

From: Ann L. Diamond [mailto:adiamond@tarrantcounty.com]
Sent: Tuesday, November 18, 2008 3:03 PM
To: Barbara Walther; Kennon L. Peterson
Cc: Russ Meyer
Subject: SBOT Court Rules Committee's input on Jury Innovation issues

Judge Barbara Walther, Chair, SBOT Committee on Jury Service
Ms. Kennon Peterson, Rules Attorney, Texas Supreme Court

Dear Judge Walther and Kennon,

You asked for input of the SBOT Standing Committee on Court Rules regarding the jury proposals from the Committee on Jury Service. The SBOT Standing Committee on Court Rules met on Friday, November 14, 2008.

The SBOT Committee on Court Rules has asked that I convey that there is a difference of opinion on the matters presented, especially regarding whether there should be a guarantee that juror notes are to be permitted to be taken back into deliberations. The concern most often raised is that individuals take notes with varying degrees of accuracy and a person who took notes is likely to have undue credibility during deliberations compared to other jurors if a dispute arises. This credibility boost was considered by many on the Committee to be unlikely to correlate to actual accuracy. Instead, several Committee members felt that, in lieu of expanded note taking, consideration should be given to making it easier for jurors to hear or see a playback of the actual testimony to clarify or reconcile juror recollection.

Some members of the Committee liked the idea of jurors taking notes and of permitting them to be taken back into deliberation, reasoning that the purpose of note taking is not clear if the notes are not permitted to be referred to during deliberations. Others on the Committee pointed out that note taking can be part of the concentration and learning process, as some people learn better taking notes than they do just listening. Still others were concerned that people can obsess about their own note taking, losing much of what goes on in trial in the quest to write copious notes.

Those who opposed the notes being guaranteed to be taken back into deliberations outnumbered those who supported notes being taken back into deliberations. Even when the matter is left to the trial judge, Committee members generally felt that great caution should be used in determining which cases were suited for taking notes into deliberations.

Some suggested that there are really two kinds of juror rights/concerns. Concerns such as getting an escort to their mode of transportation or the availability of counseling after trial and other creature comfort-type issues seem quite different from concerns such as note taking (the latter relating directly to the case, the former more to the security and personal comfort of the jurors). Some members of the Committee felt that the two kinds of concerns may not need to be all treated the same -- perhaps the creature comfort issues are more appropriate to a bill of rights and the case-related issues such as note taking are best left to the trial judge.

Regarding all matters that relate to actual trial procedure (juror note taking, for example) the Committee has deep concerns about having what are essentially trial court procedural rules contained in a bill of rights or any other law outside the TRCP. As a structural matter, consistent with good drafting principles, anything that is essentially a trial procedure requirement should be contained in a properly enacted Rule of Procedure and not in some other law. A bill of rights outside of the TRCP is not the proper format for enacting new trial procedural rules.

As to juror notes in particular, it was suggested by a Committee member that perhaps the Court of Criminal Appeals case you shared with us regarding juror note taking is sufficient guidance

and introducing anything beyond or different from that would open up challenges or ambiguities without advancing justice.

Another matter: it was pointed out that requiring courts to provide notebooks may be a cost burden on smaller counties, if no funding is provided for this mandate.

Thank you for inviting our input. Please let us know if we may be of further service.

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cc: Russ Meyer, Vice Chair, SBOT Standing Committee on Court Rules