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The Latest in Juries

What's Happening Around the Country That's of Interest to New York Lawyers and Judges?

By Elissa Krauss

The American Bar Association's Principles for Juries and Jury Trials, approved by the ABA House of Delegates in 2005, highlight the latest in jury research and practice. The 19 jury principles cover everything from assembling a jury to post-verdict activity.¹ They provide a roadmap for "best practices" in conducting modern jury trials in light of existing legal and practical constraints.

The ABA Principles begin by emphasizing the importance of protecting the right to trial by jury. They then highlight operational enhancements aimed at assuring jury pool representativeness and facilitating citizens' participation through practices such as eliminating automatic exemptions and shortening the term of service. This article will focus on those Principles concerned with enhancing jurors' understanding of evidence and law, beginning with three highly controversial Principles and proceeding to three that remain controversial in New York but are widely accepted elsewhere.

Three prominent jury researchers, including two who participated in the American Jury Project, have provided comments on the results of their own research or experience in these areas.

Widely Controversial Principles

The three widely controversial ABA Principles concern jury size, unanimous verdicts, and whether to permit jurors in civil cases to discuss the evidence during trial.²

Juries of fewer than 12 members and non-unanimous verdicts were endorsed by the Supreme Court in the 1970s.³ Thus, a whole generation of civil trial attorneys in most jurisdictions, including New York, has known only juries of fewer than 12 and non-unanimous verdicts. The commentary to the Principles points to extensive research suggesting that larger juries and unanimous verdicts are more reliable and more accurate.⁴

No recommendation is being made here that the New York Legislature amend the statutes concerning civil jury size and verdict votes. Nevertheless, experience elsewhere provides food for thought. In the federal courts, unanimity has always been required, and juries of 12 are explicitly permitted by Rule 48 of the Federal Rule of Civil Procedure. Professor Stephan Landsman, the American Jury Project's Reporter, interviewed 10 Seventh Circuit District Court judges who tried cases with larger juries as part of the Seventh Circuit's evaluation research on seven of the ABA Principles.⁵ He reports on the variety of reasons most of the judges preferred larger juries in his commentary (see page 21).

The Executive Summary of the Seventh Circuit research reports that 85% of attorneys who participated in the study preferred juries of larger than six, and 92% of those in trials in which juries of 10 or 11 were seated

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felt that the “right number” of jurors were used.⁶ In light of the Seventh Circuit’s experience, New York civil practitioners may, by consent of the parties, use the flexibility available to them to occasionally opt for larger juries or unanimous verdicts.

Even more controversial (and not tested in the Seventh Circuit’s Project) is the suggestion that civil juries *may* discuss evidence among themselves before deliberations.⁷ The recommendation is drawn from Arizona’s Rule of Civil Procedure 39(f), which permits judges to instruct jurors in civil cases that they may discuss the evidence among themselves when they are all together in the jury room during the trial. There is no suggestion that New York depart from the long tradition of prohibiting jurors from discussing a case before deliberations. However, there is much to be learned from the Arizona jurors’ experience in discussing evidence before deliberations.

Arizona’s adoption of the jury discussion rule led to the first-ever systematic taping of jurors’ pre-deliberation and deliberation discussions in 50 trials.⁸ These tapes

The Arizona jurors’ discussions provide insight into another area of concern to attorneys and judges: how jurors who submit written questions for witnesses react when their questions are not asked. Professor Shari Diamond and her colleagues at Northwestern studied the tapes of jurors’ discussions both before and during deliberations to discern reactions to unanswered questions.¹⁴ The researchers found that when a question was disallowed “the most common reaction from jurors was no reaction at all, either during the trial itself or during deliberations.”¹⁵

Thus, while allowing jurors to discuss the case during trial is not recommended, the Arizona experience provides New Yorkers with otherwise unavailable insights about jurors’ behavior and reactions.

Two Principles That Are Controversial in New York: Juror Note-Taking and Questions of Witnesses

Juror note-taking and submission of written questions for witnesses remain controversial in New York practice.

There is much to be learned from the Arizona jurors’ experience in discussing evidence before deliberations.

are a treasure trove of insight into jurors’ concerns and thought processes, providing evidence that contradicts many long-held assumptions. For example, despite instructions to the contrary, many jurors discuss “forbidden” topics such as insurance and attorney fees, but the influence of these discussions tends either to be minimal or different from that assumed by practitioners.⁹

Talk about insurance occurred in 85% of the cases studied.¹⁰ In only two cases was there explicit evidence that talk of insurance influenced verdicts.¹¹ Of interest to litigators is the finding that jurors’ discussion about insurance most often focused on the plaintiff’s insurance coverage rather than the defendant’s coverage. Attorney fees were mentioned by at least one member of the jury in 83% of the cases, despite the fact that they are never mentioned in instructions or testimony.¹² In only four cases did jurors’ concern about attorney fees appear to affect the jury’s award.¹³

Thus, simply forbidding jurors from discussing a widely known topic is no guarantee that the topic will not be discussed. There is no reason to think that Arizona jurors are different from New York jurors in this regard. Counsel and judges are well advised to bear in mind that during deliberations jurors often discuss and make assumptions about the role of insurance and attorney fees.

The ABA Principles recommend these practices as part of Principle 13: “The court and parties should vigorously promote juror understanding of the facts and the law.”

Principle 13 recommends that all jurors be permitted to take notes and be provided with writing materials, and that jurors in civil cases “ordinarily” be permitted to submit written questions for witnesses.

Note-taking has become routine in many jurisdictions. It is so widespread in the federal courts that when the Seventh Circuit decided to test seven concepts from the ABA Principles note-taking was not among them.¹⁶ The New York Court of Appeals held nearly a decade ago that it is within the discretion of the trial court to permit jurors to take notes.¹⁷ The Court cited leading research to support its conclusion.¹⁸

More recently, researchers have found that note-taking in combination with substantive preliminary instructions enhances jurors’ comprehension and performance. Of particular interest is the finding that for many people the act of taking notes rather than the notes themselves is what helps them recall the evidence.¹⁹

Ninety-one trials in New York’s Jury Trial Project²⁰ included note-taking. In the Project, roughly 60% of jurors took notes when permitted to do so. Jurors said they find note-taking helpful in understanding evidence and law as well as in reaching a decision.²¹ Not surpris-

ingly, jurors with a college education are more likely than others to take notes because they are trained to use note-taking as a memory aid.²²

Despite all the evidence contradicting judges' and attorneys' fears about note-taking, New York judges hesitate to allow the practice. The National Center for State Courts National Program to Increase Citizen Participation, a nationwide study reviewing actual trial implementation of jury innovations, found that New York lags behind its neighbors and the nation as a whole in allowing note-taking or providing note-taking materials. The results comparing New York to its neighbors (Connecticut and New Jersey) and to the nation as a whole are discussed in a commentary by Paula Hannaford-Agor, Director of the National Center for State Courts Center for Jury Studies, and Chris Connelly (see page 19).

Juror questions in criminal trials remain controversial in New York and elsewhere.

Jurors' written questions for witnesses are more problematic. Though many New York civil trial judges routinely allow jurors to submit written questions for witnesses, the practice is by no means universal. Some civil trial judges have permitted jurors to submit written questions for some time, including Judge Leonard Austin, Judge Alice Schlesinger, Judge John P. Lane, Judge Stanley Sklar, and Judge Dana Winslow. Judge Rosalyn Richter and Judge Donna Siwek, as a result of their experience with the Jury Trial Project, began allowing jurors to submit questions.

Juror questions in criminal trials remain controversial in New York and elsewhere. The drafters of the ABA Principles implicitly acknowledged this by recommending that civil juries "ordinarily" be permitted to submit written questions and that the procedure "be considered" in criminal trials.

In New York State, the First Department has long held that in criminal trials it is within the trial court's discretion to allow written questions from jurors.²³ This holding is consistent with those of every federal circuit that has considered the issue and the court rules or high court holdings in at least 31 states.²⁴ In light of the First Department's position, Judge Michael McKeon and Judge Felix Catena permitted jurors to submit written questions in criminal trials as part of the Jury Trial Project's research. Judge Anthony Ferrara of New York City Criminal Court has begun doing so as a result of the Project's recommendations.

Professor Diamond found that the Seventh Circuit's recent Jury Project provided new insights into the role the judge plays in jurors' submission of questions. For this study, jurors were permitted to submit written questions in 27 trials.

Federal judges were more likely than the New York State judges to reject the questions. In the Seventh Circuit project only 69% of the jurors' questions were asked, while New York judges permitted 90% of the questions submitted.²⁵ Only four objected-to questions were asked. Among the Seventh Circuit jurors, 62% reported submitting questions; a similar percentage of New York jurors submitted questions in the New York Jury Trial Project. Notably, in six of the Seventh Circuit trials, no questions at all were submitted. Professor Diamond looked closely at what might have distinguished those six trials. She discusses her finding that the judge's own instructions may have played a crucial role in whether jurors submitted questions in her commentary on page 23.

Sensitive to the key role judges play in both allowing and limiting jurors' questions, Jury Trial Project judges devoted considerable attention to drafting suggested instructions for judges interested in permitting questions. Ultimately, two recommended instructions were developed and included in the Unified Court System's pamphlet summarizing key Jury Trial Project recommendations.²⁶ Each suggested instruction cautions jurors that for the most part questions are to be asked by attorneys, not jurors, and that jurors should limit their questions to clarification of statements made by witnesses.

The National Program to Increase Citizen Participation survey found that while the practice of permitting jurors to submit questions is increasing, it has been generally slow to catch on. Moreover, New York lags behind the national average in permitting jurors to submit written questions. In New Jersey, where a court rule authorizes juror questions in civil cases, such questions were permitted in 55% of reported trials.²⁷ By contrast, in Connecticut, which also has court rules authorizing juror questions, only 1% of reported trials included juror questions.²⁸

Substantive Preliminary Jury Instructions

ABA Principle 6(C)(1) recommends that preliminary instructions include elements of the charges or claims. Judges and attorneys in the 35 New York Jury Trial Project trials where substantive preliminary instructions were given generally agreed that such instructions had a positive impact on fairness, were helpful to jurors' understanding, and aided trial preparation. Nevertheless, the procedure remains controversial in New York State.

On the criminal side, the Second Department just recently reversed its earlier holding that it was a mode of proceedings error to review the elements of the charges at the outset of the trial. In *People v. Harper*, the court looked

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Jury Innovation in Practice

The Experience in New York and Elsewhere

By Paula Hannaford-Agor and Chris Connelly

The “State-of-the-States” Survey

The National Center for State Courts (NCSC) National Program to Increase Citizen Participation Through Jury Innovations is surveying judges, attorneys, and court administrators across the country to document policies and practices related to jury trials.¹

As of May 19, 2006, NCSC received completed questionnaires from 9,139 judges and lawyers, describing 8,066 state court trials in the 50 states and the District of Columbia. Criminal and civil jury trials each comprise 50% of the dataset.² We received 171 reports of jury trials in New York State: 97 replies from state trial judges, 72 from attorneys, and the remainder from other practitioners. In addition, 22 of the 708 federal court jury trials reported on were conducted in New York State.

In all, the dataset reflects nearly 10% of the jury trials that take place annually in state and federal courts. Reports by state trial court judges account for nearly one-third of all general jurisdiction court judges in the nation.

Trial Practices

The judge and lawyer questionnaires asked about the various techniques used in the respondent’s most recent trial. Table 1 provides an overview of the New York responses on several of these techniques compared to responses from Connecticut, New Jersey, and other state courts.

| | New York Courts | New Jersey Courts | Connecticut Courts | Other State Courts |
|--|------------------------|--------------------------|---------------------------|---------------------------|
| Jurors permitted to take notes | 26% | 28% | 51% | 74% |
| Jurors given paper for notetaking | 19% | 31% | 47% | 70% |
| Jurors given a notebook | 1% | 0% | 2% | 7% |
| Juror questions permitted | 4% | 33% | 1% | 16% |
| Civil trials | 5% | 55% | 1% | 18% |
| Criminal trials | 1% | 0% | 0% | 14% |
| Jurors given final instructions before closing arguments | 6% | 2% | 2% | 47% |
| Jurors receive at least one copy of written instructions | 6% | 27% | 31% | 77% |
| All jurors receive copy of written instructions | 4% | 16% | 15% | 38% |

As a baseline, the survey asked about the evidentiary and legal complexity of each trial. Overall, New York State trials were comparable to those of other states in terms of trial complexity. Twenty-two (13%) of the New York State trials were rated as very complex by at least one measure of complexity and 6% on both measures. Nationally, 18% of trials were rated very complex on at least one measure of complexity and 6% on both measures.

Juror Notebooks

Trials that are highly complex (rating a 6 or higher on a 7-point scale) are trials in which juror notebooks can be extremely helpful to jurors.³ Yet, juror notebooks were less popular in New York than in other state courts. Jurors were

given a notebook in only one of the 22 New York trials reported to be particularly complex. In other states, jurors were given trial notebooks in 12% of the 499 trials that were rated particularly complex.

Note-Taking

Permitting jurors to take notes during trial has caught on less quickly in New York than in other jurisdictions. Juror note-taking was permitted in 26% of reported New York trials, compared to 74% in other state courts. Note-taking materials were provided to jurors in only 19% of New York trials, as compared to 70% of those in other state courts.

Juror Questions of Witnesses

The practice of permitting juror questions varies substantially across the country. Nationally, jurors were allowed to ask questions in 14% of criminal trials and 18% of civil trials (16% overall). In New York State courts, the rate of permitting juror questions was much lower: 1% and 5% in criminal and civil trials, respectively. The three states that mandate juror questions in civil and criminal trials, Arizona, Colorado, and Indiana, had the highest rates of permitting juror questions (94%, 63% and 90%, respectively). Seven states (Delaware, Iowa, Louisiana, Mississippi, Nebraska, and North and South Carolina) reported no instances of juror questions in their trials; two of these (Mississippi and Nebraska) prohibit juror questions.

Jury Instructions

There is considerable variation across the country in the timing and form of jury instructions. For example, in 47% of state court trials respondents reported that jury instructions were given before closing arguments, compared to just 6% in New York State. Fourteen states (including New York) overwhelmingly favored jury instructions after closing arguments, although only three routinely kept written instructions from jurors. Jurors were

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at the ABA Principles and also at the Jury Trial Project research to conclude that the decision whether to preliminarily instruct the jury on the elements of crimes charged is within the trial court's discretion.²⁹ The Seventh Circuit Jury Project found that judges who used substantive preliminary instructions overwhelmingly thought they improved the fairness of the trial (82%) and jurors' understanding (91%). As in the New York research, attorneys were less comfortable than judges with the concept. Nevertheless, 72% of attorneys thought prelimi-

not understand key instructions.³⁷ But improving comprehension is no easy task. Balancing juror comprehension against the rigors of appellate review is extremely difficult.³⁸

Conclusion

The goal of providing jurors with tools that enhance comprehension has been met with open arms in some quarters and resistance in others. The ABA has defined best practices for achieving this goal in its comprehensive Principles for Juries and Jury Trials. The in-court experi-

Extensive research in the 1970s and 1980s found that 50% or more of jurors who had completed service and deliberation did not understand key instructions.

nary instruction improved jurors' understanding of the case. Jurors who heard preliminary instructions generally found them helpful and 73% of those who were not given such instructions wished they had.³⁰ Moreover, examination of the use of multiple innovative practices in a research setting found that the combination of note-taking and preliminary substantive instructions is more effective in enhancing juror comprehension than either one alone.³¹

Providing Written Copy of Instructions to Deliberating Jurors

Principle 14 declares that jurors should routinely be supplied with a written copy or copies of the judge's charge to the jury. Here again, research has shown that written instructions help jurors resolve disputes, reduce juror confusion, and reduce the number of questions during deliberations.³² In New York civil trials, judges may exercise their discretion to provide jurors with written copy of the charge.³³ In criminal trials, however, the parties must consent before a jury may be given instructions in writing.³⁴ The Fourth Department has held that consent is not required where the judge chooses to project the charge onto a screen or the wall so that jurors may read along while the judge reads the charge.³⁵

As with the other ABA recommendations that remain controversial in New York State, the National Center for State Courts' National Program to Increase Citizen Participation found that New York lags behind the nation as a whole, as do New York's two neighbors, in permitting written instructions.

One concept in the ABA Principles that is not controversial is the idea that it is best for jury instructions to be given in language that jurors can understand.³⁶ Extensive research in the 1970s and 1980s found that 50% or more of jurors who had completed service and deliberated did

ence in New York State, combined with data obtained from federal and state courts across the country, should be persuasive to judges that improvements can be made in jury trials without sacrificing fairness. ■

1. See <www.abanet.org/juryprojectstandards/principles.pdf>. Unfortunately, the extensive Commentary to the Principles is not currently available online.
2. Principle 3: Juries should have 12 Members. Principle 4: Juries should be unanimous.
3. *Williams v. Fla.*, 399 U.S. 78 (1970) (jury of less than 12 in criminal trials); *Colgrove v. Battin*, 413 U.S. 149 (1973) (jury of less than 12 in federal civil trials); see *Apocada v. Or.*, 406 U.S. 404 (1972); *Johnson v. La.*, 406 U.S. 356 (1972) (non-unanimous verdicts).
4. E.g., Dennis J. Devine, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 662 (2001).
5. TrialGraphix, *7th Circuit American Jury Project: Executive Summary* (May, 2006).
6. *Id.* at 3.
7. Principle 13: The courts should vigorously promote juror understanding of the facts and the law. Subpart F suggests that civil juries "may be instructed" that they may discuss evidence among themselves prior to deliberations.
8. Diamond & Vidmar, *Juror Discussion During Civil Trials: A Study of Arizona's Rule 39(f) Innovation* (2002). Available at <http://www.law.northwestern.edu/Diamond/papers/arizona_civil_discussions.pdf>.
9. Diamond & Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857 (2001).
10. *Id.* at 1875.
11. *Id.* at 1893.
12. *Id.* at 1900.
13. *Id.* at 1903.
14. Diamond, et al., *Jurors' Unanswered Questions*, 41 Ct. Rev. 20 (Spring 2004).
15. *Id.* at 25.
16. Note-taking is permitted in every state (except Pennsylvania where it is prohibited in criminal cases) and has been held to be discretionary by every Federal Circuit Court. These cases are listed at the Web site of the American Judicature Society: <http://www.ajs.org/jc/juries/jc_improvements_notetaking.asp>. Last visited July 14, 2006.

An Experiment in Larger Juries in Civil Trials

By Stephan Landsman

In the fall of 2005, the Seventh Circuit Bar Association, in cooperation with the judges of the Seventh Circuit Court of Appeals and federal district judges from throughout the Circuit, agreed to undertake an eight-month program to test several of the innovative jury practices specified in the American Bar Association's Principles for Juries and Jury Trials.

Among the principles designated for testing was the use of 12-person juries in civil cases. Notwithstanding contrary Supreme Court precedent,¹ ABA Principle 3 declares: "Juries should have 12 members." The commentary to Principle 3 highlights experimental data demonstrating that the superiority of 12, both in terms of diversity and predictability of decision making, is overwhelming.²

As part of the Circuit Bar's program, I interviewed 10 judges who had conducted approximately 20 civil jury trials with either 11 or 12 jurors.³ The interviews provide strong support for a return to juries of 12.

All the judges I interviewed recognized the potential for 12-person juries to enhance diversity. One judge kept careful records and noted that his juries of 12 had 27% minority membership while on panels of six the figure was 17%. Others noted, anecdotally, an increase in the number of African American and women jurors in the larger juries. However, diversity meant more than race and gender to these federal district judges. They noted an increase in geographical diversity, an enhanced range of life experience, and greater acquaintance with those who were foreign-born (especially important in several cases involving immigrant witnesses).

In the end, eight of our 10 judges recognized the particular importance of diversity and six concluded that this issue tipped the scale, leading them to favor larger juries in civil cases.

The judges also noted the advantage in numbers of a 12-person jury. For one judge this meant a reduced risk that one or two jurors would dominate. For another it

forestalled "overrepresentation" of a single point of view. A third saw a panel of 12 as enhancing the dignity and importance of the civil trial process – raising its status to that of the criminal trial.

None of the judges I interviewed favored six-person juries. All thought them too small and, for one reason or another, too risky. Relying on the permissive federal rule, all considered eight jurors the minimum appropriate.⁴

Larger juries posed few logistical problems. *Voir dire* was found to be slightly longer (perhaps by an hour). Deliberations of these juries of 10 or 11 took no longer than deliberation of juries of eight, typical for federal court. There was one hung jury, but the parties in that case elected to accept its 9-3 vote as determinative. None of the attorneys involved objected to the larger jury size.

This group of judges generally agreed that bigger is better. They were not treating 12 as a magic number. Instead, modern concerns about diversity and quality of deliberations led them to appreciate the traditional wisdom that had led to reliance on larger juries. Their reaction to their experience is, perhaps, a signpost to the future – one informed by the wisdom of history and findings of social science. ■

1. See *Williams v. Fla.*, 399 U.S. 78 (1970).

2. See Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 *Psychol. Pub. Pol'y & L.* 622 (2001); Michael J. Saks, *The Smaller the Jury the Greater the Unpredictability*, 79 *Judicature* 263 (1996).

3. Variation occurred because jurors were excused in several cases due to illness or for other reasons.

4. Fed. R. Civ. Proc. 48.

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given at least one copy of instructions in 61% of jury trials nationally compared to only 5% of trials in New York. This also varied considerably from state to state.

Conclusions

New York State is a national leader in jury improvement efforts related to the summoning, qualification, and treatment of jurors. Under Judge Kaye's leadership, New York spearheaded the use of multiple source lists, eliminated occupational exemptions, raised the juror fee to \$40 per day, and reduced the term of service. New York has been less active in providing jurors with decision-making tools during trial. New York's Jury Trial Project has demonstrated that techniques such as juror note-taking, juror questions,

and written jury instructions work as well in New York State as in other state courts. Bearing these positive experiences in mind, we hope New York State will soon join the mainstream in courtroom jury improvements. ■

1. All of the analyses are based on judge/attorney surveys.

2. Capital felony, non-capital felony, and misdemeanor trials comprise 3%, 36%, and 12% of the surveys, respectively.

3. The content of juror notebooks can vary depending on the nature of the case, but they often contain a brief summary of the claims and defenses, preliminary instructions, copies of trial exhibits or an index of exhibits, a glossary of unfamiliar terminology, and lists of the names of expert witnesses and brief summaries of their backgrounds.

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17. *People v. Hues*, 92 N.Y.2d 413 (1998). A New York trial court rule authorizes judges in both civil and criminal matters to decide for each case whether to allow jurors to take notes. 22 N.Y.C.R.R. § 220.10. New York criminal jury instructions include a standard jury instruction on note-taking. CJI 2d [NY] Note taking (Revised Oct. 25, 2001). The instruction is available at <<http://www.nycourts.gov/cji/1-General/cjgc.html>>. Last visited July 14, 2006. It is reprinted in the pamphlet, *Jury Trial Innovations in New York State: A Practical Guide for Trial Judges*. Available from the Office of Court Research (212) 428-2990 and online at <www.nyjuryinnovations.org>. Can also be requested by e-mailing the author at: ekrauss@courts.state.ny.us.
18. Penrod & Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 Psychol. Pub. Pol'y & L. 259, 263 (1997).
19. *Id.* at 263.
20. Unified Court System, "Final Report of the Committees of the Jury Trial Project" (2005), available at <www.nyjuryinnovations.org/materials/Final_Report_of_the_Committees_of-the_Jury_Trial_Project.pdf>.
21. *Id.* See also Elissa Krauss, *Jury Trial Innovations in New York State*, N.Y. St. B.J. (May 2005), p. 22.
22. *Id.* at 74.
23. *People v. Knapper*, 230 A.D. 497, 245 N.Y.S. 245 (1st Dep't 1930). Most recently affirmed in *People v. Miller*, 8 A.D.3d 176, 778 N.Y.S.2d 12 (1st Dep't 2004).
24. These decisions are available at the American Judicature Society Web site <http://www.ajs.org/jc/juries/jc_improvements_juror_questions.asp>. Last visited July 14, 2006.
25. Of 347 questions submitted in 19 trials only 41 were objected to and 37 of those were not asked. *Jury Trial Innovations*, *supra* note 17, at 5.
26. One suggested instruction was drafted by Hon. Stanley Sklar. The other was drafted by Hon. William Donnino. See *Jury Trial Innovations*, *supra* note 17, at 12.
27. NJ Rules of General Application, 1:8-8c. Earlier this year, jurors in the high-profile Vioxx trial in New Jersey were permitted to submit questions and at least 23 were addressed to witnesses. Lisa Brennan, *When Jurors Run the Show*, NJLJ, Apr. 4, 2006. Available at law.com.
28. *People v. Harper*, 818 N.Y.S.2d 113, 2006 WL 1543932 (2d Dep't 2006), *rev'g* *People v. Mollica*, 267 A.D.2d 479, 700 N.Y.S.2d 759 (2d Dep't 1999).
29. *Id.*
30. TrialGraphix, *supra* note 5, at 5. Jurors' average helpfulness rating on a 7-point scale was 5.8.
31. ForsterLee & Horowitz, *The Effects of Jury-aid Innovations on Juror Performance in Complex Civil Trials*, 86 Judicature 184, 188 (2003).
32. Heuer & Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 L. & Hum. Behav. 4009 (1989).
33. 22 N.Y.C.R.R. § 220.11.
34. *People v. Owens*, 69 N.Y.2d 585, 516 N.Y.S.2d 619 (1987); see *People v. Johnson*, 81 N.Y.2d 980, 599 N.Y.S.2d 525 (1993).
35. *People v. Williams*, 8 A.D.3d 963, 778 N.Y.S.2d 244 (4th Dep't 2004).
36. This concept is incorporated into the ABA's Principle concerning substantive preliminary instructions (6(C)(1)) as well as in Principle 14 which declares: "The court should instruct the jury in plain and understandable language regarding the applicable law."
37. Simon & Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury and the Classroom*, 5 L. & Soc'y Rev. 319 (1971); Strawn & Buchanan, *Juror Confusion: A Threat to Justice*, 59 Judicature 478, 481 (1976); Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979); Severance, Greene & Loftus, *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. Crim. L. & Criminology 198 (1984); Kramer & Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. Mich. J. L. Reform 401 (1990); Reifman, et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & Hum. Behav. 539 (1992).
38. See Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37 (1993), and *Communicating with Juries: How to Draft More Understandable Instructions*, National Center for State Courts (2006) (originally published in 10 Scribes J. Legal Writing 2005-2006).

Juror Questions at Trial

In Principle and in Fact

By Shari Seidman Diamond

The practice of allowing juror questions during trial, although familiar at common law,¹ fell into disuse over time and has only recently been revived. While the practice remains controversial, experience with pilot programs permitting jurors to submit questions during trial is producing “converts” among judges and attorneys who participate in these trials.

One recent convert is Judge James Holderman, co-chair of the Seventh Circuit Bar Association’s American Jury Project, which tested seven ABA Principles between October 2005 and May 2006. Judge Holderman’s initial skepticism about juror questions disappeared after he found through experience that the procedure worked smoothly, the questions were generally relevant and provided beneficial insights to the attorneys, and, the jurors appreciated the opportunity to submit questions. Other Seventh Circuit judges and attorneys reached the same conclusions.

In the Seventh Circuit Project, 14 judges permitted jurors to submit questions in 27 cases. Jurors submitted questions in 20 of the 27 cases. There were no notable differences in length of trial or complexity of evidence and law between the group of seven cases in which the jurors did not submit questions and the 20 in which they did. The question arises: what influenced whether jurors submitted questions in a particular case?

I interviewed all of the judges who permitted questions and asked them to describe how they went about it. In some respects, all of their instructions were similar. All specified that questions were to be submitted in writing, that the judge would discuss the questions with the attorneys, and that legal rules might prevent the judge from permitting some questions. In other ways, the instructions differed. Some judges described juror questions as an “opportunity”; others specifically told the jurors that their questions should be aimed at clarifying a witness’s testimony. Some told jurors to write down their questions and give them to the bailiff, without indicating when that would occur; others told the jurors that questions would be collected after each witness finished testifying. Some provided special forms for questions; others did not. With the small sample of cases and the variety of combinations of procedures used, we could not assess how these variations affected the number of questions that jurors submitted. But one difference turned out to be crucial in affecting whether any questions were submitted at all.

The principal difference between the group of trials in which jurors submitted questions and the group in which no questions were submitted was whether or not the judge mentioned the possibility of juror questions again after the initial introduction. In the 20 trials in which

jurors submitted questions, 10 of the 11 judges asked the jury after each witness if there were any questions; the 11th asked only after the first witness and received questions only for that witness. But the three judges who presided in the seven remaining trials in which no questions were submitted mentioned juror questions only in their initial introduction before testimony began and never again mentioned the possibility of juror questions.

It turned out that when the judges only mentioned juror questions in their introductory remarks, many jurors simply did not realize that questions were an option when the time for questions came. On their post-trial questionnaires, only a little more than a third (38%) of the jurors in these cases reported that they were permitted to submit questions. By contrast, among jurors who sat on trials in which the judge mentioned the possibility of submitting questions during the trial, 99% understood that questions were an option. Thus, when judges mentioned that jurors would be permitted to ask questions only at the outset of the trial, at the same time that they gave the jurors other important and sometimes complex information and the judges never reinforced that message during the trial, most jurors did not recall the embedded instruction on juror questions.

The Seventh Circuit test of juror questions demonstrated an important lesson about realistic implementation of innovations. The results show that judges who are interested in offering jurors a real opportunity to submit questions must make sure that jurors know they can do it by giving the jurors a reasonable opportunity to actually submit the questions they have. A single mention of the procedure at the outset of a trial is apparently not sufficient.

The success of the efforts of the various Jury Commissions, Projects, Courts, and Bar Associations to optimize jury trials depends on what happens in the trenches. The courtroom can be a daunting environment, and jurors depend on the judge for guidance. It is thus up to the court to assure that “innovation on the books” becomes “innovation in fact.” ■

1. *United States v. Bush*, 47 F.3d 511, 515 (2d Cir. 1995).

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