

**MASSACHUSETTS JURY DUTY - YOU MAKE A DIFFERENCE**

With The Honorable Maynard Kirpalani  
And Assistant District Attorney Mark Lee  
By the Massachusetts Judicial Branch

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Donna Holmes Dominguez

1           CAPTION: Jury Duty, Michael Ryan, Host

2           MICHAEL RYAN, BNN LIVE HOST: Hello. My name is Mike Ryan.  
3           The name of the show is Jury Duty: You Make a Difference on  
4           BNN, the show that should answer all your questions about the  
5           one day, one trial jury system.

6           HOST RYAN: Our guests today are Judge Kirpalani, Maynard  
7           Kirpalani from the Superior Court, and Assistant District  
8           Attorney Mark Lee, Suffolk County.

9           Welcome. Thank you,

10          MR. KIRPALANI: Thank you.

11          MR. LEE: Thank you.

12          MR. KIRPALANI: Good afternoon.

13          MR. LEE: Thank you.

14          HOST RYAN: For being on the show.

15          Judge Kirpalani is a graduate of Washington College, and  
16          received his law degree from the University of Virginia. He  
17          started his legal career way back in 1978 with Parker, Daily,  
18          Colder, and White. Did I get that right?

19          And went onto several other firms including Wilson, Elser,  
20          Moskowitz, Edelman, and Dicker, one of the largest law firms  
21          in the county. Correct?

22          MR. KIRPALANI: Yes.

23          HOST RYAN: And was appointed to the bench in 2010 by former  
24          Governor Deval Patrick, and has written and lectured  
25          extensively about civil litigation.

1           Mark Lee is the Chief Deputy for the Homicide Unit for  
2 Suffolk County. He is a graduate of Brown University and of  
3 Fordham University Law School, worked as prosecutor for Kings  
4 County in Brooklyn New York before coming to the Bay State in  
5 1997, and has worked at the DA's office since then.

6           A former recipient of the Boston Bar's Prosecutor of the  
7 Year Award. He has also lectured and written extensively about  
8 ethical prosecution practice.

9           Did I get that right?

10          MR. LEE: Yes.

11          HOST RYAN: Okay.

12          MR. LEE: Yes. By and large.

13          HOST RYAN: So, so today we'd like to talk about the, the  
14 attorney voir dire project. And I guess we should start off,  
15 Judge Kirpalani, what does voir dire mean in the Court?

16          MR. KIRPALANI: Well, voir dire is the process by which  
17 prospective jurors are questioned by the Court and now by the  
18 attorneys often to determine whether they, in the first  
19 instance, whether they can as we say stand indifferent in the  
20 case to be tried. And that means that they can be fair and  
21 impartial, decide the case without any extraneous influences  
22 or any biases or prejudices that might prevent them from  
23 deciding the case simply on the facts and the law that the  
24 Court gives them.

25          So voir dire is, is the process by which we question the

1 jurors to determine if they meet that standard.

2 HOST RYAN: So in other words, if I go to jury duty, and I  
3 go into the jury box, that doesn't necessarily mean I'm going  
4 to be on that jury, correct?

5 MR. KIRPALANI: It does not. During a voir dire process, as  
6 the questions are asked, there may be reasons that the Court  
7 determines that a juror cannot be indifferent in that  
8 particular case. Maybe they'd be fine in some other case, but  
9 the facts or the circumstances of that case present a  
10 situation where the Judge determines that they cannot be  
11 indifferent.

12 Or the lawyers feel they can't be indifferent and they  
13 challenge to the Judge. They say we challenge this  
14 prospective juror for cause, meaning they're not indifferent,  
15 and here's why.

16 So you can get in the jury box and then be excused for  
17 cause.

18 And I think we'll probably talk about this later. There's  
19 also what we call preemptory challenges. That is each side  
20 has a right to challenge or ask to excuse a certain number of  
21 jurors who have already been found indifferent, so suitable  
22 for service, on, without giving any reason to the Judge. It's  
23 really a matter of their trial strategy as to who, who, who is  
24 the, the best set of jurors for their case that would be most  
25 receptive to their client's claims or defenses.

1           So it's a matter of judgment for the lawyer.

2           HOST RYAN: So Attorney Lee and Judge Kirpalani, you've been  
3 on this committee to implement attorney participating voir  
4 dres so that in years past, lawyers couldn't ask questions of  
5 prospective jurors, only the, the Judge could?

6           MR. LEE: Well, in years past, lawyers could participate,  
7 but it was not participation as a matter of right. It was  
8 discretionary with the Court.

9           So if you wanted to participate in the voir dire process,  
10 you had to make a motion to the Court and request it. And of  
11 course that required the other party to agree as well.

12           So in, in, since 1997, I managed to get that done twice, so  
13 it wasn't very frequent.

14           HOST RYAN: So Judge Kirpalani, you've been involved now  
15 with some of these cases where the attorneys now can  
16 participate in voir dire.

17           MR. KIRPALANI: Yes. I've tried, since the, the new  
18 statute, the new procedures were implemented on February 2<sup>nd</sup> of  
19 this year, and I've tried a number of cases, both civil and  
20 criminal, involving attorney participation in voir dire.

21           HOST RYAN: Is this an option for the parties or --

22           MR. KIRPALANI: Well --

23           HOST RYAN: -- is it mandatory?

24           MR. KIRPALANI: Well, it's, it's, the statute, which is  
25 Chapter 254 of the Acts of 2014, which is what established

1 this new procedure essentially, it, it creates a right to  
2 attorney conducted voir dire, and I'll say attorney conducted,  
3 but it includes self-represented litigants as well. They have  
4 the same rights as lawyers in this process.

5 So there is a right to, to voir dire now and by the  
6 attorneys.

7 There is a standing order that governs how that right may  
8 be invoked. In other words, you have to file a motion. You  
9 have to describe the topics that you want to question them on.

10 The Judge may actually ask for the list of questions.  
11 That's at the option of the Judge.

12 So, so there is a right to voir dire. But how it's crafted  
13 or how it, how it looks in the particular courtroom is still  
14 very much up to the discretion of the Judge.

15 HOST RYAN: Now, has anybody in the Suffolk DA's office  
16 conducted trials under this new program?

17 MR. LEE: We have a number of attorneys who have done so.  
18 I've encouraged all the lawyers in our office to, to seize the  
19 opportunity to participate in it.

20 At the moment, we have one lawyer who has actually  
21 participated in the panel form of the voir dire which is what,  
22 what some people view as the purest form of the voir dire  
23 process.

24 But a large number of others have also participated in  
25 what's known as the sidebar voir dire which is done out of the

1 presence of the other jurors and just with the Judge, the  
2 prospective juror, and the, and the parties.

3 HOST RYAN: Judge Kirpalani, is the attorney assisted voir  
4 dire, is that conducted prior to the challenges, as you  
5 mentioned, challenge for cause and preemptory?

6 MR. KIRPALANI: Actually, no. It, it comes after. It, it's  
7 always been the case that the Judge in the Superior Court or,  
8 or in the other Trial Courts has the obligation under statute  
9 to ask certain questions of all prospective jurors such as do  
10 they know the, any of the witnesses or the parties, do they  
11 have a stake in the outcome of the case, things like that that  
12 would probably be, or potentially disabling for their  
13 prospective jury service.

14 So the Judge still has to go through this process of asking  
15 the statutory questions. And then, and at that point, there  
16 may be challenges for cause, or the Judge may decide sua  
17 sponte that I'm excusing this juror because I don't think  
18 they're impartial or can be impartial.

19 At that point, the attorney conducted portion of the voir  
20 dire starts, and the attorneys can now question the, the  
21 prospective jurors.

22 If they believe that even though the Judge has declared a  
23 member of the panel indifferent, they may still as a result of  
24 questioning or an answer that was given come back to the Court  
25 and say Judge, now I think you need to excuse this particular

1 juror for cause and here's why, because the answer they just  
2 gave.

3 HOST RYAN: So, Mark, what's the difference between, you've  
4 mentioned sidebar voir dire and panel.

5 MR. LEE: Well, the panel voir dire is a voir dire that's  
6 conducted of a larger group of prospective jurors at one time,  
7 so simultaneously.

8 And typically you'll have anywhere from 12 to 14 people put  
9 in the jury box, and then each lawyer will be given a set  
10 amount of time to voir dire or examine those jurors with  
11 regards to the specific issues in the case.

12 But the, the dynamic is that you are speaking to a group,  
13 and eliciting answers from a, from a group all at one time.

14 Whereas the individual voir dire is done individually juror  
15 by, prospective juror by prospective juror at the sidebar so  
16 that at any given time, it's just that individual along with  
17 the parties and the Judge.

18 You, you tend to get a little bit more privacy with the,  
19 with the, the sidebar conducted voir dire.

20 With the panel voir dire, you sacrifice some privacy, but  
21 there's some expediency in, in being able to ask one question  
22 that can cover the entire group in terms of if you, if you  
23 intend to ask every single juror a particular question, now  
24 you can ask the group as a whole and work with different  
25 groups, different jurors and getting different answers.

1           HOST RYAN: So you, several people could respond from the  
2 panel questions?

3           MR. LEE: That's correct.

4           HOST RYAN: Your Honor, do, do the parties meet before trial  
5 to discuss the mechanics of this? Or is this, there's been,  
6 they've been given training prior to?

7           MR. KIRPALANI: Well, they, each case is a little different.

8           So as I said, the process starts when the parties bring a  
9 motion, and actually the other side may oppose some of the  
10 topics or propose their own topics to be covered in the  
11 questioning.

12           So that happens at the final, usually at the final trial  
13 conference in the criminal case, final trial conference in the  
14 civil cases and a final pretrial conference in the criminal  
15 cases.

16           So there's a discussion then. The Judge may issue, I  
17 typically issue an order after that saying exactly which  
18 topics are approved, and any other ground rules I want to lay  
19 down.

20           And then usually the day of trial, there's another  
21 discussion about exactly how this is going to work.

22           And, and so there's really two opportunities to weigh, for  
23 the parties to get together with the Court and discuss how  
24 it's going to happen.

25           But there is a standing order that gives a lot of structure

1 to the process to begin with so between that and the fact that  
2 a lot of people in the bar and the, on the bench have gotten  
3 training, they, people are learning what to do I think pretty  
4 quickly.

5 HOST RYAN: It's interesting that parties can object to the  
6 other party's question during the voir dire?

7 MR. LEE: Yes. And with the panel voir dire, obviously  
8 that, that, that involves the attorney standing up in front of  
9 the larger group of prospective jurors and making the  
10 objection.

11 At the sidebar, it's, it's fairly discrete and private.

12 But, yes, if I, if I feel that the other side is asking a  
13 question that's not necessarily designed to determine whether  
14 a juror is fair and objective but is instead designed to  
15 either indoctrinate the juror or to influence the juror's  
16 thinking about something, I might object to the form of the  
17 question and perhaps recommend to the Judge that the question  
18 be asked in a different way.

19 HOST RYAN: Has that happened at any of the trials that  
20 you've been involved with?

21 MR. KIRPALANI: So far infrequently. What I see more of is  
22 when, is the, there are oppositions to the motion. You know,  
23 the motion will say I want to ask about these topics, and then  
24 the opposition will say well, we don't think that you should  
25 go into these topics for this reason, like maybe it's too, too

1 much of an intrusion into juror privacy.

2 And so a lot of the, a lot of the things get worked out  
3 before the impanelment begins.

4 But I have had a situation where a lawyer did object to the  
5 way a question was being asked, and I, and I did request that  
6 the lawyer ask it in a different fashion.

7 HOST RYAN: So is, what's the feedback from your office,  
8 Mark?

9 MR. LEE: The feedback I've gotten so far has been very  
10 positive. One of the things that I, when I, I lectured within  
11 the office about the lawyer conducted voir dire or the lawyer  
12 participated voir dire. And I said, one of the things I said  
13 to the group was that everyone is, is basically starting off  
14 on the same foot, that, that nobody's more knowledgeable than  
15 any, anyone else is.

16 And so it's an opportunity for a lawyer who's been  
17 practicing for two years to be on equal footing with a lawyer  
18 who's been practicing for 22 years.

19 And the same goes for the judiciary. There are no, they  
20 are no more equipped to handle this on the fly than we are.

21 And so I, I, I encouraged everyone to jump in with both  
22 feet. And I think that the feedback I've been getting has  
23 been generally very, very positive.

24 Specific comments including, wow, the, the jury that I  
25 selected in this last trial, it was so much more meaningful

1 and enlightening as we went through the process and I got to  
2 be a part of the process. I felt like I was making better  
3 decisions about who to keep and who not to keep.

4 And, and I think that, that really stems from being able to  
5 participate yourself.

6 HOST RYAN: What about members, your peers on the Superior  
7 Court bench, Judge, any feedback?

8 MR. KIRPALANI: I think the, the feedback I get generally is  
9 that, you know, honestly, as Mark pointed out, we, we, all  
10 Judges or lawyers came from a culture where attorney conducted  
11 voir dire was not done even though the rules permitted it. It  
12 just didn't happen often.

13 So the Judges are as unfamiliar with the procedures as,  
14 most of them, some of them practiced in other jurisdictions,  
15 myself included. But by and large, we, this is new to us.  
16 And so anything new, any time there's change, you might  
17 approach it with some trepidation. Oh, it's going to take too  
18 long, it's going to, it's going to, you know, somehow poison  
19 the entire jury venire with some question.

20 And so, but I think the feedback I'm getting is that, well,  
21 you know, this has not been, this, we, this has, our fears  
22 have not been realized. This is working pretty well. It's  
23 not adding that much time to impanelments.

24 Obvious, it's inevitable that it adds some time, but, but  
25 so it's been, it's, it's been pretty positive. I haven't

1 heard of anybody with like some big complaint or horror story  
2 about something that happened in their courtroom.

3 HOST RYAN: Did you set a time limit for the questions?

4 MR. KIRPALANI: I have not done that yet. You know, I sort  
5 of, I, I think, you know, I sort of, my philosophy is that you  
6 give, you give the lawyers the benefit of the doubt, expect  
7 that they're going to act professionally and responsibly and  
8 in all aspects of trial, including the voir dire.

9 And that, and my experience has been they, they're not,  
10 they're not chewing up a lot of time doing it. They're being,  
11 they're being, you know, measured and judicious in their use  
12 of questioning. I think they realize that if they spend too  
13 much time with the juror, they might get a little tired of  
14 hearing you talk.

15 And, you know, so I have not set time limits. It, the  
16 rules and the statute allow me to set reasonable time limits.

17 And by and large, I haven't heard of many of my colleagues  
18 setting time limits either, but that's, at least anecdotally,  
19 it doesn't seem like that's happening a lot, that there's,  
20 we're letting things take their natural course.

21 HOST RYAN: So you feel like it hasn't really added too much  
22 to the time of putting a jury together?

23 MR. KIRPALANI: No. I mean I think, I'm actually involved  
24 in the data collection process for the SJC Committee. And I  
25 mean there are, the data is still raw, and it's only been six

1 months since we've been doing this, so it's probably too early  
2 to draw any conclusions.

3 But it's, you know, it's adding some time. You know, the,  
4 the question ultimately will be if it's that's much of a  
5 burden how, more of a burden, how do we deal with it, how do  
6 we meet that with resources.

7 You know, the legislature has spoken. We have attorney  
8 conducted voir dire. It's, so, so we live with it, but the,  
9 you know, do we need more resources to handle the increased  
10 time it may take or the increased load it may take?

11 We are seeing an uptick in multiday impanelments. That is  
12 there are more cases that are, are taking, than before that  
13 are taking more than one day to pick a jury.

14 And so, you know, that's, that's, you know, that's going to  
15 happen I think. And, and, but by and large, I don't think  
16 it's added tons of time to cases.

17 You know, it's, it's, you know, again, the data will show  
18 generally that if the Judge does it himself or herself, it,  
19 it's taking shorter time than if the lawyers are involved too.

20 As I said, I think part of that's to be expected. It's  
21 inevitable.

22 But, you know, there's a benefit. You know, I think  
23 everybody perceives there is a benefit to the attorneys  
24 conducting voir dire for many reasons. So.

25 HOST RYAN: So you haven't noticed from your colleagues that

1 it has measurably lengthened the trial process?

2 MR. LEE: No, but, but it's not a big concern of ours  
3 whether it takes two days or two and a half or three days to  
4 pick a jury.

5 My feeling has always been that, drawing on my experience  
6 in New York, that it is, it is, it was and is going to take a  
7 little bit more time to pick a jury. But I felt the tradeoff  
8 was absolutely worth it in that the quality of the juror that,  
9 jury that is selected goes up as a result because of the extra  
10 time spent.

11 But you won't find practitioners, at least I don't believe  
12 you won't find them complaining about the amount of time that  
13 it takes because they're the most invested in, in getting the  
14 quote unquote quality, quality jury.

15 I think the judiciary has different, has other things to  
16 consider, for instance juror's time as well as the, the  
17 efficiency with which the Court calendar gets moved.

18 So those are, those are things that I don't have to worry  
19 about. And so therefore the amount of time generally speaking  
20 is not an, a big issue for practitioners.

21 HOST RYAN: If I'm a first time, if I've done jury duty  
22 before your Honor and I'm coming in and I'm going to be placed  
23 in a trial where you're going to have assisted attorney  
24 participating voir dire, should I be nervous? Should I be  
25 worried?

1 MR. KIRPALANI: I don't think so. I mean I, I've, you know,  
2 seen attorney conducted voir dire for many years as a lawyer  
3 in other jurisdictions and now for, you know, at least half a  
4 year here, and I haven't seen, I think that the privacy and  
5 the dignity of the jurors is being respected. I think the  
6 Judges are required to explain to the jurors what's going to  
7 happen.

8 I always tell them if you've ever done jury service before,  
9 you may be in for, you know, there's a new experience here  
10 because the lawyers may ask you questions. And they may ask  
11 you questions about your experiences that are relevant to this  
12 case, your feelings, you know, and, and about issues in the  
13 case, and that some of that may be somewhat private. But  
14 it's, it's, it's a necessary part of the process to make sure  
15 that we get a fair and impartial jury so that everybody gets  
16 a, a fair trial.

17 And it's, also tell them, as the standing order provides,  
18 that if there's something that they're asked that they would  
19 prefer not to answer for some reason or would prefer to answer  
20 in private if for instance they're being asked as a group,  
21 they have the right to do that, and we tell them that.

22 And, and I haven't seen or heard of many complaints from  
23 perspective jurors about this process.

24 So I would say no. I think some, I think you see a lot of  
25 jurors actually enjoy, enjoy it because they get to get into a

1 dialogue with the lawyers about the issues in the case. And,  
2 you know, and some people like to talk anyway and be the  
3 center of attention. Others see that other perspective jurors  
4 are, are having a good discussion with the lawyer, and they're  
5 like, hey, that's, you know, that's not so bad. And, and so  
6 I, I don't think any juror should be concerned about it. And  
7 if they are, they can always raise that concern with the  
8 Judge.

9 HOST RYAN: Now, you've seen this in New York, and you have  
10 people and you have, obviously have worked the, these trials.  
11 Do they feel jurors are more engaged because of additional  
12 questioning from, from the members of the bar?

13 MR. LEE: I, I think so. But I, it really depends on the  
14 approach that the lawyer takes. I think that is the key,  
15 entire key, to a successful voir dire is the approach that you  
16 take with the jurors, which is to say that it's imperative  
17 that you, you treat them with respect, that you understand  
18 that from their perspective it's an incredibly nerve-racking  
19 situation because the, the, the, the risk of being embarrassed  
20 is, is, is fairly high at least in their minds because they  
21 have no idea what the lawyers are going to ask them, they have  
22 no idea why they're being asked the question. And sometimes  
23 they get into their heads that there is actually a right or a  
24 wrong answer.

25 And when you're sort of put on the spot like that, it can

1 be, it can be nerve-racking.

2 So I think for lawyers, it really is important for them to  
3 give great thought and consideration to how you handle it and  
4 how you approach the jurors.

5 HOST RYAN: Does attorney participating voir dire enhance  
6 juror selection?

7 MR. KIRPALANI: I, I think so. I mean first of all, as a  
8 practicing lawyer, trial lawyer, I very much appreciated the  
9 opportunity to question the jurors directly. I always felt  
10 that I had a much better in, that I picked a much better jury  
11 and I had a much more insight into the jurors that were seated  
12 than, than the way it's been customarily done in Massachusetts  
13 with the questionnaire and the Judge asking some questions.

14 It's impossible for a Judge to know the case as well as the  
15 lawyers do, to know the facts, to know maybe the subtle things  
16 that might provoke a bias in someone. And, and so the  
17 lawyers' ability to, you know, supplement, augment, and fill  
18 in the gaps of what the Judge has tried to do, and then and  
19 certainly I think, you know, historically the Judges have  
20 produced unbiased juries too.

21 But I think it's, it's, with the lawyers involved,  
22 everybody's doing a better job of it.

23 And, and so I would also say that in addition to  
24 eliminating bias, you know, one of the goals of voir dire is  
25 to, and, and this is part of the ABA standards on voir dire,

1 is to facilitate the lawyers in making a more intelligent  
2 exercise of their preemptory challenges. So even though this  
3 juror has been declared indifferent, you know, they're looking  
4 for the most or least receptive jurors to their part, to their  
5 client's case, claims, or defenses. And, and they're entitled  
6 to do that. And this helps them do that.

7 HOST RYAN: And you've seen, seen this in New York and in  
8 here. Do you feel that attorney participating voir dire  
9 enhances jury?

10 MR. LEE: Without question. I'm a, I'm an enormous proponent  
11 of it, and I think it became very obvious during our committee  
12 meetings that I was an enormous proponent of it.

13 I think that like anything else, it, it, it depends on  
14 whose hands it is in. The better lawyers are going to do a  
15 better job with it.

16 But I, I think in Massachusetts, when I first came here, I,  
17 I was quite frankly shocked that the lawyers were not  
18 participating in any way whatsoever.

19 And I think the, the, the new standing order gives an, an  
20 attorney a genuine opportunity to, to pick a fair, a, to pick  
21 a fairer jury than, than we had before.

22 And we have the ability to glean some more information from  
23 the prospective jurors and to make more intelligent decisions.

24 And what I didn't like about it before was that in many  
25 ways you were making decisions based upon a number of cursory

1 answers on a one page questionnaire which then caused many  
2 lawyers, including myself, and I'm a, sometimes embarrassed to  
3 admit it, to fall back on old stereotypes and, and biases and  
4 prejudices, which, which is not the way I think Massachusetts  
5 would like to, to, to conduct trials, and, and certainly not  
6 the judiciary, and certainly not me as a practitioner.

7 HOST RYAN: So basically, in the olden days, you just had  
8 the confidential juror questionnaire, and you would just --

9 MR. LEE: And the Judges would ask some questions. But, but  
10 the Judges don't have the same incentive to ask the questions  
11 that I do.

12 HOST RYAN: Sure.

13 MR. LEE: And rightly so. They're, they have many more  
14 considerations to, to think about in, in managing a trial.

15 So the fact that it's, that I now have a hand in it means  
16 that I can, I can have some control over the destiny of that,  
17 that part of the trial.

18 HOST RYAN: Judge Kirpalani, is this expected, once the  
19 pilot program is over, will this move into District Court,  
20 Housing, Juvenile?

21 MR. KIRPALANI: Well, it's premature to say. The, the SJC  
22 committee, one, one very large component of the work at hand  
23 is to study the practices of jury selection in all of the  
24 Trial Court Departments that use jurors, and that's an ongoing  
25 process right now.

1           And, and it's expected that it probably will take more than  
2 a year to get a handle on that and decide what are the best  
3 practices for those individual Courts.

4           And then the SJC is likely to make some recommendations as  
5 to each Trial Court. So we don't know what those  
6 recommendations will be because we don't, we really are in the  
7 process of studying this.

8           But that, and that's, that's where we are.

9           HOST RYAN: Well, we've run out of time.

10          We'd like to thank you at home for watching Jury Duty: You  
11 Make a Difference on BNN.

12          Just remember, if you have any questions regarding your  
13 jury service, you can always contact the Office of Jury  
14 Commissioner online at MAJury.Gov or toll free at 1-800-THE-  
15 JURY, that's 1-800-843-5879.

16          You do make a difference. Please serve when called. It's  
17 important to all of us.

18          Thank you, Judge Kirpalani. Thank you, Assistant District  
19 Attorney Mark Lee. And thank you at home.

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I, Donna Holmes Dominguez, further certify that I neither am counsel for, related to, nor employed by any of the parties involved in this interview.

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Notary Public, Commission Expires 6-9-17

May 2, 2016 \_\_\_\_\_  
Date

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