not be present during the discussions settling the instructions, *see United States v. Romero*, 282 F.3d 683, 689-90 (9th Cir. 2002); *United States v. Sherman*, 821 F.2d 1337, 1339 (9th Cir. 1987), some judges prefer to settle the instructions in open court with the jury excused and the defendant present. If so, it is advisable that the entire discussion concerning instructions be on the record.

In a criminal case, an objecting party “[o]ffering an alternative instruction alone is not enough; the district court must be fully aware of the objecting party’s position.” *United States v. Williams*, 990 F.2d 507, 511 (9th Cir. 1993); *accord United States v. Campbell*, 42 F.3d 1199, 1204 (9th Cir. 1994).

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

Oral instructions to the jury on the law they must apply are an essential feature of a jury trial. *United States v. Becerra*, 939 F.3d 995, 998 (9th Cir. 2019) (citing *Guam v. Marquez*, 963 F.2d 1311, 1314-15 (9th Cir. 1992)). All jury instructions must be read aloud to the jury in the presence of counsel and the defendant. *Marquez*, 963 F.2d at 1314-15. “A trial court does not satisfy its duty to instruct jurors in a criminal case just by providing those jurors with a set of written instructions to use during deliberations.” *Becerra*, 939 F.3d at 998.

4.4.3 Civil Cases

Ordinarily, a party may not assert error if an instruction was not submitted in writing. *Swiderski v. Moodenbaugh*, 143

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F.2d 212, 213 (9th Cir. 1944). However, when the parties' legal contention and the record demonstrated that the trial court was fully informed of the contention, the fact that the charge was requested orally did not preclude a finding of error. *Id.*

Although an objection to a jury instruction must “stat[e] distinctly the matter objected to and the grounds of the objection[.]” Fed. R. Civ. P. 51(c)(1), an objection to an instruction need not be formal. *Hunter*, 652 F.3d at 1230. An objection is timely if it is made before the court instructs the jury and before final jury arguments are delivered, or, if a party has not previously been informed of an instruction or an action on a request, that party objects promptly after learning that the instruction or request will be, or has been, given or refused. Fed. R. Civ. P. 51(b) & (c). In a civil case, unlike a criminal case, a party may properly object by submitting a proposed instruction supported by relevant authority and having language specific enough to make the nature of the alleged error clear. *Hunter*, 652 F.3d at 1230-31.

Fed. R. Civ. P. 51(d)(1) provides that a party may assign as error:

- A. an error in an instruction actually given if that party made a proper objection, or
- B. a failure to give an instruction, if that party properly requested it and, unless the court made a definitive ruling on the record rejecting the request, also made a proper objection.

However, in addition to the assignment of error in Fed. R. Civ. P. 51(d)(1), “[a] court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.” Fed. R. Civ. P. 51(d)(2); *see Hunter*, 652 F.3d at 1230 n.5.

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

In considering a party's request to give jurors an instruction that defines a common word, the trial court should take into account that the "law does not require courts to define ordinary words and phrases." *Lewiston Milling Co. v. Cardiff*, 266 F. 753, 759 (9th Cir. 1920) (holding no error in trial court's refusal to define the words "may" and "might"); see *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1029 (9th Cir. 2003) (the district court "need not define common terms that are readily understandable to the jury").

The civil rules provide that the court must inform counsel of its proposed action on the requested instructions before closing arguments to the jury. Fed. R. Civ. P. 51(b). The purpose of this rule is to avoid error by affording the trial judge an opportunity to correct instructions before the jury has decided the case. *Inv. Serv. Co. v. Allied Equities Corp.*, 519 F.2d 508, 510 (9th Cir. 1975).

4.5 Written Jury Instructions Provided to Jurors

The trial court should furnish the jury with a copy of the written instructions to assist it during deliberations. *See United States v. McCall*, 592 F.2d 1066, 1068 (9th Cir. 1979) (“[t]he preferred procedure [is] sending a copy of [the] instructions to the jury at the start of deliberations”); NINTH CIR. JURY TRIAL IMPROVEMENT COMMITTEE, SECOND REPORT: RECOMMENDATIONS AND SUGGESTED BEST PRACTICES 12 (2006). The trial court may consider providing a copy of the jury instructions to each juror during the reading of the instructions and for use during deliberations. *See United States v. Becerra*, 939 F.3d 995, 1002 (9th Cir. 2019) (“[A]lthough the use of written jury instructions was once a rarity, courts now often supplement oral jury instructions with written ones, giving them to jurors to read contemporaneously with the oral instructions or to take to the jury room after the oral charge.”).

Providing a correct copy of the instructions may assist in nullifying a judge’s misstatement of the law made during the reading of the jury instructions. *See United States v. Ancheta*, 38 F.3d 1114, 1116-17 (9th Cir. 1994) (misstatement of instructions was not plain error because “the court provided the jury with written instructions that properly stated the government’s burden of proof”).

In addition to providing written jury instructions, the court should orally read the jury instructions to help guarantee equitable access and inclusion in the courtroom. *See Becerra*, 939 F.3d at 1002 (holding that the district court committed structural error by failing to read an oral charge to jury); *see also* Elizabeth Dimaano, *Managing a Jury Trial: Oral Jury Instructions as a Tool for Inclusion*, JURY TRIAL IMPROVEMENT COMM. NEWSL., Fall 2020.

4.6 Preliminary Jury Instructions Before Opening Statements

After a jury is empaneled and before the lawyers' opening statements, some judges give preliminary instructions to the jury regarding the issues to be presented and the types of evidence to be admitted. *See* 9TH CIR. CIV. JURY INSTR., PRELIMINARY INSTRUCTIONS; 9TH CIR. CRIM. JURY INSTR. 1.1-1.16. This practice is intended to facilitate:

1. better decision-making by jurors, and
2. greater understanding by jurors of their duty in the decision-making process by providing them with a legal framework for the parties' positions.

A jury instructed on the elements at the beginning has a yardstick to consider the import and significance of the evidence more easily as it is introduced. *See* NINTH CIR. JURY TRIAL IMPROVEMENT COMMITTEE, *Best Practices Recommendations: Ensuring Efficiency and Cost Effectiveness of Jury Trials*, § II.G (Jan. 21, 2021).

Each juror should be given a copy of the preliminary jury instructions at the time the judge reads the instructions aloud. Both paper copies and electronic displays can be used for this purpose.

If the judge gives preliminary instructions, the jury should be told that instructions given at the end of the case will govern the jury's deliberations and will be binding on the jury.

4.7 Adverse Inference Instructions

4.7.1 In General

When relevant evidence is destroyed or spoiled, the court may sanction the responsible party by instructing the jury that it may infer that the spoiled or destroyed evidence would have been unfavorable to the responsible party. The decision to give or refuse to give an adverse inference instruction is within the trial court's discretion. *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); see *United States v. Sivilla*, 714 F.3d 1168, 1172 (9th Cir. 2013) ("We review a district court's refusal to give an adverse inference instruction, when properly raised by the appellant, for abuse of discretion."). Indeed, "[w]hen relevant evidence is lost accidentally or for an innocent reason, an adverse evidentiary inference from the loss may be rejected." *Med. Lab'y Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 824 (9th Cir. 2002). Adverse inference instructions are normally provided to juries at the conclusion of trial.

4.7.2 Criminal Cases

An instruction concerning evidence lost or destroyed by the government is appropriate when the balance "between the quality of the Government's conduct and the degree of prejudice to the accused" weighs in favor of the defendant. *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979) (en banc) (Kennedy, J., concurring); accord *United States v. Sivilla*, 714 F.3d 1168, 1173 (9th Cir. 2013). The government bears the burden of justifying its conduct, and the defendant bears the burden of demonstrating prejudice. *Sivilla*, 714 F.3d at 1173.

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In evaluating the government's conduct, a court should consider whether:

1. the evidence was lost or destroyed while in the government's custody,
2. it acted in disregard of the defendant's interests,
3. it was negligent,
4. the prosecuting attorneys were involved, and
5. if the acts were deliberate, whether they were taken in good faith or with reasonable justification.

Sivilla, 714 F.3d at 1173 (citing *Loud Hawk*, 628 F.2d at 1152).

Factors relevant to prejudice to the defendant include:

1. the centrality and importance of the evidence to the case,
2. the probative value and reliability of secondary or substitute evidence,
3. the nature and probable weight of factual inferences and kinds of proof lost to the accused, and
4. the probable effect on the jury from the absence of the evidence.

Id. Although a showing of bad faith on the part of the government is required to warrant the dismissal of a case based on lost or destroyed evidence, it is not required for a remedial jury instruction. *Id.* at 1170.

4.8 Instructions During the Course of Trial

Judges often give the jury limiting or clarifying instructions during a trial. *See* 9TH CIR. CIV. JURY INSTR. 2.0-2.16; 9TH CIR. CRIM. JURY INSTR. 2.1-3.20. In civil cases, these can include instructions for considering stipulated testimony, stipulated facts, tests and experiments, and expert opinion. *See* 9TH CIR. CIV. JURY INSTR. 2.1, 2.2, 2.10, 2.13. In criminal cases, these can include instructions for considering prior bad acts, similar acts, evidence for limited purpose, and opinion evidence of an expert witness. *See* 9TH CIR. CRIM. JURY INSTR. 2.10, 2.11, 2.12, 3.14.

With respect to experts, the Supreme Court has held that although Federal Rule of Evidence 704(b) prohibits an expert witness in a criminal case from opining about whether the defendant had a mental state or condition that constitutes an element of the crime charged or of a defense, “[a]n expert’s conclusion that ‘most people’ in a group have a particular mental state is not an opinion about ‘the defendant’ and thus does not violate Rule 704(b).” *Diaz v. United States*, 602 U.S. 526, 538 (2024).

To prevent such testimony from becoming unduly prejudicial, district judges “should be protective of Congress’s intent to preserve the jury’s core duty, by providing specific admonitions and instructions when expert testimony about a relevant mental state is introduced.” *Id.* at 542. (Jackson, J., concurring). At the end of each trial day, jurors should be directed not to do any research into the case, the persons involved, or the issues raised, and to avoid reading news reports, posts or opinions related to it.

4.9 Final Jury Instructions (Before and After Closing Arguments)

Many courts now instruct at the close of the evidence and before closing argument, although a judge has discretion to give instructions before or after argument or both. Fed. R. Civ. P. 51(b)(3); Fed. R. Crim. P. 30(c). Many judges give substantive final instructions before closing argument and then instruct on the rules governing deliberations after counsel have concluded. Under 28 U.S.C. § 753(b), court reporters are required to record verbatim “all proceedings . . . had in open court” unless, in civil cases with the approval of the judge, the parties specifically agree otherwise. In criminal cases, jury instructions must be recorded as they are being read to the jury.

Many verdict forms contain what some refer to as “mapping instructions,” which tell the jury which questions they are to answer and which questions they are to skip, depending on their earlier answers. Many judges explain, or even walk through, the mapping instructions with the jury as part of the judge’s final jury instructions.

4.10 Use of Indictment in Criminal Cases

The trial judge has wide discretion as to whether the jury should be provided with a copy of the indictment during jury deliberations. *See United States v. Polizzi*, 500 F.2d 856, 876 (9th Cir. 1974); *see also United States v. Petersen*, 548 F.2d 279, 280 (9th Cir. 1977) (holding that trial judge had discretion to refuse defendant's request that copy of information be furnished to jury). Most judges, however, do not send the indictment to the jury. Great caution should be exercised before providing a jury with the indictment because it is frequently cast in highly prejudicial terms.

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

4.11 Venue in Criminal Cases

Although venue is not an element of the offense, it is a question of fact that the government must prove by a preponderance of the evidence. *See United States v. Moran-Garcia*, 966 F.3d 966, 969 (9th Cir. 2020). It is normally not for the court to determine venue, and it is error to not give a requested instruction on venue. *Id.* at 969. *See* Section 1.1.9.

For example, in *Moran-Garcia*, the defendant was caught in a boat six miles off the California coast and indicted for attempting to unlawfully enter the United States. *Id.* at 968. The indictment alleged that the offenses occurred “within the Southern District of California.” *Id.* The Ninth Circuit found that the district court erred in taking the question of venue away from the jury where there was a dispute over whether the Southern District of California extends three or twelve miles out to sea, and the court “could not properly take judicial notice that the location where the boat was captured fell within the Southern District of California, since it did not.” *Id.* at 969.

The Committee’s model instruction on venue can be found at Instruction 6.32. *See* 9TH CIR. CRIM. JURY INSTR. 6.32.

4.12 Verdict Forms

4.12.1 In General

“Verdict forms are, in essence, instructions to the jury.” *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998).

Three types of verdict forms are generally recognized:

1. The general verdict is a “verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions.” *General Verdict*, BLACK’S LAW DICTIONARY (11th ed. 2019).
2. The general verdict with special interrogatories, often simply referred to as special interrogatories, is a “general verdict accompanied by answers to written interrogatories on one or more issues of fact that bear on the verdict.” *Id.* at General Verdict with Interrogatories.
3. The special verdict is a “verdict in which the jury makes findings only on factual issues submitted to them by the judge, who then decides the legal effect of the verdict.” *Id.* at Special Verdict; *see* Fed. R. Civ. P. 49.

Note: “special verdict,” “special interrogatory,” and “special issue” are often used synonymously to “refer to a jury question that requires detailed, specific answers about each factual issue—as opposed to a *general verdict*, *general interrogatory*, or *general issue*, which asks merely who wins.” *Special verdict; special interrogatory; special issue*, GARNER’S DICTIONARY OF LEGAL USAGE (3rd ed. 2011) (emphasis in original).

4.12.2 Criminal Cases

In criminal cases, “[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one.” *Riley v. McDaniel*, 786 F.3d 719, 726 (9th Cir. 2015) (quoting *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008)).

4.12.3 Drafting Considerations

The trial court should require that counsel submit proposed verdict forms before the commencement of trial. Notwithstanding any deadline set by the court, the court should consider any verdict forms submitted by counsel during trial.

The trial court may wish to direct counsel for each party to meet before trial and develop agreed-upon verdict forms. To the extent counsel are unable to agree on verdict forms, the court may still require the parties to submit proposed verdict forms.

The court may find it helpful to request that counsel submit proposed verdict forms in an editable electronic format.

Judges are encouraged to use pretrial conferences to review attorney-submitted verdict forms. Some judges use the pretrial conference to settle preliminary issues with the proposed forms and then finalize verdict forms as the trial unfolds and before closing arguments.

Before closing arguments, the form of the verdict should be decided so that counsel can effectively structure their final arguments. This also enables the court to tailor its instructions. *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1374 (9th Cir. 1987); *accord Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999) (approving of logic in *Landes*);

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see also MANUAL FOR COMPLEX LITIGATION § 11.633 (Fed. Jud. Center, 4th ed. 2004) (discussing benefits of having counsel draft and submit proposed verdict forms at pretrial conference). The failure to follow this practice may constitute reversible error. *Landes Constr. Co.*, 833 F.2d at 1374.

The trial judge should exercise caution when drafting instructions on how the jury should proceed on verdict forms after they make certain findings. Such “mapping instructions” should be clear and consistent with the prior findings made. *See* Section 4.9.

4.12.4 Special Verdict and Special Interrogatories

4.12.4.1 Civil Cases

The court has wide discretion to decide whether to have the jury return a special or a general verdict. Fed. R. Civ. P. 49; *Mateyko v. Felix*, 924 F.2d 824, 827 (9th Cir. 1991). This discretion “extends to determining the form of the special verdict, provided the questions asked are adequate to obtain a jury determination of the factual issues essential to judgment.” *Mateyko*, 924 F.2d at 827.

Additionally, the court has complete discretion on the decision of whether to submit general verdicts with special interrogatories, and their form, to the jury. *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999). The court “shall disclose at least the substance of the special interrogatories before closing arguments have been completed.” *Id.* It is also good practice for the court to submit the actual special interrogatories to counsel in writing before argument. *Id.*

4.12.4.2 Criminal Cases

Unlike in civil cases, there is no Federal Rule of Criminal Procedure expressly authorizing special verdicts. *See Black*

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v. United States, 561 U.S. 465, 472 (2010). Although there is no per se prohibition, special verdicts in criminal trials are not favored. *See United States v. Ramirez*, 537 F.3d 1075, 1083 (9th Cir. 2008). “Exceptions to the general rule disfavoring special verdicts in criminal cases have been expanded and approved in an increasing number of circumstances.” *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998) (collecting cases). *But see Black*, 561 U.S. at 472 (“Although not dispositive, the absence of a Criminal Rule authorizing special verdicts counsels caution.”).

The trial judge has discretion to determine whether to use special verdicts. *Reed*, 147 F.3d at 1181. In making the determination, the judge should base its decision on the facts of each case, taking into account whether the special verdict:

1. infringed on the jury’s power to deliberate;
2. required the jury to issue a report of its deliberations;
3. hindered the jury’s power to follow or not to follow the instructions of the court; or
4. restricted the jury’s historic function of tempering rules of law by common sense.

See id. at 1182 (citing *United States v. O’Looney*, 544 F.2d 385, 392 (9th Cir. 1976)).

Note that “special verdict” and “special interrogatory” are often used synonymously to “refer to a jury question that requires detailed, specific answers about each factual issue.” *Special verdict; special interrogatory*, Garner’s Dictionary of Legal Usage (3rd ed. 2011). There does, however, appear to be a distinction. “Strictly speaking, the term ‘special interrogatories’ refers only to interrogatories that accompany

a general verdict.” *Floyd v. Laws*, 929 F.2d 1390, 1395 (9th Cir. 1991); *see also Black v. United States*, 561 U.S. 465, 472 (2010) (noting that, “[a]lthough the special interrogatories requested by the Government in this case have been called ‘special verdicts’ by the parties and the courts below, they more closely resemble what Civil Rule 49(b) describes as ‘general verdicts with answers to written questions.’” (alteration omitted)).

Special interrogatories are often necessary to satisfy the Supreme Court’s command in *Apprendi v. New Jersey* that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” 530 U.S. 466, 490 (2000).

4.12.4.3 Apprendi Issues Generally

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a sentencing factor that raises the statutory maximum must be found by the jury beyond a reasonable doubt. Special interrogatories are often necessary to satisfy the requirements of *Apprendi* and *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc).

4.12.4.4 Drug Quantities

Although quantity and drug type are not elements of controlled substance offenses, a jury must determine those facts before a sentencing enhancement based upon drug type or quantity can be applied. The government need not prove that the defendant had knowledge of the type of controlled substance or the quantity for the enhancement to apply. *United States v. Collazo*, 984 F.3d 1308, 1329 (9th Cir. 2021) (en banc).

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When it is necessary to determine the amount of a controlled substance, the trial court may use Model Instruction 12.2 (Determining Amount of Controlled Substance) with Instruction 12.1 (Controlled Substance–Possession with Intent to Distribute). *See* 9TH CIR. CRIM. JURY INSTR. 12.1-12.2. The court may also consider submitting a special verdict to the jury. *See* 9TH CIR. CRIM. JURY INSTR. 12.5 cmt. (Controlled Substance—Conspiracy to Distribute or Manufacture); *United States v. Toliver*, 351 F.3d 423, 426 (9th Cir. 2003) (noting “a district court properly complies with *Apprendi* by instructing the jury to return special findings on the quantity and drug type”).

If the charged controlled substances are not in evidence, the court should only allow the jury to use comparison drugs that are from the defendant’s activity or a conspiracy in which the defendant was involved. *United States v. Lemus*, 847 F.3d 1016, 1022-23 (9th Cir. 2016) (stating that purity of controlled substances not connected to defendant could not be used to estimate purity of defendant’s drugs).

4.12.4.5 Venue

In cases with muddled legal postures, the trial court might consider using a special verdict requiring a venue finding separate from substantive guilt. *United States v. Ghanem*, 993 F.3d 1113, 1131 (9th Cir. 2021). For a discussion about jury instructions relating to venue, see Section 1.1.9; and Section 4.11.

Chapter Five: Jury Deliberations And Verdicts

This chapter discusses issues that may arise during jury deliberations. Unless otherwise indicated, the sections apply to the way the court may respond to these matters in both civil and criminal cases. Jury sequestration is discussed in Section 8-6.

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5.1 Court Officer's Jury Responsibilities

When the case is submitted to the jury, a court officer—typically the courtroom deputy clerk—is charged with the jurors' care and comfort during their deliberations. It is this court officer's responsibility to prevent any communications between outsiders and the jurors during deliberations. The court officer may not communicate with the deliberating jurors about their deliberations except to ask if they have agreed upon a verdict. The court officer may facilitate communications from the jury to the court.

Some district court judges in the Ninth Circuit administer an oath to the court officer before the jury begins deliberations. For example, the following oath is used in the District of Oregon:

Do you solemnly swear or affirm to keep this jury together in some private and convenient place; that you will not permit any person to speak to or communicate with them, nor do so yourself, unless by order of the court, or to ask them whether they have agreed upon a verdict; and that you will return them into court when they have so agreed or when ordered by the court?

5.2 Questions from Jury During Deliberations

The jury's communications with the court during deliberations must be in writing. The jury must not disclose in its communications to the court how it stands regarding the verdict. It is recommended that the court give an instruction regarding communications with the court before the jury begins deliberations. *See* 9TH CIR. CRIM. JURY INSTR. 6.24 (criminal cases); 9TH CIR. CIV. JURY INSTR. 3.3 (civil cases).

The judge must use procedural safeguards when communicating with the jury. *See United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979). When a jury has asked a question, such safeguards should include providing the parties with the question; suggesting a response; hearing comments, objections, and alternate responses from counsel; and articulating the court's answer to the jury's question before responding to the jury. *See United States v. Martinez*, 850 F.3d 1097, 1100-03 (9th Cir. 2017) (holding that the district court violated Federal Rule of Criminal Procedure 43(a) and the defendant's Sixth Amendment right to counsel by failing to notify counsel of a jury question and to give counsel the opportunity to be heard during the preparation of a response). These discussions should be done on the record. In a criminal case, failure to allow the defendant to be present during such proceedings violates Federal Rule of Criminal Procedure 43 unless the defendant has waived the defendant's presence. *See id.*

When a jury requests clarification on an issue, the district court has an obligation to "clear away the confusion 'with concrete accuracy.'" *United States v. McCall*, 592 F.2d 1066, 1068 (9th Cir. 1979) (quoting *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946)); *Crowley v. Epicept Corp.*, 883 F.3d 739, 750 (9th Cir. 2018) (quoting *United States v. Anekwu*, 695 F.3d 967, 986 (9th Cir. 2012)). The manner in which the district

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court fulfills this obligation is committed to its discretion. *See Anekwu*, 695 F.3d at 986 (criminal cases); *Crowley*, 883 F.3d at 739 (civil cases). However, “it is reversible error for a trial judge to give an answer to a jury’s question that is misleading, unresponsive, or legally incorrect.” *Anekwu*, 695 F.3d at 986 (criminal cases); *Crowley*, 883 F.3d at 739 (civil cases). In addition, when a trial court responds to jury questions “every effort must be undertaken to avoid influencing or coercing a jury to reach one verdict over another.” *United States v. Evanston*, 651 F.3d 1080, 1084 (9th Cir. 2011). The court’s responsibility to answer jury questions is limited to answering legal, not factual questions. *Id.* at 1086 (citing *Arizona v. Johnson*, 351 F.3d 988, 994 (9th Cir. 2003)).

In a criminal case, if the jury submits a question regarding the consequences of a guilty verdict, it is recommended that the court give 9TH CIR. CRIM. JURY INSTR. 6.22.

5.3 Readback (or Playback) of Testimony

5.3.1 Generally

The district court has “great latitude to address requests for readbacks.” *United States v. Price*, 980 F.3d 1211, 1227 (9th Cir. 2019) (quoting *United States v. Medina Castenada*, 511 F.3d 1246, 1249 (9th Cir. 2008)). A readback of trial testimony is only appropriate, however, where the “‘particular facts and circumstances of a case’ favor a readback and sufficient protections are in place to avoid undue emphasis on any portion of the testimony.” *United States v. Chadwell*, 798 F.3d 910, 915 (9th Cir. 2015) (quoting *United States v. Sacco*, 869 F.2d 499, 502 (9th Cir. 1989) (internal edits omitted)). The risk of undue emphasis is particularly strong when the testimony repeated to the jury directly contradicts the defendant’s testimony or that of other defense witnesses. *See Sacco*, 869 F.2d at 502 (discussing playback of videotaped testimony).

Although the court has broad discretion on readbacks, it “should balance the jurors’ need to review the evidence before reaching their verdict against the difficulty involved in locating the testimony to be read back, the possibility of undue emphasis on a particular portion of testimony read out of context, and the possibility of undue delay in the trial.” *United States v. Criollo*, 962 F.2d 241, 243 (2d Cir. 1992).

5.3.2 Cautionary Instruction Regarding Readback

Jurors should be told to give full consideration to the entirety of the testimony when a specific witness’s testimony is read back in part or in full. *United States v. Sandoval*, 990 F.2d 481, 486-87 (9th Cir. 1993). “To avoid the inherent risk of undue emphasis from a readback: (1) preferably the readback or replay should take place in open court with all present; (2) the jury should ordinarily be provided with the witness’s

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entire testimony, direct and cross-examination; and (3) the jury should be admonished to weigh all the evidence and not just one part.” *United States v. Newhoff*, 627 F.3d 1163, 1168 (9th Cir. 2010).

If the judge allows a readback, the jurors should be given an admonition that tells them:

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

Id. These admonitions are included in 9TH CIR. CRIM. JURY INSTR. 6.28 (criminal cases) and 9TH CIR. CIV. JURY INSTR. 3.4 (civil cases).

5.3.3 Refusal to Provide Readback

The Ninth Circuit has found no error, absent a showing of prejudice, in the trial judge's admonishing the jury not to abuse the readback privilege. *Turner v. Marshall*, 63 F.3d 807, 819 (9th Cir. 1995) (in a criminal case, "the trial judge's statement, 'I want you to use [the readback privilege] if you need it but please don't utilize the reporter frivolously,' did not violate [the defendant's] constitutional rights."), *overruled in part on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999); *see also United States v. Ratcliffe*, 550 F.2d 431, 434 (9th Cir. 1976) (per curiam) (although not subscribing to wisdom of policy of no readbacks, not abuse of discretion when court explained its rule as being inducement to jurors to pay close attention). The Second Circuit, however, has held that "the district court erred in announcing before jury deliberations began a prohibition against readbacks of testimony." *Criollo*, 962 F.2d at 244.

A district court does not abuse its discretion when it denies a jury's request for a readback because of the concern that the jury would focus on "one particular piece of evidence at the expense of other evidence." *Medina Casteneda*, 511 F.3d at 1249. However, it is error for the court to deny the jury's readback request without consulting counsel for their views. *United States v. Birges*, 723 F.2d 666, 671 (9th Cir. 1984).

5.3.4 Defendant's Right to Be Present at Readback

In a criminal case, a defendant has the right to be present at readbacks, unless the defendant has waived the right to be present at trial or when the testimony is read back. *See Newhoff*, 627 F.3d at 1168 (stating that counsel for both sides and the defendant should be present for the readback).

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5.4 Juror Access to Trial Exhibits During Deliberations

See Section 3.20.5.

5.5 Supplemental Jury Instructions

When a jury question indicates confusion about the original instructions, supplemental instructions may be necessary to eliminate the apparent confusion. The decision to deliver supplemental instructions to the jury is within the discretion of the trial court. *United States v. Solomon*, 825 F.2d 1292, 1295 (9th Cir. 1987); *see also United States v. Humphries*, 728 F.3d 1028, 1033 (9th Cir. 2013) (stating that a district court’s wide discretion in crafting jury instructions carries over to a trial judge’s response to a question from the jury); *Crowley*, 883 F.3d at 750-01 (stating the same in a civil case); Fed. R. Crim. P. 30 advisory committee’s note to 1987 amendment (“[T]he court retains power . . . to add instructions necessitated by the arguments.”); Fed. R. Civ. P. 51(b)(3) (stating that the court may instruct the jury at any time before the jury is discharged).

A district court’s supplemental instruction is subject to reversal, however, if it fails to “clear away jury confusion” or if “the answer was legally incorrect” and if “such error or confusion was prejudicial to the defendant.” *United States v. Castillo-Mendez*, 868 F.3d 830, 839 (9th Cir. 2017); *see also Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 847 (9th Cir. 2014); *Avila v. L.A. Police Dep’t*, 758 F.3d 1096, 1103 (9th Cir. 2014) (holding district court did not abuse its discretion when it re-read its original instructions because the offered supplemental instructions “would have done more to confuse than to clarify”). In addition, the district court must ensure that any supplemental instructions are not coercive or prejudicial to either party. *See, e.g., United States v. Alvarez-Ulloa*, 784 F.3d 558, 568-69 (9th Cir. 2015); *United States v. Gaskins*, 849 F.2d 454, 458 (9th Cir. 1988); *United States v. Tham*, 665 F.2d 855, 858 (9th Cir. 1981); *United States v. McDaniel*, 545 F.2d 642, 644 (9th Cir. 1976). In a criminal case, the district court risks violating Fed. R. Crim. P. 43 if it fails to consult with counsel before giving a supplemental

instruction in response to a jury question. *Martinez*, 850 F.3d at 1101-02 (citing *Artus*, 591 F.2d at 528).

If the court's original instructions correctly state the law and generally address the jury's question, the district court "act[s] within its discretion by simply referring the jury to the instructions they had already been given." *Arizona*, 351 F.3d at 995; *see Crowley*, 883 F.3d at 750-51 (stating the same in a civil case). *But see Scanlon v. Cnty. of Los Angeles*, 92 F.4th 781, 814 (9th Cir. 2024) (discussing precedents and warning that "there is a delicate balance to be struck between giving the jury additional instructions and directing it to the instructions that have already been given"). "[I]f a supplemental jury instruction given in response to a jury's question introduces a new theory to the case, the parties should be given an opportunity to argue the new theory . . . to prevent unfair prejudice." *United States v. Fontenot*, 14 F.3d 1364, 1368 (9th Cir. 1994); *see also United States v. Hannah*, 97 F.3d 1267, 1269 (9th Cir. 1996) (holding no prejudice when court permitted additional closing argument on supplemental instructions); *Gaskins*, 849 F.2d at 458 (holding that there was prejudice when the court gave supplemental instructions but no additional time for argument to address new theory).

The court must be careful to ensure that supplemental jury instructions do not result in a constructive amendment of the indictment in violation of the Fifth Amendment. *United States v. Ward*, 747 F.3d 1184, 1189 (9th Cir. 2014). A constructive amendment occurs when the instructions "diverge materially" from the indictment and where evidence was "introduced at trial that would enable the jury to convict the defendant for conduct with which he was not charged." *Id.* at 1191.

In a civil case, it is recommended that the court give 9TH CIR. CIV. JURY INSTR. 3.6, regarding additional instructions of law, before giving the supplemental instruction to the jury.

5.6 Deadlocked Jury (*Allen* Charge)

5.6.1 Generally

“An *Allen* charge is, on occasion, a legitimate and highly useful reminder to a jury to do its duty.” *Rodriguez v. Marshall*, 125 F.3d 739, 750 (9th Cir. 1997), *overruled on other grounds by Payton v. Woodford*, 299 F.3d 815, 827 (9th Cir. 2002).

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

In the Ninth Circuit, an *Allen* charge is upheld “in all cases except those where it’s clear from the record that the charge had an impermissibly coercive effect on the jury.” *United States v. Banks*, 514 F.3d 959, 974 (9th Cir. 2008) (quoting *United States v. Ajiboye*, 961 F.2d 892, 893 (9th Cir. 1992)); *see also United States v. Croft*, 124 F.3d 1109, 1123 (9th Cir. 1997); *United States v. Mason*, 658 F.2d 1263, 1266 (9th Cir. 1981) (approving charges “only if in a form not more coercive than that approved in *Allen*”). The Ninth Circuit’s Model Criminal Jury Instructions provide trial courts with language for a non coercive *Allen* charge. 9TH CIR. CRIM. JURY INSTR. 6.25; 9TH CIR. CIV. JURY INSTR. 3.7 (script for an *Allen* charge in a civil jury trial); *see also* 9TH CIR. CRIM. JURY INSTR. 6.26 (script for post *Allen* charge inquiry where criminal jury remains deadlocked).

5.6.2 Timing

The *Allen* charge is usually delivered after the jury announces a deadlock but may be given as part of the original instructions. *Wills*, 88 F.3d at 716. An *Allen* charge included in the initial instructions is considered less coercive than one provided after the jury reaches impasse. *United States v. Armstrong*, 654 F.2d 1328, 1334 35 (9th Cir. 1981). Generally, a second *Allen* charge is impermissible because it conveys a message that “‘the jurors have acted contrary to the earlier instruction’ . . . and that message serves no other purpose than impermissible coercion.” *Evanston*, 651 F.3d at 1085 (quoting *United States v. Seawell*, 550 F.2d 1159, 1162 63 (9th Cir. 1977)); *see also United States v. Nickell*, 883 F.2d 824, 828 29 (9th Cir. 1989).

5.6.3 Coercion

The Ninth Circuit examines three factors in determining the coerciveness of an *Allen* charge: “(1) the form of the instruction, (2) the time the jury deliberated after receiving the charge in relation to the total time of deliberation and (3) any other indicia of coerciveness.” *United States v. Berger*, 473 F.3d 1080, 1090 (9th Cir. 2007) (quoting *United States v. Steele*, 298 F.3d 906, 911 (9th Cir. 2002)); *see also United States v. Sproat*, 89 F.4th 771, 775 (9th Cir. 2023) (“Ordinarily, it is not unconstitutionally coercive merely to instruct a jury that has informed the court of an impasse to return the next day.): *Warfield v. Alaniz*, 569 F.3d 1015, 1029 (9th Cir. 2009) (holding that a weekend interval between *Allen* charge and resumed deliberations “probably would have diluted any coercive effect”).

With respect to the form and content of the instruction, trial courts should look to the Model Jury Instructions. *See* 9TH CIR. CRIM. JURY INSTR. 6.25; 9TH CIR. CIV. JURY INSTR. 3.7. The

Ninth Circuit's Model Criminal Jury Instructions provide two options for the *Allen* charge. See 9TH CIR. CRIM. JURY INSTR. 6.25; *Steele*, 298 F.3d at 911. The Ninth charge should caution jurors not to abandon their conscientiously held views solely to reach a verdict. *United States v. Lorenzo*, 43 F.3d 1303, 1307 (9th Cir. 1995). Although it is helpful to incorporate an instruction on the burden of proof, its absence does not necessarily require reversal. See *United States v. Quintero Barraza*, 78 F.3d 1344, 1350 (9th Cir. 1995); *United States v. Cuzzo*, 962 F.2d 945, 952 (9th Cir. 1992). *Allen* charges should not refer to the possibility of a retrial. See *United States v. Hernandez*, 105 F.3d 1330, 1334 (9th Cir. 1997).

The Ninth Circuit considers the periods of deliberation before and after an *Allen* charge in relation to each other, evaluating whether the amounts of time were disproportionate to one another. See, e.g., *United States v. Freeman*, 498 F.3d 893, 908 (9th Cir. 2007) (holding no coercion when jury deliberated for three hours before the *Allen* charge and for two hours after); *Berger*, 473 F.3d at 1092 93 (holding no coercion when jury deliberated for three and one half days before the *Allen* charge and seven hours after); *Cuzzo*, 962 F.2d at 952 (holding there was no appearance of coercion when total time of deliberation was proportionate for eleven day trial, after which the jury deliberated two days before receiving *Allen* charge, and six additional hours afterward). A relatively short deliberation after an *Allen* charge does not raise a suspicion of coercion if the jury decided simple issues and the time was not disproportionate in relation to the total deliberation period. See *Hernandez*, 105 F.3d at 1334 (holding that forty minutes of additional deliberations compared to four and one half hours of initial deliberations did not raise suspicion of coercion).

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The court's reference to the expense of trial or retrial could be indicative of coercion. An *Allen* charge should not refer to the costs of trial or the possible need for retrial. *Hernandez*, 105 F.3d at 1334; *United States v. Bonam*, 772 F.2d 1449, 1450 (9th Cir. 1985). The judge should avoid learning the split or the identity of holdout jurors. *Ajiboye*, 961 F.2d at 894. If the judge learns of a numerical split, even inadvertently, extreme caution should be exercised before giving an *Allen* charge. *Id.* at 893-94. Similarly, an *Allen* charge should not be given if the court learns the identity of the holdout jurors. *United States v. Williams*, 547 F.3d 1187, 1205-07 (9th Cir. 2008) (reversing conviction because judge received note by lone hold out juror and then gave supplemental instruction to continue deliberating, which hold out juror could have interpreted as directed specifically at that juror).

5.7 Juror Unable to Complete Deliberations

5.7.1 Less than Twelve (or Six) Jurors

In criminal jury trials, the parties may stipulate in writing, subject to the court's approval, that the jury may consist of any number less than twelve for any reason. Fed. R. Crim. P. 23(b)(2)(A). The parties may also stipulate a jury of fewer than 12 persons may return a verdict, should the court find it necessary to excuse one or more jurors for just cause. *Id.* 23(b)(2)(B). The parties may make such stipulation "at any time before the verdict," including after trial commences or during deliberations. *Id.* 23(b)(2). Even absent stipulation, the court may excuse a juror for "just cause" if the court concludes that a valid verdict may be returned by the remaining eleven jurors. Fed. R. Crim. P. 23(b)(3).

In civil jury trials, "[a] jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused" Fed. R. Civ. P. 48(a). Rule 48 further provides that the verdict must be unanimous and returned by a jury of at least six members, unless the parties stipulate otherwise. *Id.* 48(b); *Mixed Chicks LLC v. Sally Beauty Supply LLC*, 879 F. Supp. 2d 1093 (C.D. Cal. 2012) (asserting that the trial will proceed with eight jurors). It is generally advantageous to impanel more than 6 jurors; if the court must dismiss a juror during deliberations, it need not declare a mistrial so long as at least 6 jurors are able to return a verdict after the dismissal. *See* Fed. R. Civ. P. 48 advisory committee's note to 1991 amendment ("If the court takes the precaution of seating a jury larger than six, an illness occurring during the deliberation period will not result in a mistrial,"); *see also* Sections 5.7 and 5.13.

5.7.2 Just Cause to Excuse Juror

The court must have an adequate basis for a finding of just cause to excuse a juror. Good cause “generally focuses on sickness, family emergency, or juror misconduct.” *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998); *see also*, e.g., *United States v. Jones*, 534 F.2d 1344, 1346 (9th Cir. 1976) (excusing drunk juror before deliberations had begun was not abuse of discretion). Just cause may be found when the length of a juror’s absence is not known (such as due to an illness), or when the trial is lengthy and complex and the time the juror would be out is so long that the members of the jury would suffer dulled memories because of the delay. *See United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991) (in a two and-a half day trial, the trial court’s decision to excuse a juror who could not attend one day for lack of transportation was reversible error); *but see United States v. Stratton*, 779 F.2d 820, 834 (2d. Cir. 1985) (no abuse of discretion where court excused juror who had previously notified the court of upcoming religious holiday, and jury would have been forced to wait four and-a half days for her to return).

The trial court in a civil jury trial may also excuse a juror “for good cause,” either during trial or after deliberation commences. Fed. R. Civ. P. 47(c). The Ninth Circuit “recognize[s] the district court’s broad discretion on matters concerning juror bias and review[s] such challenges for an abuse of discretion.” *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1220 (9th Cir. 1997) (citing *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1460 (9th Cir. 1989)); *Dietz v. Bouldin*, 579 U.S. 40, 48 49 (2016) (noting that “improper extraneous influences such as prejudicial information not admitted into evidence, comments from a court employee . . . or bribes offered to a juror” serve as a basis to challenge the verdict).

A trial court judge may not remove a juror because the juror refuses to join other jurors in reaching a unanimous verdict. *See Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1451 (9th Cir. 1995) (concluding trial court most likely excused holdout juror because of scheduling conflict and therefore did not abuse discretion).

5.7.3 Excusing a Deliberating Juror in Criminal Trial

Appellate courts have upheld the dismissal and replacement of jurors during deliberations whose physical or mental condition prevented them from effectively participating in deliberations. *See United States v. Depue*, 879 F.3d 1021 (9th Cir. 2018) (determining dismissal of juror who was physically unwell and may have been poisoned by fellow juror was not abuse of discretion), *amended on other grounds after reh'g en banc*, 912 F.3d 1227 (9th Cir. 2019).

A trial court also has just cause to excuse a juror who exhibits “untruthfulness” or failure to follow the court’s instructions, *United States v. Vartanian*, 476 F.3d 1095, 1098 99 (9th Cir. 2007), or an inability to “deliberate impartially,” *United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999). However, “if the record evidence discloses any reasonable possibility that the impetus for a juror’s dismissal stems from the juror’s views on the merits of the case, the court must not dismiss the juror.” *Id.* at 1087 (emphasis in original).

5.8 Adding Alternate Jurors After Deliberations Begin

The Federal Rules of Criminal Procedure give courts three options after excusing a juror for good cause after deliberations have begun:

1. declare a mistrial;
2. proceed with 11 jurors pursuant to Rule 23(b); or
3. seat an alternate pursuant to Rule 24(c).

United States v. Brown, 784 F.3d 1301, 1304 05 (9th Cir. 2015) (describing the court’s options and holding that the court may proceed with 11 jurors even if alternates are available). Rule 24(c) allows the trial court to retain—rather than discharge—jurors after deliberations begin but provides that the court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. Fed. R. Crim. P. 24(c)(3). Rule 24(c) further provides that if an alternate replaces a juror after deliberations have begun, the court must first instruct the jury to begin deliberations anew, such that alternates may exercise independent judgment and not be intimidated or influenced by existing jurors’ views. *See* 9TH CIR. CRIM. JURY INSTR. 6.30 (“Resumption of Deliberations After Alternate Juror is Added”); *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (en banc) (noting the “inherent coercive effect upon an alternate juror who joins a jury” that has already reached a conclusion).

The rules in civil trials are very different. The 1991 amendment to the Federal Rules of Civil Procedure eliminated the provision allowing trial courts to impanel alternate jurors in civil trials who do not participate in deliberations. Fed. R. Civ. P. 47(b) advisory committee’s note to 1991 amendment

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(“The former provision for alternate jurors is stricken and the institution of the alternate juror abolished.”); *see also N. Star Yachts Intern., Inc. v. Diaship, Inc.*, 19 F.3d 28 (9th Cir. 1994) (concluding that the rule’s requirement that each juror participate in the verdict precluded the parties’ stipulation that an alternate seventh juror would not participate in deliberations). Accordingly, the trial court should not have occasion to add alternate jurors after deliberations have begun.

Instead, the trial court should impanel more than six jurors such that at least six are able to return a verdict if a juror is dismissed after deliberations have begun. *See* Fed. R. Civ. P. 48 advisory committee’s note to 1991 amendment; *see also* Section 5.6(A).

5.9 Polling

After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually by asking each juror whether the verdict as published constitutes that juror's individual verdict in all respects. Fed. R. Crim. P. 31(d); Fed. R. Civ. P. 48(c); *see Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899) (noting that the right of a party to have the jury polled is an "undoubted right"); *United States v. Gomez-Lepe*, 207 F.3d 623, 630 (9th Cir. 2000) ("As juror polling cases and Rule 31(d) make clear, the trial judge has broad discretion to decide how to proceed in a polling situation."); *United States v. Portac, Inc.*, 869 F.2d 1288, 1297 (9th Cir. 1989) (affirming trial court's decision to wait until the jury had finished deliberations on all counts before conducting a poll); *In re Hawaii Fed. Asbestos Cases*, 871 F.2d 891, 895 (9th Cir. 1989) ("The form of jury polling is a matter entrusted to the sound discretion of the trial judge.").

If polling verifies the unanimity of the verdict, the court should direct the clerk to file and record the verdict and discharge the jurors with the appropriate instructions. If, however, polling results in any doubt as to the unanimity of the verdict or, in a civil case, a lack of assent by the number of jurors that the parties stipulated to, the court should confer privately on the record with counsel and determine whether the jury should be returned for further deliberations, or a mistrial should be declared. Fed. R. Crim. P. 31(d); Fed. R. Civ. P. 48(c); *see* Fed. R. Civ. P. 48 advisory committee's note to 2009 amendment (noting that the rule accounts for the "parties' opportunity to stipulate to a nonunanimous verdict" in a civil case); *United States v. Nelson*, 692 F.2d 83, 85 (9th Cir. 1982); *United States v. Freedson*, 608 F.2d 739, 741 (9th Cir. 1979) (concluding that trial court "acted within the bounds of its discretion in directing further deliberations

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rather than discharging the jury” because “[t]he judge could well have concluded that further deliberation might clarify the undecided juror’s state of mind and produce either a clear verdict or clear disagreement”).

5.10 Receiving the Verdict

5.10.1 Reception of an Unsealed Verdict

Judges should receive verdicts consistent with the following steps. Upon announcement by the jury that it has reached a verdict, the court must gather all interested parties convene in open court to receive the verdict. In a criminal case, the presence of the defendant is required under Federal Rule of Criminal Procedure 43(a), unless one of the exceptions in Rule 43(b) or (c) applies. Moreover, any victims of the offense should be given “reasonable, accurate, and timely notice” of the return of verdict so that they can be present. *See* 18 U.S.C. § 3771(a)(2) and (3). When court is convened, the judge should announce that the jury is ready to return its verdict and instruct the clerk to have the jurors enter and assume their seats in the jury box. If not already known, the judge should ask who the foreperson is. The judge should then ask the foreperson if the jury has unanimously agreed upon its verdict. If the response is a no, the court should, without further inquiry, return the jury to continue its deliberations. If the response is a yes, the court should direct the foreperson to hand the verdict to the clerk, who will then deliver it to the judge for inspection before publication.

The judge will then examine the verdict to determine whether it is in proper form (in writing and signed by the foreperson) and sufficient (covering the issues submitted in a complete and unambiguous manner). If the verdict forms are not properly completed, the judge should not proceed with publication and should instead send the jurors back to the deliberation room and speak with counsel regarding the appropriate corrective action to take regarding the issues with the verdict, such as declaring a mistrial or sending the jury back into deliberations.

If the verdict appears sufficient, the judge will explain to the jurors that their verdict will now be “published”; instruct the jury to pay close attention as the verdict is published; and explain that, following publication, the jury may be “polled.” After this has been done, the judge must publish the verdict by reading it aloud (or by having the clerk do so). If either party requests, or on the court’s own motion, the court shall poll the jury.

5.10.2 Reception of a Sealed Verdict

On some occasions an indispensable party may not be available to receive a verdict when the jury reaches agreement. In such cases a sealed verdict—i.e., a verdict produced in its written form and placed in a sealed envelope—may be delivered to the clerk for subsequent “reception” and publication in open court when the jury, the judge, and all necessary parties are present.

A sealed verdict may also be appropriate when the jury reaches a verdict as to one defendant but not as to another or when the jury reaches a verdict as to some counts but is returned for further deliberations with respect to the other counts. *See California v. Altus Fin. S.A.*, 540 F.3d 992, 1005 (9th Cir. 2008) (accepting sealed partial verdicts resolving some of the issues before the jury returned for further deliberations with respect to the remaining verdict form).

Judges should take the following steps to receive sealed verdicts. In the case of a sealed verdict, upon announcement by the jury that it has reached a verdict, the court must gather all interested and available parties convene in open court and on the record. In a criminal case, the presence of the defendant is required under Federal Rule of Criminal Procedure 43(a), unless one of the exceptions in Rule 43(b) or (c) applies. Moreover, any victims of the offense should

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be given “reasonable, accurate, and timely notice” of the return of verdict so that they can be present. *See* 18 U.S.C. § 3771(a)(2) and (3). When court is convened, the judge should announce that the jury is ready to return its verdict, explain that a sealed verdict will be taken, and instruct the clerk to have the jurors enter and assume their seats in the jury box. If not already known, the judge should ask who the foreperson is. The judge should then ask the foreperson if the jury has unanimously agreed upon its verdict. If the response is a yes, the court should direct the clerk to hand a suitable envelope to the foreperson and instruct the foreperson to place verdict forms in the envelope, to seal the envelope, and to hand it to the clerk for safekeeping. The court will then recess the proceedings, instructing the jury and all interested parties to return on a future date for the opening and formal reception of the verdict. Before the jury leaves, the judge must instruct that, in the interim, no member of the jury should discuss the verdict or any other aspect of the case with any other person, including any other juror.

When court is again convened for the formal reception and publication of the verdict, the judge should direct the clerk to hand the sealed envelope to the jury foreperson and instruct the foreperson to open the envelope and verify that the contents consist of the jury’s verdict without modification or alteration of any kind. After the foreperson verifies the verdict, the judge should direct the foreperson to hand the verdict back to the clerk, who will then deliver it to the judge for inspection before publication.

5.11 Inconsistent or Incomplete Verdicts

5.11.1 Incomplete Verdicts

5.11.1.1 Criminal Cases

In the Ninth Circuit, “it is settled that a trial court may accept a partial verdict on only one of two or more counts of an indictment” and may “accept a verdict on only one count of an indictment, and then return the jury for further deliberations on the remaining counts.” *United States v. Ross*, 626 F.2d 77, 81 (9th Cir. 1980) (“Such procedure does not of necessity influence the jury in its deliberations, and a trial court is entitled to exercise its sound discretion in this regard.”); *see also* Fed. R. Crim. P. 31(b) (stating that in a trial involving multiple defendants or multiple counts, a jury can return a partial verdict as to “any defendant about whom it has agreed” or any “counts on which it has agreed”). However, the trial court needs to have sufficient justification to accept a partial verdict. Also note that “acquittals can preclude retrial on counts on which the same jury hangs.” *Yeager v. United States*, 557 U.S. 110, 117-25 (2009).

Thus, after the court becomes aware of the jury’s deadlock as to some counts or defendants, the court may make “brief and objective inquiries into the status of jury deliberations” and should consider the circumstances surrounding the jury’s deliberations before deciding to accept a sealed verdict. *See Ross*, 626 F.2d at 81; *Lowenfield*, 484 U.S. at 234-35, 237 41 (holding that the trial court’s polling of the deadlocked jury regarding whether further deliberations might assist them in returning a verdict was not coercive). The court should consult with the parties on the record regarding its intended course of action and should allow the parties to make objections to any supplemental jury instructions.

If the circumstances warrant it, the court may inform the jury of their right to return a partial verdict, accept the any partial verdict that the jury returns, direct the jury to return for further deliberations with respect to the unagreed upon counts or defendants. *See Ross*, 626 F.2d at 81; *Nelson*, 692 F.2d at 85 (“If, in fact, after further deliberation, the jury did arrive at a unanimous verdict on ten counts, but were unable to agree on three counts, and announced that verdict in open court, the district judge could then have accepted the partial verdict.”). The court must not pressure or coerce the jury to reach a certain result through its directions to the jury. It may become appropriate to give the jury an *Allen* charge during this process or to ultimately declare a mistrial as to the unagreed-upon counts or defendants. The court should refer to the sections of this manual regarding if and when an *Allen* charge should be given, or a mistrial declared. *See* Section 5.5 and Section 5.13; *see also* Fed. R. Crim. P. 31(b) (stating that “[i]f the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts”).

5.11.1.2 Civil Cases

If a jury submits an incomplete, ambiguous verdict, with no other indication that it is deadlocked as to some claims, the trial court can clarify whether the verdict was filled out correctly by resubmitting the incomplete verdict to the jurors with a request for the jury to clarify the ambiguity. A resubmission is not coerced by advising the jury that the first verdict appeared incomplete and asking whether it was filled out incorrectly.

If, however, a jury fails to answer all the questions submitted in a verdict because it is partially deadlocked, the court may accept the verdict for those issues that the jury has resolved. *See Altus Fin. S.A.*, 540 F.3d at 1004-05 (accepting partial verdict after the jury had deliberated for a substantial

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amount of time and informed the court that it was deadlocked as to some of the issues but not others) (citing *Skyway Aviation Corp. v. Minneapolis Northfield & S. Ry. Co.*, 326 F.2d 701, 704 (8th Cir. 1964) (holding that the jury’s failure unanimously to agree on whether plaintiff had been negligent did not vitiate an otherwise unanimous special verdict for plaintiff, given jury’s finding that plaintiff’s negligence, if any, was not the proximate cause of the accident)). The Ninth Circuit has not adopted a clear standard for assessing whether a trial court properly accepts a partial verdict in a civil case, but other circuits affirm such a decision where accepting a partial verdict would not risk inconsistent verdicts as to the other issues and where the court accepts a partial verdict after the jury indicates that it has been deadlocked on the other issue “for quite some time.” *See, e.g., Sanchez v. City of Chicago*, 880 F.3d 349, 361 (7th Cir. 2018).

When the jury’s answers fail to resolve a vital issue, the court may exercise its discretion to either return the jury for further deliberations as to the unresolved issue or to declare a mistrial as to that issue. *See Altus Fin. S.A.*, 540 F.3d at 1004 05 (“If the answered verdict forms do not dispose of all the issues submitted to the jury, the court must either resubmit the unanswered verdicts to the same jury or declare a mistrial with respect to the unresolved issues.”); *Union Pac. R.R. Co. v. Bridal Veil Lumber Co.*, 219 F.2d 825, 831-32 (9th Cir. 1955) (following dismissal of jury, if answered verdict forms leave vital issue unanswered, the court must “send the case back for a new trial”; to do otherwise “would deprive the parties of the jury trial to which they are entitled constitutionally”). If, after consulting with the parties, the court decides to resubmit the unanswered verdicts to the jury, the court should refer to the sections of this manual regarding if and when an *Allen* charge should be given, or a mistrial declared as to the unresolved issues. *See* Sections 5.5 and 5.13.

Note: The court should decline to enter partial final judgment in accordance with the partial verdict where the issue resolved by the partial verdict is not separable and distinct from the issue on which the jury failed to reach unanimous agreement and will be the subject of a new trial. *See Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9th Cir. 1995) (“Partial trials ‘may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from others that a trial of it alone may be had without injustice.’” (quoting *Gasoline Prod. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497 (1931))).

5.11.2 Inconsistent Verdicts

5.11.2.1 Criminal Cases

If the trial court determines that a verdict is internally inconsistent, the best course of action is to decline to accept the verdict, consult with counsel regarding the corrective action that the court intends to take, give the jury supplemental instructions, and then return the jury for further deliberations. *See United States v. McCaleb*, 552 F.3d 1053, 1058 (9th Cir. 2009) (“[T]he [district] court may ask the jury to clarify an inconsistent or ambiguous verdict.” (quoting *Larson*, 9 F.3d at 1402)); *id.* at 1057-58 (reviewing trial court’s decision to return the jury for further deliberations after the jury found the defendant guilty of the charge in count one and count one’s lesser-included offense and affirming the court’s instruction to the jury regarding the alternative nature of these offenses and its request that the jury return for further deliberations and clarify its verdict).

The court should allow the parties an opportunity to object to any supplemental instructions before they are given to the jury. If a district court decides to address a jury on an inconsistency in its answers, the court must not pressure or

coerce the jury to reach a certain result through its direction to the jury to reconsider its findings. *See McCaleb*, 552 F.3d at 1057-58 (concluding that the district court’s supplemental instruction did not coerce the jury into reaching a verdict); *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (reversing conviction and ordering new trial after finding that the judge’s supplemental instruction to deadlocked jury that it must reach a verdict was coercive).

Note: When it comes to post-trial motions for judgment of acquittal or a new trial based on seemingly inconsistent verdicts, the trial court should be aware that “it is well established that ‘[i]nconsistent verdicts may stand, even when a conviction is rationally incompatible with an acquittal, provided there is sufficient evidence to support a guilty verdict.’” *United States v. Suarez*, 682 F.3d 1214, 1218 (9th Cir. 2012) (quoting *United States v. Guzman*, 849 F.2d 447, 448 (9th Cir. 1988)) (collecting cases); *United States v. Powell*, 469 U.S. 57, 65 (1984) (noting that there is no federal constitutional right to a consistent verdict, provided that sufficient evidence supports the conviction); *Ferriz v. Giurbino*, 543 F.3d 990, 992 (9th Cir. 2005) (“The Supreme Court has made it clear that inconsistent verdicts may stand when one of those verdicts is a conviction and the other an acquittal.”). Although a court need not decide if the verdicts are actually inconsistent, “[i]n many cases, close scrutiny of the facts may resolve any apparent inconsistencies, whether the trial be by judge or by jury.” *United States v. Loney*, 719 F.2d 1435, 1438 (9th Cir. 1983); *see, e.g., Guzman*, 849 F.2d at 448 (not inconsistent for jury to acquit on substantive charges but convict on conspiracy charge); *United States v. Ayers*, 924 F.2d 1468, 1482-83 (9th Cir. 1991) (not inconsistent to convict defendant but acquit co-defendant where facts supported inference that defendant had the necessary intent and was involved in conspiracy); *McCaleb*, 552 F.3d at 1058 (noting that when a jury finds a defendant guilty of a crime

and its lesser-included offense, a court can disregard and treat as surplusage a guilty verdict on the lesser-included offense).

5.11.2.2 Civil Cases

A federal district court has the discretion to decide whether a jury's answers to a verdict form are inconsistent and whether the issue should be resubmitted to the jury. *See Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1032-39 (9th Cir. 2003) (discussing different types of inconsistencies and how to deal with inconsistent answers); *Mateyko v. Felix*, 924 F.2d 824, 827 (9th Cir. 1990) ("If the inconsistency between special verdict answers is noticed prior to the dismissal of the jury, the district court has the discretion to resubmit the issue to the jury with a request for clarification."); *Larson*, 9 F.3d at 1401-02 (rejecting party's argument that the trial court erred by failing to try to reconcile the jury's answers before resubmitting the issues to the jury for clarification).

When the jury is still available, the practice of resubmitting an inconsistent verdict to the jury for clarification is well accepted. *See Duk*, 320 F.3d at 1056-60 ("[R]esubmitting an inconsistent verdict best comports with the fair and efficient administration of justice."); *id.* at 1059 ("Resubmission of an inconsistent verdict is done with the sole purpose of allowing a jury to reconcile inconsistencies . . . [including through] redeliberation."); *see also* Fed. R. Civ. P. 49. Thus, when a verdict appears to be internally inconsistent, the best course of action is to decline to accept the verdict, consult with counsel regarding the corrective action that the court intends to take, give the jury supplemental instructions, and then return the jury for further deliberations. *See Duk*, 320 F.3d at 1056-59 (approving acceptance of a second verdict, after resubmission, that had different answers to the exact same questions when compared with the first verdict); *City of Sonora*, 769 F.3d at 1019-21 (affirming supplemental instructions, given after the

court found the answers in the initial verdict inconsistent, where the instructions identified and explained the inconsistency).

The court should allow the parties an opportunity to object to any supplemental instructions before they are given to the jury. *See* 9TH CIR. CIVIL JURY INSTR. 3.6 cmt. (“Unless the additional instruction is by consent of both parties, both sides must be given an opportunity to take exception or object to it. If this instruction is used, it should be made a part of the record.”). If a district court decides to address a jury on an inconsistency in its answers, the court must not pressure or coerce the jury to reach a certain result through its direction to the jury to reconsider its findings.

Note: Inconsistencies within verdicts are generally the subject of post-trial motions. *See El-Hakem v. BJY Inc.*, 415 F.3d 1068, 1074 (9th Cir. 2005) (discussing how, after a jury has been discharged, the trial court has a duty to try to reconcile the jury’s seemingly inconsistent answers). Not every inconsistency warrants a new trial and in some cases a trial court may enter judgment in accordance with the jury’s answers even where some of those answers may appear inconsistent. *See, e.g., Floyd v. Laws*, 929 F.2d 1390, 1397 (9th Cir. 1991) (concluding that inconsistent responses in special verdict given in violation of a “stop here” instruction should be disregarded and entering judgment in accordance with the jury’s answers before the “stop here” instruction); *Zhang*, 339 F.3d at 1037-39 (“In the case of a special verdict, inconsistencies . . . require a new trial only if they arise between two or more factual findings; otherwise, the determination of liability can simply be conformed to the factual findings. Similarly, in the case of a general verdict with interrogatories, the trial court has the discretion to enter judgment on the factual findings, even if they conflict with the jury’s conclusion as to liability . . . ; only if there is a conflict within the factual findings would a new trial be required.”); *id.* at 1035-37 (collecting cases

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regarding inconsistent legal conclusions (general verdicts) and stating that a trial court cannot grant a new trial “due to [apparent] inconsistencies between general verdicts” and may enter judgment in accordance with such general verdicts as long as they are not “irreconcilably inconsistent”).

5.12 Resuming Deliberations

With respect to the issue of resuming deliberations, the court should refer to the sections in this chapter regarding the addition of a new juror during deliberations, the giving of an *Allen* charge, and incomplete or inconsistent verdicts. *See* Sections 5.5, 5.7, 5.10. Additionally, if the trial court wishes to resubmit a matter to the jury in a criminal case, it should do so before the jury is discharged. *See Dietz*, 579 U.S. at 42, 51 (recognizing, in a civil case, that although a trial judge can recall a jury for further deliberations after discharging them, there is a high potential that jurors may be tainted in the period after discharge but before recall, and thus, “[a]ny suggestion of prejudice in recalling a discharged jury should counsel a district court not to exercise its inherent power”).

5.13 Allegations of Juror Misconduct

The trial court has an affirmative obligation to “detect potentially contaminating influences on juror deliberations and implement appropriate measures to remedy juror misconduct.” *United States v. Perez*, 658 F.2d 654, 663 (9th Cir. 1981). The Ninth Circuit reviews the trial court’s treatment of possible juror misconduct for an abuse of discretion. *See United States v. Abascal*, 564 F.2d 821, 833 34 (9th Cir. 1977) (holding that the trial judge did not abuse discretion when the judge declined to interrogate jurors regarding their potential exposure to newspaper articles about the case published during the trial; the appellate court also determined that there was no prejudice to the defendant and therefore no basis for a new trial). This is true in both criminal jury trials, *see id.*, and civil jury trials, *Hard*, 870 F.2d at 1461 62; *Smith v. City of Honolulu*, 887 F.3d 944, 953 54 (9th Cir. 2018) (holding that it was not an abuse of discretion for the trial court to dismiss the jury foreperson who threatened other jurors).

Examples of juror misconduct include:

- a. using extrinsic evidence in reaching a verdict, *see United States v. George*, 56 F.3d 1078 (9th Cir. 1995);
- b. failing to honestly answer a material question in voir dire where an honest answer would support a challenge for cause, *see United States v. Edmond*, 43 F.3d 472 (9th Cir. 1994) (holding that a juror’s failure honestly to answer a question did not warrant a new trial because an accurate response would not have provided a valid basis for a challenge for cause);
- c. making outbursts during proceedings that indicate the juror has formed an opinion about the proceedings or the parties, *Perez*, 658 F.2d 654;

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- d. extorting the defendant for an acquittal, *United States v. Shapiro*, 669 F.2d 593, 599 (9th Cir. 1982); or
- e. discussing the case with others, including with other jurors, *see id.* at 601.

When presented with allegations of juror misconduct or bias, the trial court may, within its discretion, order an evidentiary hearing or question individual jurors to determine whether the allegations are true. *See, e.g., United States v. Soulard*, 730 F.2d 1292, 1306 (9th Cir. 1984) (determining that the trial court “was not obligated under Ninth Circuit law to conduct an investigative hearing” into allegations of an extrajudicial communication between a juror and the prosecuting attorney (emphasis in original)). If the court chooses to question the jurors, it should question each juror individually, on the record, and in the presence of counsel and the defendant. *See, e.g., Gouveia v. Espinda*, 926 F.3d 1102 (9th Cir. 2019). Counsel should be permitted to ask the jurors questions, but the court should bear in mind that repeated questioning could itself be prejudicial in causing jurors to be curious about the subject matter of the inquiry. *See Shapiro*, 669 F.2d at 601 (noting the “strong possibility” that jurors assumed the court’s inquiry “was occasioned by defense misconduct.”). The court should admonish each juror not to discuss the content of the inquiries with other jurors. *See Silverthorne v. United States*, 400 F.2d 627, 640 41 (9th Cir. 1968).

If the court determines the allegations of juror bias or misconduct were founded, the court must then determine whether the bias or prejudice amounted to a deprivation of the accused’s Fifth or Sixth Amendment rights. *United States v. Hendrix*, 549 F.2d 1225, 1229 (9th Cir. 1977) (noting that “not every incident of juror misconduct requires a new trial.”). If the trial court determines that juror bias or misconduct

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“prejudiced the defendant to the extent that he has not received a fair trial,” the trial court must order a new trial. *Id.* If the court determines the defendant’s constitutional rights were not violated, it may nevertheless dismiss the offending juror if necessary to avoid further issues. *See Perez*, 658 F.2d at 663. It is reversible error, however, to dismiss a juror because of that juror’s views on the merits. *See Symington*, 195 F.3d at 1085.

5.14 Declaring a Mistrial

“A mistrial may be declared and a defendant may be retried without violating the Fifth Amendment’s provision against double jeopardy when ‘there is either (1) manifest necessity for the discharge of the original proceedings, or (2) the ends of public justice would otherwise be defeated.’” *United States v. Cawley*, 630 F.2d 1345, 1348 (9th Cir. 1980) (quoting *Arnold v. McCarthy*, 566 F.2d 1377, 1386 (9th Cir. 1978)). There is “manifest necessity” where the jury is hopelessly deadlocked and cannot reach a verdict. *See Richardson v. United States*, 468 U.S. 317, 326 (1984).

After the jury communicates that it is unable to reach a verdict, the judge must question the jury to determine independently whether further deliberations might overcome the deadlock. *See Cawley*, 630 F.2d 1345; *see also Harrison v. Gillespie*, 596 F.3d 551 (9th Cir. 2010) (determining it was abuse of discretion to deny defendant’s jury poll request before declaring a mistrial; failure to poll jury before declaring mistrial violated Fifth Amendment’s prohibition on Double Jeopardy). The jury’s “own statement that it is unable to reach a verdict” is “the most critical factor,” but that statement alone is not a sufficient ground to declare a mistrial. *United States v. See*, 505 F.2d 845, 851 (9th Cir. 1974). The court should also consider “the length of the trial and complexity of the issues, the length of time the jury has deliberated, whether the defendant has objected to a mistrial, and the effects of exhaustion or coercion on the jury.” *United States v. Hernandez Guardado*, 228 F.3d 1017, 1029 (9th Cir. 2000). The court may then consider giving the jury an *Allen* charge. *See* Section 5.5.

Before declaring a mistrial and discharging a jury, the court should provide the parties an opportunity to “comment on the propriety of the order, to state whether that party consents or

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objects, and to suggest alternatives.” Fed. R. Crim. P. 26.3. After the court takes the above steps, the court’s decision to declare a mistrial and discharge the jury is afforded great deference. *Hernandez Guardado*, 228 F.3d at 1029.

If there is no manifest necessity for the district court to declare the mistrial, the Double Jeopardy Clause bars retrial of that offense, but only the offense on which the district court improperly declared a mistrial. *See United States v. Carothers*, 630 F.3d 959, 964 (9th Cir. 2011) (permitting retrial on greater offense on which jury was hopelessly deadlocked and prohibiting retrial on lesser included offense on which district court refused to receive jury’s verdict).

Juror misconduct may also result in a mistrial if it amounts to a deprivation of the defendant’s right to a fair trial. *See* Section 5.8.

In civil jury trials, certain juror misconduct or jury tampering may result in a mistrial. *See, e.g., Rinker v. Napa Cnty.*, 724 F.2d 1352 (9th Cir. 1983) (reversing verdict due to cumulative, prejudicial effect of plaintiff’s ex parte contact with juror and jury’s decision not to inform the trial court); *Dietz*, 579 U.S. at 48 49 (noting various forms of juror taint that can support a challenge to the verdict). However, if the court dismisses the offending juror (or excuses a juror due to illness), mistrial need not be declared so long as at least six remaining jurors are able to return a verdict.

5.15 Discharging the Jury

After the verdict has been returned, ask the parties if there is any objection to discharging the jury or any objection to the entry of the verdict form into the record. In an appropriate case, consider whether to offer government-provided counselling to the jurors. *See also* Section 5.9 (Polling the Jury) and Section 6.5 (Post-Verdict Counselling of Jurors).

Chapter Six: Post-Verdict Issues

This chapter discusses issues relating to post-verdict interviews of jurors by the court without attorneys, by attorneys (with or without a judge present), and by the news media. It also discusses post-verdict evidentiary hearings regarding extraneous information that may have affected the verdict and may support a motion for new trial. In addition, the chapter addresses motions for a new trial premised on false answers given during jury selection. The chapter also provides information about the availability of post-verdict counseling for jurors in cases that may cause serious psychological trauma to one or more jurors. Finally, the chapter concludes with brief comments regarding certificates of appreciation and post-trial jury service questionnaires (or surveys) that can be given to jurors upon the completion of their service. This chapter does not discuss post-verdict motions for judgment of acquittal in criminal cases, renewed motions for judgment as a matter of law in civil cases, or motions for a new trial in criminal or civil cases except as expressly noted.

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6.1 Post-Verdict Interviews of Jurors by Judge (Without Attorneys)

After receiving the verdict or discharging the jury, some judges meet with jurors in civil and criminal cases without the presence of counsel for the parties. Depending on the circumstances of the case or the personal practice of the judge, conferences between the court and jurors can be a valuable resource, both in expanding the judiciary's understanding of juror attitudes and needs and in addressing juror concerns. In addition, jurors generally appreciate being thanked for their service, both in open court and afterwards. Judges, however, should exercise caution.

Communication between the court and jurors without the presence of counsel for the parties may occur only after the verdict has been received or the jury has been discharged. Although a judge may express appreciation to the jurors for their service, a judge should refrain from stating approval or disapproval of the verdict. The court also should not initiate discussion of matters that could be implicated in post-trial motions, such as the merits of the case, facts, or evidence on which the jury deliberated. Conferences should, in general, be viewed by the court as an opportunity for jurors to express their concerns and offer their constructive suggestions in the areas of jury care, comfort, and comprehension.

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

Now that the case has been concluded, some of you may have questions about the confidentiality of the proceedings. Some jurors ask if they are now at liberty to discuss the case with anyone. Because the case is over, you are free to discuss it with anyone you choose. By the same token, however, I would advise you that you are under no obligation to discuss

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this case with anyone. If you do decide to discuss the case with someone, I would suggest you treat it with a degree of solemnity in that whatever you decide to say, you would be willing to say in the presence of the other jurors or under oath here in open court in the presence of all the parties. Also, if you do decide to discuss this case, you should keep in mind that the other jurors stated their opinions during deliberations with the understanding they were being expressed in confidence. Please respect the privacy of the views of the other jurors.

6.2 Post-Verdict Interviews of Jurors by Attorneys or News Media

Judges (and some local court rules) typically prohibit attorneys from conducting post-trial interviews with jurors, especially about the jury's internal deliberations or how the jury arrived at a verdict. As the Ninth Circuit has explained:

We have long imposed restrictions on lawyers seeking access to jurors. These rules derive their authority from the common law, where judges placed the veil of secrecy about jury deliberations. Rules restricting lawyers' access to jurors: (1) encourage freedom of discussion in the jury room; (2) reduce the number of meritless post-trial motions; (3) increase the finality of verdicts; and (4) further Federal Rule of Evidence 606(b) by protecting jurors from harassment and the jury system from post-verdict scrutiny. Indeed, it is incumbent upon the courts to protect jurors from the annoyance and harassment of such conduct, and it is improper and unethical for lawyers to interview jurors to discover what was the course of deliberation of a trial jury. Therefore, in cases where there has been no showing of juror misconduct, we have held that a district court does not abuse its discretion in refusing to allow post-verdict interrogation of jurors. We have also held that a district court's denial of a motion to interrogate jurors does not raise a constitutional problem where there has been no specific claim of jury misconduct.

Mitchell v. United States, 958 F.3d 775, 787 (9th Cir. 2020) (quotation marks, citations, and brackets omitted). A verdict generally cannot be impeached based on a jury's deliberations or the how the jury reached its verdict.

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Some judges, usually with the parties' consent, invite the jurors to remain in or return to the courtroom after the verdict has been received to discuss with the counsel any issues that the judge allows to be discussed. And many jurors appreciate the opportunity to do this. Typically, the judge will remain in the courtroom to moderate and supervise the discussion. Learning from jurors in this way can help lawyers improve their trial skills and, when permitted by the judge, allows the parties to understand what the jury considered most important or persuasive. A judge also may allow counsel to ask the jurors questions, which any juror may decline to answer. A judge also may allow jurors to ask questions of the lawyers, which any lawyer similarly may decline to answer.

Regarding post-verdict interviews of jurors by news media, the court should avoid placing direct restraints on news media. News gathering is an activity protected by the First Amendment. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). There is a heavy presumption against the constitutional validity of any restraint imposed on the media's ability to gather information. *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978).

6.3 Post-Verdict Hearings Regarding Extraneous Information

“A defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is ‘a reasonable possibility that the extrinsic material could have affected the verdict.’” *United States v. Prime*, 431 F.3d 1147, 1157 (9th Cir. 2005) (quoting *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988) (emphasis in original)). The same standard applies in civil and criminal cases. *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir. 2000). Moreover, the inquiry is objective; the court “need not ascertain whether the extraneous information actually influenced any specific juror.” *United States v. Montes*, 628 F.3d 1183, 1187 (9th Cir. 2011) (quoting *United States v. Keating*, 147 F.3d 895, 901-02 (9th Cir. 1998)).

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

Evidence that is “part of the trial” and that does not “enter the jury room through an external, prohibited route” is not extraneous. *United States v. Bussell*, 414 F.3d 1048, 1054 (9th Cir. 2005) (holding that speculation by deliberating jurors about whether defendant’s husband, who had been a codefendant, had pleaded guilty, when in fact the husband had died while jury was deliberating, was not extraneous evidence

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because alleged source of speculation—a supplemental jury instruction stating that the codefendant’s case had “been disposed of”—was part of the trial).

Some factors to be considered by a court in determining whether extraneous evidence could have affected the verdict are:

1. whether the extrinsic information was actually received, and if so, how;
2. the length of time the information was available to the jury;
3. the extent to which the jury discussed and considered it;
4. whether the extrinsic information was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and
5. any other factors that may bear on the issue of the reasonable possibility that the introduction of extrinsic material substantially and injuriously affected the verdict.

Cook v. LaMarque, 593 F.3d 810, 827 (9th Cir. 2010).

When deciding the significance of extrinsic evidence, the court may consider the following:

1. whether the prejudicial statement was ambiguously phrased;
2. whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial;

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3. whether a curative instruction was given or some other step taken to ameliorate the prejudice;
4. the trial context; and
5. whether the statement was insufficiently prejudicial given the issues and evidence in the case.

Id. (quoting *Sassounian v. Roe*, 230 F.3d 1097, 1109 (9th Cir. 2000)).

The introduction of extrinsic information assumes particular importance in criminal cases. When jurors learn of extrinsic facts regarding the defendant or the alleged crime, whether from another juror or otherwise, the speaker “becomes an unsworn witness within the meaning of the Confrontation Clause” of the Sixth Amendment. *See Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) (en banc), *overruled on other grounds by Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012); *see also Estrada v. Scribner*, 512 F.3d 1227, 1238 (9th Cir. 2008). After it has been established that extraneous information reached one or more jurors, the party opposing a new trial generally has the burden of demonstrating the absence of prejudice. *United States v. Rosenthal*, 454 F.3d 943, 949 (9th Cir. 2006).

In criminal cases, allegations of jury tampering are treated very differently from “prosaic kinds of jury misconduct.” *United States v. Dutkel*, 192 F.3d 893, 894-95 (9th Cir. 1999). “Jury tampering” is normally understood to refer to “an effort to influence the jury’s verdict by threatening or offering inducements to one or more of the jurors.” *Id.* at 895. Jury tampering, however, may occur in other ways. *United States v. Rutherford*, 371 F.3d 634, 642 n.6 (9th Cir. 2004).

Jury tampering creates a presumption of prejudice. *United States v. Stinson*, 647 F.3d 1196, 1216 (9th Cir. 2011).

The government carries the heavy burden of rebutting that presumption by establishing that the contact with the juror was harmless to the defendant. *United States v. Henley*, 238 F.3d 1111, 1115 (9th Cir. 2001) (citing *Remmer v. United States*, 347 U.S. 227 (1954), and 350 U.S. 377 (1956)). A defendant must make a prima facie showing of prejudice by establishing that “the intrusion had an adverse effect on the deliberations.” *Rutherford*, 371 F.3d at 642. An “adverse effect” may be found when “the intervention interfered with the jury’s deliberations by distracting one or more of the jurors, or by introducing some other extraneous factor into the deliberative process.” *Id.* at 642 (quoting *Dutkel*, 192 F.3d at 897); *see also Henley*, 238 F.3d at 1116 n.8 (examples of less serious intrusions of extraneous information, to which lesser standard may apply).

The court must consider whether to conduct an evidentiary hearing before ruling on a motion for new trial based on allegations of juror misconduct or the imparting of extraneous information. *See Montes*, 628 F.3d at 1187. An evidentiary hearing, however, is not required every time there is an allegation of juror misconduct or bias. *Id.* The court must consider “the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source.” *Id.* at 1187-88 (quoting *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993)). An evidentiary hearing is not necessary if the court knows the exact scope and nature of the extraneous information, *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001), or if it is clear that the alleged misconduct or bias could not have affected the verdict, or the allegations are not credible. *United States v. Brande*, 329 F.3d 1173, 1176 (9th Cir. 2003) (citing *Angulo*, 4 F.3d at 848 n.7); *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991). An evidentiary hearing must be held if a new trial is sought based on alleged jury tampering. *See Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir. 2003).

Rule 606(b) of the Federal Rules of Evidence governs the scope of a juror's testimony upon an inquiry into the validity of a verdict or indictment. A juror may not testify about how the jurors reached their conclusions. *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1140 (9th Cir. 1999) (juror's statements to press regarding impact of evidence did not warrant new trial). Rule 606(b) permits a juror to testify regarding extraneous prejudicial information improperly brought to the jury's attention. It is essential, however, to distinguish between testimony regarding the fact that extrinsic information was brought to the jury's attention (e.g., the substance of the communication, who knew about it and when, and the extent it was discussed) versus the subjective effect of that extraneous information upon the mental processes of a particular juror in reaching a verdict (e.g., "I changed my vote because of that new information"). Testimony regarding the former is permissible. *See Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983); *Henley*, 238 F.3d at 1118; *Sassounian*, 230 F.3d at 1108-09. Thus, a juror may testify that the juror conducted an independent investigation or observed a matter and may reveal the substance of what the juror communicated to fellow jurors concerning that investigation or matter. *See Rhoden v. Rowland*, 10 F.3d 1457, 1459-60 (9th Cir. 1993) (jurors could be asked whether they saw defendant shackled during trial and whether they discussed it with other jurors).

It is less clear that a juror may be questioned about the subjective impact of that information on jurors' deliberations. Although the Ninth Circuit held in *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981), that questioning about the subjective impact was impermissible and that such information could not be considered by a trial court, it later "weakened the precedential value" of that holding. *See United States v. Mills*, 280 F.3d 915, 922 (9th Cir. 2002) (noting that jurors' opinions that extrinsic evidence had not been harmful were not controlling and that other circuits allowed a trial

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judge to interview jurors to determine effect of extrinsic evidence). Testimony regarding a juror's "general fear and anxiety following . . . [a tampering] incident" is admissible to determine whether there is a reasonable possibility that the extraneous contact affected the verdict. *United States v. Rutherford*, 371 F.3d 634, 644-45 (9th Cir. 2004).

In addition, the Supreme Court has held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 225 (2017) (emphasis added). The Court added, however:

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Id. at 225-26. Finally, under Rule 606(b), jurors may not testify about other jurors' use of alcohol or drugs during trial. *Tanner v. United States*, 483 U.S. 107, 125 (1987).

6.4 New Trial Motions Based on False Voir Dire Answers

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

6.5 Post-Verdict Counseling of Jurors

Some trials may involve issues or evidence that are psychologically difficult for jurors to see, hear, or consider. In some criminal cases, evidence showing production, distribution, or possession of child pornography may require the jury to see or hear evidence that is emotionally disturbing. Also, civil cases involving sexual, racial, ethnic, or religious discrimination or harassment may present similar circumstances.

The *Guide to Judiciary Policy* discusses how counseling services for petit jurors (and court staff) can be made available. See *Guide to Judiciary Policy*, Vol. 4, § 350.60 (Counseling and Emergency Services for Jurors). In general, courts may provide counseling services to petit jurors through the Employee Assistance Program (EAP) during jurors' terms of service. Also, petit jurors may receive EAP counseling services at the end of their term of service, but courts must authorize the provision of such services before jurors have been dismissed. Therefore, when EAP counseling services are to be provided to petit jurors at the end of their term of service, an order must be entered before their dismissal that extends the term of service "for administrative purposes" for a period sufficient to allow individual jurors to obtain counseling. *Id.* at § 350.60.10.

Typically, EAP services are provided by Federal Occupational Health, a component of the U. S. Public Health Service, through an interagency agreement. A court may contact the Administrative Office's Court Services Office if there is a need for EAP services for jurors, and the court will be put in contact with EAP so that appropriate service arrangements can be made locally. *Id.* at § 350.60.20.

6.6 Certificates of Appreciation for Juror Service

Chambers or the Clerk's Office can prepare certificates of appreciation that are suitable to present to jurors after they have completed their service. These certificates can show the seal of the court, identify the name of the case, the dates of jury service, and the name of the individual juror to whom a certificate is presented. Many jurors take pride in their public service, and a certificate of appreciation is an easy and inexpensive way that the court can express its appreciation to a juror. Other judges send letters to jurors thanking them for their service.

6.7 Post-Trial Jury Service Questionnaires

After the jury has rendered its verdict (and either before or after it has been discharged), the courtroom deputy or bailiff can distribute to each juror a written Post-Trial Jury Service Questionnaire. Jurors might want to complete this questionnaire while waiting for the lawyers to return to the courtroom to receive the verdict. Alternatively, jurors can be invited to complete the questionnaire after they have been discharged but before they leave the courthouse. The jurors should complete these questionnaires anonymously.

By reviewing the responses to these questionnaires, the court can learn much about how well jurors value their jury service, how they felt the court valued their time, how clear were the jury instructions, and other ways in which the court can improve the experience for jurors and the trial process overall. (This includes issues relating to parking and transportation, security protocols, availability of water, coffee, and bathrooms, and whether breaks times are too long or too short). In addition, because the answers are anonymous, the court might consider showing the responses to the lawyers in a case after the verdict becomes final.

Some questions that might be asked of jurors on this Post-Trial Jury Service Questionnaire are:

1. After having served as a juror in this case, what is your overall impression of jury duty?
2. How does your present attitude differ from your original conception of jury duty, if at all?
3. How effective was the scheduling of your time during the trial (e.g., length and timing of breaks, lunch? starting on time, etc.)?

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4. Did you observe anything about the operation of the jury system that we could improve to make your understanding clearer, either generally or about a particular issue?
5. What is your overall impression of the attorneys in this trial (e.g., preparedness, clarity of opening statements, direct examinations, cross-examinations, closing arguments, manner, appearance, conduct, etc.)?
6. What is your overall impression of the judge's jury selection process, the management of the trial, and instructing the jury?
7. Was there anything about this trial experience that impressed you especially, either favorably or unfavorably? Who? What? Why?
8. Please use the following space to add any comments regarding your jury service that would help us better serve the needs of future jurors.

Chapter Seven: Civil Trials With Pro Se Litigants

This chapter concerns issues relating to civil trials involving unrepresented persons as parties, i.e., pro se litigants. For criminal cases in which the defendant chooses self-representation, see Section 1.1.1.

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7.1 Generally

A large portion of the federal court civil docket is made up of pro se litigants. These include both prison inmate (§ 1983) and civilian civil litigants. Many courts try to provide pro bono counsel in civil cases through a program of volunteers, sometimes waiting until a case is nearing trial (i.e., after the court has denied a motion for summary judgment) before seeking pro bono counsel. Volunteers, however, are not always available or willing to take on some cases, and there are instances in which the pro se party rejects pro bono counsel. The lack of counsel presents issues for the trial court not regularly encountered when parties are represented.

Courts preliminarily screen civil complaints brought by self-represented litigants proceeding in forma pauperis to determine whether they state cognizable claims. 28 U.S.C. § 1915(e)(2); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (section 1915(e)(2) applies to all in forma pauperis complaints). A district court liberally construes the filings of a self-represented plaintiff and affords the plaintiff the benefit of any reasonable doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Cases should be decided on the merits whenever possible, and self-represented litigants are not necessarily held to the same technical standards as represented parties. *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010).

Courts, however, hold self-represented litigants to the same standards of conduct as attorneys, and they are not exempt from the Federal Rules of Civil Procedure or from Local Rules. A self-represented plaintiff does not lose the right to a jury trial by failing to file pre-trial documents, such as jury instructions. *Solis v. Cnty. of Los Angeles*, 514 F.3d 946, 955 (9th Cir. 2008). Self-represented litigants are not entitled to attorney's fees in civil rights actions. *Gonzalez v. Kangas*, 814 F.2d 1411, 1411-12 (9th Cir. 1987).

7.1.1 A Statutory and Personal Right

“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel” 28 U.S.C. § 1654. “[T]hat right is personal . . . , and absent some other statutory authorization, [the pro se litigant] has no authority to prosecute an action in federal court on behalf of others than himself.” *Stoner v. Santa Clara Cnty. Off. of Educ.*, 502 F.3d 1116, 1126 (9th Cir. 2007) (citing *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir. 1987)).

7.1.2 No Right to Court-Appointed Counsel

Unlike in criminal cases, “there is no constitutional right to counsel in a civil case.” *Adir Int’l, LLC v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1038-39 (9th Cir. 2021) (internal quotation marks omitted). “Unlike in criminal cases that implicate the Sixth Amendment right to counsel, civil litigants who cannot afford counsel are not constitutionally guaranteed the appointment of a lawyer.” *Id.* at 1039.

Section 1915(e)(1) of Title 28, however, permits a court to “request an attorney to represent any person unable to afford counsel.” This provision gives district courts discretion to designate counsel to represent an indigent civil litigant. *See Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Counsel may be designated only in “exceptional circumstances,” which requires an evaluation of “the likelihood of success on the merits [and] the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved.” *Id.*

7.2 Application and Discretion to Depart from Rules

7.2.1 Pro Se Litigants Are Subject to the Same Rules

“[J]udges have no obligation to act as counsel or paralegal to pro se litigants” because requiring trial judges to explain the details of federal procedure or act as the unrepresented party’s counsel “would undermine district judges’ role as impartial decisionmakers.” *Pliler v. Ford*, 542 U.S. 225, 226-27 (2004).

Although it is true that the law generally relieves pro se litigants “from the strict application of procedural rules and demands that courts not hold missing or inaccurate legal terminology or muddled draftsmanship against them,” *Blaisdell v. Frappiea*, 729 F.3d 1237, 1241 (9th Cir. 2013) (citation omitted), courts are not obligated to advocate for or assist a pro se litigant through the trial thicket.

7.2.2 Court’s Discretion to Weigh Substance Over Procedure

Allegations asserted by pro se litigants, “however inartfully pleaded,” are held “to less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 519-20 (1972); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (“A document filed pro se is to be liberally construed” (citation and internal quotation marks omitted)). However, pro se status does not excuse a plaintiff from complying with the requirement that they allege facts, not mere conclusions. *See Brazil v. U.S. Dep’t. of Navy*, 66 F.3d 193, 199 (9th Cir. 1995).

The court has a “duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th

Cir. 1990); *see also Waters v. Young*, 100 F.3d 1437, 1441 (9th Cir. 1996); *United States v. Ten Thousand Dollars (\$10,000.00) in U.S. Currency*, 860 F.2d 1511, 1513 (9th Cir. 1988) (“We have consistently held in this circuit that courts should liberally construe the pleadings and efforts of pro se litigants, particularly ‘where highly technical requirements are involved.’” (quoting *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984))); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003).

“District courts ‘have broad discretion in interpreting and applying their local rules.’” *Delange v. Dutra Constr. Co., Inc.*, 183 F.3d 916, 919 (9th Cir. 1999) (quoting *Miranda v. S. Pac. Transp.*, 710 F.2d 516, 521 (9th Cir. 1983)). Indeed, a district judge has broad discretion to depart from local rules, including the service requirements, “where it makes sense to do so and substantial rights are not at stake.” *Pro. Programs Grp. v. Dep’t of Com.*, 29 F.3d 1349, 1353 (9th Cir. 1994). When the pro se litigant is also an attorney, however, they should not be afforded special consideration or be treated as proceeding without counsel under the rules. *Huffman v. Lindgren*, 81 F.4th 1016, 1020-21 (9th Cir. 2023) (citing the uniform view on the issue by other circuit courts).

7.3 Case Management and Pretrial Conference

This Manual discusses case management and pretrial conferences at Sections 1.1.13 (criminal trials) and 1.2.11 (civil trials). These conferences are opportune times to educate the pro se litigant on the court's expectations for the conduct of the case and to answer questions. During a pretrial conference, the court should address in detail how an unrepresented party will give testimony, conduct voir dire, handle exhibits, and submit jury instructions, verdict forms, motions in limine, and witness subpoenas.

7.4 Compelling Witnesses

Under 28 U.S.C. § 1915, a person proceeding in forma pauperis (“IFP”) may obtain service of process through the U.S. Marshals Service. Persons granted IFP status (which is typical in a pro se case) will have the filing fee and service of process fees for the summons and complaint waived by the court. For self-represented prisoners, however, the statute only permits the waiver of prepayment of the filing fee. *See* 28 U.S.C. § 1915(b)(1). The statute also provides that “[t]he officers of the court shall issue and serve all process,” which includes subpoenas. *See* 28 U.S.C. §1915(d).

In addition, court review of a pro se party’s witness list to identify service issues, relevance, or cumulativeness will promote an orderly and fair trial. This should be a topic discussed at the Final Pretrial Conference.

7.5 Inmate, Law Enforcement, and Correctional Staff Witnesses

7.5.1 Other Inmates

Pro se plaintiffs will often ask that “other inmate” witnesses be compelled to attend and testify at trial through court-ordered subpoena or writ. Experience has demonstrated that some inmate witnesses do not wish to testify, pose security concerns for transport and local housing (such that remote testimony should be considered), or do not have relevant evidence to offer. This is a topic to discuss at the Final Pretrial Conference. The court may consider requiring the plaintiff to move to compel and declare:

1. That the prospective witness is willing to attend; and
2. That the prospective witness has actual knowledge of relevant facts.

This can be done by a declaration, signed under penalty of perjury by the prospective witness.

If a plaintiff seeks to obtain the attendance of an incarcerated witness who refuses to testify voluntarily, the plaintiff should submit a motion for the attendance of a witness. Such motion should be in the form described above. In addition, the party must indicate in the motion that the incarcerated witness is not willing to testify voluntarily.

7.5.2 Law Enforcement and Correctional Staff Testimony

Pro se plaintiffs will often want to compel correctional officers or prison staff (e.g., doctors, nurses)—all in the control of the defendant—to testify. Although subpoenas are an option,

they are impractical and cumbersome. Using a process similar to the inmate witness (Section 7.5.1), requiring the plaintiff to move to compel the issuance of process or directing the defendant to produce employee witnesses under their control can help resolve this issue and fairly address the pro se party's interest in putting on their case.

The pro se party's motion can be required to proffer that the prospective witness has actual knowledge of relevant facts based on reports and records, presence at relevant times, statements/testimony of others, or some other manner. This will prevent the needless summoning of a person with no relevant evidence or any effort to harass the opponent.

7.6 Jury Selection

7.6.1 Generally

Under Federal Rule of Civil Procedure 47, “the court may permit the parties or attorneys to examine prospective jurors or may itself do so.” Where the court does the examination, it must permit the parties or their attorneys to “make further inquiry [the court] considers proper.” *Id.*

Court-led voir dire is an advantage in limiting the uninitiated pro se party from engaging the venire at length and potentially stepping outside the normal bounds of appropriate inquiry. Time limits should also be considered as they are generally common in federal cases.

Parties should be encouraged to submit proposed voir dire questions to the court before trial to ensure that legitimate concerns are addressed.

Some consideration should be given to examining the venire on the fact of the pro se party’s self-represented status. Can the jury be fair and impartial? The party has a right to self represent, and the court should inquire whether the party’s exercise of that right will impact the jury’s ability to be fair and impartial in hearing and deciding the case.

7.6.2 Pro se Civil Rights Cases

Many pro se civil trials involve allegations against law enforcement for civil rights violations. Screening the jury for bias or prejudice about these facts is important. The court should consider inquiring of prospective jurors for potential bias or prejudice for or against persons with criminal convictions, law enforcement experience, and family members with criminal convictions or law enforcement experience.

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In addition, if the plaintiff is currently in custody, the plaintiff might not be physically present in the courtroom but instead may be testifying by video and observing the proceedings remotely. A court might consider inquiring about whether these circumstances might affect a prospective juror's impartial consideration of the case.

7.7 Direct Examination of the Pro se Litigant

Judges have substantial latitude in controlling the mode and order of examining witnesses and presenting evidence. Fed. R. Evid. 611. Most courts require the pro se party to testify using a question-and-answer format to avoid narrative testimony. *See United States v. Nivica*, 887 F.2d 1110, 1120 (1st Cir. 1989). In *Nivica*, the court told the pro se party that the party would have to both ask questions and then provide the answer. *Id.* Using this format, the court avoids allowing a narrative that invites a broad and unspecific set of responses. The question and answer format also allows the opponent an opportunity to object to improper testimony before it is given before the trier of fact.

Ordering the pro se party to draft their questions in advance and confirm their compliance at the outset of trial will ensure an orderly, effective, and efficient process.

A court may allow a narrative, of course, but should consider providing some structure or lead in the form of categories. For example, “you are claiming to have been the victim of excessive force. Tell us what happened at that time.” Or, “you are claiming you suffered injury due to the actions of the defendants, please describe those injuries.” Or, “tell us what items of financial loss you have experienced due to defendant’s conduct.” In this way, the narration has an implied limit as to scope and a focus on the issues at hand.

Another consideration for the court is where the inmate pro se party sits to deliver their testimony. Although a pro se civilian can easily take the stand as any other witness, the inmate pro se party is often restrained with leg shackles or in some other manner. Allowing the inmate pro se party to testify from counsel table allows some dignity whereas shuffling from counsel table to the witness stand in chains does not.

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The other alternative is, of course, to have the witness take the stand while the jury is on a break and then break again to allow the party to return to counsel table, minimizing the image connotated by the shackles.

7.8 Handling Evidence, Sidebars, and Matters of Law

7.8.1 Evidence

Inmate pro se parties will have limited mobility in the courtroom. Directing the pro se party to create a witness binder of exhibits expedites the presentation of evidence. In fairness, the opposing party should be required to do the same. Using Federal Rule of Evidence 104, a court can pre-admit evidence, which will also save time.

7.8.2 Sidebars and Matters of Law

Many judges avoid sidebars and prefer to deal with evidentiary matters before and after court, at breaks, or during the noon recess. This is particularly important with the inmate party whose movement is typically limited. Use of a pre-trial exhibit review (Fed. R. Evid. 104) also removes much of the need for any side-bars. Motions for Judgment as a Matter of Law can similarly be dealt with when the jury is on a break.

Chapter Eight: High Profile Cases

The high profile case comes in all shapes and sizes. It can be a on a hot-button political topic that arrives with a TRO, or a local issue that has gained significant public attention. It can be a RICO criminal matter involving well known gangs and murders, public corruption, gaming, national security, celebrities, or whatever catches the fancy of the internet. It can slam into chambers needing immediate attention or conclude with a months-long trial. Or both. This chapter addresses the complexities that high profile cases provide.

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8.1 Before the Case Is Filed

High profile cases offer a stress test on all of the practices that you have adopted in your court and that this book has discussed in the preceding chapters. Before the whirlwind hits, it is important that your procedures are publicly available to help lawyers and the public understand, generally, how you expect a case to proceed.

Depending on the case, security may be a significant concern for you, chambers staff, and family members. If you have not already done so, familiarize yourself and chambers staff with the various safety protocols adopted by your courthouse in case of an incident in your courtroom or a need to evacuate the building. Take advantage of the security measures that will reduce or eliminate the presence of your contact information on the internet or social media, and advise your family accordingly. Ask the U.S. Marshal to inspect your home to consider security upgrades. Discuss with chambers staff and family the appropriate responses when someone attempts to communicate with them about matters of public importance or cases before you.

Public access to the court and dissemination of accurate information about the case will matter. Your district may have a public information officer to communicate with the media or another method to do so; learn about those relationships so that you can develop a media plan when the case begins.

8.2 After the Case Is Filed

8.2.1 Call A Colleague

You will not be the first person to have a high profile case like yours. Reach out to colleagues who have had one recently, in your district or anywhere else, to get their advice on how to handle the variety of matters that arise. Although this chapter will identify a number of issues to think about, there is no substitute for the experience of your colleagues. Even if you don't know them, they will be happy to help. Although every case is different, and every district is different, it is an enormous benefit to bounce ideas and concerns off someone who has addressed something similar.

8.2.2 Call the U.S. Marshal

Call the U.S. Marshal in your district, let that person know what the case is about, and raise any concerns that come to mind. High profile cases, particularly those that involve hot-button political or cultural issues, can bring lots of nasty email, phone calls and internet threats. The Marshal will be able to advise you on particular security strategies and concerns. Hopefully, you will have already taken advantage in advance of the internet-scrubbing of your home contact information and other identifiers and have a suitable home protection system. You will already know the security protocol if there is a problem in your courtroom. Review all of this with chambers staff to address their questions and concerns and remind them of security precautions as appropriate.

8.2.3 Call the Clerk

The Clerk's Office is likely to bear the brunt of the public interest in your case. Call the Clerk of the Court to discuss the impact the case may have on the Clerk's Office. The Clerk's

Office may receive angry phone calls or deal with members of the public who demand to speak to you. It will also need to arrange appropriate access for the press and public to hearings. In all likelihood, it will have dealt with other high-profile cases, so listen to the Clerk's advice.

8.2.4 Develop a Media Access Plan

Assume that the media will want access to everything about the case. You will want to update your research on the media's First Amendment rights to obtain access to sealed material for when the inevitable request arrives.

With luck, your District will have a public information officer or media point person who will be able to address media questions about the case and concerns about access. It is helpful to have a web page on the court's website that can disseminate relevant information about the timing of hearings and progress of the case.

The media may have substantive questions about developments. Some judges speak directly to the press, off the record, to steer coverage in an accurate direction. If you do this, ensure that the media representative is reliable before such an interview. Other judges prefer to have the district's public information officer be the conduit for any substantive responses.

Your plan should also consider: Do you need an overflow courtroom? Will there be assigned seats for the media? Defendant's family? Victims? If a hearing is conducted by Zoom, do you have a large enough Zoom license to accommodate a substantial number of viewers?

8.2.5 Make a Case Management Plan

Take a breath and think about the litigation before you. Consider all the steps it will take to resolve the case and how you want to manage it (motions, discovery, case management conferences, settlement approaches, trial calendar). Continually revise that plan as new information presents itself.

Also, think about the impact of the case on all of the other cases on your docket. Do you need to adjust the workload of your clerks based on the demands of the case? Is it possible to hire an emergency clerk to bear some of the load? Will you need to adjust your law and motion calendars to give each matter the attention it deserves?

8.3 Pretrial Case Management

In high profile cases, it is important to provide procedural justice so that everyone in the courtroom knows the rules, your expectations, and, to the extent possible, feels that they have been respected and heard. Let the parties and lawyers know if you have made plans for this case that differ from the way you handle a typical case. Tell them what you expect: that the case will not be tried in the media; that the parties will be courteous to each other and the court; that they will accommodate their adversaries to the extent consistent with their client's interests; and that the case will proceed efficiently to trial on the schedule that you set after consulting with the lawyers. You must lead by example. Hold frequent (monthly or bi-monthly) status or case management conferences to reinforce those expectations and to address any disputes quickly, hopefully before they need to be briefed.

Ensure that your order setting the Pre-trial Conference is comprehensive and fit for the case. Set expectations for motions in limine and briefing of other issues. Get proposed jury instructions before the conference and ask which ones should be settled before trial. At the conference, describe your expectations for lawyer conduct during jury selection and trial, from where to stand to how to make objections. Explain how you will protect the privacy of jurors (see section 8.4 below). Settle the content of a jury questionnaire and describe how voir dire will be conducted.

In civil cases, keep ADR in mind. Sometimes the most intractable case can be resolved with the help of a trusted third party. Figure out who that person might be and require the parties to engage with each other if there's any hope of resolution. If you typically set time limits in civil cases, prepare to be more generous than usual to ensure that the parties have ample time to present their theories of the case.

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In criminal cases, greet defendants by name when the case is called. Do not reject out of hand the position of their lawyers without allowing a reasonable amount of time to argue motions. In complex criminal cases, use your case management power to require disclosure of “other acts” and Jencks material well in advance of trial so that it can proceed without an extended break caused by the defendants’ need to consider how to respond to the “new” evidence.

8.4 Jury Concerns

In a high-profile matter, the media and partisans will dig up whatever clues they have to the identity of jurors and may make inappropriate contact during jury selection and trial. You need a plan to protect the jurors.

Start with voir dire. Among the matters you should consider in advance are: Will you use a questionnaire, which will be helpful in uncovering pertinent attitudes and biases before in person questioning? If so, will you send it to jurors in advance or require them to come to the jury room to fill it out, which will give you the opportunity to explain what the case is about, what their obligations are with respect to not discussing or researching the case, and the extent to which you will be able to keep their responses (such as personal identification information) confidential? Will you require the lawyers in a murder or other serious criminal matter not to disclose the identity of the jurors to their clients? Will you restrict the lawyers in any way in researching jurors through social media? Will you refer to juror names during voir dire or just to their juror number? Will you conduct some of voir dire individually in chambers or your jury room because of the potential sensitivity of the answers? Will you allow lawyers to ask questions or conduct voir dire solely yourself given the sensitivity of the subject matter? Will you need to sequester the jury? If so, what will the arrangements be?

When trial starts, you should consider: How will jurors access the courthouse and get to your jury room? How will they leave at the end of the day or end of the trial? Will they use public elevators to get to the cafeteria on the lunch break? Is their obligation clear to alert you if anyone tries to communicate with them?

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Jurors all have cell phones, and many may receive “alerts” from news outlets for “breaking news.” Events in your high profile case may qualify as breaking news, or events outside of court that you don’t want the jurors to know about may occur. Consider whether to direct jurors to delete any apps that send them such alerts until a verdict has been entered.

Keep jurors updated to the extent possible about the length of the trial. If the evidence is grizzly (as in gang cases involving murders, for example), consider foreshadowing the evidence during jury selection. Adopt a trial schedule that allows jurors time away from the courtroom (for example, 8:30 a.m. to 1:30 p.m., four days or five days a week).

When trial concludes, tell the jury that the lawyers and media may attempt to contact them and that they have no obligation to discuss the trial or deliberations unless they want to. If they choose to speak to anyone, advise them to respect the privacy interests of their fellow jurors.

8.5 Trial

The evidence in high profile cases is often fraught and emotions run high. Plan to meet with trial counsel every morning for 30 minutes before starting trial to address concerns and objections, witness order and other problems. Insist on cooperation. Require notice of witnesses at least a day in advance. In criminal cases, exhort the parties to move the case along. In civil matters, do the same if you haven't imposed time limits. But recognize the stress that the lawyers are under and accommodate them to the extent consistent with your goal of doing justice in an efficient manner.

Avoid bench conferences when the jury is present. Deal with unavoidable issues that were not handled in the morning conference at a break or the end of the day. Schedule motions so that they do not interfere with the trial day.

Make sure your record is complete. If you ruled on a matter without fully explaining your reasoning, take the opportunity to do so at a later break or (reported) morning conference.

Before a cooperator or high-profile witness will testify, coordinate with the Marshal on the proposed strategy and logistics needed to keep that witness safe.

The media may ask for access to admitted exhibits. One solution may be for the clerk to download admitted exhibits on a thumb drive at the end of the trial day that the clerk will use for the record. This can be provided to the court's public information officer to be uploaded to the public docket.

Sometimes, however, it may be necessary to seal certain exhibits or proceedings. For a discussion of that topic, see Section 3.31.

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Have a Court Security Officer help manage the public in the courtroom, including enforcing prohibitions on recording, photography, filming, and eating. Monitor the overflow courtroom, if you are using one, the same way.

Keep your staff, the court reporter, security officers and marshals happy. Schedule breaks as necessary and divide work to avoid burn out.

Finally, take care of yourself. Get plenty of rest and exercise. Fatigue is inevitable but managing fatigue and stress is possible and important. Stay positive. Retain your sense of humor.

High profile cases offer the public a window into the rule of law and how our system of justice operates. They put all the participants to the test. Careful planning and effective communication with everyone involved will help them, and you, achieve an outcome that best demonstrates the principles of due process and equal justice under the law, and increases confidence in the courts.

8.6 Jury Sequestration

Sequestration has two primary purposes: To avoid tainting of the jury by extraneous information and to prevent others from intentionally tampering with the jurors by means of bribe or threat. A judge may choose to sequester jurors based on several factors:

1. trial publicity,
2. public sentiment,
3. interested parties, and
4. maneuvering and machinations of the lawyers outside the courtroom.

By eliminating distractions, judges also hope that jurors will be more focused on the evidence introduced at trial and the instructions provided by the court.

Because of the large financial expense, as well as the emotional toll it takes on families, courts must weigh the pros and cons of sequestration. Advocates argue that sequestration can intensify the bonding process. Jurors may make emotional connections with each other. They may be open to other perspectives and listen to competing arguments and be more willing to voice their own beliefs. Juror sequestration can also diminish the effect of differences in backgrounds. Tensions based on race, ethnicity, or class may be defused when jurors get to know one another.

The negatives of jury sequestration seem to outweigh the positives in most cases. First, the possibility of sequestration dissuades people from serving. They fear being separated from their families. And things many Americans take for

granted—access to the Internet, television, radio, newspapers, exercise, even snacks and drinks—can be taken away for an indefinite period of time. Problems may develop in the jury room. Cliques may emerge, reducing the jurors' ability to freely discuss issues. Jurors may feel as if their willpower is questioned and resist altering their viewpoint. Or a juror may simply want the trial to end and will bend to the ideas of others.

Other concerns include the likelihood that jurors may develop an affinity toward the court staff or prosecutor, at the expense of the defendant. Because the defendant's case is at issue, jurors may blame the defendant for the discomforts of having their lives taken from them. Jurors may also improperly favor the prosecution because of the continuous interaction with court officers, courtroom staff, and guards. Court officers may pass along their own predispositions, more likely oriented toward conviction.

To preserve the impartiality of jury trials, judges—and attorneys—need to stay aware of the risks posed by social media. Addressing this issue could reduce the need for sequestered juries. This also would reduce costs and likely increase the number of jurors able and willing to serve.

If attorneys and judges work together to develop a plan to address juror's use of social media and outside information, sequestration can be avoided in almost all cases. Sequestration is very costly and takes an emotional toll on jurors and their families as well. Unless the case is highly publicized and extreme measures must be taken to ensure impartiality, sequestration generally should be avoided.

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Appendix I: Sample Order for Final Pretrial Conference (Crim.)

I. General Directions

The parties must electronically file the documents described below using the District Court's CM/ECF system, except where otherwise indicated in this Order. Trial exhibits and witness disability statements may not be electronically filed. Other than copies of the actual trial exhibits, each filed document must be separately and clearly captioned. When documents are required by this Order to be sent to the Court by email attachment, they must be submitted in Word format and transmitted by email to the Courtroom Deputy. Any questions may be directed to the Courtroom Deputy. No late filings of, or supplemental filings to, any of the trial documents listed below will be accepted without good cause shown.

II. Motion to Continue Trial Date

A request to postpone the trial must be made in writing at least two weeks before the trial date. The moving party must state whether the Defendant agrees with or opposes the request and whether opposing counsel agrees with or opposes the request.

III. Trial Documents Due from Each Party 14 Days Before Pretrial Conference

- A. Trial memoranda (all parties).
- B. Motions in limine (all parties).
- C. Requested jury instructions (all parties).

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For any requested Ninth Circuit model instructions, please submit only the model instruction number and not the full text of that instruction. In addition to the CM/ECF-filed requested jury instructions, all parties must email a copy of their case specific requested jury instructions as an attachment in Word format to the Courtroom Deputy.

D. Proposed voir dire questions (all parties).

E. Trial exhibit list (all parties).

Each party must prepare a list of proposed exhibits, in numerical order, using whole numbers with no subparts, and a short identifying description (e.g., “Letter from Smith to Jones, dated Jan. 1, 2011”). The parties must confer in advance to avoid the same document on both Plaintiff’s exhibit list and Defendant’s exhibit list. Plaintiff’s exhibits must be numbered and listed starting with the number “1.” Defendant’s exhibits must be numbered and listed starting with the number “201.” If there are likely to be more than 200 exhibits per party or if there are multiple parties, please contact the Courtroom Deputy well in advance to obtain additional instructions. In addition to filing the exhibit list with the CM/ECF system, the parties must email their exhibit list in Word format to the Courtroom Deputy.

F. Trial Exhibit Notebooks (all parties).

For all trial exhibits for which paper copies can be made, all parties must deliver to the Clerk’s Office, but need not electronically file, a Judge’s paper copy of such trial exhibits, three-hole punched and placed into labeled three-ring binders with numerical side index tabs for each exhibit. At the time that the Judge’s copy of trial exhibits is delivered, counsel must also provide a similarly prepared copy to opposing

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counsel. Original exhibits must be submitted no later than the time of trial. In addition, separate instructions may be sent by the Courtroom Deputy regarding the electronic Jury Evidence Presentation System (“JERS”).

- G. Expert witness list and narrative summaries of any expert testimony (all parties).
- H. Requested verdict form (all parties).
- I. A complete witness list (government only).

IV. Additional Trial Documents Due from Each Party 7 Days Before Trial (or 7 Days Before Pretrial Conference, If A Pretrial Conference Has Been Scheduled)

- A. Any responses or objections to any trial document listed above (all parties).
- B. Statement of witnesses or others with disabilities (all parties).

The parties need not electronically file but must deliver to each other and to the Clerk’s Office a designation of all witnesses, parties, counsel, or others who will be present at trial and who may need accommodation for any disability. Please be specific in your description of the accommodation that may be needed.

IT IS SO ORDERED.

Appendix II: Sample Order for Final Pretrial Conference (Civil)

I. General Directions

The parties must electronically file the documents described below using the District Court's CM/ECF system, except where otherwise indicated in this Order. Trial exhibits, impeachment exhibits, impeachment witness statements, and witness disability statements need not be electronically filed. Other than copies of trial exhibits, each filed document must be separately captioned. When documents are required by this Order to be sent to the Court by email, they must be submitted in Word format and transmitted by email to the Courtroom Deputy. Any questions also may be directed to the Courtroom Deputy. Absent a showing of good cause, no exhibits or testimony will be received in evidence at trial unless presented in accordance with this Order.

II. Documents Due 28 Days (Four Weeks) Before the Pretrial Conference

A. Plaintiff's Trial Exhibit List and Trial Exhibits.

1. Each party must prepare a list of proposed exhibits, in numerical order, with a short identifying description (e.g., "Letter from Smith to Jones, dated Jan. 1, 2011"). The parties must confer in advance to avoid listing the same document on both Plaintiff's exhibit list and Defendant's exhibit list. Plaintiff's exhibits must be numbered and listed starting with the number "1." Defendant's exhibits must be numbered and listed starting with the number "201." If there are likely to be more than 200 exhibits per party or if there are multiple

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parties, please contact the Courtroom Deputy well in advance to obtain additional instructions. In addition to filing the exhibit list with the CM/ECF system, Plaintiff must email its exhibit list in Word format to the Courtroom Deputy.

2. Each trial exhibit must have an exhibit sticker on the first page that lists both the exhibit number and the case number.
3. Trial Exhibit Notebooks
 - a. Judge's Copy and Opposing Counsel Copy. Do not electronically file trial exhibits. Instead, please provide a Judge's paper copy of Plaintiff's trial exhibits (bearing a copy of the exhibit stickers), double-sided and three-hole punched, and placed in labeled three-ring binders with numerical side index tabs for each exhibit. (This set is in addition to the original trial exhibits.) Staples and clips must be removed from the copies of the exhibits that are placed in three-ring binders. Not later than the time when the Judge's paper copy of trial exhibits is delivered to the Court, counsel must provide a similarly prepared copy to opposing counsel.
 - a. Original Trial Exhibits. Not later than the first day of trial, the original trial exhibits must be delivered to the Courtroom Deputy. This set is in addition to the Judge's bench copy. The original trial exhibits must also be inserted in labeled three-ring binders with numerical side index tabs for each exhibit. The original exhibits will be used first by the witnesses and

later by the jury, so counsel is encouraged to bring an additional copy of the trial exhibits for counsel's own use at trial. Thus, counsel will need to prepare at least four exhibit notebooks (an original to be used by the witnesses, a Judge's bench copy, a copy for opposing counsel, and a copy for counsel's own use). In addition, separate instructions may be sent by the Courtroom Deputy regarding the electronic Jury Evidence Presentation System ("JERS").

4. Photographs, charts, and the like must be individually numbered and listed, unless they are part of a unified or common set, in which case they may be given a lead exhibit number, with sequential designations by letter, e.g., Ex. 50a, 50b, etc.
5. Each impeachment exhibit must be listed on a party's exhibit list only as "Impeachment Exhibit." Impeachment exhibits must be marked and delivered only to the Clerk's Office. Plaintiff's and Defendant's impeachment exhibits are due seven (7) days before the pretrial conference. See Section VI(A)(2) below for a discussion of what constitutes an "impeachment" exhibit.
6. Even if exhibits are pre-admitted in evidence at the pretrial conference, an exhibit must be "used" or "referenced" during trial to be submitted to the jury during deliberations.
7. Do not mark an expert witness report as an exhibit.
8. Parties must seek leave of court to file supplemental exhibits after the applicable exhibit deadlines set

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forth in this Order. Any proposed supplemental exhibits must be separately captioned and include a complete amended exhibit list.

B. Plaintiff's Lay Witness List.

1. List the names of all lay witnesses to be called and, for each witness, state: the witness's address and occupation; counsel's estimate of the length of time for direct examination; and a fair narrative statement summarizing the substance of the testimony expected to be elicited on direct examination. Do not merely provide the subject matter of the testimony. For example, do not say, "The witness will testify about the accident." Instead say, "The witness will testify that the defendant ran a red light and was traveling at approximately 30 miles per hour."
2. Testimony at trial will be limited to the material fairly summarized in the witness statement, absent a showing of good cause for the omission, balanced against any prejudice to the opposing party. If an issue is not fairly and accurately disclosed, the Court may exclude that portion of the witness's direct examination, even though that issue may have been fully revealed during that witness's deposition.
3. Impeachment witness statements must be marked and delivered only to the Court. Plaintiff's and Defendant's impeachment witness statements are due seven (7) days before the pretrial conference. See Section VI(A)(2) below for a discussion of who constitutes an "impeachment" witness.

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C. Plaintiff's Expert Witness List.

1. Supply a narrative statement or report of each expert witness to be called at trial (whether in a party's case-in-chief or rebuttal). The narrative statement or report must set forth the qualifications of the expert witness and summarize in fair detail the substance of any opinions to be expressed by the expert witness, along with the facts, data, and assumptions upon which each opinion is based. Counsel must also provide an estimate of the length of time for direct examination. Do not mark an expert witness report as an exhibit.
2. As with lay witnesses, testimony at trial of an expert witness will be limited to the material fairly summarized in the expert witness statement or report, absent a showing of good cause for the omission, balanced against any prejudice to the opposing party. If an issue is not fairly and accurately disclosed in the statement or report filed with the Court, the Court may exclude that portion of the expert witness's direct examination, even though that issue may have been fully revealed during that expert witness's deposition or in the written report separately disclosed to opposing counsel.
3. The requirement for filing expert witness statements for purposes of trial does not replace a party's obligations to provide expert disclosure during discovery under Rule 26 of the Federal Rules of Civil Procedure or any applicable court order.

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D. Plaintiff's Substantive Evidence Deposition Designations.

1. Deposition testimony that Plaintiff intends to offer as substantive evidence in lieu of live testimony must be submitted to the Court with those portions sought to be admitted highlighted. Portions of deposition testimony that Plaintiff intends to offer as substantive evidence must be highlighted in yellow, and portions of deposition testimony that Defendant intends to offer as substantive evidence must be highlighted in blue. The Court prefers Mini-Transcripts, if they are available.
2. The Court encourages the parties to confer well in advance of these deadlines and to submit a single copy of each deposition transcript that contains appropriate highlighting for each party's designations (yellow for plaintiff; blue for defendant). After all objections and other matters (including cross-designations under the "rule of completeness") relating to such deposition testimony have been ruled upon, counsel for the party initially propounding such deposition testimony will be required to prepare a "final" edited transcript (preferably, a mini-transcript) of all testimony that will be read (or otherwise presented by video or audio) to the jury.
3. Where video-taped deposition testimony is to be shown to the jury, the Court recommends that the video be "tightly edited" (preferably under 30 minutes) with a synchronized transcript appearing on the video. In the absence of a stipulation among the parties, any "final" editing will need to await the Court's rulings on any objections. In addition,

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the Court encourages the parties to stipulate to neutral summaries of the video-taped witness's background and the witness's role in the events of the trial, so that deposition presentation time need not be taken up with those matters. The Court or counsel may explain to the jury what a deposition is before showing a video-taped deposition offered in lieu of live testimony.

4. Deposition transcripts used in lieu of live testimony are generally not considered to be trial exhibits because they will be read to the jury and not given to the jury during deliberations. The final edited transcript, however, will be listed in the trial records as a "court exhibit."
 5. Deposition excerpts (whether by video, audio, transcript, or otherwise) that are intended solely for impeachment purposes need not be filed with the Court or disclosed to opposing counsel. See Section VI(A)(2) below for a discussion of what constitutes an "impeachment" witness.
- E. Plaintiff's Itemized List of Special Damages (if any). Please specify and itemize any special damages claimed and briefly describe the nature of the evidence that will support the claim for each item.
- F. Plaintiff's Trial Brief. Please provide a brief summary of all material factual and legal contentions, along with the elements of each claim or defense, including citations to all relevant authorities. Trial memoranda are limited to 35 pages in length (preferably using 13-point font) unless prior approval has been received.
- G. Plaintiff's Motions in Limine. Please state all motions

in limine in a single document, with each separate motion clearly identified. Include specific citations to all necessary and appropriate authorities. This document is limited to 15 pages in length (preferably using 13-point font) unless prior court approval has been received. Motions in limine may not be filed under seal, unless prior court approval has been received.

- H. Plaintiff's Proposed Voir Dire Questions (for jury trials). Plaintiff may submit voir dire questions that Plaintiff would like the Court to ask. Upon request, the Court will likely allow each party up to 15 minutes for attorney-conducted voir dire after the Court's questioning. If any voir dire is undertaken by counsel with permission of the Court, it will be limited to matters that are appropriate for voir dire.
- I. Plaintiff's Proposed Jury Instructions (for jury trials). The parties must confer about proposed jury instructions and, if possible, submit a joint set of stipulated jury instructions, in addition to any instructions about which the parties may disagree. For any Ninth Circuit model instructions, please submit only the model instruction number and not the full text of that instruction. Instructions must be brief, clear, written in plain English and free of argument. In addition to the document electronically filed using CM/ECF and delivered as a Judge's paper copy, please email a copy of the Proposed Jury Instructions in Word format to the Courtroom Deputy. If there are more than 10 instructions, please include an index. Counsel need only submit proposed jury instructions that are case-specific to the claims or defenses presented. The Court will use its own preferred general instructions.

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- J. Plaintiff's Proposed Verdict Form (for jury trials). The parties must confer about a proposed verdict form and, wherever possible, submit a stipulated form of verdict or set of questions, in addition to any matters about which the parties may disagree. In addition to the document electronically filed using CM/ECF and delivered as a Judge's paper copy, please email a copy of the Proposed Verdict Form in Word format to the Courtroom Deputy.
- K. Plaintiff's Suggested Findings of Fact and Conclusions of Law (for court trials). The parties must confer about suggested findings of fact and conclusions of law and, wherever possible, submit a joint set of suggested findings of fact and conclusions of law, in addition to any suggested findings or conclusions about which the parties may disagree. In addition to the document electronically filed using CM/ECF and also delivered as a Judge's paper copy, please email a copy of the Suggested Findings of Fact and Conclusions of Law in Word format to the Courtroom Deputy. The suggested findings of fact must be fairly and neutrally stated and not be argumentative in form. Each suggested finding of fact and conclusion of law must be separately stated in its own numbered paragraph.

III. Documents Due 21 Days (Three Weeks) Before the Pretrial Conference

- A. Defendant's Exhibit List and Trial Exhibits. See instructions above regarding Plaintiff's Exhibit List. As stated above, Defendant's exhibits must be numbered and listed starting with the number "201."
- B. Defendant's Lay Witness List. See instructions above regarding Plaintiff's Lay Witness List.

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- C. Defendant's Expert Witness List. See instructions above regarding Plaintiff's Expert Witness List.
- D. Defendant's Substantive Evidence Deposition Designations, Including Defendant's Cross-Designations to Plaintiff's Deposition Designations. See instructions above regarding Plaintiff's Substantive Evidence Deposition Designations.
- E. Defendant's Trial Brief. See instructions above regarding Plaintiff's Trial Brief.
- F. Defendant's Motions in Limine. See instructions above regarding Plaintiff's Motions in Limine.
- G. Defendant's Proposed Voir Dire Questions (for jury trials). See instructions above regarding Plaintiff's Proposed Voir Dire Questions.
- H. Defendant's Proposed Jury Instructions (for jury trials). See instructions above regarding Plaintiff's Proposed Jury Instructions.
- I. Defendant's Proposed Verdict Form (for jury trials). See instructions above regarding Plaintiff's Proposed Verdict Form.
- J. Defendant's Suggested Findings of Fact and Conclusions of Law (for court trials). See instructions above regarding Plaintiff's Suggested Findings of Fact and Conclusions of Law.

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K. Defendant's Objections to Plaintiff's Evidence and Defendant's Responses to Plaintiff's Motions in Limine.

1. Defendant may file objections to Plaintiff's exhibits, witnesses and witness statements (lay and expert), and substantive deposition testimony designations. Objections may be brief, must be specific and complete and identify the exhibit by number, the witness statement by name, and the transcript by page and line number.
2. Defendant may file separately in one document a response to Plaintiff's motions in limine.
3. Defendant may file separately objections to Plaintiff's proposed voir dire questions (for jury trials), objections to Plaintiff's proposed jury instructions (for jury trials), objections to Plaintiff's proposed verdict form (for jury trials), and objections to Plaintiff's suggested findings of fact and conclusions of law, in addition to Defendant's alternative suggested findings of fact and conclusions of law (for court trials).

IV. Documents Due 14 Days (Two Weeks) Before the Pretrial Conference

- A. Plaintiff's Responses to Defendant's Objections and to Defendant's Motions in Limine. Plaintiff may respond to Defendant's Objections to Plaintiff's exhibits, witnesses and witness statements (lay and expert), substantive deposition testimony designations, proposed jury instructions (for jury trials), proposed voir dire (for jury trials), proposed verdict form (for jury trials), and suggested findings of fact and

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conclusions of law (for court trials). Responses must be sufficiently specific to enable the Court to provide a ruling. Plaintiff may also file separately in one document a response to Defendant's motions in limine.

- B. Plaintiff's Reply in Support of Motions in Limine. Plaintiff may file a reply in support of Plaintiff's motions in limine.
- C. Plaintiff's Objections to Defendant's Evidence. Plaintiff may file objections to Defendant's exhibits, witnesses and witness statements (lay and expert), substantive deposition testimony designations and cross-designations, proposed jury instructions (for jury trials), proposed voir dire (for jury trials), proposed verdict form (for jury trials), and alternative suggested findings of fact and conclusions of law (for court trials). Objections may be brief but must be specific and complete and identify the exhibit by number, the witness statement by name, and the transcript by page and line number.
- D. Plaintiff's Cross-Designations to Defendant's Substantive Evidence Deposition Designations. See instructions above regarding Plaintiff's Substantive Evidence Deposition Designations.

V. Documents Due 7 Days (One Week) Before the Pretrial Conference

- A. Defendant's Responses to Plaintiff's Objections. Defendant may respond to Plaintiff's Objections to Defendant's exhibits, witnesses and witness statements (lay and expert), substantive deposition testimony designations, proposed jury instructions

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(for jury trials), proposed voir dire (for jury trials), proposed verdict form (for jury trials), and alternative suggested findings of fact and conclusions of law (for court trials). Responses to objections may be brief provided they are sufficiently specific and complete to enable the Court to provide a ruling.

- B. Defendant's Reply in Support of Motions in Limine. Defendant may file a reply in support of Defendant's motions in limine.
- C. Plaintiff and Defendant's Joint Status Report to the Court. Not later than nine (9) days before the pretrial conference, Plaintiff and Defendant must meet and confer regarding each other's filed objections to exhibits, witnesses (lay and expert), substantive deposition testimony designations, proposed voir dire questions, proposed jury instructions, proposed verdict form, suggested findings of fact and conclusions of law, and motions in limine. In a single document entitled "Joint Status Report," the parties must inform the Court about which disputes they have resolved and which disputes remain unresolved and in need of decision by the Court. There must be no argument or substantive discussion contained in the Joint Status Report. The Joint Status Report must be filed no later than seven (7) days before the pretrial conference.
- D. Plaintiff and Defendant's Joint Neutral Statement of the Case (for jury trials). Not later than nine (9) days before the pretrial conference, Plaintiff and Defendant must meet and confer regarding a brief, two (2) double-spaced pages, at most, joint neutral statement of the case sufficient to identify for the jury the parties and the nature of the claims and defenses (and counterclaims and crossclaims, if applicable).

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The parties must file not later than seven (7) days before the pretrial conference a single joint document, regardless of whether they agree on the entirety of the neutral statement of the case. If they do not agree, the joint document must indicate the specific portions of the neutral statement where the parties agree, the specific portions where they disagree, and what each party would propose for those portions where they do not agree.

- E. Plaintiff and Defendant's Stipulations. Not later than nine (9) days before the pretrial conference, Plaintiff and Defendant must meet and confer regarding what stipulations of fact, definitions or glossaries of technical terms, list and positions of relevant people (with or without photographs), and other similar material they have agreed upon that may be presented to the jury (in jury trials) or to the Court. The parties must file not later than seven (7) days before the pretrial conference a single joint document, without argument, describing the contents of any such stipulation.
- F. Statement of Witnesses or Others with Disabilities. The parties may not electronically file but must deliver to each other and to the Clerk's Office a designation of all witnesses, parties, counsel, or others who will be present at trial and who may need accommodation for any disability. Please be specific in your description of the accommodation that may be needed.

VI. Miscellaneous

A. Impeachment Evidence (Exhibits and Witnesses).

1. The parties may not electronically file or deliver to each other but must deliver to the Clerk's Office all impeachment exhibits and witness statements of impeachment witnesses. Impeachment exhibits must be marked in the same fashion that trial exhibits are marked but may be labeled on the exhibit list simply as "Impeachment Exhibit." A party seeking to use an impeachment exhibit must bring several copies to trial. If the Court allows such evidence to be used, copies of the impeachment exhibit will be provided to the witness and to opposing counsel at the appropriate time.
2. Impeachment evidence is evidence (whether an exhibit or live or deposition witness testimony) that is primarily offered to impeach the credibility of a witness. Impeachment of a witness's credibility may occur by showing bias or prejudice, a prior inconsistent statement, a lack of testimonial capacity (e.g., issues of perception, recall, or communication), a witness's character for untruthfulness, or evidence of a criminal conviction, all as provided for under the Federal Rules of Evidence. Evidence that is offered primarily to prove or disprove an element of a claim or defense is not evidence that is offered to impeach the credibility of a witness and thus is not impeachment evidence; it must be disclosed in accordance with this Civil Trial Management Order.

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- B. No other replies. No party may file a reply beyond what is specified in this Order, unless expressly allowed or requested by the Court.
- C. The Pretrial Conference. The following topics may be discussed:
 - 1. Motions in limine;
 - 2. Objections to exhibits, witnesses, and deposition designations;
 - 3. Voir dire questions, procedures, and limitations;
 - 4. Peremptory and cause challenge procedures;
 - 5. Jury instructions and verdict form (for jury trials);
 - 6. Neutral statement of the case (for jury trials);
 - 7. Use and disclosure of demonstrative evidence (for jury trials);
 - 8. Examination of expert witnesses (e.g., “no tendering”);
 - 9. Stipulations;
 - 10. Daily schedule and possible use of “chess clock” style time limits;
 - 11. Courtroom technology, equipment, and personnel needs; and
 - 12. Juror notebooks and juror questions.

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- D. No Late Submissions. No exhibits or testimony will be received in evidence at trial unless presented in accordance with this Order. Late submissions, including but not limited to any supplemental or revised exhibits, supplemental or amended witness statements, or supplemental or amended jury instructions, will not be accepted unless there has been a showing of good cause.
- E. Trial Court Guidelines. Please review and follow the Trial Court Guidelines for the U.S. District Court of Oregon, which can be found on the Court's website at <https://www.ord.uscourts.gov/index.php/attorneys/trial-court-guidelines>.

IT IS SO ORDERED.

Appendix III: Sample Order Regarding Researching Jurors

I use the standard Jury Questionnaire administered by our Jury Office, amended to include some case specific questions, in most cases prior to trial. In advance of jury selection, the Jury Office will provide to counsel for the parties completed Juror Questionnaires returned by prospective jurors who have not been excused based on hardship. I will hold a hearing before jury selection to determine whether to excuse any respondents based on their questionnaire answers.

The confidentiality of all completed Juror Questionnaires provided to counsel must be maintained by the parties, their counsel, and anyone working for a party or counsel. This Order also restricts the parties, their counsel and anyone working for a party or counsel from contacting or attempting to contact any prospective juror. This means that the parties, their counsel, and any agent, consultant, investigator, or other person working for them may not communicate with or otherwise contact or attempt to communicate with or attempt to otherwise contact any prospective juror in any manner, whether through social media, by email, by telephone or messaging platforms (including WhatsApp, Telegram, and the like), by mail, or in person.

I do not restrict the parties, their counsel, and any agent, consultant, investigator, or anyone working for them from conducting research regarding a prospective juror, provided it is done only from generally available sources and that there is no actual contact or any reasonable possibility of contact with a prospective juror. Contact includes notifying a prospective juror that their social media profile has been viewed by a party, attorney, investigator, or the like, even if that notification is inadvertent or provided automatically by the social media site. With the recognition that social media is constantly changing

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and evolving, the following are guiding, non-exhaustive examples of permissible research and impermissible contact:

1. LinkedIn may not be used to conduct any research on any prospective juror. The reason for this restriction is that a prospective juror who is on LinkedIn may be notified of the identity of anyone who uses LinkedIn to view the prospective juror's profile or other information or be notified that an "anonymous" person has viewed the prospective juror's profile or that an inquiry through LinkedIn has been made, even if an investigator uses an account that allows for "anonymous" searches. Those notifications constitute "contact" with the prospective juror. This restriction also applies to any other form of social media, besides LinkedIn, that has this feature or a similar feature, including TikTok, if the automatic notification setting is employed.
2. Some social media sites have features that automatically notify users that their posts have been seen by certain people, such as temporary "stories" that provide the poster a list of accounts that have "viewed" the post/post. These features may not be used to conduct any research on any prospective juror, even if they are posted publicly, because the automatic notification constitutes "contact" with the prospective juror, as the individual may be notified of the identity of anyone who views their post. This applies to "stories" on Instagram, SnapChat, and Facebook, and to any other form of social media with similar automatic notification features.
3. Other social media sites and features may only be used to view publicly available profiles, feeds, and posts. No "follow requests," "friend requests," or the

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like may be sent to any prospective juror on any social media site, regardless of whether a profile is public or private. The reason for this is that these requests constitute contact, and a prospective juror who uses these sites may be notified of the identity of anyone who sends such a request. This applies to Twitter, Facebook, Instagram, TikTok, SnapChat, Threads, and any other form of social media.

4. Only sources that are publicly available and private sources that derive their information from publicly available sources may be used to research a prospective juror. This includes private databases maintained by third parties based on open-source or other publicly available information, notwithstanding the fact that a subscription or fee may be needed to access those databases.
5. No in-person surveillance, no matter how brief, of any home, neighborhood, or place of work of any prospective juror or any family member of a prospective juror is allowed.

Appendix IV: Objectionable Comments in Openings and Closings

This Appendix contains a non-exhaustive list of some of the more egregious types of improper comments or arguments made by counsel during opening statements or closing arguments in criminal or civil cases.

1. Appeal to passion or prejudice of the jurors

A prosecutor “may not make comments calculated to arouse the passions or prejudices of the jury.” *Allen v. Woodford*, 395 F.3d 979, 1016 (9th Cir. 2005). Similarly, counsel must avoid making unduly prejudicial or inflammatory remarks. *See Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1151 (9th Cir. 2001). On the other hand, what is unduly prejudicial may be context specific. *See Mercer v. Theriot*, 377 U.S. 152, 154-55 (1964) (holding that a plaintiff’s opening statement, in which counsel stated that plaintiff would establish that the defendant was a hit-and-run driver with complete disregard for life, was not significantly outside bounds of permissible advocacy when it was undisputed that the driver of the vehicle did not stop to render aid or report the accident).

2. Reference to inadmissible evidence

“[W]hile prosecutors are not required to describe sinners as saints, they are required to establish the state of sin by admissible evidence unaided by aspersions that rest on inadmissible evidence, hunch or spite.” *United States v. Schindler*, 614 F. 2d 227, 228 (9th Cir. 1980).

3. Mention of a defendant’s other, uncharged crimes

“Other crimes” evidence may not be mentioned in opening statements. *Leonard v. United States*, 277 F.2d 834, 841-42

(9th Cir. 1960) (holding the trial judge should have instructed the jury to “put out of their minds all statements made by government counsel concerning other crimes”).

4. Counsel’s personal opinions

Counsel must avoid presenting any personal evaluation of the case or its evidence. *United States v. Davis*, 548 F.2d 840, 845 (9th Cir. 1977). *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) (stating that it is improper for a lawyer to express a personal opinion about the credibility of a witness). When the prosecution vouches for the credibility of witnesses and expresses personal opinions concerning the guilt of the accused, such actions may impermissibly “induce the jury to trust the Government’s judgment rather than its own view of the evidence.” *United States v. Young*, 470 U.S. 1, 18-19 (1985).

5. Mention of a criminal defendant’s possible failure to testify

The prosecution is prohibited from commenting on a defendant’s failure to testify. *Griffin v. State of California*, 381 U.S. 609, 615 (1965).

6. Improper vouching by referring to a plea or cooperation agreement

Referencing the requirement in a plea agreement that a cooperator testify truthfully before any issue of credibility of the witness has been raised is improper, albeit not necessarily a cause for reversal. *United States v. Shaw*, 829 F.2d 714, 717-18 (9th Cir. 1987) (improper vouching is present when the prosecutor stated that the government has agreed that “as long as [a witness] is truthful we will present his truthful cooperation to the local prosecutor,” as these words imply that

the prosecution has some method for determining whether the witness's testimony is truthful); *United States v. Necoechea*, 986 F.2d 1273, 1280 (9th Cir. 1993) (prosecutor's reference to truthfulness provision in a witness's plea agreement was improper vouching, as it "mildly impl[ies] that the government can guarantee the witness's truthfulness).

7. Attempts to align the jury with the government

A prosecutor may not suggest that the jury is a link in the chain of law enforcement and thereby attempt to align a neutral (i.e., the jury) with a party to the case (i.e., the government). *Leavitt v. Arave*, 383 F.3d 809, 834 (9th Cir. 2004).

8. Calling on jurors to imagine the state of mind of a victim

It is improper for the prosecutor to "describe[] crimes . . . from [the victim's perspective]." *Field v. Woodford*, 309 F.3d 1095, 1109, as amended, 315 F.3d 1062 (9th Cir. 2002).

9. Sending a message to the community

"A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005).

10. Commenting on financial disparity between the parties and other improper comments

The Ninth Circuit held that the following were all improper prejudicial statements made during a plaintiff's opening statement: "(1) indulg[ing] in criminal imagery; (2) comment[ing] on the financial disparity between the parties; (3) dwell[ing] upon irrelevant subjects; (4) conduct[ing] himself

with a lack of decorum; and (5) ma[king] unsubstantiated accusations of tampering with documents against [the defendant] and its counsel.” *Kehr v. Smith Barney, Harris Upham & Co., Inc.*, 736 F.2d 1283, 1285 (9th Cir. 1984).

11. Golden rule arguments

A “golden rule” argument is a suggestion to the jury that they should do unto others, such as make an award to the plaintiff, as they would have others do unto them if they were in the unfortunate position of the plaintiff. This comment is improper because it asks the jury to depart from a neutral stance and base their decision on personal interest. *See Johnson v. Bell*, 525 F.3d 466, 484 (6th Cir. 2008); *Forrestal v. Magendantz*, 848 F.2d 303, 309 (1st Cir. 1988).

12. Reptile arguments

A “Reptile Argument” is where the plaintiff’s attorney appeals to the jury’s primal instincts, particularly fear and safety concerns, by framing the defendant’s actions as a threat to the community’s safety and well-being. This approach seeks to activate the jurors’ “reptilian brain” to prioritize self-preservation over rational deliberation, encouraging them to deliver a verdict that protects themselves and their community from harm. In this respect, this argument is related to “golden rule” arguments. *See David Ball and Don Keenan, Reptile: The 2009 Manual of the Plaintiff’s Revolution* (2009).

13. “Send a message” arguments

It is improper to argue “send a message”, *Strickland v. Owens Corning*, 142 F.3d 353 (6th Cir. 1998), except in a punitive damages case, *Settlegoode v. Portland Pub. Schools*, 371 F.3d 503, 519 (9th Cir. 2004).

14. Arguing inferences beyond the court's limiting instruction

Arguing inferences or purposes beyond the limited purpose for admission is improper. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

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