

STATE BAR OF TEXAS



Ann Diamond, Chair
Russ Meyer, Vice Chair

Court Rules Committee

February 6, 2009

The Hon. Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Juror Note-Taking

Dear Justice Hecht:

At its meeting on January 16, 2009, the State Bar Rules Committee ("SBOT Committee") was advised that the Supreme Court Rules Advisory Committee ("SCAC") has by majority vote recommended that the Supreme Court revise the Texas Rules of Civil Procedure to expressly allow jurors to take notes in civil cases, and to provide that jurors may (1) bring their notes into the jury room during deliberations, and (2) remove their notes from the courthouse at the end of each day and following the conclusion of a trial.

The SBOT Committee respectfully submits this letter following its discussion of these topics at its January 16, 2009, meeting. The discussion at the SBOT Committee meeting produced several "straw polls" of the Committee members' initial reactions. While these informal polls might not reflect final positions of the membership if more study and debate time were available, several points bear mention.

Despite the complexity of the issues, the SBOT Committee achieved apparent consensus on several points at its January 16 meeting. First, the Committee strongly opposes the SCAC recommendation that the rules should be amended to allow jurors to take notes made during trial with them when they leave the courthouse for the day or at the conclusion of a trial. Given that the purpose of allowing juror note-taking is to aid individual jurors' recollection of the evidence presented at trial, that purpose has been fulfilled when the jury renders a verdict. Moreover, some Committee members pointed out that because Texas Rule of Evidence 606(b) currently prohibits juror testimony as to

"any matter or statement occurring during the jury's deliberations," juror notes not destroyed post-trial might be offered as evidence of what jurors considered or discussed during their deliberations, effectively circumventing TRE 606(b). (We understand that the SCAC recommended an amendment to TRE 606 to address and avoid this possibility.) Also, some Committee members expressed concern that jurors in high-profile cases might be tempted to take extensive notes not to aid their own recollection of the evidence, but for the commercial value such notes might command – either on their own or in support of a book or movie based on the trial.

Next, there appeared to be general consensus that, whatever rule changes (if any) the Court ultimately adopts, uniform admonitory instructions should inform juries before trial begins about when they will be allowed to refer to their notes, how the notes may be used during the trial, and whether jurors will be allowed to retain their notes post-trial. Allowing juror note-taking and then surprising jurors by refusing to permit the notes in deliberations should not happen; jurors should be told at the beginning of trial whether they will be permitted to take their notes into deliberations.

The SBOT Committee also offers the following input on other aspects of the SCAC's proposal:

Most, but not all, of the SBOT Committee favors allowing juror note-taking as a general matter, although several members feel the issue should be left to the discretion of the trial judge. However, the SBOT Committee is divided as to whether jurors should be permitted to bring their notes to the jury room and refer to them during deliberations. The concerns expressed include the over-reliance on note-taking to the exclusion of memory, the potential for jurors who have taken notes to be ceded more power in deliberations than would otherwise be given, and the ability of trial counsel to influence the juror note-taking by creating demonstrative displays of argument that are easily replicated by juror note-takers who may not fully appreciate the difference between argument and evidence.

Although some SBOT members favor always allowing juror notes to be taken into the jury room and other members would always prohibit that practice, the debate and straw poll results do not necessarily reflect an irreconcilable policy disagreement between two entrenched camps; it appears that some members might support such a practice if sufficient procedural safeguards are used to ensure that juror notes are not treated as "evidence" by jurors or relied on as a summary of the evidence superior to the jurors' own recollection of the trial evidence. Moreover, members (whether they support or oppose juror note-taking as a rule or would leave it to the discretion of the trial judge) see the need for uniform and unequivocal instructions if the notes are to be taken into the jury room.

For example, some SBOT members who oppose rules that broadly permit jurors to take notes into deliberations appear more inclined to support such use if accompanied by a modified version of the TRCP 226a admonitory instructions considered by the SCAC. Such a change to TRCP 226a might be the following:

Any notes you have taken are for your own personal use and may be taken back into the jury room and consulted by you during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely upon your independent recollection of the evidence and not be influenced by the fact that another juror has taken, or has not taken, notes.

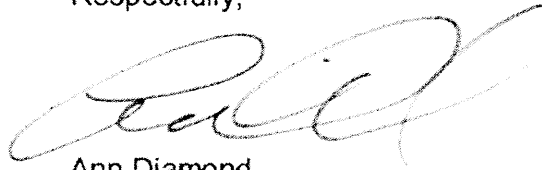
Unfortunately, the time constraints of a single meeting precluded a more definitive resolution, in part because of the numerous sub-issues involved. To name just a few:

1. Should a trial court have discretion to permit the use of juror notes during deliberations in some types of civil cases but not others? If so, should such discretion be specifically limited to particular kinds of cases? (For example, the discretion to allow such use of juror notes in long, complex trials but not in shorter, simpler cases.)
2. How would trial courts enforce any admonitory restrictions on the use of juror notes? How would trial courts ensure that jurors do not add to their notes at home, if the notes are taken home? Could juror violations of such instructions be raised on appeal?
3. Should jurors be permitted to take notes on anything other than paper notepads, such as computers, PDA's, and voice recording devices? How would electronic notes be 'collected and destroyed', if that is the intent?
4. Would the Americans with Disabilities Act ("ADA") or other law require that jurors with writing disabilities be assigned court-paid note-taking assistants?

The next SBOT Committee meeting is scheduled for March 6, 2009; if the juror note-taking issue remains under active consideration by the Court at that time, additional discussion and feedback by the SBOT Committee is anticipated. In addition, the SBOT Committee is aware that pending Texas legislation regarding juror note-taking (SB 445) may already be or may soon become a factor in the Court's consideration.

We hope that our observations and recommendations will be helpful to the Court's consideration of these difficult issues, and we stand ready to assist the Court in any appropriate manner regarding potential changes to procedural rules in Texas courts.

Respectfully,

A handwritten signature in black ink, appearing to read "Ann Diamond", with a large, sweeping flourish extending to the right.

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