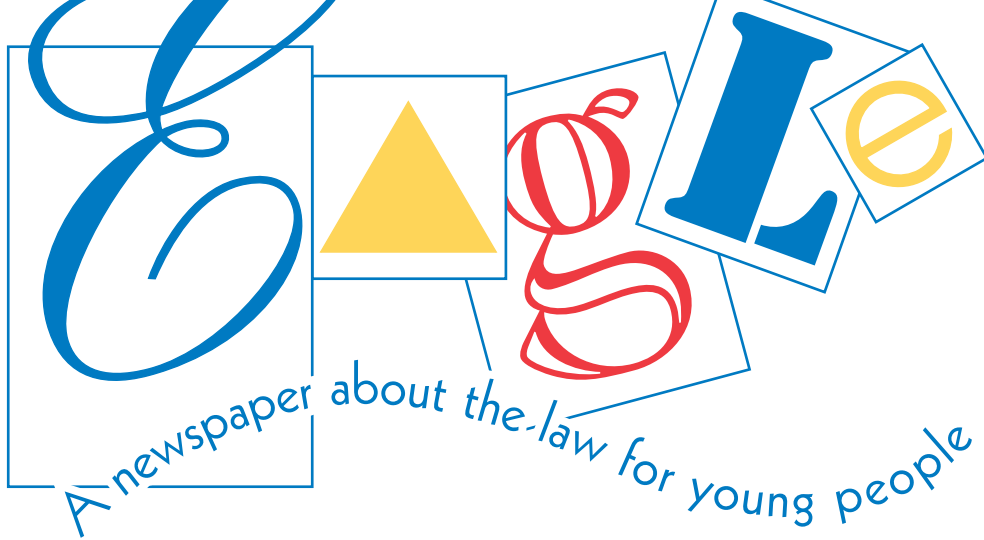


# LEGAL



FALL 2008

## Weighing in on Questions From the Jury Box

by Barbara Sheehan

Flash forward a few years and imagine you're sitting on a jury in a court of law, getting ready to decide a verdict with your fellow jurors. You've heard the arguments from both sides, but you're still unsure about a few of the facts in the case. What do you do?

In a number of states throughout the country, including New Jersey, some courts are allowing jurors to ask questions. This is in stark contrast to trials of the past, where jurors strictly listened and reached decisions based on the facts presented to them.

Paula L. Hannaford-Agor, Director of the Center for Jury Studies at the National Center for State Courts, says that courts are recognizing that jurors need and process information in ways that traditional trial procedures have not facilitated well. She predicts that serving on jury trials in the

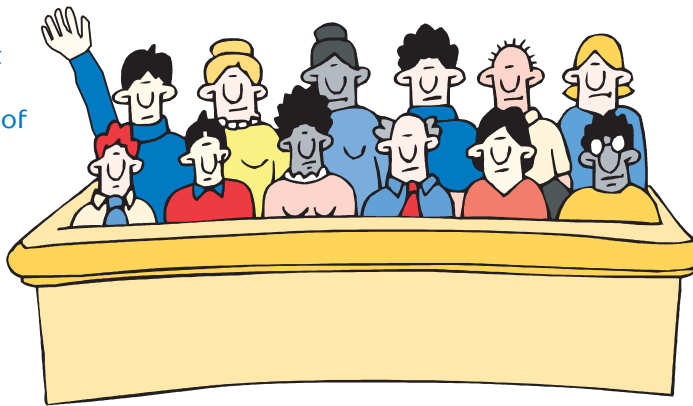
future will probably feel a little more like taking a class, not only from the standpoint of jurors being able to ask questions, but also by the courts allowing jurors to take notes and possibly obtain access to more written documents pertaining to the cases they decide.

Hannaford-Agor is among a growing contingent of people who believe this involvement from jurors keeps them more engaged, better informed and ultimately enhances the justice process. Still, for others, the verdict is out on whether allowing this kind of juror participation is a good idea—particularly in criminal trials where a person's freedom may be at stake.

### Is it fair to defendants?

Questions about the fairness of these new procedures came to light during the 2007 trial of top White House official I. Lewis "Scooter" Libby, a key player in the administration of President George Bush. Libby faced criminal charges for his involvement in an incident concerning undercover CIA agent Valerie Plame.

In the case, Libby was accused of lying to prosecutors who were



CONTINUED ON PAGE 2

## Legislation Aims to Curb Gang Violence and Recruitment in New Jersey

by Phyllis Raybin Emert

The numbers tell the story. There is an increase in gang-related crime and more gang members in the Garden State than in years past. In response to studies that show an increased gang presence in the state and a rise in gang-related homicide, several new statutes have been passed

and signed into law by Governor Jon Corzine.

The Gang Violence Prevention Instruction bill became effective in January 2007. It requires every board of education to offer elementary school students "instruction in gang violence prevention and...ways to avoid membership in gangs" as part of the health and physical education curriculum.

One of the cosponsors of the bill, state Senator Leonard T. Connors Jr. stated, "Gang violence is on the rise in

the state, and...gangs are using schools, even elementary schools, as recruiting grounds. This disturbing trend requires that we take greater measures to inform children of the dangers and potential consequences that associating with a gang may lead to." Connors continued, "By instilling this lesson in children at an early age, the goal is simply to persuade them from joining gangs...[and] driving home the message that gang membership will only lead you down a road of danger and violence."

James A. McCall, the Coordinator for Health and Physical Education in the State Office of Academic Standards said, "We're in the process of revising the standards, and gang violence prevention will be one of the components that will be infused in the standards. Through education, we can help students develop decision-making skills to lead a healthy, happy life [with] classes on social and emotional well-being... how to get help if you need it, how to develop communication...and assertiveness skills." He declared, "It's not too young to talk about violence."

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## Debating the Fairness of the Fairness Doctrine

by Cheryl Baisden

When the First Amendment to the U.S. Constitution was drafted, there were only two ways to exercise the right to free speech — running around telling people your thoughts in person or putting them down on paper and circulating your ideas in print. That all changed in the early part of the 20th century, after radio had been invented and a handful of stations began broadcasting news, music and other forms of entertainment.

"American thought and American politics will be largely at the mercy of those who operate these stations, for publicity is the most powerful weapon that can be wielded in a republic," predicted Congressman Luther Johnson during



a 1927 debate about regulating the new broadcast industry. "And when a weapon is placed in the hands of one person, or a single selfish group is permitted to...acquire ownership or dominate these broadcast stations throughout the country...It will be impossible to compete with them in reaching the ears of the American people."

Since radio stations could reach large numbers of people, and what they broadcast could be controlled by the companies or individuals who owned them, Congress passed the Radio Act of 1927, creating a commission to license and oversee the stations. A year later the Federal Radio Commission, which would later become the Federal Communications Commission (FCC), adopted a general policy asking stations to show "regard for the opinions of others" in their broadcasts. That casual policy became a formal FCC rule known as the Fairness Doctrine in 1949.

"At the time the Fairness Doctrine was established, TV was starting to become a big force in the country," explained entertainment attorney Ronald Bienstock. "If you controlled the television stations you really had a lot of power, and that could have a big impact on politics. In fact, the Fairness Doctrine was not really created to benefit the average citizen. It was an attempt to guarantee fair time to politicians in both political parties, particularly at election time."

With just three major TV stations on the air when the Fairness Doctrine became an official FCC rule, protecting the First Amendment right to be heard made sense, noted Bienstock. The country was struggling with what was known as the Cold War (a hostile but nonviolent relationship between the United States and what was

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trying to determine who revealed Plame's identity to the press. Speculation at the time pointed to the leak being related to Plame's husband publicly criticizing the way the Bush administration handled the intelligence leading to the Iraq war.

While the trial made media headlines due in large part to the high ranking of the officials involved, it also became noteworthy in some legal circles for the fact that jurors in the case were allowed to ask questions.

While this practice is still relatively new in civil cases, where mostly money is at stake, it is even more rare in criminal trials like the Scooter Libby case, where a person could go to prison if convicted. According to an article in *The Washington Post*, the judge in the Libby case believed it was important for jurors to be able to explore the things they wanted answered. Rather than blurting out questions during the trial, jurors were given a notebook where they could write down their questions. Then the questions were given to the judge, who discussed them with the lawyers in the case and determined which ones would be asked.

According to *The Washington Post*, some of the questions from jurors were "dead on," homing in on key evidence and testimony. Other questions "elicited new insights into witnesses' thinking," and others "evoked a few laughs." The whole practice, the article reported, was "controversial among attorneys on both sides," who were worried about losing control of the trial. In the end, Libby was convicted of lying and obstructing justice and was sentenced to 30 months in prison.

**What is the trend?**

While the practice of allowing juror questions is still fairly new, it is undoubtedly gaining ground. According to the American Judicature Society (AJS), "Currently, about one-third of states have a **statute** or rule that permits juror questions to witnesses, and most of the remaining states and all the federal circuits that have considered the issue permit such questions at the judge's discretion." The AJS also reported, however, that the practice of jurors posing questions to witnesses is still barred in a few jurisdictions. For example, Minnesota and Texas prohibit questions from jurors in criminal cases, and Mississippi and Nebraska bar such questions in both civil and criminal cases.

**What are the rules in New Jersey?**

In New Jersey, as a result of a 2002 New Jersey Supreme Court ruling, juror questions are permitted at the discretion of the judge in civil trials. This ruling followed a pilot program of the New Jersey Supreme Court Civil Practice Committee in the year 2000, where 11 trial judges first

experimented with the concept. One of those judges was the Hon. Yolanda Ciccone, who now serves as assignment judge of Vicinage 13 (Somerset, Hunterdon and Warren counties).

When the pilot program was first proposed, it was "somewhat revolutionary" because the courts had never allowed jurors to ask questions in New Jersey, Judge Ciccone remembers. The big concerns of the legal community back then, she said, were that allowing juror questions would slow down trials and could potentially introduce indiscreet information into the courtroom. That is why the judge and the attorneys in the case typically review juror questions first. Only those that pass their scrutiny are asked, usually by the judge, on behalf of the jurors.

As for the feedback on the pilot program, the jurors "absolutely loved it," recalled Judge Ciccone. "Many felt it really enhanced their experience and I thought it was a great tool to keep jurors involved," she said. The judge also noted that jurors usually asked good questions.

Lawyer reaction was mixed, however, Judge Ciccone noted it was more favorable than some anticipated. According to a

follow-up report from the program, 59 percent of the 272 attorneys

who were involved said they favored allowing jurors to submit questions to witnesses in civil trials, compared to 36 percent who

opposed it. (Four percent did not answer the question.)

"Jurors submitting questions is a good idea as long as the safeguards remain in place to scrutinize and review the proposed questions before the question is posed to the witness," one attorney who participated in the program said, according to the follow-up report. "The questions gave me an indication as to what the jury considered significant," the attorney noted.

Still, another attorney quoted in the report was not so supportive, "Part of the lawyering process is to know what questions to ask or not. When a juror asks a question that was not specifically asked by a lawyer, it doesn't seem right to allow the lawyering strategy to dissolve."

**What do NJ lawyers say now?**

After eight years since that first pilot program, Morristown civil trial attorney Brian F. Curley said that in his experience, jurors asking questions in civil trials is still fairly uncommon, although it does happen occasionally. Curley counts himself among those who support the practice, as long as juror questions are presented in a fair manner, with the judge—not the jurors—asking the questions.

"At the end of the day, we want to make sure that the jury has what they think they need to make an informed and just decision," Curley said.

Passaic County Senior Assistant Prosecutor Paul De Groot, on the other hand, sharply rejects the idea, at least for criminal trials, where a person's freedom may be at stake. De Groot contends that as a prosecutor, it is his "burden" to prove a case beyond a reasonable doubt. And he says it

CONTINUED ON PAGE 4



**Fast Facts About Jury Duty**

If you are ever lucky enough to sit on a jury, the Hon. Yolanda Ciccone has one piece of advice—"Do it enthusiastically."

Judge Ciccone says that serving on a jury not only helps you fulfill an important duty of U.S. citizenship but can also be very rewarding.

Here are some facts about serving on a jury provided by the New Jersey Judiciary:

- In order to serve on a jury, a person must be a U.S. citizen, must be at least 18 years old, and must be able to read and understand English.
- Jurors are paid \$5 a day, an amount that is set by state law.
- Jurors are chosen at random from among a county's registered voters and licensed drivers, as well as from among those residents who file state income tax returns and homestead rebate applications.
- There are two types of juries: petit juries and grand juries. A petit jury decides the outcome of a criminal trial or of a civil trial in which monetary damages are sought. A grand jury decides whether there is enough evidence for a person to be brought to trial for a crime.
- In New Jersey, juries in criminal trials consist of 12 jurors, while juries in civil trials consist of six jurors. Grand juries consist of 23 people who typically meet once a week for 16 weeks.
- Unlike criminal or civil trials, grand jury proceedings are not open to the public.
- Grand and petit jurors cannot have pleaded guilty or been convicted of an **indictable offense**, and must be able to mentally and physically perform the functions of a juror. The judiciary will, with advance notice, provide reasonable accommodations consistent with the Americans with Disabilities Act if such accommodations are needed.

To read more about the ins and outs of jury duty, see the New Jersey State Bar Foundation's publication, *Educational Guide for Trial Jurors*.

# Gang Violence and Recruitment CONTINUED FROM PAGE 1

McCall explained that health and physical education classes deal with bullying, suicide prevention, driver education, traffic safety and conflict resolution. Core ethical values, like respect for one another, honesty, empathy, and trustworthiness are developed as well as the skills of refusal and negotiation in difficult situations.

## Other gang-related legislation

Additional laws were passed or amended in New Jersey within the last few years that deal with gang recruitment, bail funds and firearms possession. A statute was passed to “develop and maintain...a gang education seminar program to educate public and nonpublic school administrators on how to recognize signs of gang involvement or activity.” An act concerning criminal street gang activity was amended. It is against the law to recruit someone to participate in a gang, knowing that person will be involved in criminal activity. It is also against the law to threaten bodily injury in the course of recruiting someone to join a gang, to inflict bodily injury or to recruit or threaten someone under 18 years of age.

In addition, a new law will make it difficult for gang members to bail out their friends with large amounts of cash without identifying where the money came from. Upon request of the prosecutor, the court must inquire into the source of the money. Another law makes it a crime to “possess, receive or transfer a community gun.” This offense is punishable by a large fine, imprisonment, or both. A community gun is one that has been used in criminal activity between two or more people.

On the federal level, the U.S. Senate passed the Gang Abatement and Prevention Act and the Youth Promise Act in 2007. Both pieces of legislation are currently stalled in a House of Representatives subcommittee as members are divided on whether to adopt an enforcement or prevention approach to gang violence.

## What the studies show

It is generally assumed that gangs are only found in urban areas and are involved in violent crime. These common perceptions are false and the 2007 Street Gang Survey conducted by the New Jersey State Police has the statistics to back it up.

“Almost seven out of every 10 New Jerseyans live in a municipality where gangs can be found,” the survey indicated. “The majority of gang criminality... involved crimes of opportunity and emotional impulse, such as simple assault, shoplifting, burglary and auto theft.”

There are gangs in rural and suburban areas throughout the Garden State, not just urban areas. Ronald J. Casella, a prosecutor in rural Cumberland County, said, “We definitely have a gang problem. We’ve arrested and convicted gang members of criminal activity in our county,” he confirmed. “Gangs thrive because there’s money to be made [and] it’s usually in dealing with illegal drugs. They’re really not differentiating whether it’s an urban setting or a rural setting or the suburbs...Gangs will flourish where there’s a market.”

Violent gang crime is only a small portion of total crime by gang members. However, the gang survey noted that “municipalities reporting multiple gang homicides are more likely to be cities, more likely to report the presence of several gangs, more likely to report large numbers of gang members, and more likely to report a wide variety of gang crime.”

According to the survey, the most prevalent gangs throughout New Jersey are the Bloods, the Latin Kings, the Crips, MS-13 and the Pagans Motorcycle Club. Many of these gangs originated in California and have specific colors, hand gestures, tattoos, phrases and graffiti associated with them. One of the most significant findings of the survey is the fact that the presence of gangs in New Jersey is 10 points higher in the most recent survey

compared to one conducted in 2004. Nearly 70 percent of New Jersey’s population live in towns and communities in which there are street gangs. In June 2005, Attorney General Peter Harvey estimated that there were 17,000 street gang members in the state.

## Impact of gang violence

The Office of Injury Surveillance and Prevention Center for Health Statistics analyzes and distributes information on injuries in New Jersey, and supports injury prevention programs around the state. In a November 2006 study on the impact of gangs and violence, it found that homicides are increasing, especially among young adults, and gang-related homicides are on the rise.

According to the study, *Violence in New Jersey: The Impact of Gangs*, gang homicides often involve a “young male victim.” The weapon used is usually a gun and the “attack occurs in public place[s].” The study noted that 40 percent of all murders in 2003 and 2004 (310 of 786 total homicides) fit into these

gang categories.

The same organization conducted another study titled *Violent Deaths in New Jersey, 2003–2005*, which was released in February 2008. The study noted that New Jersey has a lower violent death rate as compared with the rest of the nation, however, among the 197 homicides reported in children up to 19 years of age, two-thirds were among 15 to 19-year-olds. Of these, about 61 percent were black, nearly 23 percent were Hispanic, and 80 percent were male. The weapons most likely to be used in homicides by those between 10 and 19 years of age were guns, followed by knives.

The study stated, “The recent increase in homicides in New Jersey has been especially characterized by homicides committed with firearms in urban areas. The majority of victims are young black males.” It was also noted, “Violent deaths have a pronounced age pattern among males...peak[ing] dramatically in young adulthood.”

Since “gang membership is a significant and positive determinant of violence...detering gang membership is an important step in violence prevention,” the study concluded. Prevention programs at schools and in the community and through parent education “show modest success [and] could have long term effects.” Reducing illegal firearms is another major factor in controlling violence. New Jersey has strict gun control laws, but many guns are brought in from states that have more lenient gun laws. The problem of gang violence is a difficult one and not easily solved. “Successful prevention starts early in life,” the study concluded.

## Prevention awareness in schools

“Gangs are recruiting children at a very young age,” stated Prosecutor Casella, “so there really is a need to reach them young. There’s not only the need to try to deter children from joining gangs, but also to provide them direction, alternative activities, and positive role models.”

According to Casella, kids need people who care about them and will help them to focus on developing their particular talents and abilities in sports, computers, writing, art or academics. Casella noted that members of the Cumberland County Prosecutor’s Office have “made presentations to school teachers, to school board members, to those involved in working with young people in terms of gang awareness so that they understand and can recognize the presence of gangs within their schools and communities.”

Casella referred to a successful program in 2005 called Project Vision in which the city of Bridgeton in Cumberland County (and other communities throughout the state) received funds for after-school programs, where kids could spend time in those important hours when adult supervision in the home is not possible. He pointed out the difficulty in getting funds for these types of programs and recommended volunteers from the community like retired teachers, members of the PTA or local police athletic leagues supervise children in after school activities.

“We need a community effort,” Casella stated. “It’s not something that can be done in the everyday work of the schools. You need to put programs in place.”



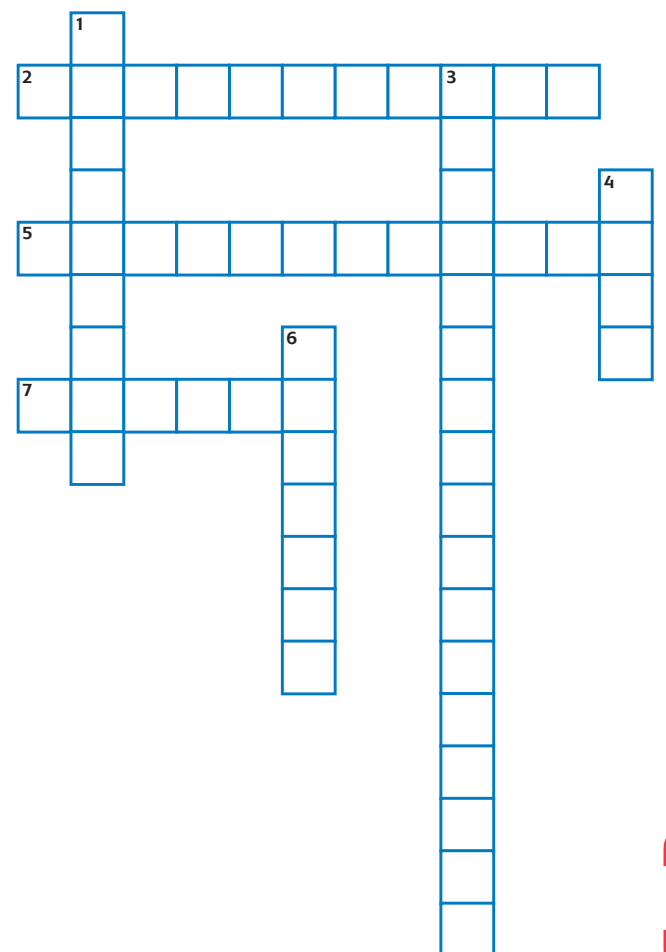
C R O S S W O R D

### ACROSS

- laws made by a legislative body.
- not able to be used as evidence in a court of law or other applicable proceeding.
- to charge someone with a criminal act.

### DOWN

- in a legal case, the person accused of civil wrongdoing or a criminal act.
- an offense that requires a determination of whether to prosecute.
- to refuse approval or passage of a bill that has been approved by a legislative body. The executive branch of government has the power to veto, but that power may be overridden with enough support.
- a particular law established by a legislative branch of government.



## Fairness Doctrine CONTINUED FROM PAGE 1

then the Soviet Union), and politicians like Senator Joseph McCarthy were publicly questioning the patriotism of some Americans by claiming they were Soviet Union sympathizers, or members of that country's Communist Party.

"In their view, the best way to make sure voices on both sides were heard was to set up a fairness policy," said Bienstock. "The problem was, and still is, how do you define what's fair?"

### Differing views

Under the FCC's Fairness Doctrine, TV and radio stations were told they had to air different viewpoints that reflected opposing opinions, and they had to do so in a fair way, so one side was not represented during busy viewing times and the other during hours when few people were tuned in. They were not required to give equal time to all sides, Bienstock explained, and what was "fair" time was never really spelled out. Also, it was up to the people who thought they were not being heard to contact the station and ask for time. If they were not satisfied with the result, or the station wanted to fight the request, they would contact the FCC for a ruling.

"Without any guidelines, and with the stations and public policing things themselves, it really wasn't the best system, and it was never really fair," said Bienstock. "Over the years, both sides fought over the Fairness Doctrine and whether it should exist, and both sides saw it as a First Amendment issue."

TV and radio station owners argued that the doctrine denied them their constitutional right to free speech and freedom of the press by forcing them to air views they disagreed with, often at great expense to them since air time cost money. As journalists, they felt they should be allowed to decide what constituted a balanced story. Individuals who demanded to be heard also claimed infringement on their First Amendment rights and deemed the doctrine necessary to protect that right.

The Fairness Doctrine was heavily relied upon in the ruling for the 1969 U.S. Supreme Court case of *Red Lion Broadcasting Co., Inc. v. FCC*. The case involved a Pennsylvania radio station that aired a program maligning the book, *Goldwater: Extremist on the Right* and its author Fred J. Cook. When he was denied equal time

to respond to the attack, Cook appealed to the FCC under the guise of its Fairness Doctrine. The FCC sided with the author, however, the radio station refused to give him radio time. When the case finally reached the U.S. Supreme Court, it ruled in favor of the FCC, denying Red Lion's claim that the FCC ruling violated its freedom of speech.

### The doctrine's demise

According to the Museum of Broadcast Communications, the nature of broadcasting had changed by the 1980s with the overabundance of cable stations cropping up. Although the FCC had been enforcing the Fairness Doctrine for decades, with the 1987 case of *Meredith Corp. v. FCC*, the courts ruled that the doctrine was "not mandated by Congress and therefore it was not enforceable by the FCC." In August 1987, the FCC officially repealed the policy. In the spring of that same year, both the U.S. House of Representative and the U.S. Senate passed **legislation** that would make the Fairness Doctrine a federal law, forcing the FCC to impose it. President Ronald Reagan, however, **vetoed** the legislation.

In a 1993 issue of *Electronic Media*, then-FCC Chairman James Quello explained, "The fairness doctrine doesn't belong in a country that's dedicated to freedom of the press and freedom of speech."

### Resurrecting the doctrine


Some continue to pursue reinstating the Fairness Doctrine, and fear the FCC's move to relax rules that limit how many newspapers and TV and radio stations one company can own in a certain market will further affect free speech.

"The news departments have become corporate profit centers...All of them are run by giant corporations that have all kinds of deals with the

government and are not going to offend public officials...we need a vigorous and an independent press that is willing to speak truth to power. And we no longer have that in the United States of America," attorney Robert F. Kennedy Jr. said in a 2005 speech in San Francisco.

airwaves and modern communications to as many diverse viewpoints as possible." Ortiz stated that Senator Obama supports "media-ownership caps, network neutrality, public broadcasting, as well as increasing minority ownership of broadcasting and print outlets."

Bienstock claimed the controversy surrounding the Fairness Doctrine is typical.

"Whenever there is a big political race or a significant political issue, people start talking about the Fairness Doctrine," said Bienstock. "There is always someone who wants to be heard and thinks they aren't getting their fair share of time. But the truth is that the best way to handle the situation is by using our freedom of choice. In this country we can choose what we want to watch or listen to. If we don't like something, we can change the channel, and if enough people do that, then the station owners will make adjustments to what they broadcast because it will affect their income from advertisers." 



## Fairness Doctrine

### Presidential candidates weigh in

Since the failed attempt in 1987, members of Congress have occasionally proposed legislation that would make the Fairness Doctrine federal law, but the bills have never made it to an actual vote. As the presidential election draws near, the possibility of legislation is again being discussed. For his part, President George Bush has stated that if Congress ever passed legislation to reenact the Fairness Doctrine while he is still in office, he would do exactly what President Reagan did before him and veto it.

Neither presidential candidate favors the doctrine, and in fact, Republican candidate Senator John McCain is cosponsor of legislation called the Broadcaster Freedom Act, which would prevent the FCC from re-establishing the Fairness Doctrine. While Democratic candidate Senator Barack Obama does not support the Fairness Doctrine, Michael Ortiz, his press secretary, told *Broadcasting and Cable* magazine in June, "He [Senator Obama] considers this debate to be a distraction from the conversation we should be having about opening up the

## GLOSSARY

**defendant** — in a legal case, the person accused of civil wrongdoing or a criminal act.

**inadmissible** — not able to be used as evidence in a court of law or other applicable proceeding.

**indict** — to charge someone with a criminal act.

**indictable offense** — an offense that requires a determination of whether to prosecute.

**legislation** — laws made by a legislative body.

**statute** — a particular law established by a legislative branch of government.

**veto** — to refuse approval or passage of a bill that has been approved by a legislative body. The executive branch of government has the power to veto, but that power may be overridden with enough support.

## Jury Box CONTINUED FROM PAGE 2

is a burden he "gladly welcomes." It is not the jury's duty, he says, to act as investigators and detectives.

"If I've done my job properly, I should have all the questions answered for the jury," De Groot said.

Further, De Groot asserted that because jurors aren't legally trained or experienced in the rules of court, their questions might reveal a prejudice or infringe on the defendant's rights. This, he said, could potentially lead to a mistrial or an appeal.


Jon Iannaccone, an attorney in the Passaic County Public Defenders Office, agreed.

There are things that are **inadmissible** to make sure the trial is fair, Iannaccone says.

An example of this, he said, is the defendant's criminal record. If the jury

knows that the **defendant** has been found guilty of past crimes, they might convict him because he is a "bad person" and not because of the evidence in the case at hand, Iannaccone said.

That type of information, however, even if asked by a juror, would probably not make it into the courtroom because the judge would strike it as inadmissible. Still, opening the floor to juror questions is a path some lawyers don't want to go down.

In criminal cases, jurors have an opportunity to ask questions during the grand jury process, when they decide whether to **indict** a defendant and send the case to a trial, De Groot pointed out. That, he firmly argues, is where all juror questions should end. 

## CROSSWORD SOLUTION

