Report to SCAC on Jury Innovations

Judge Tracy Christopher, 295th District Court

Nov. 21-22, 2008

We have been asked to review several jury innovations for civil cases. Several other committees and task forces have also looked at these issues. I have done a short survey of trial judges[1] to get their feelings on the issues, reviewed the ABA and National Center for State Courts publications, made a review of some of the other states instructions[2] and included some cursory legal research too.

1. Note Taking

A. SB 1300[3]

SB 1300 calls for a mandatory instruction to the jury that they make take notes and use them during deliberations to refresh their memories. The court is to provide materials for note taking and is to destroy the notes at the end of the day. The notes may not be used on appeal or for any other reason.

B. Senate Jurisprudence Committee

The Senate Jurisprudence Committee's Interim Report calls for juror note taking during civil trials but prohibit juror notes during deliberations. The court would keep all notes confidential and destroy them after the verdict.

C. PJC Oversight

Recommended that 226a include an instruction to the jury on taking notes to make it clear that note taking is permissible in civil cases. The previous PJC instruction was changed to delete the sentence "Your personal recollection of the evidence takes precedence over any notes you have taken."

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[1] Using the Texas Center for the Judiciary, I sent an email to all district judges that tried civil cases. I received over 100 responses with many responses coming from smaller counties. In fact, the more urban counties are underrepresented. I have a separate compilation of all responses but will summarize the results in this report.

[2] In 2007, my law clerk, Daniel Wilson, gathered the pattern jury charge basic instructions from a number of states: Alabama, California, Florida, Illinois, Indiana, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Tennessee and Virginia. I have not updated his research, nor should anyone consider it definitive research for each state.

[3] I am using the version of SB 1300 that was distributed to everyone. I understand there may be some changes when it is next proposed.

D. SCAC discussions

Recommended some restrictions on the use of notes during deliberations and decided to remain silent on the issue of what to do with the notes after trial.

E. State Bar Committee on Jury Service

Drafting a juror bill of rights that would include the right to take notes in the trial judge's discretion, incorporating some of the *Price* elements (see below).

F. State Bar Court Administration Task Force

The Task Force recommended that the Supreme Court amend the rules of civil procedure to expressly allow in appropriate cases, juror note-taking.

G. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Supports juror note taking with the decision left to the sound discretion of the trial judge.

H. Texas Judicial Council TJC

Its draft resolution supports juror note taking in the discretion of the trial judge with appropriate safeguards. (Vote scheduled for Dec. meeting)

I. Trial Judges Survey

The vast[4] majority of trial judges surveyed already allow juror note taking in civil trials. The vast majority do not allow jurors to show their notes to others during deliberations. A few do not allow notes back into the jury room during deliberations. A solid[5] majority have the policy of note destruction at the end of trial.

J. ABA, National Center for State Courts (NCSC) and other States

The ABA *Principles for Juries and Jury Trials* (August 2005) mandates that jurors be told that they may take notes, be given appropriate instructions about the use of notes and destroy the notes at the end of trial. Juror note taking should be encouraged because it enhances recall of the evidence.

The NCSC *Jury Trial Innovations* (Second Edition 2006) outlines the pros and cons of juror note taking and identifies as the only con that jurors who take notes may participate more effectively in jury deliberations that those who do not. The pros include: aids memory, encourages more

[4] A vast majority is in the 85% range. I am not giving the exact numbers as answers continue to come in.

[5] A solid majority is in the 60-65% range.

active participation in deliberation, decreases deliberation time, keeps jurors alert in trial, increases juror confidence and reduces the number of requests for read back portions of testimony.

The majority of other states surveyed indicated a right to take notes, with cautionary instructions and was about 50/50 on destruction of notes at the end of trial.

K. Texas case law on note taking

In *Price v. State*, 887 S.W. 2d 949 (Tex. Crim. App. 1994) the Texas Court of Criminal Appeals overturned previous case law that prohibited note taking in criminal cases and left note taking to the discretion of the trial judge in appropriate cases. It included a list of requirements that the trial judge had to meet before allowing note taking and approved instructions about note-taking. Here are the requirements: "*First,* determine if juror note-taking would be beneficial in light of the factual and legal issues to be presented at the trial. If the trial is to be relatively short and simple, the need for note-taking will be slight. On the other hand, if a long and complex trial is anticipated, note-taking could be extremely beneficial. *Second,* the trial judge should inform the parties, *prior to voir dire,* if the jurors will be permitted to take notes. If note-taking is to be allowed, the parties should be permitted to question the venire as to their ability to read, write or take notes." *Id*. at 954

Here are the pre-trial instructions:

"1. Note taking is permitted, but not required. Each of you may take notes. However, no one is required to take notes.

2. Take notes sparingly. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships.

3. Be brief. Overindulgence in note taking may be distracting. You, the jurors, must pass on the credibility of witnesses; hence, you must observe the demeanor and appearance of each person on the witness stand to assist you in passing on his or her credibility. Note taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made the observation itself. Keep in mind that when you ultimately make a decision in a case you will rely principally upon your eyes, your ears, and your mind, not upon your fingers.

4. Do not take your notes away from court. At the end of each day, please place your notes in the envelope which has been provided to you. A court officer will be directed to take the envelopes to a safe place and return them at the beginning of the next session on this case, unopened.

5. Your notes are for your own private use only. It is improper for you to share your notes with any other juror during any phase of the trial other than jury deliberations. You may, however, discuss the contents of your notes during your deliberations."

Id. at 954-955

Here are the pre-deliberation instructions:

"You have been permitted to take notes during the testimony in this case. In the event any of you took notes, you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing or you might make a mistake in recording what you have seen or heard. Therefore, you are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case."

Id. at 955

The tone of the opinion was to discourage note-taking. "We note that trial judges who do *not* permit juror note-taking will eliminate review of the matter on appeal and probably save many hours of trial and appellate court time." *Id*. at 954.

In *Manges v. Willoughby*, 505 S.W 2d 379 (Tex. Civ. App.-San Antonio 1974, writ ref'd n.r.e.) the court held that juror note taking was probably not error and was harmless. Civil cases after *Manges* all found no error or harmless error.

L. Recommendation

The SCAC is already vetting the changes to Rule 226a on note taking. Finalize the language submitted. This appears to be the appropriate rule to use. Should we tackle the issue of destruction of notes and use of notes for appellate issues? This issue could also tie into jury misconduct.

2. Questions by Jurors During Trial

A. SB 1300, PJC Oversight, State Bar Jury Service Committee

Silent on this issue.

B. Senate Jurisprudence Committee's Interim Report

The committee recommends allowing juror questions during civil trials by permitting anonymous written questions before deliberations. Counsel would object outside the presence of the jury and witnesses. After ruling on admissibility, judges could recall the jury and witnesses. Questions would be read verbatim and counsel would have the opportunity to cross-examine each witness.

C. State Bar Court Administration Task Force

The Task Force recommended that the Supreme Court amend the rules of civil procedure to expressly allow in appropriate cases, juror questions.

D. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Supports juror questions, in writing, with objections outside the presence of the jury, with the decision as to whether the procedure should be used to be left to the sound discretion of the trial judge.

E. Texas Judicial Council TJC

Its draft resolution supports juror questions in the discretion of the trial judge with appropriate safeguards. (Vote scheduled for Dec. meeting)

F. Trial Judges Survey

A few[6] trial judges already allow juror questions with limitations (some only with consent of the parties.) The questions must be in writing, the lawyers and judge review them and objections are made at the bench. A solid majority of the trial judges (with an opinion) felt juror questions were a bad idea but many did not have an opinion.

For those who thought it was a good idea or that they might consider it with safeguards, all agreed that the questions should be written, not shown to other jurors, with the lawyers having a right to object and perhaps having the court re-phrase the questions. The judge then asks the question with ability to follow-up by the lawyers if they wanted to. Some variations included the idea of just showing the notes to the lawyers and letting them decide whether to incorporate the

[6] Roughly 10%

ideas into their own questions. Some thought the lawyers ought to agree to the process before it is done and some thought the judge should have the discretion to say no questions at all.

For those who felt it was a bad idea, here are some of their objections: could create error; the lawyers should be the ones in charge of their case presentation; it causes the jurors to become advocates; it could lead to juror discussion before hearing all of the evidence; delay of the trial; you do learn what the jurors are thinking which can be a problem if they are thinking of inadmissible evidence (insurance, did he take a polygraph, income tax ramifications); it would unintentionally assist one side or the other; it would help the party with the burden of proof.

G. ABA, NCSC and other States

The ABA recommends that jurors be allowed to ask questions with the safeguards outlined above; written questions, opportunity to object outside the presence of the jury, with the court or the lawyers then asking the question. The rationales for this rule are that questions can materially advance the pursuit of truth and enhance juror satisfaction.

The NSCS reports that juror questions are most useful in complex cases and that the jury should be instructed to ask questions to clarify a witness's testimony if the testimony was confusing or complicated. Advantages include: the questions alert the lawyers when jurors do not understand and gives them an opportunity to correct the misunderstanding, will increase juror comprehension and keeps jurors engaged and alert. Disadvantages include: jurors may become advocates, jurors may interpret the court's failure to ask their question as an indication that the witness's testimony should be discounted; jurors may be offended if their questions are not asked; adds to trial length.

Eight states (of the ones that I reviewed) have pattern instructions for juror questions. There is an entire ALR on this issue. 31 ALR 3d 872 "The view has been expressed by some courts that the practice of jurors asking questions in open court during trial should be encouraged on the theory that it is of prime importance for jurors to obtain a fair comprehension of the issues and clarification of any facts which will promote a better understanding of the evidence. Other courts have taken the position that juror questioning should be discouraged, reasoning that laymen are not well qualified to conduct an examination and that a complaining counsel may be placed in the unreasonable tactical position of not being able to raise an objection for fear of alienating the questioning juror."

H. Federal case law

In *United States v. Cassiere*, 4 F.3d 1006 (1st Cir. 1993), the First Circuit held it was not plain error to allow juror questions where the case was complex, the defendant did not object, questions were put in writing and the jurors were told not all questions would be asked and the questions asked were bland and were designed to clarify testimony already given. The court stated that juror questions should be reserved for exceptional cases and should not be routine.

Other circuits have found no reversible error in juror questions with safeguards but all discourage

the routine use of questions: *States v. Lewin,* 900 F.2d 145 (8th Cir. 1990); *DeBededetto v. Goodyear Tire &Rubber Co*., 754 F.2d 512 (4th Cir. 1985); *United States v. Callahan*, 588 F. 2d 1078 (5th Cir.) *cert denied*, 444 U.S. 826 (1979); *United States v. Collins*, 226 F. 3d 457(6th Cir. 2000)

In *United States v. Ajmal*, 67 F. 3d 12 (2nd Cir. 1995) the Second Circuit held that the trial judge abused his discretion in allowing juror questions in a routine drug case. The court conceded that the "practice of allowing juror questioning of witnesses is well entrenched in the common law and in American jurisprudence. Indeed, the courts of appeals have uniformly concluded that juror questioning is a permissible practice, the allowance of which is within a judge's discretion." *Id*. at 14. In this case the district court "encouraged juror questioning throughout the trial by asking the jurors at the end of each witness's testimony if they had any queries to pose. Not surprisingly, the jurors took extensive advantage of this opportunity to question witnesses, including [the defendant] himself. Such questioning tainted the trial process by promoting premature deliberation, allowing jurors to express positions through non-fact-clarifying questions, and altering the role of the jury from neutral fact-finder to inquisitor and advocate. Accordingly, the district court's solicitation of juror questioning absent a showing of extraordinary circumstances was an abuse of discretion." *Id*. at 15.

I. Texas case law

In *Morrison v State*, 845 S.W. 2d 882 (Tex. Crim. App.1992), the Court of Criminal Appeals held that it was per se harmful error to allow jurors to question witnesses.

The few civil cases on point have declined to follow the Court of Criminal Appeals. In *Fazzino v. Guido*, 836 S.W. 2d 271, 275 (Tex. App.-Houston [1st Dist.] 1991, writ denied), the Houston Court of Appeals concluded that juror questions, with appropriate safeguards, are permissible. Here were the steps:

> 1. After both lawyers had concluded their respective direct and cross-examination, the trial court asked the jurors for written questions.
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> 2. The jury and witness left the courtroom while the admissibility of the question was determined.
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> 3. The trial court read the question to both lawyers and they were given the opportunity to object to the questions.
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> 4. The jury and witness were brought back into the courtroom and the admissible questions were read to the witness verbatim.
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> 5. After the witness answered, both lawyers were allowed to ask follow-up questions limited to the subject matter of the juror's question.

The Dallas court of Appeals agreed. *Hudson v. Markum,* 948 S.W. 2d 1 (Tex. App.—Dallas 1997, pet denied)

J. Recommendation

Full discussion of this issue by the SCAC. Perhaps obtain names of lawyers who have participated in the trials with jury questions and get their opinions on the process. Perhaps talk to the few judges that have used the procedure. If supported by a majority draft a new rule on juror questions-could be Rule 265.1-with safeguards as outlined in the *Fazzino* case. Also should rule be discretionary with the court? At the request of either side? Only with agreement on both sides? Should jurors be instructed that questions should only be asked if the testimony needed to be clarified?

3. Interim Summation/Argument

A. SB 1300

SB 1300 provides that the court may, at the request of either party or on its own initiative, allow counsel to make interim summations after opening and before closing.

Note the use of the word "summation" in the statute which according to Black's Law Dictionary is equal to closing argument.

B. PJC Oversight and State Bar Committee on Jury Service

Silent on this issue.

C. State Bar Court Administration Task Force

The Task Force recommended that Supreme Court amend the rules of civil procedure to expressly allow in appropriate cases, interim statements by counsel.

Note the use of the word "statement" which is generally used in connection with opening statement-a preview of the evidence.

D. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Supports interim summation with the decision left to the sound discretion of the trial judge as to whether it is appropriate for the case.

E. Trial Judges Survey

I may have skewed the survey process by asking the judges about interim "argument" rather than statements. Argument more closely tracks the "summation" language in SB 1300. The judges, who have actually done it, liken it more to a summary of the evidence.

A few judges have allowed interim statements of some sort in long trials or when there was a long break between days of trial. Most judges felt it might be appropriate only in very long trials, where a break in the days of trial occurred or where the trial was bifurcated in some manner but doubted they would ever try a case that needed it. Many judges thought it would never be appropriate. A couple of judges thought it might be more useful to have essentially a progressive opening statement, especially with experts, where a lawyer might get 5 minutes to explain what this expert was going to talk about and why his testimony was important, rather than a summation.

Objections to the process included: inserting argument during the trial confuses the jury as to the difference between argument and evidence; allowing argument without knowledge of the charge is a waste of time for the jurors; jurors should listen to all of the evidence before someone tries to persuade them; even if the rule was to only summarize the evidence it will lead to "argument" and more chances for error; this will encourage the jurors to discuss the case before they have heard all of the evidence.

F. Other states

I did not survey other states on this issue. The Manuel for Complex Litigation, (Fourth) §12.34 (2004) recommends interim statements in complex cases as an aid to juries. "In a lengthy trial, it can be helpful if counsel can intermittently summarize the evidence that has been presented or can outline forthcoming evidence. Such statements may be scheduled periodically (for example, at the start of each trial week) or as the judge and counsel think appropriate, with each side allotted a fixed amount of time. Some judges, in patent and other scientifically complex cases, have permitted counsel to explain to the jury how the testimony of an expert will assist them in deciding an issue. Although such procedures are often described as "interim arguments," it may be more accurate to consider them "supplementary opening statements," since the purpose is to aid the trier of fact in understanding and remembering the evidence and not to argue the case."

In *AcandS, Inc. v. Godwin*, 667 A.2d 116 (Md. 1995) the trial court allowed interim summaries but the summaries became argumentative leading to frequent mistrial motions. At one point the trial judge "punished" the plaintiffs and did not allow them interim argument due to their conduct. Ultimately because the court reversed the punitive damages finding, any error as to the nature of the summation was moot.

G. Texas law

In *Parker v. State,* 51 S.W 3d 719 (Tex. App.—Texarkana 2001), the court held that there is no right to interim argument in criminal cases but that the error was harmless in this case.

I have been unable to find any civil cases on point.

H. Recommendation

Full discussion of this issue with the SCAC-particularly the distinction between statements and argument. Perhaps further discussion with trial judges or lawyers that have used this procedure. If supported by a majority, draft rule could be placed in Rule 265. Should we include criteria for granting interim argument? Also should rule be discretionary with the court? At the request of either side? Only with agreement on both sides?

4. Juror Discussions about the evidence before deliberations

A. SB 1300

SB 1300 calls for jurors to be able to discuss the evidence before deliberations with all of the other jurors as long as they reserve judgment about the outcome of the case.

B. PJC Oversight

The committee did not recommend changing our current rule that prevents this. The new draft of 226a adds language explaining why we do not want jurors to do this.

C. SCAC discussions

We had a brief discussion about this rule, recognizing that we think many jurors already do this in secret. Consensus of the group was that we did not want to change the prohibition. No vote taken.

D. State Bar Committee on Jury Service and Task Force

No discussions about this.

E. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Does not support interim deliberation.

F. Trial Judges

Not surveyed on this point.

G. ABA, NCSC and other States

The ABA recommends that jurors in civil cases be allowed to discuss the evidence when all are present "as long as they reserve judgment about the outcome of the case." This rule recognizes jurors' natural desire to talk about their shared experience. The ABA cited several studies that indicated that these discussions did not lead to premature judgments by the jurors, enhanced juror understanding in complicated cases and decreased the amount of "fugitive" discussion that jurors had with family members.

The NCSC reports that this innovation has been extensively studied since Arizona started the practice in 1995. The studies indicate that it does not cause any pre-judgment of the case. The studies also showed that the innovation is best for longer, complex cases-there is no advantage in shorter trials.

Of the states I surveyed, only Indiana allowed early discussions. The rest followed Texas' procedure. Indiana's specific instruction is as follows:
"When you are in the jury room, you may discuss the evidence with your fellow jurors only when all of you are present, so long as you reserve judgment about the outcome of the case until your final deliberations begin. Until you reach a verdict, do not communicate about this case or your deliberations with anyone else."

As indicated above, Arizona also allows this procedure with this instruction: Do not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Both sides have the right to have the case fully presented and argued before you decide any of the issues in the case. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of trial.

H. Texas law

In *Golden Eagle Archery, Inc. v. Jackson,* 24 S.W.3d 362 (Tex. 2000), the court clarified TRCP 327 and TRE 606 as to when testimony of jurors is admissible to show misconduct. Specifically the court held that statements that a juror made to another juror before deliberations were admissible to show juror misconduct but held that the statements in that case did not rise to reversible error. Statements made by jurors during deliberations continue to be inadmissible to show jury misconduct.

I. Recommendation

Any further discussion necessary? (Any modification of the discussion rule would also invoke the issues in TRCP 327 and TRE 606)