Kentucky Law Journal

Volume 99 | Issue 4 Article 8

2011

An Unnecessary Conflict: Bifurcated Civil Trials and States' Need for an Alternate Rule for Alternate Jurors

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NOTES

An Unnecessary Conflict: Bifurcated Civil Trials and States' Need for an Alternate Rule for Alternate Jurors

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INTRODUCTION

IMAGINE a complex products liability action is set for trial in Kentucky. After months of discovery and pre-trial motions, the court orders the trial to proceed on a bifurcated basis with an initial phase ruling on liability and, if necessary, a second phase on damages. As is common procedure in the state, twelve regular jurors are seated, and two alternate jurors are empanelled in case a regular juror becomes unable to serve. After five exhausting weeks of evidence presentation, the case is finally ready to be submitted to the jury for the initial liability verdict.

Immediately before submission of the case, the judge's attention is directed to Kentucky's rule on alternate jurors: alternate jurors must be released immediately upon the first submission of the case to the jury.[2] The judge, conscientious of the purpose and plain language of the rule, is left with no choice but to release the two alternate jurors when the case is submitted on the initial issue of liability. The alternate jurors, by rule, are no longer jurors and are completely divorced from the proceedings. After four days of intense deliberations, a plaintiff's verdict is reached, necessitating a determination of damages.

Another two weeks go by as the parties present evidence on the plaintiff's damages. Without warning, one of the regular twelve jurors becomes ill and is no longer able to continue serving in the case. The defendant, already wary of the unfavorable outcome of the case, exercises his right to refuse a verdict by less than twelve jurors. The trial judge is forced to declare a mistrial. Over two months' time and countless judicial resources are wasted, caused, ironically, by a conflict between two judicial devices designed to promote judicial economy: bifurcation and alternate jurors. This Note

1 JD expected 2011, University of Kentucky. BA 2008, Kentucky Wesleyan College. I wish to thank Professor Scott Bauries for his comments and assistance with this manuscript, as well as Attorney Paul A. Casi for introducing to me this topic. I am also grateful to my parents, Ray and Carolyn Brunson, and to my brothers, Stefan and Ryan Brunson, for their love and support.

2 *See* KY. R. CIV. P. 47.02.

explains why the previous scenario is entirely plausible and why several states, including Kentucky, should change their alternate juror court rules or statutes to explicitly allow for the simultaneous functioning of these two devices.

I. BACKGROUND

A. Trial Bifurcation and Alternate Jurors as Devices of Judicial Economy

The American trial court system employs several procedural tactics in order to facilitate justice and judicial economy.[3] Two such tactics are alternate juror rules and trial bifurcation. The use of alternate jurors has been a procedural device employed in the American judicial system for several decades.[4] Alternate jurors replace regular jurors who become incapacitated during trial, either during presentation of evidence or, in some states, deliberations;[5] they serve to "protect against the unexpected and . . . ensure that at least [the minimum number of] qualified jurors will still be available to deliberate a verdict at the conclusion of the trial."[6]

Bifurcation is also important to the judicial efficiency of the United States.[7] "Bifurcation, the division of trial issues for separate and independent evaluation, might be one of the most important concepts in civil litigation"[8]; the procedure most commonly divides the issue of liability from damages. Bifurcation is an important tool for furthering judicial economy because of its ability to "expedite and economize litigation."[9] In fact, the benefit to judicial economy is largely considered the primary benefit of bifurcation, with "[m]ost courts appear[ing] to have subscribed to the proposition that: 'conservation of both time and money are the bedrock basis for the [bifurcation] rule.'"[10]

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3 *See* 35A C.J.S. *Federal Civil Procedure* § 21 (2010).

4 *See* FED. R. CIV. P. 47 advisory committee notes (stating that an alternate juror procedure was in effect in federal civil courts from 1937 until 1991, when the institution of alternate jurors in civil trials was abolished).

5 Andrea N. Silvestri, Comment, *Time for Change: Maryland's Inadequate Treatment of Alternate Jurors and the Federal Solution*, 38 U. BALT. L. REV. 203, 205-06 (2008).

6 Hodge v. Commonwealth, 17 S.W.3d 824, 840 (Ky. 2000).

7 Although civil cases can be bifurcated, trifurcated, or polyfurcated, Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 706 n.6 (2000), for readability's sake, this Note will employ the terms 'bifurcated' or 'phased' interchangeably, reflecting the most common arrangement in state trial courts. It should be noted, however, that the considerations of judicial economy addressed in this Note would be just as relevant, if not more, in trifurcated and polyfurcated cases.

8 Derek A. Shoemake, *Bifurcation: A Powerful but Underutilized Tool in South Carolina Civil Litigation*, 59 S.C. L. REV. 433, 433 (2008) (internal citation omitted).

9 *Id.* at 435.

10 Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bi-*

B. In Some States, Alternate Jurors and Trial Bifurcation Do Not Work Harmoniously

Despite the proven benefits of both judicial devices, the two devices do not work harmoniously in several state courts around the country, including Kentucky.[11] This is because some state civil procedure rules provide for alternate jurors but mandate dismissal of any remaining alternate jurors when the regular jury retires to deliberate.[12] Therefore, in a bifurcated case, no alternate jurors are available after the first phase of the trial.[13] For years, state court judges have evaded this dilemma by ignoring the plain language and purposes of alternate juror dismissal rules, oftentimes to the detriment of their litigants.[14]

This Note explores the dilemma previously demonstrated and offers recommendations on how to resolve the inherent disconnect between current alternate juror rules and bifurcated trials. Part II of this Note first discusses the importance of alternate jurors to judicial efficiency and the purposes of mandatory dismissal rules. Further, this Part explains and illustrates the rule existing in several state civil court systems[15] that mandates dismissal of alternate jurors upon retirement of the jury to deliberate and the overwhelming trend by which trial judges in these states

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furcating Claims for Punitive Damages, 1998 WIS. L. REV. 297, 298 n.6 (quoting Rossano v. Blue Plate Foods, Inc., 314 F.2d 174, 176 (5th Cir. 1963)).

11 *See, e.g.*, Hurley v. Heart Physicians, P.C., No. X05CV000177475S, 2007 WL 4574299, at *4 (Conn. Super. Ct. Nov. 14, 2007).

12 ALA. SUP. CT. R. 47(b); ALASKA R. CIV. P. 47(b)(2)(A); ARK. R. CIV. P. 47(b); CONN. GEN. STAT. ANN. § 51-243 (West 2005); DEL. SUP. CT. CIV. R. 47(b); FLA. R. CIV. P. 1.431(g)(1); HAW. R. CIV. P. 47(b); 735 ILL. COMP. STAT. ANN. 5 / 2-1106 (WEST 2003); KY. R. CIV. P. 47.02; LA. CIV. CODE ANN. art. 1769 (2003); MD. R. CIV. P. 2-512(f)(3); MISS. R. CIV. P. 47(d); MO. ANN. STAT. § 494.485 (West 1996); NEV. R. CIV. P. 47(b); N.M. R. CIV. P. 1-047(B); N.Y. C.P.L.R. 4106 (MCKINNEY 2007); N.C. GEN. STAT. § 9-18 (2009); N.D. R. CIV. P. 47(d); OHIO R. CIV. P. 47(D); OR. R. CIV. P. 57(F); R.I. GEN. LAWS § 9-10-13 (1997); S.C. R. CIV. P. 47(b); S.D. CODIFIED LAWS § 15-6-47(b) (2001); TENN. R. CIV. P. 47.02(2); TEX. GOV'T CODE ANN. § 62.020(d) (West 2005); VT. R. CIV. P. 47(d); VA. CODE ANN. § 8.01-360 (2007); W. VA. CODE ANN. § 56-6-12a (LexisNexis 2005); WYO. R. CIV. P. 47(d).

13 *See Hurley*, 2007 WL 4574299, at *4.

14 *See, e.g.*, Lloyd Noland Hosp. v. Durham, 906 So. 2d 157, 160-61 (Ala. 2005); Stivachtis v. Travelers Ins. Co., No. CV980420305S, 2003 WL 721495, at *3 (Conn. Super. Ct. Jan. 21, 2003); Detraz v. Lee, 955 So. 2d 1287, 1287 (La. Ct. App. 2007); Stokes v. State, 843 A.2d 64, 67-68 (Md. 2004); Sulfridge v. Piatt, No. 00CA695, 2001 WL 1764391, at *3-5 (Ohio Ct. App. Dec. 26, 2001).

15 This Note discusses the problem presented by inconsistent bifurcation and alternate juror rules in the civil context. While a parallel issue is presented in criminal trials at the state level (and indeed a great deal of cases and commentary on the issue of alternate jurors focuses primarily on the criminal side), the additional considerations of the criminal trial process mandate separate analyses, which are beyond the scope of this Note. Nonetheless, because many cases and commentaries in this arena do concern criminal matters, it is helpful to borrow some limited reasoning and analysis when it is clearly applicable to the issues in both contexts.

improvise and often ignore these mandatory rules. Part II also discusses the importance of judicial adherence to the mandatory alternate juror dismissal rules.

Part III of this Note explains the problems associated with such improvisation and ignorance of alternate juror dismissal rules, specifically in bifurcated or phased trials. Part IV argues that states that mandate dismissal of alternate jurors at the beginning of jury deliberations should amend their civil rules to officially and specifically facilitate the common existence of bifurcation and alternate jurors. Part IV further provides a model for correcting these rules and explains the model's benefits. Overall, this Note aims to demonstrate that such amendments to alternate juror rules would create clear, unambiguous procedures for the use of alternate jurors in bifurcated proceedings and would foster an environment of efficiency, fairness, and justice in an area of procedural law currently characterized by confusion and improvisation.[16]

16 This Note's analysis of some ancillary issues related to this topic is necessarily limited. First, this Note does not aim to resolve the long-standing and intense debate on the propriety of bifurcation. *See, e.g.*, Dan Cytryn, *Bifurcation in Personal Injury Cases: Should Judges Be Allowed to Use the "B" Word?*, 26 NOVA L. REV. 249, 250 (2001); David L. Tobin, *To B . . . or Not to B . . ."B" . . . Means Bifurcation*, FLA. B.J., Nov. 2000, at 14, 14-20. Rather, this Note simply accepts the reported benefits of bifurcation and proposes a solution for the workable coexistence of bifurcation and the institution of alternate jurors.

Furthermore, the Note does not attempt to contribute to the debate on the propriety of mid-deliberation substitutions. *See e.g.*, Jeffrey T. Baker, *Post-Submission Juror Substitution in the Third Circuit: Serving Judicial Economy While Undermining a Defendant's Rights to an Impartial Jury Under Rule 24(C)*, 41 VILL. L. REV. 1213, 1228-33, 1238-44 (1996); Douglas J. McDermott, Note, *Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial*, 35 B.C. L. REV. 847, 878-79 (1994). Rather, it aims to illustrate the reasons many states have chosen to retain the "mandatory post-submission dismissal" rules for alternate jurors despite decades of consideration of the issue and to better demonstrate the desirability of developing alternate juror rules that clearly allow for the provision of alternate jurors in phased trials. *See Hurley*, 2007 WL 4574299, at *3 n.3 ("Prior to 1980, the procedures regarding alternate jurors in both civil and criminal cases were governed by § 51-243, which required the dismissal of alternate jurors when the case was given to the regular panel for deliberation. In 1969 a bill (House Bill No. 6809) was introduced to amend § 51-243 by permitting the substitution of alternate jurors after deliberations had commenced and requiring the dismissal of alternates at the same time as the regular panel. The bill passed in the House of Representatives, but was drastically amended in the Senate which took out the references to substitution of alternates during deliberations and the dismissal of alternates at the same time as the regular panel. The Senate version was enacted into law but, in effect, as amended, it just restated the prior law."); *see also* Sheldon R. Shapiro, Annotation, *Alternate Jurors in Federal Trials Under Rule 24(c) of Federal Rules of Criminal Procedure or Rule 47(b) of Federal Rules of Civil Procedure*, 10 A.L.R. FED. 185 (2010 Supp.).

Finally, this Note recognizes that it is the practice of some courts to select wholly different juries for subsequent phases of bifurcated trials. *See infra* notes 168-69 and accompanying text. The analysis in this Note, however, presumes the use of the same jury for each phase. Nevertheless, this Note also argues that to the extent trial judges may rely on the option to select entirely new juries for the second phase of bifurcated trials, when alternates are unavailable, the model rule proposed provides a much better solution. *See infra* notes 172-78 and

II. Alternate Jurors and Mandatory Dismissal

A. Importance of Alternate Jurors to Judicial Economy

Courts commonly need alternate jurors in civil jury trials, and the use of alternate jurors has a substantial positive impact on judicial economy.[17] The judicial system takes great care to prevent mistrials because "[l]itigation today is . . . expensive in time and money."[18] Alternate jurors are extremely important in civil trials because of the "increasing prevalence of lengthy and complex trials, and the resulting rise in the opportunities for juror incapacitation or disqualification."[19] Many states allow for the provision of alternate jurors at the trial judge's discretion.[20] Alternate jurors are subject to the same qualifications as regular jurors, and prior to their dismissal, they retain all the same privileges and hear the same evidence as regular jurors.[21] Although the institution of the alternate juror has been abolished in federal civil courts,[22] it is still a viable and essential institution in America's state civil courts, especially as court administrators increasingly "wince at the escalating costs of jury trials."[23] Indeed, the use of alternate jurors is a major improvement from common law systems in which mistrials were declared when regular jurors could no longer serve.[24]

High courts have been emphatic about the value of alternate jurors in the trial setting. The Kentucky Court of Appeals stressed the importance of alternate jurors in its analysis of an appeal claiming that a juror in the trial was unfit for service.[25] The court concluded its opinion in the case with a universal admonition to trial courts throughout the state in regards to alternate jurors:

> We would be remiss if we did not comment on the jury procedure utilized in this case. The court elected not to seat an alternate juror. When no alternate juror is seated, the court is left no alternative but to declare a mistrial when juror bias is discovered absent the parties' agreement to proceed with a jury

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accompanying text.

17 *See supra* notes 3-6 and accompanying text.

18 Koch v. Rist, 730 N.E.2d 963, 967 (Ohio 2000) (Fain, J., concurring).

19 Jon D. Ehlinger, Note, *Substitution of Alternate Jurors During Deliberations: Constitutional and Procedural Considerations*, 57 Notre Dame L. Rev. 137, 137 (1981) (footnote omitted).

20 *See, e.g.*, Ala. Sup. Ct. R. 47; Conn. Gen. Stat. Ann. § 51-243 (West 2005); Ky. R. Civ. P. 47.02; Ohio R. Civ. P. 47(D).

21 Silvestri, *supra* note 5, at 206 (citation omitted).

22 50A C.J.S. *Juries* § 259 (2008).

23 Judicial Administration and Space Management: A Guide for Architects, Court Administrators, and Planners 98 (F. Michael Wong ed., 2001).

24 Silvestri, *supra* note 5, at 206 (citation omitted).

25 Nave v. Commonwealth, No. 2007-CA-002607-MR, 2009 WL 1974439 (Ky. Ct. App. July 10, 2009).

> of less than twelve members. This result seems nonsensical when the cost of seating an alternate juror is *de minimus* when compared to the alternative of declaring a mistrial or, in the most deplorable scenario, proceeding to a verdict with a less than impartial juror on the panel. We urge our trial courts to avoid the result reached in this case by seating an alternate juror. The seating of an alternate juror would have easily resolved the present controversy at the trial level by simply removing Juror Boyd and proceeding with the alternate juror.[26]

While this specific case dealt with biased jurors, the logic of the court's statement extends to any instance in which a regular juror becomes unable to serve. Because of the obvious benefits of using alternate jurors, appellate courts reviewing such cases "suggest to trial courts that, when seating a jury, appointing at least one alternate juror is a valuable safety measure, to avoid . . . problem[s] and to protect trial proceedings."[27] Examples of reasons why jurors have failed to serve throughout an entire civil trial are numerous and varied: "family trips,"[28] "fail[ure] to return from a lunch break,"[29] medical emergency,[30] "refus[al] to deliberate,"[31] "reading a law book" during a break,[32] sleeping during testimony,[33] and "death in [the] family."[34]

B. Trial Courts Often Act in Contravention of Mandatory Dismissal Rules

In several states, alternate jurors must be dismissed at the start of trial deliberations, according to the text of the states' rules of civil procedure.[35] For example, Kentucky's Rule of Civil Procedure dealing with alternate jurors states:

> If the membership of the jury exceeds the number required by law, immediately before the jury retires to consider its verdict the clerk, in open court, shall place in a box the cards bearing numbers identifying the jurors empanelled to hear the case and, after thoroughly mixing them, withdraw from the box at random a sufficient number of cards (one or two, as the case may be) to reduce the jury to the number required by law, whereupon the jurors so selected for elimination shall be excused.[36]

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26 *Id.* at *4.

27 *Ex parte* Hunter, 256 S.W.3d 900, 903 n.4 (Tex. Ct. App. 2008) (citation omitted).

28 Menard v. Lafayette Ins. Co., 2009-0029 (La. App. 3 Cir. 6/3/09); 13 So. 3d 794, 799.

29 Hardesty v. Pino, 222 P.3d 336, 342 (Colo. App. 2009).

30 Terrance v. Dow Chem. Co., 2006-2234 (La. App. 1 Cir. 9/14/07); 971 So. 2d 1058, 1062.

31 Grassilli v. Barr, 48 Cal. Rptr. 3d 715, 728 (Ct. App. 2006).

32 Carpenter v. Rohrer, 2006 ND 111, ¶ 4, 714 N.W.2d 804, 811.

33 Sakler v. Anesthesiology Assocs., P.S.C., 50 S.W.3d 210, 216 (Ky. Ct. App. 2001).

34 DeGhelder v. Compton, No. 01-04-00139-CV, 2005 WL 1606545, at *1 (Tex. Ct. App. July 7, 2005).

35 *See infra* note 37.

36 Ky. R. Civ. P. 47.02. Kentucky's rule was first adopted in 1953 and at the time was

This type of rule (a "mandatory dismissal" rule), is the same model used by twenty-eight other state courts.[37]

The language of mandatory dismissal rules differs throughout the states as some states' court rules provide that alternate jurors must be released "upon the final submission of the case to the jury."[38] Other states' rules follow the form of Federal Rule of Civil Procedure 47(b), prior to its amendment in 1991 abolishing the alternate juror, which read "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."[39] While this language and the use of the word 'after' do not indicate that this rule on its face is a "mandatory dismissal" rule, "courts have uniformly construed the phrase 'after the jury retires' to mean 'as soon as the jury retires' or 'immediately after the jury retires,' but not to mean 'at any time after the jury has retired.'"[40] Many state courts that do not have mandatory dismissal rules employ discretionary dismissal rules, allowing for the judge at his option to retain or dismiss alternate jurors after the case goes to deliberations.[41] Only one state, Washington, specifically addresses bifurcation in its civil procedure rules.[42]

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identical to FEDERAL RULE OF CIVIL PROCEDURE 47(b). 7 KURT A. PHILIPPS, DAVID W. KRAMER & DAVID W. BURLEIGH, KENTUCKY PRACTICE: RULES OF CIVIL PROCEDURE 191 (2005).

37 Twenty-nine states, including Kentucky, have alternate juror court rules or statutes which mandate dismissal of alternate jurors at the start of jury deliberations: Alabama, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wyoming. ALA. SUP. CT. R. 47(b); ALASKA R. CIV. P. 47(b)(2)(A); ARK. R. CIV. P. 47(b); CONN. GEN. STAT. ANN. § 51-243 (West 2005); DEL. SUP. CT. CIV. R. 47(b); FLA. R. CIV. P. 1.431(g)(1); HAW. R. CIV. P. 47(b); 735 ILL. COMP. STAT. ANN. 5 / 2-1106(b) (WEST 2003); KY. R. CIV. P. 47.02; LA. CIV. CODE ANN. art. 1769(D) (2003); MD. R. CIV. P. 2-512(f)(3); MISS. R. CIV. P. 47(d); MO. ANN. STAT. § 494.485 (West 1996); NEV. R. CIV. P. 47(b); N.M. R. CIV. P. 1-047(B); N.Y. C.P.L.R. 4106 (MCKINNEY 2007); N.C. GEN. STAT. § 9-18(a) (2009); N.D. R. CIV. P. 47(d); OHIO R. CIV. P. 47(D); OR. R. CIV. P. 57(F); R.I. GEN. LAWS § 9-10-13 (1997); S.C. R. CIV. P. 47(b); S.D. CODIFIED LAWS § 15-6-47(b) (2001); TENN. R. CIV. P. 47.02(2); TEX. GOV'T CODE ANN. § 62.020(d) (West 2005); VT. R. CIV. P. 47(d); VA. CODE ANN. § 8.01-360 (2007); W. VA. CODE ANN. § 56-6-12a (LexisNexis 2005); WYO. R. CIV. P. 47(d).

38 N.C. GEN. STAT. ANN. § 9-18 (West 2010); *see also* VA. CODE ANN. § 8.01-360 (West 2010). It is not clear from the rule itself what "final submission of the case to the jury" means. In at least one state, but in the criminal context, "final submission of the case" has been held to mean "when the jury retires to deliberate upon the sentence in the punishment or second stage of the proceedings." Miller v. State, 2001 OK CR 17, ¶ 23, 29 P.3d 1077, 1083 n.6 (citation omitted).

39 Shapiro, *supra* note 16.

40 *Id.* § 8[a].

41 *See* CAL. CIV. PROC. CODE § 233 (West 2010); ARIZ. R. CIV. P. 47(f); COLO. R. CIV. P. 47(b); UTAH R. CIV. P. 47(b).

42 WASH. CT. R. 47(b). ("An alternate juror may be recalled at any time that a regular juror is unable to serve, including a second phase of any trial that is bifurcated. If the jury has commenced deliberations prior to the replacement of a regular juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and to begin deliberations

Throughout the United States, trial courts' disregard of mandatory dismissal rules is both common and alarming. For example, in *Brockington v. Grimstead*, the Court of Special Appeals of Maryland considered an appeal from a medical malpractice lawsuit in which the trial judge acted in direct contravention to Maryland's rule on alternate jurors.[43] Maryland's civil rule on alternate jurors is similar to Kentucky's,[44] specifying that "[w]hen the jury retires to consider its verdict, the trial judge shall discharge any remaining alternates who did not replace another jury member."[45]

Nevertheless, the trial judge took the liberty of retaining two alternate jurors after the jury retired to consider its verdict and even allowed the alternates to sit in on jury deliberations without participating.[46] In fact, even though the Maryland mandatory dismissal rule had been in effect since 1984,[47] the appellate court noted that the trial judge acknowledged having "used this same [incorrect] procedure many times previously."[48] Because this issue was a matter of first impression for the Maryland appellate courts, at least in the civil context, it leaves one to wonder how many times since the rule's enactment similarly uninformed Maryland judges made the same mistake.[49] It also leaves one to wonder why this rule was disregarded or overlooked by several, presumably competent, attorneys.

Situations similar to Maryland's are found throughout America's state courts. For example, in *Fader v. Planned Parenthood of New York City*, a New York appellate court reviewed a trial judge's failure to dismiss alternate jurors before deliberations.[50] The New York alternate juror dismissal rule (CPLR 4106) provided that alternate jurors "shall be seated with, take the oath with, and be treated in the same manner as the regular jurors, except that after final submission of the case, the court shall discharge the alternate jurors."[51] The appellate court ruled that the appellant had not preserved the issue for appeal properly and had therefore waived her right

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anew.").

43 Brockington v. Grimstead, 933 A.2d 426, 429-32, 446 (Md. Ct. Spec. App. 2007) (regarding Maryland's rule on alternate jurors, specifically MD. R. CIV. P. 2-512).

44 KY. R. CIV. P. 47.02.

45 MD. R. CIV. P. 2-512(f)(3).

46 *Brockington*, 933 A.2d at 430.

47 MD. R. CIV. P. 2-512(f)(3) (amended 2007) (the current version still provides for the dismissal of remaining alternate jurors immediately before the jury retires to consider its verdict).

48 *Brockington*, 933 A.2d at 430.

49 *Id.* at 435 ("Although there are no appellate decisions construing Rule 2-512(b), the Court of Appeals twice has interpreted its criminal counterpart, Rule 4-312(b), which is nearly identical.").

50 Fader v. Planned Parenthood of N.Y.C., 717 N.Y.S.2d 166, 167 (App. Div. 2000).

51 N.Y. C.P.L.R. 4106 (McKinney 2010).

to the effectuation of the provisions of CPLR 4106, and the waiver did not constitute the denial of due process.[52]

The 2005 New York case *Gallegos v. Elite Model Management Corp.*[53] provides another glaring example of the need for better rules on alternate jurors and for attorneys and judges to heed the rules. In *Gallegos*, following an unfavorable verdict, the defendants sought to have it vacated, "argu[ing] that the trial court disregarded the mandate of CPLR 4106, which requires that the court discharge the alternate jurors after the case is submitted to the jury . . . by substituting those alternate jurors."[54] During the trial, however, and immediately before jury deliberations commenced, plaintiff's counsel discussed with both defense counsel and the judge the need for "keep[ing] the alternates 'on call' after the jury beg[an] deliberations, so that in case one of the regular jurors bec[ame] incapacitated an alternate could be substituted."[55] Following a long colloquy, the judge decided that substituting an alternate would be preferable to proceeding to a verdict with fewer jurors or declaring a mistrial,[56] despite the judge's admission that he had "never done it,"[57] that he believed it to be a "fundamental error,"[58] and that he did not "think it would stand up on appeal."[59]

Further highlighting the importance of clear alternate juror rules and the need for attorneys to take notice of them is *Pillard v . Goodman*, a legal malpractice case arising out of *Gallegos*.[60] A defendant in the *Gallegos* case, Ms. Pillard, brought an action against her attorneys based, in part, on their alleged negligence in "fail[ing] to object to, and research the issue of, retaining of the alternate jurors after the jury began deliberating, in violation of CPLR 4106 and fail[ing] to object to the substitution of the alternate jurors and to insist that a mistrial be declared."[61] Although this claim was dismissed because the court found that Pillard's attorney had validly objected to the substitution at trial,[62] the appellate court in *Gallegos* asserted that Pillard's counsel should have been more "forceful" in his objection.[63] Pillard's action against her attorneys is not surprising

52 *See Fader*, 717 N.Y.S.2d at 167.

53 Gallegos v. Elite Model Mgmt. Corp., 807 N.Y.S.2d 44 (App. Div. 2005).

54 *Id.* at 47.

55 *Id.* at 49.

56 *Id.* at 49-51.

57 *Id.* at 49.

58 *Id.*

59 *Id.*

60 Pillard v. Goodman, 906 N.Y.S.2d 775 (Sup. Ct. 2009).

61 *Id.* at *3 (citations omitted).

62 *Id. at* *5.

63 *Gallegos*, 807 N.Y.S.2d at 51.

considering that clients lose the ability to object to erroneous procedures when attorneys fail to raise objections at the time the errors occur.[64]

One particularly interesting instance of judicial evasion of court rules is found in Connecticut. Connecticut's mandatory dismissal rule reads, "[a] juror selected to serve as an alternate shall not be segregated from the regular panel except when the case is given to the regular panel for deliberation at which time he shall be dismissed from further service on the case."[65] While seemingly simple,[66] this rule has a history of being dodged by Connecticut courts. In addition to at least two lower courts that directly counteracted the rule's mandate,[67] the Connecticut Judicial Branch itself has shockingly done so. The second note to the Connecticut Judicial Branch's model civil jury instruction "Discharge of Alternate Juror(s)" reads:

> There are circumstances when the judge may wish not to discharge the alternate jurors or to emphasize the possibility that they may be recalled. Those circumstances will most often occur where the case has been bifurcated or where, because of the anticipated length of deliberation or other conditions, concern exists as to whether a regular juror might be lost during deliberation.[68]

64 *See, e.g.*, Stivachtis v. Travelers Ins. Co., No. CV980420305S, 2003 WL 721495, at *4 (Conn. Super. Ct. Jan. 21, 2003); *see also* Phoebe Carter, Annotation, *Propriety of Substituting Juror in Bifurcated State Trial After End of First Phase and Before Second Phase Is Given to Jury*, 89 A.L.R. 4th 423, 429 (1991) ("[I]t may be more prudent for counsel who wish to claim that . . . a [post-submission] substitution is improper to take all necessary procedural steps to raise and preserve the substitution claim.").

65 CONN. GEN. STAT. ANN. § 51-243 (West 2010).

66 The argument has been made that such a rule does not apply in bifurcated cases, and that in such cases, "deliberations" means the second phase of deliberations. Defendant's Reply in Support of Its Motion to Bifurcate, Hurley v. Heart Physicians, P.C., No. CV00-0177475S (Conn. Super. Ct. Oct. 5, 2007), 2007 WL 6756972 ("[I]n a bifurcated case, the jury's final 'deliberation' is after both the liability and damages phases of the trial. Under this analysis, alternate jurors should remain during the liability decision and only be dismissed when the panel begins final deliberation on the damages portion of the case, if the trial reaches that stage."). This argument ignores the fact that the statute does not mandate release upon *final* deliberation, but rather upon "deliberation" alone, CONN. GEN. STAT. ANN. § 51-243 (West 2010), and that there are sound reasons for preventing alternate jurors from being retained during deliberations. *See infra* Part II.C.

67 *See* Stivachtis v. Travelers Ins. Co., No. CV980420305S, 2003 WL 721495, at *3 (Conn. Super. Ct. Jan. 21, 2003); O'Shea v. Mignone, No. CV8700879355, 1997 WL 331033, at *4 (Conn. Super. Ct. June 10, 1997).

68 *Civil Jury Instructions 2.9-8 Discharge of Alternate Juror(s)*, STATE OF CONN. JUDICIAL BRANCH, http://www.jud.ct.gov/ji/Civil/part2/2.9-8.htm (last visited Feb. 12, 2011).

These proposed civil jury instructions are not legal authority,[69] but the state's judicial branch nevertheless published and endorsed the note, thus indicating its promotion of this incorrect behavior.[70]

Although the previous examples have highlighted some of the more interesting cases of trial court contravention of mandatory dismissal rules, countless more examples are available.[71]

C. The Importance of Adhering to Mandatory Dismissal Rules

Whether judges retain alternate jurors in violation of procedural rules due to ignorance or unwillingness to comply, it is clear in most cases that the judges proceed with the interests of judicial economy in mind. The record in *Gallegos* indicated that though the judge considered it a "fundamental error,"[72] he replaced the two jurors "in the interest of preserving the nine weeks that [litigants had] been at trial."[73] In most cases when a juror must be excused and an alternate cannot lawfully replace that juror, the alternatives are to have the parties agree to a verdict by less than the statutorily required number of jurors or to declare a mistrial.[74] According to a Kentucky appellate court, when an alternate juror is needed but not available, "the court is left no alternative but to declare a mistrial . . . absent the parties' agreement to proceed with a jury of less than twelve members."[75] Indeed, in a phased trial, one Ohio trial court blatantly ignored the state's alternate juror dismissal rule because "[f]aced with [9] weeks of trial, [34] plaintiffs and over 4000 pages of transcripts, the trial court . . . wanted to ensure that enough jurors would be present to reach a verdict."[76]

Despite judges' desires to maintain judicial efficiency, it is important that they follow the plain language of the rules of civil procedure in their

69 *Civil Jury Instructions Home*, STATE OF CONN. JUDICIAL BRANCH, http://www.jud.ct.gov/ji/Civil/default.htm (last visited Feb. 12, 2011) ("This collection of Civil Jury Instructions is intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency.").

70 *Id.*

71 *E.g.*, Lloyd Noland Hosp. v. Durham, 906 So. 2d 157 (Ala. 2005); Stivachtis v. Travelers Ins. Co., No. CV980420305S, 2003 WL 721495 (Conn. Super. Ct. Jan. 21, 2003); Detraz v. Lee, 2004-988 (La. App. 3 Cir. 4/11/07); 955 So. 2d 1287; Stokes v. State, 843 A.2d 64 (Md. 2004); Sulfridge v. Piatt, No. 00CA695, 2001 WL 1764391 (Ohio Ct. App. Dec. 26, 2001).

72 Gallegos v. Elite Model Mgmt. Corp., 807 N.Y.S.2d 44, 49, 50 (App. Div. 2005).

73 *Id.* at 50.

74 Ehlinger, *supra* note 19, at 153.

75 Nave v. Commonwealth, No. 2007-CA-002607-MR, 2009 WL 1974439, at *4 (Ky. Ct. App. July 10, 2009).

76 Matulin v. Acad. of Court Reporting, No. 14947, 1992 WL 74210, at *6 (Ohio Ct. App. Apr. 8, 1992).

states. Adherence to the rules not only furthers sound legal objectives, but also preserves juror sanctity.

1. *Adherence to Alternate Juror Rules Furthers Sound Legal Objectives.*—The most obvious reason judges should strictly adhere to their states' rules is that the rules were carefully considered and written to further sound objectives. Because most states' rules on alternate jurors clearly contemplate only single phase trials,[77] those that mandate the dismissal of alternate jurors upon the regular jury's retirement to deliberate likely do so to prevent the possibility that alternate jurors will be substituted should a regular juror become unable to continue serving during deliberations. Courts seek to avoid this result based on several inherent dynamics of post-submission substitution.

The first concern is that the alternate jurors' inability to participate in the earlier deliberations will affect their ability to understand and process the deliberations as a whole.[78] In rejecting the proposal of post-submission juror substitution in civil cases, the New York Advisory Committee on Practice and Procedure stated that "an alternate juror who enters the jury room after deliberation has begun is not fully qualified to render an intelligent verdict, having missed part of the discussion and consideration which makes up the deliberative process."[79]

A second, and similar, concern is that alternate jurors substituted after deliberations have begun will not be able to participate effectively because of already-formed group consensuses among existing jury members and the consequential nullifying effects on the views and contentions of the substituted alternates.[80] For example, the appellate court in *Gallegos*, reviewing the trial court's decision to retain alternate jurors, stated:

> [T]he two alternates here had not participated in the beginning of the deliberations and therefore were not on equal footing with the original four jurors, who already had the opportunity to weigh the evidence, consider the views of their fellow jurors, and possibly had formed preliminary positions regarding their ultimate verdict. In the worst case scenario, deliberations may have progressed to a stage where those four jurors had reached substantial agreement, presenting a "formidable obstacle" to any attempt by the two alternates to sway the others to their view.[81]

77 Only Washington's alternate juror civil procedure rule specifically mentions bifurcated trials. *See supra* note 42.

78 STATE OF N.Y. TEMP. COMM'N ON THE COURTS, SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, Legislative Document 1958, No. 13, at 228; People v. Ryan, 224 N.E.2d 710, 713 (N.Y. 1966).

79 STATE OF N.Y. TEMP. COMM'N ON THE COURTS, *supra* note 78.

80 Gallegos v. Elite Model Mgmt. Corp., 807 N.Y.S.2d 44, 49 (App. Div. 2005).

81 *Id.* at 48-49 (citations omitted).

Ultimately, the court held that substitution of alternate jurors after submission of the case violated the state's constitutional right to a jury trial because New York's "constitutional right to [a civil] jury trial contemplates that six persons participate in [the] deliberative process,"[82] and the likelihood that the alternates will be unable to deliberate effectively can easily destroy the constitutionally required participation.[83] This argument also received recognition in the federal context when a federal advisory committee considering the mandatory dismissal rule felt that a "central difficulty with post-submission substitution is that 'the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the [other jurors].'"[84] These conclusions are supported by psychological research and studies tending to "show[] that an individual facing a group consensus may surrender his own factually correct perceptions in favor of the incorrect group conclusion."[85] Simply put, "[w]hen an alternate juror enters deliberations, he or she is forced into a coercive atmosphere."[86] Consequently, "this coercive atmosphere may pressure the alternate to prematurely agree with the original jurors."[87]

2. *Adherence to Alternate Juror Rules Preserves Jury Sanctity.*—Another related and fundamental reason that some states may choose to release alternate jurors at the start of deliberations is based on the principle of jury sanctity.[88] Rule-makers in these states presumably recognize the dangers of allowing alternate jurors in the jury room during deliberations and eliminate this possibility by mandating the jurors' release when deliberations begin.[89] Despite the fact that many courts ignore the rules, judges have expressed their concerns with jury sanctity. For example, the Court of Appeals of Maryland stated that "'[t]he presence of alternate jurors [in the jury room] who have no legal standing as jurors injects an improper outside influence on jury deliberations and impairs the integrity of the jury trial.'"[90] While many courts instruct alternate jurors not to participate in deliberations, and in some cases even instruct regular jurors not to allow alternates to participate, these instructions can easily be ignored.[91]

82 *Id.* at 48 (citing Sharrow v. Dick Corp., 653 N.E.2d 1150 (N.Y. 1995)).

83 *Id.* at 48.

84 Joshua G. Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of Federal Rules of Criminal Procedure 23(b) and 24(c)*, 55 FORDHAM L. REV. 861, 878 n.123 (1987) (alteration in original) (citing 97 F.R.D. 245, 301 (1983)).

85 *Id.* at 878 & nn.123-35.

86 Baker, *supra* note 16, at 1249 (citation omitted).

87 *Id.* (citation omitted).

88 *See* Silvestri, *supra* note 5, at 208 (discussing Stokes v. State, 843 A.2d 64 (Md. 2004)).

89 *See* Ehlinger, *supra* note 19, at 155-56.

90 Silvestri, *supra* note 5, at 208 (alterations in original) (quoting *Stokes*, 843 A.2d at 76).

91 *See* Turk v. Silberstein, 709 A.2d 578, 579-80 (Conn. App. Ct. 1998).

In some states, harmful prejudice from alternate jurors *must* be presumed from their presence in the jury room during deliberations because otherwise the determination of such prejudice would depend on examining the jury deliberations directly, and "inquiry itself is [a] dangerous intrusion into the proceeding of the jury."[92] In states that do allow alternate jurors to sit in on jury deliberations, appellate courts often find that no substantial prejudice or reversible error has occurred where impermissible conduct of alternate jurors in the jury room is alleged.[93] While this tendency likely reflects these courts' desires to avoid mistrials, the allegations of alternate juror misconduct are frequent and range from alternate jurors making gestures[94] to an alternate juror pacing back and forth and even exercising in the deliberation room.[95] The high courts of states that mandate post-submission dismissal take a much more realistic view of the effect of the presence of alternate jurors in the jury room; on this issue, the North Carolina Supreme Court has stated that "any time an alternate [juror] is in the jury room during deliberations he participates by his presence and, whether he says little or nothing, his presence will void the trial."[96] By mandating the release of alternate jurors "immediately before the jury retires to consider its verdict,"[97] states avoid the risk that alternate jurors, even those admonished not to participate, will indeed become impermissible influences on the regular jury.

III. Analysis of the Conflict

A. Bifurcated Trials Present a Unique Problem for the Use of Alternate Jurors in Mandatory Post-Submission Dismissal States

The tendency for trial court judges in mandatory post-submission dismissal states to ignore their rules of civil procedure can present a unique problem in bifurcated trials, a problem that has been exacerbated by the increasing practice of phasing of civil trials. In 1989, a survey of state court judges showed that eighty-two percent of the 800 judges surveyed had ordered bifurcation,[98] and one scholar has even suggested that in the area

92 Koch v. Rist, 730 N.E.2d 963, 965 (Ohio 2000) (citing United States v. Beasley, 464 F.2d 468, 470 (10th Cir. 1972)).

93 *E.g.*, Brassfield v. Moreland Sch. Dist., 45 Cal. Rptr. 3d 662, 666-67 (Ct. App. 2006); Henri v. Curto, 908 N.E.2d 196, 204 (Ind. 2009).

94 *Henri*, 908 N.E.2d at 203.

95 *Id.* Antics such as this could likely be attributed to the frustration that alternate jurors experience when not allowed to deliberate after sitting through long trials. *See* Mary Kaluk Lanning, Comment, *The Unnecessary Alternate Juror*, 73 U. Colo. L. Rev. 1047, 1047-49, 1066-68 (2002).

96 State v. Bindyke, 220 S.E.2d 521, 533 (N.C. 1975).

97 Ky. R. Civ. P. 47.02.

98 Symposium, *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial*

of personal injury litigation, 2000 was the beginning of an increase in the frequency of bifurcated trials.[99] At any rate, "virtually every jurisdiction" in the United States, including the federal government, "allow[s] bifurcation" either by "procedural rule[][or] caselaw."[100] While bifurcation is not common in federal courts, some states encourage the practice more than others, and bifurcation is generally regarded as "offer[ing] many benefits for both litigants and the judiciary."[101]

When civil cases are bifurcated, the jury retires following the presentation of evidence on the issue of liability and deliberates until reaching a verdict on liability alone.[102] In Connecticut and Kentucky, the alternate juror rules require that alternate jurors must be dismissed from further service "when the case is given to the regular panel for deliberation,"[103] or "immediately before the jury retires to consider its verdict";[104] twenty-seven other states have language to the same effect. Therefore, in these states, if the court follows the plain language of the law, subsequent phases of the trial must[105] be conducted without alternate jurors.[106] As previously argued, however, conducting a trial without alternate jurors is extremely risky and can result in costly mistrials.[107] The risk is even more severe in phased trials because subsequent phases occur only after an initial verdict against the defendant in the liability phase, and research suggests that "[o]n the civil side, finding the defendant liable takes longer than exonerating him or her."[108]

In the past, trial courts treated bifurcated cases with the same ignorance of mandatory alternate juror dismissal rules.[109] These trial courts

Judges Who Spend at Least Half Their Time on General Civil Cases, 69 B.U. L. REV. 731, 743-44 tbl.5.2 (1989).

99 *See* Cytryn, *supra* note 16, at 249-50.

100 Shoemake, *supra* note 8, at 435.

101 Gensler, *supra* note 7, at 705.

102 *Id.*

103 CONN. GEN. STAT. ANN. § 51-243(e) (West 2010).

104 KY. R. CIV. P. 47.02.

105 The use of 'must' here assumes that the court will bifurcate the case using only one jury. Where a court employs a wholly separate jury for a second phase of a bifurcated trial, the issue of mandatory dismissal is moot because the court can empanel a new jury with new alternates just as it did in the first phase. Nevertheless, this is not the common practice in bifurcated cases, as the preferable and most often used method is to try the phases sequentially to the same jury. *See infra* Part IV.D.3. Furthermore, judicial economy will be better served by the employment of a rule, such as the one proposed in this Note, rather than empanelling a new jury for subsequent phases. *See infra* Part IV.D.3.

106 *See* Hurley v. Heart Physicians, P.C., No. X05CV000177475S, 2007 WL 4574299, at *4 (Conn. Super. Ct. Nov. 14, 2007).

107 *See supra* Part II.A.

108 Thomas L. Brunell et al., Time to Deliberate: Factors Influencing the Duration of Jury Deliberation 18 (June 25, 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=996426.

109 *See supra* Part II.B.

allowed alternate jurors to be retained and, in some cases, substituted for incapacitated regular jurors in subsequent phases of the trial.[110] The appellate court in *O'Shea v. Mignone* even ratified such conduct, finding that it was not prejudicial for an alternate juror, who did not deliberate in the liability phase of a bifurcated trial, to replace a regular juror in the damages phase.[111] However, the court made no mention as to whether the alternate juror viewed the liability deliberation, nor did it even address Connecticut's post-submission mandatory dismissal rule.[112] Rather than ignore their states' alternate juror rules in these cases, courts should start recognizing the discrepancy between alternate juror rules and bifurcation as an important one considering the purposes of the rules. As one court wisely stated, "[w]here the words and purpose of a statute plainly apply to a particular situation, . . . the fact that the specific application of the statute never occurred to [the legislature] does not bar us from holding that the situation falls within the statute's coverage."[113]

B. Only Recently Have Courts Begun to Take Notice of the Conflict

The specific conflict between mandatory post-submission alternate juror dismissal rules and phased trials appears to have lacked judicial recognition until 2007 when the Superior Court of Connecticut finally addressed the issue in *Hurley v. Heart Physicians, P.C.*[114] *Hurley* involved a motion to bifurcate a complex products liability and medical malpractice action.[115] The plaintiff, opposing the proposed bifurcation, raised Connecticut's mandatory alternate juror dismissal rule.[116] The court acknowledged this was a matter of first impression in the state[117] and ruled that the mandatory alternate juror dismissal rule must be followed; therefore, it defeated the motion to bifurcate.[118] First, the *Hurley* court acknowledged, where "there [is] a bifurcation, the court [has] a mandatory obligation to dismiss all the remaining alternate jurors at the time the case is submitted to the jury

110 *See, e.g.*, O'Shea v. Mignone, No. CV870087935S, 1997 WL 331033, at *4 (Conn. Super. Ct. June 10, 1997); *see also* Matulin v. Acad. of Court Reporting, No. 14947, 1992 WL 74210, at *5-6 (Ohio Ct. App. Apr. 8, 1992).

111 *O'Shea*, 1997 WL 331033, at *4.

112 *See id.*

113 United States v. Jones, 607 F.2d 269, 273 (9th Cir. 1979) (citing Patagonia Corp. v. Bd. of Governors of the Fed. Reserve Sys., 517 F.2d 803, 811 (9th Cir. 1975); E. Airlines v. Civil Aeronautics Bd., 354 F.2d 507, 510-11 (D.C. Cir. 1965)).

114 Hurley v. Heart Physicians, P.C., No. X05CV000177475S, 2007 WL 4574299, at *2 (Conn. Super. Ct. Nov. 14, 2007).

115 *Id.* at *1.

116 *Id.* at *2-3.

117 *Id.* at *2. According to the author's research, this also would have been a matter of first impression in any American state trial court.

118 *Id.* at *4.

for liability deliberations at the end of the first phase of the trial."[119] The court explained that after dismissal of alternate jurors, the court would not have the option to substitute an alternate juror during deliberations or the subsequent damages phase of the trial.[120] The obligation for the trial court to release alternate jurors following the first phase was, in the court's view, an unacceptable risk:

> Given that obligation, the only possible legal manner to proceed on a bifurcated basis would be to dismiss the alternates at the start of phase one deliberations and just take a chance that none of the regular . . . jurors would become ill or otherwise unable to continue in service until the termination of the trial. This is a risk the court is unwilling to take. It could result in a needless mistrial after five or six or more weeks of trial proceedings should there be a regular juror discharged during the second phase. The negative impact of such a mistrial on judicial economy would be of a much greater magnitude than any positive impact on judicial economy to be achieved by a bifurcation. Nor is the risk to be ignored as merely abstract.[121]

Finally, noting that the trial involved complex and interrelated issues, and that it was expected to last through the holiday and influenza seasons, the court concluded that "[i]t would be irresponsible for th[e] court to ignore the very real risk of a mistrial by proceeding on a bifurcated basis."[122] The *Hurley* case provides an example of a case in which the nature of phased proceedings conflicts with the plain language of the state's alternate juror dismissal rules. While cases of this type may be common, *Hurley* seemingly represents the first case in which the court recognized the conflict and proceeded in a manner as to avoid it.

Although the *Hurley* court was correct to adhere to the plain language of the Connecticut alternate juror rule, it is unfortunate that adherence to one tactic, mandatory dismissal of alternate jurors, eliminates the employment of another, bifurcation, when both exist to further judicial efficiency. Wise attorneys who oppose bifurcation in states with post-submission dismissal rules will inevitably cite the court's reasoning on this issue. *Hurley* has spawned recognition of this problem in other trial court proceedings.[123] For example, in one pending Kentucky case, the plaintiffs vigorously opposed bifurcation, citing, among other arguments, the bifurcation/alternate juror conflict.[124] The plaintiff's attorneys relied heavily on the reasoning in *Hurley*, arguing that because of the similarity in Kentucky and

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119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *See, e.g.*, Motion to Bifurcate at 4, Shore v. Biradi, No. CV 05 4003924 S (Conn. Super. Ct. Jan. 14, 2008), 2008 WL 2692725.

124 Plaintiffs' Memorandum in Support of Motion to Reconsider at 6-9, Campbell v. Baptist Healthcare Sys., Inc., No. 07-CI-03608 (2009) (on file with author).

Connecticut's alternate juror rules, and the complexity of the litigation, the Connecticut court's reasoning should be adopted.[125] While the bifurcation/alternate juror issue in the case is not yet resolved, it nevertheless highlights recognition of the issue in the legal community.

IV. The Need for A Specific and Clear Rule

A. Eliminate Alternate Juror Procedure from the Scope of Judicial Discretion

As with any procedural device, "some measure of [judicial] discretion" in the use of alternate jurors is "inevitable."[126] The question is, however, at what point this discretion becomes vested. There are two primary ways in which rules of procedure delegate judicial discretion: by expressly providing for discretion and "by using intentionally vague language that invites flexible interpretation."[127]

A third measure of judicial discretion, however, emanates not from the rules of procedure themselves, but from judges' "inherent . . . power to manage litigation in situations not covered by statute or . . . [r]ule."[128] In many of the previously cited examples of judicial contravention of states' alternate juror rules, judges held no discretionary authority to retain the alternate jurors based on the states' explicit rules.[129] The situation involving the use of alternate jurors in bifurcated civil trials, however, is not covered by the plain language of the statutes or rules of many states, nor was it addressed in former Federal Rule of Civil Procedure 47(b).[130] In jurisdictions where the law is ambiguous, it is likely that courts will proceed in addressing the application of alternate juror rules in bifurcation proceedings under their "inherent power" authority.

There are, however, many dangers in allowing judicial discretion to govern the treatment of alternate jurors in bifurcated trials: the judge may allow the alternate juror(s) to remain in the jury room during deliberations on the initial liability verdict, or she may sequester alternates outside the jury room with no means of observing the initial deliberations. The first discretionary option is impermissible because the mere presence of

125 *Id.*

126 Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 Cardozo L. Rev. 1961, 1964 (2007).

127 *Id.* at 1968.

128 *Id.* at 1967 (citation omitted).

129 *See supra* Part II.B.

130 Shapiro, *supra* note 16, at 203 ("Although requiring in general terms that alternate jurors be discharged 'after the jury retires to consider its verdict,' Rules 24(c) and 47(b) do not purport to deal specifically with cases in which (1) separate issues (such as the issue of liability and the issue of damages in a personal injury action) are tried separately, and (2) the jury first 'retires to consider its verdict' on one issue and later 'retires to consider its verdict' on a different issue.").

alternate jurors in the jury room is a risk to both the impartiality and sanctity of the jury.[131] The traditional sequestration option is also undesirable because an alternate juror would miss the benefit of the regular jury's initial deliberations and therefore be handicapped if called to serve later in the trial. The retention of alternate jurors throughout all stages of a trial is very important in bifurcated cases, and this Note argues that the benefits of juror observation can be achieved through alternate juror sequestration and the use of audiovisual technology.[132] In bifurcated cases, then, a rule clearly specifying an ideal alternate juror procedure is preferable to the exercise of inherent authority, which may result in methods that threaten the fairness of the trial.

B. States Should Enact a Special Amended Rule to Provide for Alternate Jurors in Phased Trials

This Note proposes that states amend their mandatory dismissal rules by inserting provisions for the retention of alternate jurors in bifurcated cases until the submission of the case to the jury in the final phase of the trial. This retention should be for the sole purpose of replacing jurors who become incapacitated during the *presentation of evidence* in latter stages of the trial; jurors should not be replaced during the progression of any set of deliberations. As the regular jury deliberates following the first phase of the trial, alternate jurors should be sequestered in another room equipped with audiovisual equipment sufficient to allow the alternates to fully monitor the regular jury deliberations. This will reinforce their comprehension of the evidence presented and allow them to understand the conclusions of the initial verdict. Subsequent to the first set of deliberations, alternate jurors should be recalled to the jury box and again be afforded the same opportunity as the regular jurors to hear testimony. As a result, the alternate jurors will be as informed of the trial testimony and evidence as the regular jurors, and should a regular juror become incapacitated during presentation of evidence in the subsequent phases, an alternate juror will be available to then deliberate intelligently and competently.

To accomplish this procedure, courts should use the same technology already employed in courthouses for other purposes. Video technology is used extensively in America's trial courts for "[v]ideo-teleconferencing between remotely located witnesses and attorneys' offices or courtrooms," "[v]ideo arraignment between jail[s] and courthouses," and videotaping of witness testimony.[133] A state rule requiring a video and audio feed from the jury deliberation room to a room containing alternate jurors would

131 *See supra* Part II.C.

132 *See Supra* Part IV.B.2.

133 JUDICIAL ADMINISTRATION AND SPACE MANAGEMENT, *supra* note 23, at 61.

meet with few technological roadblocks in light of the current pervasive use of video in the courtroom; also, "[v]ideotaping of trial proceedings has passed the experimental stages and is being planned for all newer judicial buildings."[134] Implementation of new uses of video and audio technology in the courtroom could potentially be expensive and burdensome, but calls for such an expansion are not without precedent in other contexts,[135] and generally, "the current trend is toward integrated, high-technology courtrooms."[136]

1. *An Amended Rule Would Increase Alternate Juror Familiarity with the Case.*— It is important that alternate jurors witness jury deliberations in the first phase of bifurcated trials primarily for two reasons: they will be familiar with all details of the trial if later called to serve and to alleviate the alternate juror's frustration with his alternate status.

First, it is important that an alternate juror is familiar with all details of the initial phase of a trial in case she is called, in a later phase, to replace a regular juror; this includes knowing what occurs during deliberations. This is important because the issues in the separate phases of a bifurcated trial are usually related to some extent.[137] One California court gave an example of how such issues may be related in the context of punitive damages:

> Punitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case.* Thus BAJI No. 14.71, the instruction on punitive damages, tells the jury that in arriving at an award of punitive damages, it is to consider the reprehensibility of the conduct of the defendant and that the punitive damages must bear a reasonable relation to the actual damages. In order for a jury to evaluate the oppression, fraud or malice in the conduct giving rise to liability in the case, it must consider the conduct giving rise to liability.[138]

While this language deals with punitive damages explicitly, its logic applies to almost all cases of bifurcation. One scholar notes that in personal injury cases, "medical evidence may 'be important to both the liability issue as well as to the damages issue.'"[139]

The Supreme Court of Montana also provided compelling support for the proposition that all jury members, regular or alternate, should be

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134 *Id.*

135 Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1089 (2004) (suggesting that courts make videoconferencing equipment available to clients for videoconferencing with their attorneys).

136 Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—And Tomorrow's—High-Technology Courtrooms*, 50 S.C. L. REV. 799, 801 (1999).

137 Gensler, *supra* note 7, at 733; *see also* Shoemake, *supra* note 8, at 448.

138 Medo v. Superior Court, 205 Cal. App. 3d 64, 68 (Ct. App. 1988).

139 Cytryn, *supra* note 16, at 260 (quoting Griffin v. Warner Enters., No. A-97-1240, 1999 WL 419900 (Neb. Ct. App. June 22, 1999)).

familiar with all aspects of each phase.[140] The supreme court ruled that it was an abuse of discretion for a trial court to allow the bifurcated phases of a case to be tried to separate juries based in part on the reasoning that

> to try the bad faith claim to a separate jury would require a much longer period of time because the second jury must be educated on the underlying contract claim to understand the bad faith claim. In other words, the parties would have to relitigate the entire case with virtually the same evidence and with virtually the same witnesses who would be put to the inconvenience and hardship of a second trial.[141]

The court's reliance on the reasoning that to be "educated" on the underlying claim a second jury would need to be exposed to the "same evidence and . . . witnesses" is important because it supports the notion that a juror's understanding of the evidence presented in the first phase is important to his ability to competently decide the issues in the second phase.[142] And because "[d]eliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member,"[143] having the ability to monitor jury deliberations will benefit alternate jurors in understanding the evidence. Furthermore, this would eliminate the possibility, if the alternate was later called to replace a regular juror, that "[w]hile the other jurors are fully aware of each other's view points and the previously established conclusions, the alternate is not privy to such information."[144]

2. *An Amended Rule Would Help Alleviate Alternate Juror Frustration.*—An additional benefit of allowing alternate jurors to be retained throughout trial and to view deliberations is to alleviate frustration experienced by alternates who are discharged before deliberations.[145] One author states that "alternates 'may suffer high emotional and financial costs, as well as the burden of lost time' after they hear the entire case and then are abruptly dismissed."[146] Notably, this concern was highlighted in the Advisory Committee's Notes to the 1991 amendment to Federal Rule of Civil Procedure 47, which eliminated alternate jurors: "The use of alternate jurors has been a source of dissatisfaction with the jury system because of

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140 Malta Pub. Sch. Dist. v. Mont. Seventeenth Judicial Dist. Court, 938 P.2d 1335, 1335-36 (Mont. 1997).

141 *Id.* at 1339.

142 *See id.*

143 Alison Markovitz, Note, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1522 (2001) (quoting People v. Collins, 552 P.2d 742, 746 (Cal. 1976).

144 McDermott, *supra* note 16, at 880.

145 *See* Silvestri, *supra* note 5, at 217.

146 *Id.* (citation omitted).

the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation."[147]

While alternate jurors acting under the proposed rule would not be allowed to participate in jury deliberations, some authority suggests that alternate juror frustration could be mitigated substantially through their ability to observe deliberations. One commission on jury improvement noted that "[a]lternate jurors report dissatisfaction at having been required to attend trials and then been denied *the opportunity even to observe deliberations*."[148] The same commission found, however, that alternate jurors who were allowed to observe deliberations were typically "very appreciative" of the opportunity.[149] The previous statement describes the undesirable method of allowing alternates to observe from within the jury room; this Note's proposed rule instead provides alternate jurors the cited benefit while eliminating the possibility of them becoming extraneous influences during deliberations.

C. The Model Rule

The previous sections of this Note have demonstrated that mandatory alternate juror rules present courts with a dilemma in bifurcated cases, but also that a workable and beneficial coexistence can be achieved. Given the shortcomings of current rules requiring mandatory dismissal of alternate jurors,[150] the following amendments to Kentucky's current rule are proposed as an illustration of the suggested change:

> If the membership of the jury exceeds the number required by law, immediately before the jury retires to consider its verdict *in a single phase trial*, the clerk, in open court, shall place in a box the cards bearing numbers identifying the jurors empanelled to hear the case and, after thoroughly mixing them, withdraw from the box at random a sufficient number of cards (one or two, as the case may be) to reduce the jury to the number required by law, whereupon the jurors so selected for elimination shall be *permanently* excused *from service in the trial and not recalled for any reason at the moment the regular jury begins deliberating. In a trial that will be bifurcated or otherwise phased, the court shall employ the procedure above for selecting the alternate juror(s). Upon the regular jury's retirement to consider its verdict, the alternate juror(s) shall be sequestered in a separate room of the court facility and be provided with sufficient video and audio monitors of jury deliberations so the alternate jurors may clearly hear all deliberations and view evidence and exhibits. The alternate jurors shall be instructed by the court not to discuss the case with each other during any point after the*

147 FED. R. CIV. P. 47 advisory committee notes.

148 J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1517-18 (1995) (emphasis added).

149 *Id.* at 1518.

150 *See supra* Part III.A-B.

> *regular jury retires to deliberate. No alternate juror shall be permitted to substitute for a regular juror during any set of deliberations. After the regular jury has reached a decision in the initial phase or phases of deliberation, the alternate juror(s) shall be returned to the jury box and again empanelled with the regular jury. Should a regular juror become incapacitated during the presentation of evidence in any phase of the trial, he or she shall be replaced by an alternate juror in the order the alternate jurors were selected as such. Upon the moment deliberation begins in the final phase of the trial, all remaining alternate jurors shall be permanently excused.*[151]

The most glaring defect with regard to current alternate juror rules is their failure to contemplate bifurcated trials; the model rule solves this issue by providing for a separate alternate juror procedure for bifurcation. The procedure would require courts to retain and sequester alternate jurors during the first stage of deliberations and provide them with audiovisual monitoring of the deliberations. Alternate jurors, under the rule, would then return to the regular jury box for the subsequent evidentiary portion of the trial. The rule permits regular jurors to replace alternates during any evidentiary portions of the trial but forbids replacement during deliberations. Finally, the rule mandates the alternate jurors' dismissal at the beginning of the final stage of deliberations.

D. Potential Criticism of the Model Rule

1. *Rule Could Create Impermissible, Distinct Jury.*—One likely argument in opposition to such a proposal is that the seating of alternate jurors during the second set of deliberations constitutes the seating of an entirely new and distinct jury. This argument is premised on the idea that the alternate jurors were not members of the jury that reached the first verdict in the case. But this argument should not prohibit the employment of the proposed procedure:

> Alternate jurors are members of the [same] jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors.[152]

In one bifurcated case in which the existence of liability was decided in the first phase and damages in the second, an appellate court ruled that

> the alternate jurors are as aware of the reprehensibility of defendant's conduct as the regular jurors and, while they may not have personally decided the question of liability, they were members of the jury which did.

151 Proposed changes to original rule are in italics. *See* Ky. R. Civ. P. 47.02.

152 Rivera v. Sassoon, 46 Cal. Rptr. 2d 144, 146-47 (Ct. App. 1995) (citation omitted).

> They are in as good a position to evaluate the [facts] giving rise to liability as the jurors they replace.[153]

Furthermore, research suggests that one individual juror, except the jury foreperson, seldom has a strong impact on jury deliberations.[154] In fact, "the jury's foreperson has been found to be responsible for one-fourth of the total communication acts in twelve-person juries."[155] Therefore, it seems highly unlikely that the substitution of one alternate juror would have such a substantial impact on the dynamics of the entire jury as to render it in effect a new or different jury.

2. *Alternate Juror Who Disagrees with Result of Initial Deliberations Could Sabotage Later Phase Deliberations.*—One criticism raised with respect to alternate jurors who join the regular jury during the second evidentiary phase of the trial is that an alternate juror who did not agree with the previous jury's finding of liability[156] will be inclined to sabotage the earlier verdict by voting to minimize the damages award.[157] On this issue, the Supreme Court of Oklahoma stated: "[i]t is more proper to assume that when a juror is outvoted on an issue (liability) he will accept the outcome and continue to deliberate with the other jurors honestly and conscientiously to decide the remaining issues."[158] This statement is illustrative of the vital distinction between mid-deliberation substitutions of alternate jurors and substitutions in a later evidentiary phase in which the alternate participates in the deliberations from the outset.

When an alternate is substituted mid-deliberation, after the previously constituted jury has already formed a consensus or made substantial findings, the likelihood that the alternate "will accept the outcome" is a negative consequence of the coercive effect which practically may result in a verdict by less than the required number of jurors.[159] On the other hand, when deliberations begin anew in the subsequent phase, the coercive effect of the previous decision actually promotes the interests of fairness in sustaining the integrity of the previous verdict by causing the previous alternate to "accept the outcome and continue to deliberate with the other

153 *Id.* at 147.

154 SUNWOLF, PRACTICAL JURY DYNAMICS: FROM ONE JUROR'S TRIAL PERCEPTIONS TO THE GROUP'S DECISION-MAKING PROCESSES 182-83 (2004).

155 *Id.* at 183.

156 In the typical civil bifurcation, an evidentiary phase on liability precedes the subsequent phase on damages, but only if a verdict is returned finding liability. *See* Fields v. Volkswagen of Am., Inc., 555 P.2d 48, 53 (Okla. 1976) ("The trial proceeds to the second stage concerning damages only if the jury finds in favor of the plaintiff on the issue of liability.").

157 *Id.* at 55 (quoting Ward v. Weekes, 258 A.2d 379, 381 (N.J. 1969)) (internal quotation marks omitted).

158 *Id.* (quoting *Ward*, 258 A.2d at 381) (internal quotation marks omitted).

159 *See supra* Part II.C.

jurors honestly and conscientiously to decide the remaining issues."[160] As the Supreme Court of Oklahoma stated, "although a juror concludes in a first trial that a defendant is not responsible for the plaintiff's injuries, he is still capable of accepting as fact in a second trial that the plaintiff was injured, and then determining independently to what extent he was damaged."[161]

3. *The Alternate Juror/Bifurcation Problem Could be Resolved by Using Different Juries.*—With the prevalence of both bifurcation and alternate jurors, a natural question is why the conflict between these two devices has not been the subject of more published case law. One likely reason is the tendency for bifurcated proceedings that result in liability verdicts to be settled prior to the second phase.[162] Another reason is that some states allow the damages phase of a bifurcated trial to be tried by a jury separate from the jury that determined the liability issues of the case.[163] While this practice itself is the subject of scholarly debate,[164] it certainly does not render the bifurcation/mandatory dismissal conflict any less important for multiple reasons.

First, in some states, it is impermissible for different juries to decide the separate phases of a bifurcated trial.[165] In other states, however, the decision whether to try the second phase of a bifurcated trial to the same or a separate jury is discretionary,[166] and in those states, one may argue the bifurcation/mandatory dismissal conflict is tempered by the option to replace the entire jury in the second phase. The use of such a procedure as a fallback in this scenario, however, is illogical and inconsistent with the goal of maximum judicial efficiency.

The model proposed in this Note, in which the retained alternate could join the jury in the second evidentiary phase, is preferable to empanelling a completely new jury for several reasons relating to judicial efficiency. Primarily, it allows courts to avoid the bifurcation/mandatory dismissal conflict while still using the common and preferred method of allowing the same jury to try both phases.[167] Furthermore, empanelling a new jury

160 *Fields*, 555 P.2d at 55 (quoting *Ward*, 258 A.2d at 381) (internal quotation marks omitted).

161 *Id.* at 55-56.

162 Gensler, *supra* note 7, at 706 (citation omitted).

163 Tobin, *supra* note 16, at 14.

164 *Compare* Gensler, *supra* note 7, *with* Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505 (1995).

165 *See, e.g.*, Waters *ex rel.* Skow v. Pertzborn, 2001 WI 62, ¶ 24, 627 N.W.2d 497, 505.

166 *See, e.g.*, Malta Pub. Sch. v. Mont. Seventeenth Judicial Dist. Court, 938 P.2d 1335, 1338 (Mont. 1997).

167 Gensler, *supra* note 7, at 735-36 & n.189; *see also* Granholm & Richards, *supra* note 164, at 511 ("Bifurcation is the separation of the legal issues or elements of a cause of action for separate trials, *ordinarily by the same jury*." (emphasis added)).

would necessitate a new session of voir dire,[168] which typically lasts only a few hours but in some cases may take days or even weeks.[169] An alternate juror, however, would already have been subjected to voir dire along with the regular jury, and thus the process is not repeated.[170] Furthermore, scholars note that "re-using the first jury is likely to make the second-issue phase proceed much faster."[171] In a wide array of personal injury cases, evidence and testimony elicited as to liability and causation may be relevant to the damages determination as well,[172] and by allowing the same jury to determine the verdict in each phase, the court can avoid needless replication of testimony and presentation of evidence. The proposed rule would provide courts that try bifurcated cases before separate juries a strong incentive to abandon this practice and save court resources by substituting a well-informed alternate juror rather than a completely new jury.[173]

4. *The Amended Rule Does Not Eliminate the Risk of Juror Incapacitation During Deliberations.*—Another potential criticism of the rule as proposed is that it fails to provide a contingency in the case of a juror becoming incapacitated *during* a set of deliberations. As argued previously, substituting an alternate juror *during* deliberations constitutes an impermissible influence capable of completely changing the dynamics of the deliberation and therefore its outcome.[174] Despite its inability to cure the risk of mistrial in such a case, the model rule is desirable because it reduces the risk of mistrial in the context of an entire trial. This is obvious when one considers that the average length of a civil jury trial in the United States is four days, while the average length of deliberations in a civil trial is only four hours.[175] Additionally, of the several examples previously cited as reasons for juror incapacitation,[176] most juror incapacitation is likely to occur throughout the duration of the trial as a whole, rather than during the relatively short time period between the beginning of deliberations and a verdict. While complex litigation usually results in longer than average deliberations,[177]

168 Gensler, *supra* note 7, at 735 n.189.

169 James H. Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 IND. L.J. 163, 180 n.97 (1984) (citations omitted).

170 *See* Kelso, *supra* note 148, at 1530; *see also* N.Y. C.P.L.R. 4106 (MCKINNEY 2007).

171 Gensler, *supra* note 7, at 735 n.189.

172 Cytryn, *supra* note 16, at 255-59 (noting that the issues overlap in automobile accident cases, products liability cases, medical liability cases, intentional tort claims, and others).

173 The author recognizes that some bifurcated cases may involve phases that are several months apart, and it can be difficult in these cases to reconstitute the same jury panel. *See* Tobin, *supra* note 16, at 16.

174 *See supra* Part II.C.

175 D. Graham Burnett, *A Juror's Role*, EJOURNAL USA, Jul. 2009, at 7, 10, *available at* http://www.america.gov/media/pdf/ejs/0709.pdf#popup.

176 *See supra* notes 28-34 and accompanying text.

177 *See* Brunell et al., *supra* note 108, at 2.

the ratio of the average length of deliberations to the average length of entire trials (four days to four hours) shows that the greatest risk of juror incapacitation is during the presentation of evidence portions of the trial.[178] This is the risk for which the model rule provides a remedy.

5. *The Amended Rule Ignores the Distinctions Between In Person and Video Communication.*—Advocating an expansion of courtroom use of audiovisual technology may attract disapproval from those who argue that audio and video monitoring or teleconference is both practically and legally distinct from personal contact. The basic concern is that "the use of video[] [technology] may alter the process in ways that have a subtle negative impact."[179] Such a contention has been made in the contexts of criminal defendant video-conferencing and witness testimony via video-conference,[180] and the proposal for audiovisual monitoring of jury deliberations will likely draw the same type of objection.

Critics who raise this concern of audiovisual technology in the courtroom reference a criminal defendant's Sixth Amendment Confrontation Clause rights in the context of remote witness testimony.[181] This constitutional concern, however, is not present in this Note's proposal because the audiovisual communication is limited to the jury's deliberation; the evidentiary phase of the trial is not implicated. Likewise, the practical concerns most often noted with the use of audiovisual technology in the courtroom are largely inapplicable to this proposal because they deal with the inadequacies of the technology in facilitating two-way videoconferencing.[182] Anne Poulin evaluated the use of audiovisual technology in the context of communication between incarcerated persons and courts and listed the following practical concerns: determining "how to photograph the participants in the proceeding,"[183] "inability fully to capture nonverbal cues,"[184] and the inability of cameras to "replicate normal eye contact."[185]

With respect to the question of how to photograph participants in the proceeding, the concern is that the "shot affects how the defendant will be perceived by those in court."[186] Clearly, such a concern has no direct parallel to this Note's proposal. While the configuration of the jury deliberation room will dictate the most effective camera placement for monitoring the

178 Burnett, *supra* note 175.

179 Poulin, *supra* note 135, at 1101 (citation omitted).

180 *See id.*; Lederer, *supra* note 136, at 840.

181 Lederer, *supra* note 136, at 840.

182 *See* Poulin, *supra* note 135, at 1089-92.

183 *Id.* at 1108.

184 *Id.* at 1110.

185 *Id.* at 1111 (citation omitted).

186 *Id.* at 1108 (citation omitted).

deliberations, preferably so that every juror may be visible to the alternate jurors observing, there is virtually no risk that a poorly framed camera shot of a deliberating juror could possibly prejudice either of the parties, as in the case of criminal proceedings.

The second concern is relevant to this proposal but also should not be prohibitive. Poulin asserts that "videoconferencing does not effectively convey the full range of nonverbal cues."[187] While this is true, this proposal contemplates the alternate jurors' one-way monitoring of the regular jury's deliberations while Poulin's concern is focused on two-way communication *between* the defendant and the court.[188] The third concern—eye contact—also is evaluated in the context of two-way communication between the court and defendant and is inapplicable to the proposal.[189]

The most pressing and applicable concern with this Note's proposal is described by Poulin, who asserts that documents cannot effectively be viewed via teleconferencing.[190] This Note has argued that audiovisual observation of the deliberations will afford the alternate jurors the opportunity to observe and comprehend the evidence in the case.[191] However, as Poulin points out, "[m]aterial is absorbed and understood differently when it is viewed than when it is received aurally."[192] While this legitimate concern can be carried over into the context of this Note's proposal, it is distinguishable. It is less important for an alternate juror to analyze evidence personally in deliberations than a regular juror. The regular jury is free to examine exhibits entered into evidence in the jury room as a means of deciding issues of fact in the case.[193] Because alternates will not decide issues of fact in the first phase of deliberations, it is less important that they review the exhibits personally than it is that they observe and understand how the regular jury comes to its conclusions of fact, including how the regular jury's review of the evidence led to its conclusions.[194]

6. *Concerns Over Jury Privacy.*—Another possible criticism of this proposal is that audiovisual monitoring of jury deliberations by alternate jurors represents a violation of jury privacy.[195] Examples of this criticism are

187 *Id.* at 1110 (citation omitted).

188 *Id.*

189 *Id.* at 1111.

190 *Id.* at 1112.

191 *See supra* Part IV.C.

192 Poulin, *supra* note 135, at 1112 (citation omitted).

193 75B AM. JUR. 2D *Trial* §1425 (2010).

194 *See supra* Part IV.C.

195 *See, e.g.*, State v. Cuzick, 530 P.2d 288, 290 (Wash. 1975) ("[O]bservation, even by one sworn to secrecy and silence, violates the cardinal requirement that juries must deliberate in private." (citations omitted)).

found in case law from Washington, where alternate jurors in civil cases may be retained throughout deliberations but are forbidden from sitting in on the regular jury's deliberations.[196] "'[S]ecrecy'"[197] and "'privacy'"[198] are used in one Washington case addressing this issue, but the court's analysis indicates that the basis of the privacy and secrecy concerns is the alternate juror's actual presence and participation in the jury deliberations.[199] One author has noted that many federal courts ruling on this jury privacy issue based their decisions on the fear that "alternate jurors' very presence in the jury room may inhibit certain jurors from participating freely in the deliberations, and that even a silent alternate juror's physical reactions to jury comments and decisions could affect the deliberations."[200] Under the current proposal, alternate jurors would not be present in the jury room and consequently would have no opportunity to participate. Furthermore, it is unlikely that a regular juror's knowledge that he was being remotely observed by alternate jurors would prevent him from deliberating freely since "the regular jurors . . . view the alternate jurors as ordinary jury members, because of the similarity in treatment and function."[201] Finally, alternate jurors "take the same oath and . . . have the same functions, powers, facilities and privileges as the regular jurors," and therefore with respect to the secrecy of jury deliberations, they are subject to the same obligations as regular jurors.[202]

7. *Civil Trials Do Not Need the Protections Afforded by the Amended Rule.*— Finally, one may argue that the effect of an alternate juror's presence in deliberations on jury impartiality is less important in civil litigation because severe penalties such as capital punishment and incarceration are absent.[203] While it is widely accepted that fairness to criminal defendants dictates "an impartial jury free from outside influences,"[204] fairness to the litigants in civil jury trials demands the same sanctity. For example, the Court of Appeals of Kentucky stated that in a civil case "[t]he fundamental right to trial before an impartial jury is . . . basic and crucial in our system of jurisprudence."[205]

196 *See* Jones v. Sisters of Providence, 970 P.2d 371, 372 (Wash. Ct. App. 1999).

197 *Id.* at 373 (citation omitted).

198 *Id.* (citation omitted).

199 *Id.* at 374-75.

200 Ehlinger, *supra* note 19, at 155 (citation omitted).

201 *Id.* at 156.

202 *Id.* (citations omitted).

203 The Alabama Supreme Court in *Lloyd Noland Hospital v. Durham* seemed to suggest this when it noted, critically, that all of the cases cited by a party opposing post-submission substitution in a civil case were criminal cases, and that some of them involved the death penalty. Lloyd Noland Hosp. v. Durham, 906 So. 2d 157, 166 (Ala. 2005).

204 *E.g.*, Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

205 Commonwealth v. Pittman, 425 S.W.2d 726, 729 (Ky. 1968) (quoting Commonwealth

The court further stated the "general rule" that "'[a]n impartial jury, selected and kept free from all outside or improper influences has always been regarded as necessary to a fair and impartial trial, and anything not legitimately arising out of the trial of the case which tends to destroy the impartiality of the juror should be discountenanced.'"[206] Furthermore, the court has stated that "'[e]very litigant in a civil action tried by a jury or accused in a criminal prosecution or proceeding is entitled to an impartial jury, and it is the duty of the trial court to see that a jury of competent, fair, and impartial persons is impaneled.'"[207] With this statement, the Supreme Court of Kentucky equated the importance of an impartial jury in civil and criminal cases.

Some of the scholarship opposing post-submission substitution is couched in consideration of the Sixth Amendment's provision of a "right to a speedy and public trial, by an impartial jury."[208] Because of similar guarantees by state constitutions, however, this argument should not be discounted as applicable only in the criminal context. As one high court stated, "[i]t is true legal principles have been applied less stringently to civil juries than criminal juries, however, we cannot conclude that there is a double standard that can be applied to the sanctity of a jury's deliberations based on criminal or civil process."[209]

Finally, because this Note's proposal has yet to be placed into practical effect, it is unclear what other, if any, specific objections courts or litigants might raise. Nonetheless, related procedures have been suggested in legal scholarship.[210]

CONCLUSION

The proposed model rule is distinguished from rules currently in existence primarily because it contemplates and provides for a separate alternate juror procedure for a phased trial, which permits alternate jurors to observe jury deliberations by audiovisual means. Only Washington has explicitly provided for the retention of alternate jurors in bifurcated civil trials (although its rule also allows for post-submission retention of

v. Garland, 394 S.W.2d 450 (Ky. 1964)).

206 *Id.* at 728 (quoting 39 AM. JUR. 109 *New Trial* § 95 (2011)).

207 Wisdom v. Wilson, 450 S.W.2d 824, 825 (Ky. 1970) (quoting 50 C.J.S. *Juries* § 208 (2011)).

208 U.S. CONST. amend. VI; *see* Grunat, *supra* note 84, at 878 & nn.121-22 ("The sixth amendment guarantees criminal defendants the right to be tried by an impartial jury that is free from outside influences. Any post-submission contact, therefore, endangers the impartiality of the jury." (citations omitted)).

209 State Highway Comm'n v. Dunks, 531 P.2d 1316, 1318 (Mont. 1975).

210 *See, e.g.*, Lederer, *supra* note 136, at 837; Ehlinger, *supra* note 19, at 157 (arguing for allowing alternate jurors to listen in on deliberations via intercom system).

alternates generally).[211] Nonetheless, even Washington's rule falls short because it does not provide for alternates' observation of the regular jury's first phase deliberations.[212] This proposed rule allows for a workable compromise between competing interests, which together form the heart of the conflict at issue. On one hand is the objective to keep extraneous influences out of jury deliberations by prohibiting the presence of alternate jurors during regular jury deliberations. On the other hand is the desire to avoid mistrials and the waste of judicial resources. By utilizing a rule consistent with the model rule presented, trial judges will have the option of using both bifurcation and alternate jurors harmoniously, achieving both objectives.

By sequestering alternate jurors and allowing them to view audio and video feeds of regular jury deliberations, courts will afford alternate jurors the opportunity to further understand the evidence and to hear the observations of their fellow jury members in deliberations. As a result, these jurors should be more competent to serve in subsequent deliberations, as well as more attentive and enthusiastic about their roles as alternate jurors.[213]

The concerns over case load management, cost to litigants, and judicial economy, all present in America's court systems today, are not likely to decrease without the implementation and usage of effective resource-saving procedures.[214] While the use of both alternate jurors and phased trials is beneficial to judicial economy,[215] it is unfortunate that, in some states, the two devices cannot fully co-exist because of the mandates of these states' alternate juror rules. As the use of bifurcated trials increases, and courts more frequently realize the importance of alternate jurors, state trial courts will inevitably continue to experience the need for compatibility between the two rules. Astute attorneys seeking to advocate in the best interests of their clients will continue to raise the issue. Rather than relying on fashioning their own improvised procedures for promoting judicial economy, courts in states with mandatory post-submission alternate juror rules should have the benefit (and mandate) of adhering to a clear and carefully crafted rule that will allow them to employ both important devices of judicial economy.

The inherent problem between the two devices could be alleviated by the enactment of provisions in states' alternate juror rules providing for the retention of alternate jurors through the presentation of evidence phases of trial. This would effectively eliminate the risk of mistrial due to juror incapacitation while holding true to the purpose of the current rules in

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211 WASH. CT. R. 47(b).

212 *See* Jones v. Sisters of Providence, 970 P.2d 371, 374-75 (Wash. Ct. App. 1999).

213 *See* Silvestri, *supra* note 5, at 217.

214 *See* James S. Kakalik, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 17 (1997).

215 *See supra* Part II.A-B and Part III.A.

prohibiting substitution of alternate jurors during deliberations. Thereby, these two judicial devices, each aimed at increasing judicial efficiency, would be able to co-exist in furtherance of the goal.