March 5, 2004

A. Thomas Levin, Esq.
President, New York State Bar Association
One Elk Street
Albany, New York 12207

Re: New York State Bar Association
Committee on the Jury System

Dear Mr. Levin:

I am pleased to present this **second interim report** of the Committee on the Jury System. This report examines matters in accordance with the Committee's mission, which, among other responsibilities, is charged in particular with providing input, for the Association's consideration, on the issues being examined by the Chief Judge's Commission on the Jury and the Jury Trial Project.

This report focuses on:

- Whether consent excusals should be allowed;
- The extent of judicial supervision of the voir dire and the use of judicial hearing officers in this process;
- Whether counsel should have the opportunity to give interim summations;
- Whether juries should be given a written copy of the charge in whole or part for use in deliberations; and
- The extent to which jury procedures should be uniform statewide.

The Committee's January 26, 2004 interim report concentrated on the number of peremptory challenges available and whether jurors should be allowed to voice or submit written questions during trial. A copy of that report is attached as Appendix A for ease in reference.

Also, consistent with our previous report, in developing these recommendations, the Committee called on the diverse experience of its members (the roster of which concludes this report); examined current procedures and proposals, as well as reports previously prepared within our Association, Court System commissions and related information; attended hearings of the Commission on the Jury; conferred with judges and

administrators of the Jury Trial Project; and sought the input of others through surveys of relevant NYSBA sections and committees,[1] administrative judges in the various districts and, for relevant questions, commissioners of jurors. This process is described in our first interim report. Samplings from the survey responses are included in this report to share the observations and perspectives of those in the field in various areas of the state.

RECOMMENDATIONS

The following recommendations were formulated at the Committee's February 18, 2004 meeting:

ISSUE #1: Should counsel, by consent of other counsel, be able to excuse a juror without cause?

If opposing counsel agree that a juror is not appropriate for the case, use of a consent challenge can conserve time, avoid prolonged questioning and promote fairness to the parties. This position recognizes that, while potential jurors do not have a right to be selected, consent challenges are not to be used as an avenue of improper and unlawful discrimination against a potential juror. Situations of abuse of the process appear to be very infrequent; evidence of abuse of a dimension that would warrant prohibiting this procedure was not found.

Attorney respondents to the Committee's survey overwhelmingly favored use of consent challenges. A respondent commented, "Responsible trial lawyers representing their respective clients should be able to consent to excuse a juror. This procedure avoids delay in the selection of the jury." Observed a downstate practitioner, "It facilitates a workable relationship between adversaries and the jury and 'humanizes' the process," with another noting that this "facilitates further questioning of the individual jury panel."

- ***Recommendation on Issue #1****: Challenges by consent should be allowed, while making it clear that this is not a means for improper and unlawful discrimination against potential jurors.*

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ISSUE #2:

a. **To what degree should the judge be required to supervise the voir dire?**
b. **Should judicial hearing officers be involved in monitoring jury selection?**

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[1] Committee on CPLR; Commercial and Federal Litigation Section; Committee on Court Operations; Criminal Justice Section; Committee on Legal Aid; Torts Insurance and Compensation Law Section; Trial Lawyers Section; Committee on the Tort System. All of the foregoing responded to the questionnaire. The questionnaire also was provided to the Judicial Section which decided not to reply as a section.

In 1996, a court rule went into effect requiring judges to participate in the commencement of jury selection and giving judges discretion to determine the extent to which they supervise the selection process after that point.[2] Prior to its implementation, the NYSBA House of Delegates had endorsed this provision as a workable balance of the interests of the parties, judicial system, lawyers, judges, jurors and public, respecting the need for judicial discretion in each case while requiring at least limited judicial management of the voir dire process.

Input from members of the bench and bar upstate and downstate indicates that this rule continues to strike the appropriate balance of providing for the presence of a judge to begin the selection proceedings but enabling the judge to consider the circumstances of the matter in determining his/her further presence. This approach also serves to promote effective use of the judge's time.

The Committee also reviewed the practice, in more populated areas of the state, of using judicial hearing officers (JHOs) to monitor jury selection. Given the high volume of cases in some courtrooms and the limited number of judges, use of JHOs is practical and facilitates access to the court as needed.

Responding to the Committee's survey, one litigator told us, "The current rule allows either party to demand the presence of the judge. Since most cases do not need a judge's presence, an absolute rule is unnecessary but the current rule adequately covers situations where a judge is needed." Another observed, "Attorneys should bear the responsibility as officers of the court to conduct the selection process, with responsibility in accordance with the Court's instructions." Supervision should be available, another commented, in the rare situations when the lawyers' conduct requires it. A member of the bench said that after the opening discussion with the jurors, "the key is that initially, leave the lawyers to do their job – show them respect." The judge, he added, should periodically check on progress, talk with the lawyers if the voir dire is bogging down and, if still unduly slow, step in and supervise. These perspectives were expressed by members of the bench and bar without significant difference upstate and downstate.

Attorney respondents to the survey had mixed views and experiences with respect to use of JHOs, again reiterating that beyond monitoring, supervision should be on an as-needed basis. Some expressed concern about situations of JHOs lacking sufficient training with regard to challenges and other provisions in jury selection and lacking trial experience.

Downstate and upstate administrative judges responding to the survey concurred that the present rule should be maintained and that, unless necessary in the case, supervision would be a waste of judicial time. Agreeing that the judge should greet the jurors and

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[2] 22 NYCRR §202.33(e). Presence of Judge at the Voir Dire. In order to ensure an efficient and dignified selection process, the trial judge shall preside at the commencement of the voir dire and open the voir dire proceeding. The trial judge shall determine whether supervision of the voir dire should continue after the voir dire has commenced and, in his or her discretion, preside over part or all of the remainder of the voir dire.

open the proceedings, an upstate jurist added, "Unless the selection process becomes protracted – more than a half-day - judicial supervision should not be necessary. Another noted that a judge does not need to be present but readily available. Judges upstate and downstate generally saw value in use of JHOs to monitor the jury selection process.

- ***Recommendations on Issue #2****: The rule should continue that requires a judge to open the voir dire but then have discretion to determine the extent of his/her further level of supervision of the selection process. As such, the Committee did not favor, or see necessary, having the judge supervise the full voir dire as a matter of course. This is consistent with the current Association position.*

  The Committee also concluded that the courts should continue to have the opportunity to engage JHOs to monitor jury selection where warranted by the high volume of cases.

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ISSUE #3: Should juries be given a written copy of the charge?

In civil or criminal matters, the charge in a case may be complex. Committee members noted frequent situations where juries had requested that the charge be reread to them again, sometimes multiple times. Provision of a written copy would facilitate understanding and thereby promote fairness to the parties. Given the various circumstances of a case, providing a written copy of the charge should not be required as a matter of course, but the judge should have the discretion to determine whether or not the charge should be supplied to the jury in writing and, if so, whether this should include portions or the entire charge. For example, if a jury requests read-back of a certain portion, the judge might determine to give the jury a written copy of that part to reinforce this rereading. In other matters, it might be preferable to provide the full text because provision of just part of the charge might cause some jurors to give undue weight to that portion.

This view is consistent with the position taken by the House of Delegates in 1994 in approving the report and recommendations of the Association's Ad Hoc Committee on the Jury System concerning the proposals contained in the Chief Judge's Jury Project. Among its proposals, the Project called for legislation to amend Criminal Procedure Law §310.20 to give judges discretion to supply a copy of the charge in its entirety to jurors during deliberations.

The House endorsed the Ad Hoc Committee's position that supported providing the charge but with opportunity to supply some part of the charge if the judge believes that is all that is desired. Legislation was subsequently proposed by the Court System for judicial discretion to provide a deliberating jury with all or a portion of the charge.

The Court System also is calling for legislation to amend §310.30 to permit a court to provide a jury, upon its request, with written instructions on one or more elements of the

crimes or defenses. Under the proposal, the parties would be entitled to examine the instructions and be heard before submission to the jury.

As to civil matters, a court rule approved by the Administrative Board in 1998 now enables judges to provide written instructions to deliberating juries.[3] This also is among the approaches being tested in the Court System's Jury Trial Project. American Bar Association Civil Trial Standards (5(f)) recommends making the final instructions available for jurors' use in deliberations.

In our survey, this question of providing a copy of the charge in whole or part elicited a mixed response from practitioners. As our Committee concluded, a number of survey respondents viewed favorably the provision of written copies to aid jurors' understanding, when given as a supplement to, and preceded by, the oral presentation by the judge. Others expressed concern that the text could cause confusion and attempts at interpretation and that it could diminish attention to the oral presentation. The majority of administrative judges replying to the survey were favorable to written charges when appropriate.

These considerations demonstrate that the judge's role in making an oral presentation to explain the elements of the charge to the jury is essential. Provision of written copies, when determined by the judge to be appropriate in certain cases, should be intended as a written aid to facilitate juror comprehension and retention of these instructions.

- ***Recommendation on Issue #3:*** *The judge should have discretion to provide a written copy of the charge to the jury in whole or in part, after opportunity is given for the parties to examine the copy and be heard.*

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ISSUE #4: Should counsel have opportunity to give interim summations?

Interim summations have been suggested as a means of enhancing juror understanding by permitting attorneys to address the jury during the trial in short statements for such purposes as commenting on or placing in context evidence that has been or will be presented. This approach is being piloted in some courts as part of the Court System's

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[3] 22 NYCRR §220.11 Copy of the Judge's Charge to Jury.
(a) Application. This section shall apply to all civil cases heard by a jury in any court.
(b) Where the court determines that the jury's deliberations may be expedited or assisted by having a copy of the court's instructions available during deliberations, the court, upon its own motion or the motion of a party and after affording the parties an opportunity to be heard, may direct that at least one copy of the instructions be furnished to the jury when it retires to consider its verdict. If the court so directs, it shall state its reasons for doing so on the record. Where the copy thereby furnished is other than a transcript of the minutes of the proceedings, the court shall certify thereon that it is a correct copy of its instructions. Any copy of the instructions provided to the jurors in accordance with this subdivision shall be retrieved from the jury at the close of deliberations, and shall be filed with the clerk of the court.

Jury Trial Project. In recent years, legislation was requested by the Court System to permit interim summations in civil cases in the trial judge's discretion. Such opportunity also is suggested in the ABA Civil Trial Practice Standards (13) for use in the court's discretion in lengthy and/or complex proceedings.

However, in our review we considered that such a device may serve to cause more confusion, rather than promoting greater clarity, by breaking the flow of the presentation of the case, evidence, witness questioning, and related procedures in the course of the trial.

In survey responses, attorneys who saw potential for interim summations generally would make it available in very complex matters with appropriate guidelines. Among survey respondents opposing its use, a practitioner said that such a procedure is "not appropriate as there is no predicting whether the comments made will be changed by later evidence." Others commented that extra-attorney argument at that point in the proceedings would not add clarity and would, in essence, waste time, lengthening an already complicated trial. Administrative judges were generally opposed to interim summations, reflecting the views of practitioners.

- ***Recommendation on Issue #4:*** *Interim summations, required or by judicial discretion, should not be permitted.*

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ISSUE #5: Should statewide uniform provisions be instituted with regard to the jury process?

"Statewide rules should be used only when they can be truly effective on a statewide basis," this Association's Ad Hoc Committee on the Jury System concluded in its 1994 report approved by the House. Provision of a juror questionnaire was given as a positive example. The report went on to emphasize the need to consider different conditions and case volumes across the state. We renew this perspective.

Our review of the various elements of the jury process likewise showed the diverse conditions in the courts in different parts of the state. For example, the circumstances in New York County – a high volume of cases, multiple jury selections at a given time, but a paucity of potential jurors in the county - require solutions that are not necessary in many other areas of the state. In New York County, a potential juror not selected in one case may be returned to the pool for voir dire in another matter that day. In other areas, lack of facilities or a lower volume of cases present an entirely different set of circumstances with regard to utilization of jurors' time and possible waiting time. Jury pools also differ throughout the state. These wide-ranging conditions require different solutions. New procedures to address problems or make improvements in the functioning of the jury process in high-volume courts may not be appropriate and not necessary in other courts.

This diversity of conditions was emphasized in many of the attorneys' survey responses, generating a number of comments that "if it is not broken, don't fix it." Commented one upstate practitioner, "We do not need an upstate solution to a downstate problem." A judge observed, "What works well in some places will not be appropriate in others – especially rural/urban counties." Another attorney noted that in addition to dramatically different circumstances throughout the state, modification of procedures also is needed depending on the nature and complexity of a case.

The question of uniformity brought mixed responses from administrative judges with several upstate judges commenting on the importance of providing for local procedure, given the different circumstances ranging from New York City to the small rural area. The majority of commissioners of jurors also cited the need to make provision for the different conditions of the state in terms of the court's caseload, geography, workforce and economic circumstances (i.e., postponements and other job-related concerns), and other factors. A commissioner observed, "By providing for a commissioner of jurors in each of the state's 62 counties, the legislature recognized the need for a local 'touch' to take into account different problems that could occur. This flexibility must be maintained."

As indicated above, opportunity for judicial discretion should be fostered, to enable the judge to take into account the factors and dynamics of the particular matters at hand, rather than institutionalizing statewide rules.

- ***Recommendation on Issue #5:*** *Uniform statewide rules should not be implemented. Instead, the bench and bar should continue efforts to promote communication, promptness and fairness.*

FURTHER COMMITTEE ACTIONS

The Committee is pursuing its deliberations and recommendations on subjects before Court System committees and projects, as well as other issues and approaches. The Committee will continue to develop reports, provide input, and present affirmative proposals, with the purpose of ensuring that the system is effective and fair.

Respectfully submitted,

Committee on the Jury System

Peter D. FitzGerald, Chair, Glens Falls (FitzGerald Morris Baker Firth)
Jonathan Bruce Behrins, Staten Island (Behrins & Behrins)
Eileen Buholtz, Rochester (Connors & Corcoran, LLP)
Charles F. Crimi, Jr., Rochester (Crimi & Crimi)
* Vincent E. Doyle, III, Buffalo (Connors & Vilardo)
Darren J. Epstein, New York (Fellows Hymowitz & Epstein)
* Norman Goodman, New York (New York County and Supreme Court Clerk)
Jack S. Hoffinger, New York (Hoffinger Stern & Ross, LLP)

Seymour W. James, Jr., Kew Gardens (The Legal Aid Society)
Jessica Kavoulakis, Brooklyn
* Susan B Lindenauer, New York (The Legal Aid Society)
Margaret Comard Lynch, Albany (Ainsworth Sullivan Tracy Knauf Warner & Ruslander, PC)
Hon. Robert C. Noonan, Batavia, (Genesee County Court Judge and Surrogate)
John M. Ryan, Kew Gardens (Queens County, Chief Assistant District Attorney)
Ronald R. Schneider, New York (Kirkland & Ellis)
Howard D. Stave, Manhasset Hills
Jay G. Safer, Executive Committee Liaison, New York (LeBoeuf Lamb Greene & MacRae)

* *NOTE: Vincent E. Doyle, Norman Goodman and Susan B. Lindenauer also serve as members of the Commission on the Jury.*

APPENDIX A

First Interim Report of the Committee on the Jury System

January 26, 2004

A. Thomas Levin, Esq.
President, New York State Bar Association
One Elk Street
Albany, New York 12207

Re: New York State Bar Association
Committee on the Jury System

Dear Mr. Levin:

This letter report serves as a brief **interim report** from the Committee on the Jury System. The Committee was established in June 2003. The Committee, among other responsibilities, is charged in particular to provide input for the Association's

consideration, on the issues being examined by the Commission on the Jury System and the Jury Trial Project appointed by the Chief Judge. Members of the Committee are:

Peter D. FitzGerald, Chair, Glens Falls (FitzGerald Morris Baker Firth)
Jonathan Bruce Behrins, Staten Island (Behrins & Behrins)
Eileen Buholtz, Rochester (Connors & Corcoran, LLP)
Charles F. Crimi, Jr., Rochester (Crimi & Crimi)
Vincent E. Doyle, III, Buffalo (Connors & Vilardo)
Darren J. Epstein, New York (Fellows Hymowitz & Epstein)
Norman Goodman, New York (New York County and Supreme Court Clerk)
Jack S. Hoffinger, New York (Hoffinger Stern & Ross, LLP)
Seymour W. James, Jr., Kew Gardens (The Legal Aid Society)
Jessica Kavoulakis, Brooklyn
Susan B Lindenauer, New York (The Legal Aid Society)
Margaret Comard Lynch, Albany (Ainsworth Sullivan Tracy Knauf Warner & Ruslander, PC)
Judge Robert C. Noonan, Batavia, (Genesee County Court Judge and Surrogate)
John M. Ryan, Kew Gardens (Queens County, Chief Assistant District Attorney)
Ronald R. Schneider, New York (Kirkland & Ellis)
Howard D. Stave, Manhasset Hills
Jay G. Safer, Executive Committee Liaison, New York (LeBoeuf Lamb Greene & MacRae)

* *Note: Vincent E. Doyle, Norman Goodman and Susan B. Lindenauer also serve as members of the Commission on the Jury.*

The Committee convened its first meeting in early July 2003 to identify issues of concern that it anticipated would be reviewed by the Commission, as well as other issues concerning jury procedures and various proposed initiatives and approaches. Members of our Committee attended several of the public hearings held throughout the state by the Commission. The President of NYSBA and the Chair of this Committee, among others, addressed the Commission setting forth the concerns of our Association. At these Commission public hearings, our Committee obtained a grasp of many of the issues and different points of view voiced at the hearings.

Our Committee, after review, identified a number of current jury issues. A written questionnaire was developed containing questions regarding perceived jury issues, and soliciting opinions, comments and points of view. The Committee felt it was essential to seek the view of the bench and bar. It was decided not to solicit responses for individual juror experiences as it appeared to be amply covered in the public hearings.

THE BAR

The Committee identified relevant sections and committees of the NYSBA for input. The questionnaire was provided to the following committees and sections:

Committee on CPLR
Commercial and Federal Litigation Section
Committee on Court Operations
Criminal Justice Section
Committee on Legal Aid
Torts Insurance and Compensation Law Section
Trial Lawyers Section
Committee on the Tort System

All of the above responded to the questionnaire. The questionnaire also was provided to the Judicial Section which decided not to reply as a section.

JUDICIARY

In order to obtain a statewide view of the judiciary, the questionnaire was presented to the Administrative Judges across the state. Eleven of twelve Judicial Districts responded with detailed responses and comment.

The Committee Chair has been in communication with the Chair of the Commission to openly discuss scheduling and related issues.

The Commission advises that it will convene on January 27, 2004 and requests that we provide our positions if we have such.

Our Committee members have reviewed and studied the responses and comments from our questionnaires. The Committee as a whole met on January 14, 2004. The materials were divided into two groups, one for review on January 14, 2004 and the remainder for review in February.

RECOMMENDATIONS

At the January 14, 2004 meeting, the following recommendations were adopted:

ISSUE #1: Should there be a reduction in the number of peremptory challenges to jurors?

The Association is on record, in a 1994 report approved by the House of Delegates, as opposing a reduction in peremptory challenges in either civil or criminal matters. In a review of this issue at the January 14, 2004 meeting, members of the Committee on the Jury System saw the use of such challenges as aiding in providing for a fair and impartial jury and reiterated the concern, expressed in the Association's position over the years, that decreasing the number of challenges could prolong and complicate selection and could not be justified as part of an effort to conserve jury resources. Use of peremptory challenges was considered to be a means for all sides to avoid extended questioning and avoid "cause" hearings, which can be time consuming.

- **Recommendation on Issue #1**: That there be no reduction in the present number of peremptory challenges in both criminal and civil jury selection.*

* *Note: Members of the Commission also serving on the Committee did not cast votes on this issue.*

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ISSUE #2: Should jurors be permitted to ask oral questions directly to witnesses?

The Committee expressed concern about the difficulty in determining the appropriateness of the questions and maintaining control of the proceedings and enforcement of the rules of evidence if questions were to be asked directly. As one attorney survey respondent observed, "One question by a juror before all evidence is in could adversely influence other jurors to the prejudice of a party." Another said that such questioning "would only confuse and complicate facts, credibility and create confusion."

- **Recommendation on Issue #2:** That no provision be made for jurors to ask oral questions directly to a witness during trial.

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ISSUE #3: Should jurors be permitted to submit questions for witnesses in writing to the judge who would then determine whether the questions are permissible?

It was noted that the Jury Trial Project being undertaken by the Uniform Court System, is experimenting with this issue. The Committee saw the need to await the results of this experience before considering change to permit submission of questions under certain circumstances and if so, appropriate safeguards, *i.e.,* whether submission of questions should be permitted if considered appropriate in the judge's discretion or in the judge's discretion upon consultation with counsel.

- **Recommendation on Issue #3**: That submission of written questions by jurors during trial should not be permitted, pending further study and review.

FURTHER ACTIVITIES

The Committee plans to complete the review of all remaining issues at a second full Committee meeting in February. A brief second interim report will follow regarding perspectives and positions recommended by the Committee.

A full and complete report will follow after completion of its entire review.

Respectfully submitted,

Peter D. FitzGerald, Chair
Committee on the Jury System