TABLE OF CONTENTS

LIST OF FIGURES

PARTICIPATING JUDGES

	Judge	County	Committee
Hon.	Lester Adler	Westchester	Jury Instructions and Order of Trial
Hon.	Augustus Agate	Queens	Alternatives to Trial
Hon.	Phylis Bamberger	Bronx	Jury Instructions and Order of Trial
Hon.	David Michael Barry	Monroe	Voir Dire
Hon.	Peter Benitez	Bronx	Note-taking and Notebooks
Hon.	Eileen Bransten	New York	Juror Questions
Hon.	Jeffery Brown	Nassau	Jury Instructions and Order of Trial
Hon.	Brian D. Burns	Otsego	Voir Dire
Hon.	Fernando Camacho	Queens	
Hon.	John Carter	Kings	Juror Questions
Hon.	Felix J. Catena	Montgomery	Juror Questions
Hon.	Cheryl Chambers	Kings	Voir Dire
Hon.	Margaret Clancy	Bronx	Jury Instructions and Order of Trial
Hon.	Ralph Costello	Suffolk	Alternatives to Trial
Hon.	William C. Donnino*	Queens	Jury Instructions and Order of Trial
Hon.	Vincent E. Doyle	Niagara	Note-taking and Notebooks
Hon.	Paul Feinman	New York	Alternatives to Trial
Hon.	Nicholas Figueroa	New York	Note-taking and Notebooks
Hon.	Steven Fisher	App. Div.	Jury Instructions and Order of Trial
Hon.	Marianne Furfure	Steuben	Jury Instructions and Order of Trial
Hon.	Joseph Gerace*	Chautauqua	Alternatives to Trial
Hon.	Wilma Guzman*	Bronx	Note-taking and Notebooks
Hon.	Roger Hayes	New York	Voir Dire
Hon.	John Lane	Erie	Juror Questions
Hon.	Kenneth Lange*	Westchester	Note-taking and Notebooks
Hon.	Judith Lieb	Bronx	Juror Questions
Hon	Michael McKeon	Cayuga	Juror Questions
Hon.	Deborah Modica	Queens	Voir Dire
Hon.	Karla Moskowitz*	New York	Alternatives to Trial
Hon.	Robert Mulvey	Tompkins	Alternatives to Trial
Hon.	William O'Brien*	Nassau	Voir Dire
Hon.	Geoffrey O'Connell	Nassau	Voir Dire
Hon.	Thomas V. Polizzi	Queens	Alternatives to Trial
Hon.	Richard Price	Bronx	Voir Dire
Hon.	Robert Raciti	Queens	
Hon.	Gustin Reichbach	Kings	Juror Questions
Hon.	Rosalyn Richter	New York	Juror Questions
Hon.	Sheri S. Roman	Queens	Juror Questions
Hon.	Micki Scherer	New York	Voir Dire
Hon.	Alice Schlesinger	New York	Jury Instructions and Order of Trial
Hon.	Martin Shulman	New York	Alternatives to Trial
Hon.	Joseph M. Sise*	Montgomery	Jury Instructions and Order of Trial
Hon.	Donna Siwek	Erie	Juror Questions
Hon.	Stanley Sklar	New York	Juror Questions
Hon.	Martin E. Smith	Broome	Jury Instructions and Order of Trial
Hon.	Mark H. Spires	Queens	Alternatives to Trial
Hon.	Robert Stolz*	New York	Juror Questions
Hon.	Joseph D. Valentino	Monroe	Note-taking and Notebooks

Hon.	Paul Victor	Bronx	Jury Instructions and Order of Trial
Hon.	William Wetzel	New York	
Hon.	F. Dana Winslow*	Nassau	Juror Questions

* Committee Co-chair

ACKNOWLEDGEMENTS

Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman established the Jury Trial Project in order to experiment with innovative jury trial practices in New York courtrooms. They have been active supporters of the project since it began two years ago. The Project has also been supported throughout by Dean Robert G.M. Keating of the Judicial Institute.

This Report and the Jury Trial Project itself were made possible by the interests and efforts of the many judges who actively participated in its five Committees conscientiously working to develop recommendations and guidelines consistent with both the law and best practices. In particular, those who participated in data-gathering by completing questionnaires and assuring that attorneys and jurors did the same, made it possible for the Project to present the Bench and the Bar with data from actual trials involving actual New York attorneys and jurors who used the innovative trial practices reported here.

Of course, all of the judges' participation in the Project was made possible by Administrative Judges from across the State who agreed that this effort was important enough to ask trial judges to devote valuable time to it.

In addition, several distinguished jurists from other jurisdictions shared their jury trial innovations experience with Jury Trial Project judges. Judges Peter Lauriat of Massachusetts and Judith Chirlin of California along with Michael Dann (retired from Arizona) and Gregory Mize (retired from the District of Columbia) freely gave of their time and insights to provide our judges with the benefit of practical experience implementing various innovations.

Finally, the work of compiling and analyzing the data was done with professionalism and efficiency by two graduate students in Industrial/Organizational Psychology from Hofstra University – Jeremy Hirshberg, Class of 2004, and Danielle Mariconi, Class of 2005.

Future work of the Jury Trial Project will focus on education and outreach about innovative jury trial practices with the Bench and the Bar. For further information about this report, the Jury Trial Project or its future plans, contact Project Staff:

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April 2005

CHAPTER 1: EXECUTIVE SUMMARY

The Jury Trial Project (JTP) involved 51 judges from 16 counties. They are all listed at the beginning of this report. This report summarizes two years' practical experience by these judges with the following innovative practices[1] in New York State trials and proposes plans for state-wide implementation of effective jury innovations in the future.

1. Substantive preliminary instructions.
2. Written charge available to deliberating jury.
3. Voir dire openings. Short preliminary statements by counsel *before* voir dire.
4. Permitting jurors to take notes.
5. Allowing jurors to submit written questions.

In all, 26 judges sat on 112 trials involving 926 jurors and 210 attorneys in which one or more of the above-listed trial practices were used and *questionnaires were completed by trial participants*. (See Appendices A through D for details.) Additional judges who participated in the project used some of the recommended practices in trials, but did not participate in the data-gathering aspect of the project.

[1]In addition, the Committee on Alternatives to Trial recommended increased use of Summary Jury Trials (SJT), which has been used successfully in the Eighth Judicial District for several years. While other recommended procedures could be implemented by an individual judge in consultation with counsel, Summary Jury Trials require institutional change to implement. The Committee has drafted proposed procedures for binding Summary Jury Trials and is encouraged by interest in the procedure in several downstate counties. *See* discussion at page 99, *infra.*

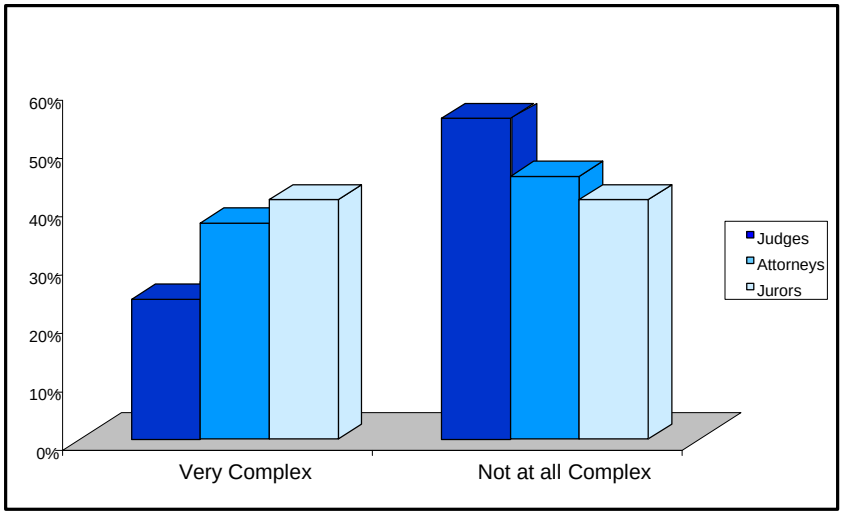
EXECUTIVE SUMMARY

Key Findings

The Jury Trial Project research effort resulted in four major findings:

1. ***Jurors tend to view trials as being very complex while judges tend to look at the same trials as not being complex.*** Attorneys' views are in between – more likely than judges to say that a trial's content was complex but less likely than jurors to give a high complexity rating. This difference in perspective, depicted in Figure 1 below, helps to explain why trial practices that enhance juror comprehension are essential to improving the trial process. [2]

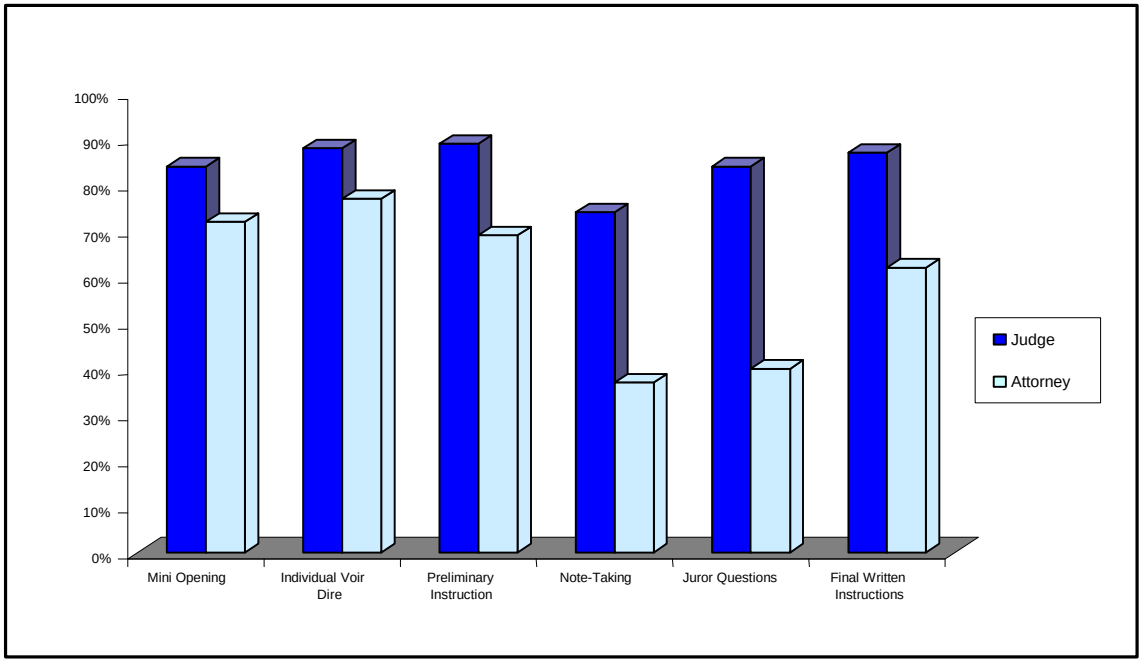
Figure 1: Trial Complexity: Judges', Attorneys' and Jurors' Views



[2] The difference between judges' and jurors' views of trial complexity is most pronounced in criminal trials where three-quarters of judges say trials are not complex, while nearly half of jurors think they are complex. See Figure 17, at page 98, *infra*.

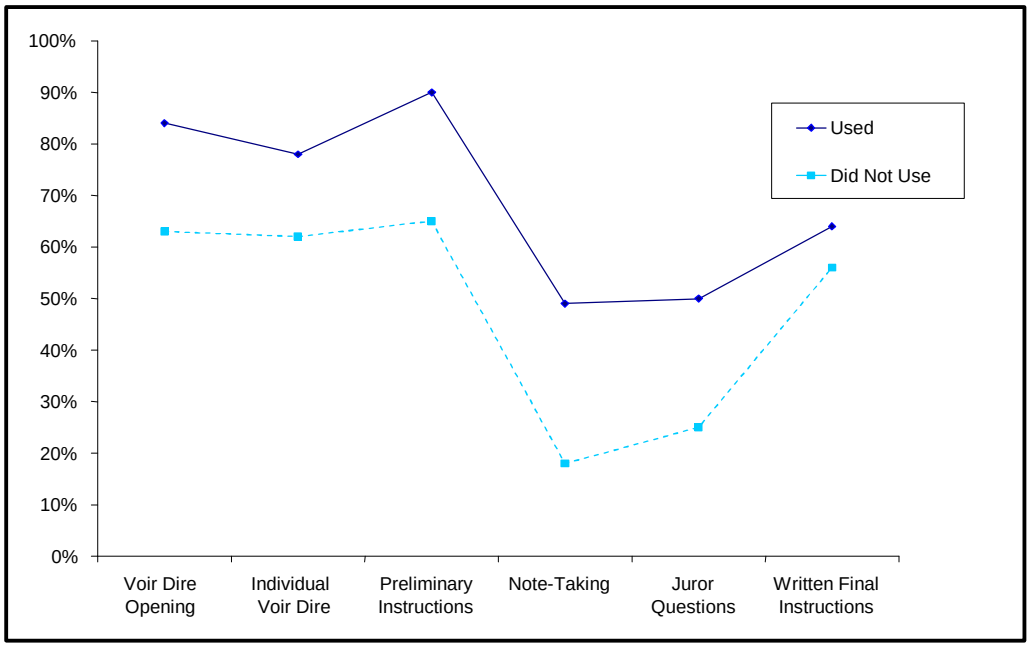
2. ***Whenever a recommended practice was used, attorneys and judges agreed that the practice had a positive effect on the fairness of the trial*** (assigning a rating of 5 or higher on a 1 to 7 scale from "No Effect on Fairness" to "Very Positive Effect on Fairness"). Thus, as shown in Figure 2 below, judges and attorneys concluded that innovative jury trial practices improve the jury trial process.

Figure 2: Innovation's Effect on Fairness: Judges' and Attorneys' Views



3. ***Attorneys who have had experience with innovative practices are more likely to approve of them than attorneys who have not.*** In some instances, as can be seen in Figure 3 below, the percent of attorneys approving an innovation doubles when they participate in a trial where the innovation is used.

Figure 3: Attorneys' Approval of Each Practice



4. Jurors serving on trials where recommended trial practices were not used would like to be able to use them in the future. In general, two-thirds or more of jurors who did not have the opportunity to use an innovation said they would want to do so in future trials.

EXECUTIVE SUMMARY

Recommendations

A brief summary of each Committee's overall findings and recommendations follows. The evaluations by judges, jurors and attorneys of each of the trial practices tested in the project are discussed in detail in later sections of this report.

Voir Dire Openings The Committee on Voir Dire recommends that judges allow each counsel (with consent of both parties) to give a short statement of the case at the outset of voir dire. This technique was used in 22 trials in the data-gathering. Judges and attorneys agreed that it improved voir dire. Jurors who heard "voir dire openings" had a better understanding of what the trial would be about than did those who did not hear them." The Committee recommends routine use of the procedure with appropriate safeguards. See page 20 *et seq.* for discussion.

Preliminary Instructions Committee members believe that there are cases where preliminary instruction covering elements of the charge are beneficial to the parties and to the jurors and recommend that the practice be used. Civil trial judges are free to expand the content of preliminary instructions, though consultation with counsel is recommended. Additionally, the Second Department has held that giving preliminary instructions defining the elements of a crime constitutes a "mode of proceedings error."[3] The Third Department upheld preliminary instructions where they "merely quoted verbatim from the Penal Law" and the Court admonished the jury to wait until it heard all the evidence before forming an opinion.[4] The ABA *Principles for Juries and Jury Trials* recommend that preliminary instructions include the elements of the charges and claims, though consultation with counsel about the content of such instructions is recommended.[5] See page 36 *et seq.* for discussion. See also http://www.abanet.org/jury/principles.html .

Written Copy of the Judge's Charge to the Deliberating Jury In 39 trials, deliberating jurors were provided with a written copy of the judge's final charge. The Committee on Jury Instructions recommends renewed efforts to obtain passage of legislation that would permit judges in criminal trials, in their discretion, to provide a written copy of the charge to jurors. See page 41 *et seq.* for discussion.

Note-taking Though long approved by the Court of Appeals, many judges and attorneys remain skeptical about note-taking, fearing that juror note-taking will distract their attention from the evidence. Data was collected for 91 civil and criminal trials in which jurors were permitted to take notes. Both the data and anecdotal reports discount

[3] *People v. Davis*, 12 A.D.3d 456, 783 N.Y. S. 2d 850 (2d Dep't 2004).

[4] *People v. Morris*, 153 A.D.2d 984, 545 N.Y.S.2d 427 (3d Dep't1989) *leave denied*, 75 N.Y.2d 922 (1990).

[5] Principle 6-C.1.

concerns that note-taking may be distracting. Therefore, the Committee on Note-taking recommends that all judges permit jurors to take notes, if they wish to do so, in accordance with existing trial court rules. To make this possible, jurors should be provided with note pads and pencils or pens. See page 73 *et seq.* for discussion.

Questions by Jurors After reviewing experience in 74 trials in which jurors were permitted to submit questions, the Committee on Juror Questions concluded that judges should have the discretion to allow jurors to submit written questions. The Committee has drafted a proposed Trial Court Rule providing that judges may allow jurors to submit written questions and that any juror question be reviewed with counsel and ruled upon out of the hearing of jurors. (See page 50 *et seq.* for the proposed rule).

Summary Jury Trial (SJT) The Committee on Alternatives to Trial focused its attention on the Summary Jury Trial and concluded that when properly utilized, summary jury trials can effectively dispose of civil cases early, at less cost in time and money to litigants, jurors, attorneys, the courts and taxpayers. The procedure has been used for several years in Chautauqua County and more recently on an experimental basis in the counties of Putnam, Orange, Saratoga, Monroe and Genesee. It is under consideration in Bronx, Clinton, Montgomery, Schenectady and New York Counties. Recently, Kings County formally adopted use of the procedure. The Association of Supreme Court Justices unanimously supported the Summary Jury Trial concept. The Committee concluded that Summary Jury Trials should be formally adopted as one of the alternative dispute resolution mechanisms available to courts and counsel.

Each of the recommendations here (with the exception of Summary Jury Trials) is included in the American Bar Association's *Principles Relating to Juries and Jury Trials*, adopted February 2005.

EXECUTIVE SUMMARY

Implementation

With the exception of Summary Jury Trials and substantive preliminary instructions, the practices discussed here can be implemented by individual trial judges. In criminal trials, consent of counsel is necessary for all innovations except note-taking. While legislation and rules are important vehicles for change, successfully implementing these practices is dependent on the support and interest of the judiciary and the bar. Thus, future work of the Jury Trial Project will focus on education and promotion: educating members of the bench and the bar about the effectiveness of these practices and their success in New York trials, and promoting these techniques through publications, training and CLE seminars. Following are the specific recommendations of the Jury Trial Project judges.

Practice Materials Provide easy-to-use materials appropriate for orienting judges and counsel to the use of various innovations. A one-page summary of authority for each JTP practices has been developed and is available at www.nyjuryinnovations.org. The summary page is followed by specific recommendations for voir dire openings, note-taking and juror questions.

Judicial Education and Discussion Make jury trial innovations a priority for judicial education and training and a regular part of training for new judges.

- The Jury Trial Project and its recommendations will be presented to a statewide meeting of Administrative Judges.

- Administrative Judges are asked to make the Project and its recommendations a topic for discussion in their monthly meetings with local judges. With 16 counties represented among JTP judges, it should always be possible to find at least one judge available to present to such meetings. Also JTP staff will be available to attend as requested.

- A series of Lunch and Learn programs on Jury Trial Innovations will be scheduled for Fall, 2005.

Education and Promotion Outreach to the judiciary, the bar and the public.

- Judges have written and submitted op-ed-type or informational pieces on specific innovations for publication in local Bar publications, as well as the regular press as appropriate.

- JTP judges and staff will continue to approach local Bar groups with offers to present CLE programs about the Project and its recommendations.

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CHAPTER 2: OVERVIEW OF THE PROJECT

History of the Project

In her 2003 State of the Judiciary address, Chief Judge Judith S. Kaye announced that under the aegis of the Judicial Institute, New York judges would begin to explore ways of more actively engaging today's jurors – such as allowing them to take notes and ask questions and other procedures designed to improve juror comprehension and participation. Judge Kaye's announcement highlighted New York's approach to jury trial innovation – as an experimental project where new techniques would be tried and evaluated in the real-world setting of actual jury trials. The project was begun with an introductory presentation to the State Administrative Judges in January of that year.

At that first meeting, the Administrative Judges were presented with a list of proposed "jury trial innovations" to be experimented with in New York State trial courts along with some of the available literature reporting on the effectiveness of such innovations elsewhere. Innovations highlighted were: juror questions, juror note-taking, substantive preliminary instructions, written final instructions, voir dire openings and individual voir dire. Invited guest speakers from other jurisdictions reported on their experiences with these practices. These guests – Judge Peter Lauriat from Massachusetts and retired Judges Michael Dann from Arizona and Gregory Mize from Washington, D.C. – shared their experiences with the Administrative Judges and discussed ways in which other states had experimented with and implemented innovative jury trial procedures.

At Judge Kaye's suggestion, rather than simply propounding rules or imposing practices untested in the New York courts, judges who had an interest in jury issues were invited to work together to test jury trial practices and then to develop recommendations based on their experiences. Each Administrative Judge was asked to invite four or five judges to participate.

Preliminary Poll of Judges By April, 2003, 49 judges were invited to participate, including two Administrative Judges who were so interested in the Project that they volunteered themselves. The first step was to poll the proposed participants about their interest in and experiences with various innovative jury trial practices. That preliminary poll of 48 judges included 36 from Supreme and County courts and 12 from City Courts. Sixteen counties were represented: Bronx, Cayuga, Chautauqua, Erie, Kings, Monroe, Montgomery, Nassau, New York, Otsego, Putnam, Queens, Steuben, Suffolk, Tompkins and Westchester. The participants were an experienced group. Half of the judges had been on the bench for more than 10 years, with the other half split between 6 to 10 years and 5 years or fewer. Equal numbers had previously tried cases as prosecutors, criminal defense attorneys and plaintiff's attorneys, with a smaller percentage having experience as civil defense attorneys.

The only practice widely used among JTP judges before the Project began was note-taking. It was used by 29 judges responding to the survey. A handful had experience using other suggested practices: nine judges had allowed jurors to submit written questions, 10 had given substantive preliminary instructions and eight said they had previously made their final instructions available to deliberating juries in writing. The judges were interested in participating in the experimental project. They also wanted tools to assist them, including specific procedures for implementing innovative practices, pattern jury instructions and opinions from counsel's office concerning the legality of the procedures.

In response to the poll or judges, a lengthy memo was prepared under the aegis of Counsel's Office, summarizing state law on the leading contenders for experimentation in the Jury Trial Project: individual voir dire out of the hearing of others, preliminary substantive and written final jury instructions, note-taking and notebooks, juror questions and interim commentary. The memo was distributed to the judges along with background materials on uses of these procedures elsewhere. JTP judges attended a full-day session at the Judicial Institute on May 30, 2003 where Judges Lauriat, Dann and Mize shared their experiences and perspectives on innovative jury trial procedures. Preliminary Committee Assignments were made to the five Committees: Voir Dire, Jury Instructions and Order of Trial, Note-Taking, Juror Questions and Alternatives to Trial. The Committees began working immediately, discussing the innovations they thought appropriate for experimentation in New York State Courts.

Finalizing the Practices to Test in the Project Over several months, Jury Trial Project judges grappled with two tasks: identifying specific practices each Committee would suggest for experimentation and providing feedback on the questionnaires to be used to collect data about experiences with and opinions about the practices. Each Committee met several times by telephone to decide which procedures it proposed to test and what implementation procedures, if any, the Committee would recommend. In addition, a large group met several times to iron out concerns about the questions asked in data-gathering questionnaires. Everyone agreed that the questionnaires ought to provide insights into judges', attorneys' and jurors' reactions to the use of innovative practices while avoiding any hint of interference with or exploration of the content of jurors' deliberations.

By October, the Committees' suggestions were clarified and questionnaires drafted. These suggestions are listed below. The questionnaires used in the study are reproduced in Appendices F, G and H.

Practices Used and Examined in the Jury Trial Project

Committee on Jury Instructions and Order of Trial[6]

1. Substantive preliminary instructions.
2. Pre-summation instructions (civil trials only).
3. Written charge available to deliberating jury.
4. Verdict sheets to contain elements or definitions.
5. Copy of verdict sheet for each juror.

Committee on Voir Dire

6. "Mini-openings"/voir dire openings. Short statements by counsel *before* voir dire.
7. Voir dire of jurors individually out of the hearing of others.

Committee on Note-taking

8. Permitting jurors to take notes.

Committee on Juror Questions

9. Allowing jurors to submit written questions.

Committee on Alternatives to Trial[7]

10. Use of Summary Jury Trials as an alternative to trial in civil cases.

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[6]It was not feasible to track in questionnaires all five of this Committee's suggestions. There is data available only on substantive preliminary instructions and written final instructions. The Committee also considered use of interim commentary, which was included in the questionnaires, but was not suggested for widespread use or evaluation.

[7] Although not precluded by any statute or court rule, Summary Jury Trials require substantial cooperation on many levels outside the system as well from the Bar. As a result, this procedure could not be widely experimented with as part of the Jury Trial Project. The Committee has made a report and recommendations about SJT, the procedure and recent developments around the State, which is included in this report at page 99, *infra.*

Methodology

Questionnaires tracked use of substantive preliminary instructions, final written instructions, voir dire openings, juror note-taking and allowing jurors to submit written questions. The questionnaires also covered use of individual voir dire out of the hearing of other jurors, interim commentary by counsel and trial notebooks[8], which were considered but not suggested by any committee.

The questionnaires to be completed by judges, attorneys and jurors were designed to compare assessments of the trial with respect to complexity, length of trial, numbers of documents, and also to assess the helpfulness of the various practices.[9] Generally, opinion statements were answered on a 1 to 7 scale (e.g. from not complex to very complex, or not at all helpful to very helpful). Respondents circled the number that corresponded to their opinion. If the judges' questionnaire indicated that a practice was used then the attorneys' and jurors' questionnaires were coded to conform to the judges' questionnaire.

Judges and attorneys were asked their views about the impact on fairness of each innovation. Here a 1 to 7 scale was also used, ranging from "none" (no impact) to "positive." In reporting these results, approval ratings of 5 through 7 were generally collapsed to indicate respondents' opinion that the practice had a "very positive" impact on the fairness of the trial.

Whether or not a particular practice was used in a trial, all attorneys were asked whether they approved or disapproved of the practice on a 1 to 7 scale. Attorneys were also asked to write down the "main reasons" for their opinion. These comments are provided in Appendices I through N at page 153 *et seq.*, *infra.*

The questionnaires were pre-tested in Fall, 2003 to assess their usefulness and usability. By November, questionnaires were completed in 32 trials. The pretest provided notable information about differences among judges', attorneys' and jurors' perceptions of the trial process.

[8] The Committee on Note-taking considered notebooks and agreed that this procedure is a good idea in a limited number of cases and therefore did not make notebooks a recommended procedure.

[9] *See* Appendices F-H for all three questionnaires.

Pretest Findings For the pretest, 278 jurors, 74 attorneys and 22 judges completed questionnaires in 20 civil trials and 12 criminal trials. The trials included a variety of case types – medical malpractice, motor vehicle and other types of cases on the civil side and misdemeanors to Class B felonies on the criminal side.

Pretest responses highlighted differences in perspective among jurors, judges and attorneys. One measure of their differing perspectives was how each group perceived trial complexity. When asked to rate trial complexity on a 1 to 7 scale, a majority of jurors indicated that most trials are very complex (assigning a complexity rating between 5 and 7), while most judges rated most trials as ***NOT*** very complex (assigning complexity rating between 1 and 3). This was true both in civil and in criminal cases – though the difference between judges and jurors was greater in criminal trials than in civil trials. Attorneys' ratings were in between the judges' and jurors' ratings. This disparity in complexity ratings suggests that jurors may need comprehension tools to help them do their jobs more effectively. The pattern of differing views concerning trial complexity remained consistent through the final study.[10]

In the pre-test, as in the preliminary poll of judges, note-taking was the only widely used jury trial innovation: it was permitted in 16 of the 32 trials. Three-quarters of the jurors who took notes said they found the procedure to be helpful in recalling the evidence and in reaching a decision.

In the pretest, pre-instruction and written final instructions were endorsed by clear majorities of attorneys. Juror note-taking and written questions were most controversial among attorneys, with the highest disapproval of juror questioning. In the pretest, attorneys completing questionnaires after a trial where an innovation was used were more likely to approve that innovation than those completing questionnaires after trials where the innovation was not used. Thus, while six of the eight attorneys involved in trials where jurors were permitted to submit written questions approved the practice, the majority of attorneys in cases where written questions were not used, disapproved of the practice (Criminal: 77%; Civil: 59%). The pattern of approval increasing with experience is one that has been detected in other research and remained consistent in the final study of this Project.

[10] Other researchers have found with respect to criminal trials specifically, "judges reported the lowest levels of complexity, jurors the highest, and attorneys' perceptions of cases' complexity typically fell somewhere in the middle." Heise, *Criminal Case Complexity: An Empirical Perspective*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 331, 333 (July 2004).

Implementing the Final Study

Once Committee members agreed to suggest specific practices to the JTP judges, a "practice manual" was created that included each Committee's suggestions, including suggested jury instructions where appropriate, excerpts from the Legal Memo prepared by counsel's office concerning New York State law on the recommended practices, summaries of research findings in other jurisdictions and a bibliography of published literature on each practice. Te manual also included copies of the questionnaires and other forms used in the project. This manual, entitled "The Jury Trial Project, An Experiment with Jury Trial Innovations: Recommendations for Participating Judges," was made available in February 2004 to all JTP judges. Judges were encouraged to make the manual available to interested counsel. It was also distributed at CLE's and public meetings.[11]

Judges were encouraged to use any of the Jury Trial Project's suggested practices as often as possible. They were asked to assure that in each trial where one or more JTP practice was used the judge, attorneys and jurors completed questionnaires. See Appendices F through H.

The Project involved a tremendous amount of paperwork. Those who conscientiously completed it made an important contribution to the JTP. Of the 51 JTP judges, 26 collected data. In addition to completing questionnaires themselves, judges were asked to assure that attorneys and jurors completed questionnaires and, where feasible, that they or their staff complete Voir Dire/Trial Data forms (different ones for civil and criminal trials), Records of Innovations Used (a one-page summary) and Jury Questions Data Forms (recording questions submitted by jurors during trial and during deliberations). Judges and attorneys were encouraged to complete questionnaires immediately upon jurors' retiring to deliberate.

[11] For example, CLE's were sponsored by the Monroe County Bar Association, the Kings County Criminal Bar Association and the Criminal Section of the Westchester Bar Association. At these sessions JTP judges and staff discussed legal and practical aspects of implementing the JTP recommended practices.

OVERVIEW

Summary of Findings

There are 112 trials in the final study of the Jury Trial Project, including 68 civil trials and 44 criminal trials. These trials involved 26 judges, 210 attorneys and 926 jurors. Fourteen counties were represented, including: Bronx, Cayuga, Erie, Essex, Fulton, Kings, Montgomery, Nassau, New York, Niagara, Queens, Schenectady, Steuben and Westchester. Civil trial judges in Erie and New York Counties were most active, accounting for 52 trials in the study.

The most frequently used practice was note-taking, used in 91 trials, followed by juror questions permitted in 74 trials. These were followed by individual voir dire out of the hearing of others (64 trials)[3] and the jury instructions practices – preliminary substantive instructions (35) and final written instructions (39). The jury instructions practices are controversial in criminal cases and require counsel's consent. Interim commentary was used in only six civil trials; and only seven trials reported use of notebooks.[12]

Basic distributions of trials, judges, attorneys and jurors are summarized in Tables 1 – 4 below. See Appendices A through D at page 110, *infra*, for details about each trial where innovations were used.

Table 1: Final Study Results

	Civil	Criminal	Total
Trials	68	44	112
Judges	15	11	26
Attorneys	134	76	210
Jurors	480	446	926

[3] Most used this procedure for part of the voir dire. Only one judge reported using this procedure to question *all* jurors in the panel.

[12] Interim commentary and juror notebooks were both considered by JTP Committees but neither was suggested to be systematically used and evaluated.

Table 2: Number of Trials in Which JTP Practices Were Used

Innovation	Criminal	Civil	Total
Mini-opening	16	6	22
Individual Voir Dire (out of hearing of other jurors)	29	35	64
Preliminary Instructions	26	9	35
Note-taking	54	37	91
Notebooks	7	-	7
Juror Questions	47	27	74
Written Final Instructions	28	11	39
Interim Commentary	6	-	6

Table 3: JTP Practices Used in Criminal Trials

Innovation	Trials	Judges	Attorneys	Jurors
Mini-openings	6	3	10	85
Individual Voir Dire	35	10	59	398
Preliminary Instructions	9	3	15	78
Note-taking	37	10	60	357
Juror Questions	27	7	42	232
Written Instructions	11	5	21	99

Table 4: JTP Practices Used in Civil Trials

Innovation	Trials	Judges	Attorneys	Jurors
Mini-openings	16	8	25	101
Individual Voir Dire	29	10	50	200
Preliminary Instructions	26	6	53	185
Note-taking	53	14	107	400
Notebooks	7	5	10	44
Juror Questions	46	10	88	332
Written final Instructions	28	10	59	187
Interim Commentary	6	2	12	3

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CHAPTER 3: REPORT OF THE COMMITTEE ON VOIR DIRE

Recommendations

For the experimental phase of the Jury Trial Project, the Committee on Voir Dire made two suggestions to JTP judges: use of voir dire openings in which attorneys, by consent of both parties, briefly describe their case to the jury panel at the outset of voir dire; and expanded use of individual voir dire questioning of jurors out of the hearing of other jurors.[13]

Voir Dire Openings

Nine judges (three civil and six criminal) provided questionnaire data on the use of voir dire openings in 22 trials. Several other judges experimented with the procedure without participating in the data collection. Judges presiding over trials where voir dire openings were used reported that the procedure was enormously successful. As a result, the Committee now recommends that all judges consider the use of "voir dire openings" (allowing each attorney a few minutes to briefly describe their side's case to the jury) at the beginning of voir dire. The use of voir dire openings is endorsed by Public Defense Bar representatives in comments to the Jury Trial Project as well as by the Association of District Attorneys.[14] The Committee recommends that this procedure be incorporated into the Judges' Bench Book and into future judicial training seminars on jury selection issues.

On the following page is the Committee's recommended procedure for implementing voir dire openings.

[13] For discussions of the use of private voir dire questioning, *see* Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, COURT REV. Spring 1999; Nietzel and Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 LAW & HUMAN BEHAVIOR 1 (1982) (finding that with individual sequestered voir dire 39% of jurors were eliminated by defense-inspired cause challenges). *See also*, Hans and Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 1179 CHICAGO-KENT L. REV. 78 (2003).

[14] These comments are available upon request from JTP Staff: ekrauss@courts.state.ny.us.

Recommended Procedures for Implementing Voir Dire Openings

1. Each counsel shall be given a brief period of time (about five minutes) to summarize the case from their side's point of view.[15] The time allotted for the voir dire openings should be added to the usual time allotted for voir dire.

2. Counsel should be given notice as early as possible of the court's intent to use the voir dire openings procedure. When counsel is first informed of the procedure at the start of jury selection, which is usually the case, reasonable time should be given to allow the attorneys to collect their thoughts and prepare.

3. Counsel can be invited to give voir dire openings to the entire panel.

4 The procedure should be used only with consent of counsel for both sides and with both sides' participation.

5. Special considerations for criminal matters:

   (1) *Rosario* material ought to be provided to the defense before counsel is asked to deliver a voir dire opening.
   (2) A defender's decision to make a voir dire opening does not preclude exercising the defendant's right not to make an opening statement at the start of the trial.
   (3) The People's voir dire should be first and there should be no rebuttal.

Suggested Judge's Introduction

Before we begin the process of asking you questions about your qualifications to serve in this case, each attorney will give a brief statement about the case. I've asked them to limit their remarks to a brief presentation. Of course, what the attorneys say to you by way of their opening remarks both now, and again later just before we begin hearing from the witnesses, is not evidence. These statements are offered to you now as a kind of "preview" of the case. The purpose in doing so is to allow us a greater opportunity to explore with you anything that might impact your ability to serve fairly and impartially as a juror in this case.

[15] This recommendation is consistent with Uniform Rules - Trial Courts, Appendix E(A)(4).

Private Voir Dire Questioning of Individual Jurors

Many judges were skeptical about the need for experimenting with this procedure – opining that in criminal cases such questioning is done routinely as-needed. Since civil voir dire is usually conducted with no judge present, this aspect of voir dire is outside of the judge's control.

Nevertheless, 20 judges reported using at least some individual questioning in Jury Trial Project trials. Nassau County Supervising Judge William Donnino adopted the practice of routinely asking some questions of every juror on the panel individually and concluded that the practice often led to excuses for cause that might not have otherwise been revealed. He notes that:

> "It often occurs that jurors who did not indicate in open court that they had a problem, described circumstances during the individual questioning that required me to excuse them for cause."

He continues to use this approach to voir dire and recommends it to others.

The Committee recommends that in all cases, judges consider the utility of questioning jurors outside of the hearing of others and use this procedure whenever it would contribute to eliciting complete information from jurors, protecting juror privacy and avoiding tainting other jurors.

Voir Dire Openings: Summary of Findings

Questionnaires were collected for 22 trials (16 civil trials and six criminal trials) in which attorneys gave brief voir dire openings.[16] Nine judges, 35 attorneys and 186 jurors participated in these 22 trials.

- Attorneys and judges agree that these voir dire openings improve juror candor, increase jurors' willingness to serve and appear to improve jurors' understanding of why the questions were being asked.[17]

- The voir dire openings help jurors understand the case. The 186 jurors who heard voir dire openings were more likely than those who heard a standard introduction at the beginning of the voir dire to say that the introduction was very helpful to them in understanding what the trial would be about.

Judges' and Attorneys' Views

Judge Richard Price (Bronx) and Judge Cheryl Chambers (Kings) report continued success with recommending and using this practice. Judge William O'Brien (Nassau) used voir dire openings with no objection after he visited the Nassau County District Attorney's office to discuss the procedure. Judge O'Brien, a member of the Committee on Voir Dire, reported:

> "At first, I was skeptical. After using voir dire openings in several criminal trials and then sitting on a trial where they were not used, I can't envision a case in which I would not like the attorneys to give brief voir dire openings. Jury selection is clearly improved by letting attorneys tell the venire a little bit about the case before questioning begins. Jurors who understand what the case is about pay closer attention to the questions and give more complete answers. Best of all, it seems to help jurors be more forthcoming about bias and at the same time reduce the number of jurors looking for reasons to avoid jury service."

[16] During the research phase of this project this procedure was called a "mini-opening" and some other published literature uses that term. Jury Trial Project judges decided to change the name to "voir dire opening" to avoid any confusion with opening statements made just prior to presentation of evidence.

[17] Others who have used voir dire openings or "mini-openings" report similar findings. *See e.g.* Connor, *Los Angeles County Trial Courts Test Jury Innovations and Find They Are Effective*, 67 DEFENSE COUNSEL J. 186 (April 2000).

The Committee on Voir Dire was helped enormously by Los Angeles Superior Court Judge Judith Chirlin who spoke with the Committee via conference call about her extensive experience using voir dire openings in civil and criminal matters.

Voir dire openings are also popular with counsel. At a meeting of Public Defender representatives some said they could not imagine a circumstance where a defender would not take the opportunity to do a voir dire opening. They have submitted a position paper to the Jury Trial Project endorsing the practice. The Association of District Attorneys has also endorsed use of voir dire openings.[18]

For the 22 trials in which attorneys made voir dire openings, two-thirds or more of both judges and attorneys concluded that the openings improved juror candor, increased jurors' willingness to serve and improved jurors' understanding of why they were being questioned.

Table 5: Voir Dire Openings: Judges' and Attorneys' Views of Helpfulness

Allowing each attorney to make a short statement describing the case before any voir dire questions were asked was very helpful to...		
	Criminal	**Civil**
Improving juror candor		
Judges	**60%**	**75%**
Attorneys	**80%**	**59%**
Increasing jurors' willingness to serve		
Judges	**60%**	**77%**
Attorneys	**80%**	**69%**
Improving jurors' understanding of why they were being questioned		
Judges	**60%**	**77%**
Attorneys	**80%**	**77%**

[18] Their comments are available from project Staff: ekrauss@courts.state.ny.us.

Two-thirds of the 35 attorneys gave high approval ratings to voir dire openings (Criminal: 71%; Civil: 66%). The most common reason given by attorneys for approving voir dire openings was summarized by an attorney who observed that it: "assists in clarifying many voir dire issues and actually shortens the process."

Attorneys also felt that the procedure improved jurors' comprehension and participation in the voir dire. For example:

> "It let the jury understand where voir dire was going and it helped them in responding more openly. It also helped eliminate jurors who should not be on the panel."

Attorneys who disapproved of voir dire openings worried, as did some judges, that the procedure could be abused by counsel. One attorney stated that:

> "Too many attorneys will say too much, leading to objections and to juror confusion."

For a complete list of all attorneys' comments favoring and opposing voir dire openings s*ee* Appendix I, at page 153, *infra*.

Attorneys participating in trials where voir dire openings were used were more likely to approve of the practice than were those in trials where there were no voir dire openings: nine out of 10 criminal attorneys and 17 out of 21 civil attorneys gave high approval ratings.

Table 6: Voir Dire Openings: Attorneys' Opinions

	Mini Opening Used	Mini Opening NOT Used	Overall Opinion
Criminal Trials			
Approve	90%	67%	71%
Disapprove	0%	33%	27%
Total	10	42	52
Civil Trials			
Approve	81%	63%	66%
Disapprove	19%	35%	32%
Total	21	91	112

Jurors' Views

There was a notable difference between jurors who heard voir dire openings and jurors who did not, with respect to the helpfulness of an early description of the case. Of the 186 jurors who heard voir dire openings, 91% said that the early case description was very helpful to their understanding of what the case would be about, while only 82% of those who heard a typical introduction thought it was very helpful. Although both are high percentages, there is a statistically significant difference between the two groups.

Private Voir Dire Questioning of Individual Jurors: Summary of Findings

? In 35 criminal trials and 29 civil trials some form of individual questioning of jurors, outside the hearing of other jurors, was conducted.

? Eleven criminal trial judges, 10 civil trial judges, 109 attorneys and 598 jurors participated in the 64 trials in which individual jurors were questioned out of the hearing of other jurors.

? In a majority of these cases, judges report that individual questioning of jurors increased juror candor and had a positive effect on the fairness of the trial.

? Attorneys also generally approved of questioning individual jurors outside of the hearing of others. Those in trials where the procedure was used showed even higher approval ratings than those in trials where it was not used. Like the judges, attorneys agreed that individual questioning improved juror candor and had a positive effect on the fairness of the trial.

? Very few jurors in this study were questioned individually and out of the hearing of others – 15% in criminal trials and 13% in civil trials. Most likely this low percentage reflects the fact that jurors questioned individually are more likely to be excused.

Judges' Views of Private Voir Dire Questioning

Table 7 summarizes judges' reports on the mechanics of the individual questioning. Most commonly, jurors who were questioned individually out of the hearing of others were questioned at sidebar. In six criminal trials and 11 civil trials voir dire was conducted in the robing room.

Table 7: Private Questioning: Where Was it Conducted?

	Criminal	Civil
At sidebar	14	10
In courtroom – while others wait outside	6	1
In jury room – while others wait outside	6	0
In the robing room	6	11
Other	2	4
Total	34	26

Table 8 summarizes reasons why jurors were questioned outside of the hearing of others. In most instances the jurors asked for privacy, though in 10 criminal trials and 12 civil trials the judge conducted individual questioning out of the hearing of others as a result of jurors' responses to other questions.

Table 8: Which Jurors Were Questioned in Private?

	Criminal	Civil
Jurors who asked to answer questions in private	27	14
Attorney asked to question juror(s) in private	0	10
Jurors' answers led judge to believe that private questioning was necessary	10	12
All jurors	1	1

Most judges feel that individual questioning increases jurors' candor (Criminal: 88%; and Civil: 90%). Also, 81% of judges in criminal trials and 96% of those in civil trials thought that the individual voir dire questioning had a positive impact on seating a fair and impartial jury.

Attorneys' Views of Private Voir Dire Questioning

Three-quarters of the 47 criminal trial attorneys and four-fifths of the 39 civil trial attorneys in cases where jurors were questioned individually outside of the hearing of other jurors gave high approval ratings to the procedure (Criminal: 77%; Civil:82%). Attorney comments included:

> "Questioning jurors individually aids getting honest, unedited answers from prospective jurors and hence a fair petit jury."

> "It allows jurors to respond to questions that may otherwise embarrass them or taint the panel."

> "Certain topics can prejudice the entire panel and should be discussed separately."

Table 9: Questioning Jurors In Private: Attorneys' Opinions

	Jurors Questioned In Private	Jurors NOT Questioned in Private	Overall Opinion
Criminal Trials			
Approve	77%	54%	72%
Disapprove	15%	46%	21%
Total	47	13	57
Civil Trials			
Approve	82%	70%	76%
Disapprove	13%	22%	17%
Total	39	23	62

Eighty-six attorneys participated in trials where jurors were questioned individually. These attorneys were more likely to approve of the procedure than those involved in trials where there was no such questioning. Attorneys who were skeptical about individualized questioning of jurors felt that it was too time consuming. One attorney said: "It should only be done if necessary; jury selection already takes long enough." For a full listing of attorneys' comments favoring and opposing individual questioning of jurors s*ee* Appendix J, at page 157, *infra*.

Most attorneys agreed that individual questioning increased juror candor (Criminal: 90%; Civil: 85%). They also agreed with the judges that individual questioning of jurors had a positive impact on seating a fair and impartial jury (Criminal: 80%; Civil: 73%).

Jurors' Views of Private Voir Dire Questioning

In criminal trials, 71% of the jurors were questioned by both judges and attorneys. In civil trials, 82% of the jurors were questioned only by attorneys. Barely more than one-tenth of jurors who completed questionnaires said they were asked questions in private (Criminal: 15%; Civil: 13%). Most likely, the data suggesting that a small number of jurors were questioned individually results from the fact that many of those questioned individually were excused. Because these jurors did not sit on the trial, they did not complete a Project questionnaire.

Among those who were not questioned in private, only 11% in criminal trials and 6% in civil trials stated that they would have liked to have been questioned in private. Finally, when asked if there were any questions asked of other jurors that they wished would have been asked in private, 16% of criminal trial jurors and 6% of civil trial jurors said "yes." The low proportions of jurors preferring to be questioned in private or wishing that others had been questioned in private suggests that jurors did not feel that the questioning they heard was intrusive, embarrassing or overly personal.

Background

Preliminary Instructions

Providing substantive preliminary instructions to criminal trial juries is controversial in New York courts. Although Criminal Procedure Law §260.30 requires that trial judges give "preliminary instructions" to the jury, Criminal Procedure Law §270.40 generally limits such preliminary instructions to the jury's "basic functions, duties and conduct." The Court of Appeals affirmed the Appellate Division's reversal of a conviction where the trial judge provided to the jury before presentation of evidence and over objection of counsel, a written outline of elements of crimes charged.[25] For another case, the Appellate Term reversed and remanded where the trial judge gave preliminary instructions outlining the elements of the crime charged and lesser included offenses in complete absence of preliminary instruction covering presumption of innocence, burden of proof and credibility.[26] Elsewhere, however, the Court of Appeals has indicated that preliminary instructions serve "to help dissipate some of the mystery."[27] The Court went on to note that "jurors [should] be familiarized with pertinent rules and procedures peculiar to the law and the courts and perhaps the particular matter at hand."[28]

More recently, the Second Department found a mode of proceedings error where the Trial Court "instructed the jury on the charge of robbery by defining its elements prior to opening statements."[29] By contrast, where the "trial court quoted verbatim from the Penal Law and the jury was specifically admonished to wait until it had heard all the evidence before forming any opinion," the Third Department found no error.[30]
The Civil Practice Law and Rules makes no reference to preliminary instructions in civil trials, and there is virtually no discussion of the issue in the appellate courts. The Fourth Department stated that, "It is doubtless helpful in a civil or criminal case for the court to deliver a pretrial charge."[31]

Research in other jurisdictions on pre-instructing jurors revealed that the practice: reduces the number of questions during deliberations, assists the jury in evaluating the evidence according to the correct legal principles and aids in recall. Researchers have also found that pre-instruction does not stimulate a "hypothesis confirming" search and

[25] *People v. Townsend*, 67 N.Y.2d 815 (1986); *see also People v. Vincenty*, 68 N.Y.2d 899 (1986).

[26] *People v. Morris*, 162 Misc. 2d 742 (App. T., 9th & 10th Jud. Dist. 1994).

[27] *People v. Newman*, 46 N.Y.2d 126 (1978).

[28] *Id.* at page 130.

[29] *People v. Davis*, 12 A.D.3d 456, 457 783 N.Y.S.2d 850, 851 (2d Dep't 2004).

[30] *People v. Morris*, 153 A.D.2d 984, 545 N.Y.S. 2d 427 (3d Dep't 1989), *lv denied*, 75 N.Y.2d 922 (1990).

[31] *People v. Cardinale*, 35 A.D.2d 1073, 316 N.Y.S.2d 369 (4th Dep't 1970).

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CHAPTER 4: REPORT OF THE COMMITTEE ON JURY INSTRUCTIONS AND ORDER OF TRIAL

The Committee on Jury Instructions and Order of Trial suggested several practices to JTP judges, including giving substantive preliminary instructions to juries in appropriate cases, providing deliberating juries with a written copy or copies of the judge's final charge and charging the jury before summation, including elements or definitions of the charges or claims on verdict sheets. The Committee also discussed the practice of permitting counsel to make summary statements to the jury during trial, also known as "interim commentary." It was assumed that obtaining counsel's consent to these procedures was necessary in criminal trials and recommended in civil trials.

Only three of these practices were tracked through questionnaires: substantive preliminary instructions, written final instructions and interim commentary. The extent to which these three were used is summarized in Table 10 below. There were 35 trials in which substantive preliminary instructions were given, 39 trials in which the jury was provided with the final charge in writing and six civil trials in which interim commentary was used.

Table 10: Use of Preliminary Instructions, Written Final Instructions, Interim Commentary

	Criminal Trials				Civil Trials			
	Trials	**Judges**	**Attorneys**	**Jurors**	**Trials**	**Judges**	**Attorneys**	**Jurors**
Preliminary Instructions	9	3	15	78	26	6	53	185
Written Final Instructions	11	5	21	99	28	10	59	187
Interim Commentary					6	2	12	39

Recommendations

Recommendation on Preliminary Instructions As a result of the JTP research efforts, the Committee concluded that substantive preliminary instructions can make it easier for jurors to understand the evidence as it is presented to them. One cautionary note: in the Second Department the use of preliminary instructions that define the elements of a crime was found, in one recent case, to be a "mode of proceedings error" mandating a reversal notwithstanding the lack of an objection to the procedure at trial.[19] The Third Department has held that preliminary instruction that "merely quoted verbatim from the Penal Law" and in which the Court admonished the jury to wait until it heard all the

[19] *People v. Davis*, 12 A.D. 3d 456, 783 N.Y.S.2d 850 (2d Dep't 2004).

evidence before forming an opinion was permissible.[20] The recently adopted American Bar Association *Principles for Juries and Jury Trials* recommend that preliminary instructions following empanelment include "the elements of the charges and claims and definitions of unfamiliar terms." [21]

In civil matters, judges have discretion to use preliminary instructions. The Committee recommends legislation permitting judges in criminal matters to provide jurors with substantive preliminary instructions covering the Penal Law definition of a crime or elements of the crime, claim(s) or other complex issues in cases where the judge finds that the nature of the charges or complexity of the issues requires such instruction.

The Committee concluded that there are times where it is appropriate to expand the introductory remarks required by Criminal Procedure Law §270.40. Such instruction may be especially useful in cases where lay knowledge of the basic crime or facts is not intuitive. In addition to introducing the parties to the matters in dispute, preliminary instructions can provide guidance in the contested issues and governing legal principles.

Recommendation on Written Final Instructions The Committee suggested that JTP judges provide deliberating juries with the judge's final instructions. Though permitted in civil trials by Trial Court Rule, in criminal trials counsel must consent.[22] There was considerable debate about the most effective and efficient way to provide the jury with the charge in writing. The Committee made no explicit recommendation about when to provide the written copy or whether to provide multiple copies or a single copy to the deliberating jury. One JTP judge routinely projects his charge using PowerPoint so that jurors can follow along while he is reading the charge to the jury. This approach has been upheld by the Fourth Department.[23]

As a result of the JTP research in criminal cases, the Committee endorses providing jurors with final charges in writing and recommends renewed efforts to obtain passage of legislation permitting judges, in their discretion, to provide deliberating jurors with a written copy of the charge. Previously proposed legislation has addressed permitting judges to provide a deliberating jury with a written copy of the charge only if the jury requests it. Committee members wondered how a jury would know they could have a

[20] *People v. Morris*, 153 A.D.2d 984, 986, 545 N.Y.S. 2d 427 (3d Dep't 1989), *lv denied* 75 N.Y.2d 922, 555 N.Y.S.2d 40, 554 N.E.2d 77 (1990).

[21] Principle 6-C. 1.

[22] 22 NYCRR §220.11 Copy of Judge's Charge to Jury; Civil Procedure Law §310.20 and §310.30 specify materials that may be given to the deliberating jury in criminal cases. Section 310.30 provides that under certain circumstances, with consent of the parties copies of the text of a statute may be given to the jury. There is no mention in either provision of the Civil Procedure Law of jury instructions. The Court of Appeals held that it was error for a trial judge to provide a *written outline* of elements at the outset of a trial. *See People v. Townsend*, 67 N.Y.2d 815 (1986).

[23] The Fourth Department held that no potential for prejudice arises from the simultaneous projection of the charge while it is being read. *People v. Williams*, 8 A.D.3d 963, 778 N.Y.S.2d 244 (4th Dep't 2004).

written copy of the charge if not told about it at the outset and if told wouldn't most juries ask for it?[24]

The Committee urges judges to consider in every trial making their charge available to the jury, and in criminal cases seeking consent of counsel to do so. Notably, a group of public defense lawyers invited to comment on the Project's recommendations endorsed this practice with the provisos that the written instructions consist of the charge as given (the transcript), that it is provided to the jury in response to a request and that the jury may be informed that they may make the request.

The Committee recommends that the procedure for implementing the recommendation be left to the trial judge. Several approaches have been used with success, including:

- ? projecting the charge on the wall while the judge is reading it;
- ? providing copies to the jurors to follow along while the judge reads; and
- ? providing one or more copies of the transcribed charge to the jury after they retire to deliberate.

Interim Commentary-Short Statements By Counsel During Trial The Committee considered the use of short statements known as "interim summations" or "interim commentary" but this practice was not well received by judges, attorneys or jurors. Both judges and attorneys expressed concern that attorneys will abuse this practice. Only one JTP judge indicated any experience with the procedure before the Project.

Even jurors were skeptical of "interim commentary" by counsel. Two-thirds of civil trial jurors said they would not like to hear short explanations of the evidence or the arguments from the attorneys during the course of the trial. Interestingly, 58% of criminal trial jurors said they would like to hear such statements. Two civil trial judges used interim commentary in six trials. Despite these two judges' successful use of the practice, given the limited data available, the Committee makes no recommendation on future use of this innovation.

[24] One JTP judge did report that after informing the jury (with consent of counsel) that they could have a written copy of the charge if they wanted it, the jury never requested the written copy.

that it moderates the effects of complexity, assisting jurors in distinguishing among multiple parties. The majority of attorneys and jurors exposed to the practice support it.[32] Moreover, it is well known that human nature causes jurors to make tentative judgments as the trial progresses. Providing a preliminary legal framework enables jurors to do so with some understanding of what the law is rather than making their own assumptions about what the law might be.

Written Final Instructions

New York law on the use of written instructions in criminal matters remains "unsettled." At least 29 states permit or require instructions to be supplied to jurors in writing.[33] All of the Federal Circuit Courts have approved the practice and the Supreme Court of the United States long ago held it was not error to provide the jury with a written copy of the charge.[34]

In civil matters, Uniform Rules - Trial Courts §220.11 authorizes the trial judge to provide the jury with its charge in writing on its own motion or a motion of a party, "where the court determines that the jury's deliberations may be expedited or assisted by having a copy of the court's instructions available." The practice has been endorsed by the New York State Bar Association's House of Delegates[35] and is also endorsed by a group of public defense lawyers who submitted comments to the JTP.[36]

Criminal Procedure Law §310.20 and §310.30 specify materials that may be provided to a deliberating jury including, with consent of the parties, copies of the text of a statute. These sections are silent as to submission to the jury of a written copy of the court's charge. However, the Court of Appeals has ruled that providing the jury with a written

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[32]*See e.g.* Heuer and Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUMAN BEHAVIOR 4009 (1989) (34 civil and 33 criminal trials, 550 jurors, 95 attorneys, 63 judges); ForsterLee and Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 JUDICATURE 184 (Jan-Feb 2003) (laboratory-based mock jury research); FINAL REPORT OF THE MASSACHUSETTS PROJECT ON INNOVATIVE JURY TRIAL PRACTICES (2001); Connor, *Los Angeles County Trial Courts Test Jury Innovations and Find They are Effective*, 67 DEFENSE COUNSEL J. 186 (April 2000).

[33] Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas and Wisconsin.

[34] *Haupt v. United States* 330 U.S. 631, 643 (1947)**.**

[35] New York State Bar Association Committee on the Jury System, REPORT TO THE HOUSE OF DELEGATES, MARCH 2004. Approved by the House of Delegates on April 3, 2004.

[36] Though defense bar representatives qualified their endorsement by suggesting that the writing be a transcript provided only at request of the jury, they did note that the jury should be informed that they could make the request.

copy of the court's charge, *over defendant's objection*, violates Criminal Procedure Law §310.30.[37]

Extensive research in other jurisdictions examined jurors' and judges' expectations from, and reactions to, providing final instructions in writing to deliberating juries.[38] The findings were: jurors' expected the written copy to be helpful and they reported that the written copy was even more helpful than expected. However, their post-trial comprehension of instructions was about the same with and without written instructions. Jurors experienced less confusion about the instructions and more confidence in their verdict when they had a written copy of the charge during deliberations. Jurors found written instructions helpful in resolving disputes about what the instructions meant or how to apply them and that they looked at the written copy an average of five times in deliberations, spending an average of 25 minutes (or 16% of their deliberation time) discussing the written copy. Total deliberation time is about the same with or without written instructions. However, fewer questions are asked by deliberating juries and judges felt that the procedure made the trial fairer.

Preliminary Instructions: Summary of Findings

In nine criminal trials and 26 civil trials, judges reported giving substantive preliminary instructions. Nine judges, 68 attorneys and 263 jurors participated in these trials.

- Judges and attorneys were overwhelmingly positive about this practice.
- Judges and attorneys thought pre-instruction was helpful to jurors' understanding of the law and had a positive impact on the fairness of the trial.
- A majority of attorneys found pre-instruction very helpful to their trial preparation.
- Jurors who heard preliminary instructions on the law that included elements of the claims or charges were more likely than those who heard standard preliminary instructions to report that the early explanation of the law helped them to better understand the burden of proof.

[37] *People v. Johnson*, 81 N.Y.2d 980, 599 N.Y.S. 2d 525 (1993).

[38] Heuer and Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUMAN BEHAVIOR 4009 (1989); Dann, *'Learning Lessons' and 'Speaking Rights':Creating Educated and Democratic Juries*, 68 IND. L. J. 1229 (1993); FINAL REPORT OF THE MASSACHUSETTS PROJECT ON INNOVATED JURY TRIAL PRACTICES (2001).

As shown in Table 11 below, most judges and attorneys thought that preliminary instructions had a positive impact on fairness and were very helpful to juries' understanding of the law. In criminal trials, 90% of the attorneys thought the preliminary instructions were very helpful to trial presentation.

Table 11: Preliminary Instructions: Judges' and Attorneys' Views

In trials where preliminary instructions included explicit discussion of the elements of the claims or charges…		
	Criminal	**Civil**
How many trials?	**9**	**26**
They had a positive impact on fairness		
Judges	**89%**	**89%**
Attorneys	**80%**	**66%**
They were very helpful to jurors' understanding of the law		
Judges	**100%**	**92%**
Attorneys	**80%**	**79%**
They were helpful to trial presentation (Attorneys only)	**90%**	**54%**

Judges' Views of Preliminary Instructions

In nine criminal trials and 26 civil trials, judges gave preliminary instructions that included explicit discussion of the elements of the claims or charges. The judges consulted with counsel about the content of the preliminary instructions in 30 of the 35 trials (Criminal: 7; Civil 23). Three criminal trial judges and six civil trial judges participated in this experiment. While the sample size is small, judges' reactions to the usefulness and effectiveness of preliminary instructions are very positive.

In all of the criminal trials that used preliminary instructions, and in all but one of the civil trials, the judges thought the practice was very helpful to jurors' understanding of the law. In most of the trials (89% of both civil and criminal trials), judges felt that use of preliminary instructions had a positive impact on the fairness of the trial.

Not all JPT judges' opinions and experiences are reflected in questionnaire responses. For example, during committee meetings, several expressed concerns that in criminal trials preliminary instructions must be used with caution. The procedure can create a problem where there are multiple counts and some may be withdrawn. On the other hand, complex charges involving "acting in concert" or defenses such as "justification" are best explained before evidence is presented.

Bronx County Acting Supreme Court Justice Phylis Skloot Bamberger reported that she uses a generic preliminary instruction designed to assist jurors' understanding of criminal charges. She uses an analogy to the body, explaining to the jury that every crime charged has at least two parts – an "action" part (the body) and a "thought" part (the head).

Attorneys' Views of Preliminary Instructions

Sixty-eight attorneys participated in trials where the judge reported that substantive preliminary instructions were given. As with other JTP practices, attorneys in trials where substantive preliminary instructions were given were more likely to approve the practice than those in trials where it was not used. Overall, three-quarters of both civil and criminal attorneys gave high approval ratings to this innovation; seventy percent of attorneys in trials where substantive preliminary instructions were not used gave high ratings to the practice; while 85% of attorneys in trials where substantive preliminary instructions were used, approved of the practice.

Table 12: Preliminary Instructions: Attorneys' Opinions

	Preliminary Instructions Given	Preliminary Instructions NOT Given	Overall Opinion
Criminal Trials			
Approve	85%	70%	74%
Disapprove	15%	27%	25%
Total	13	44	57
Civil Trials			
Approve	92%	70%	74%
Disapprove	8%	28%	18%
Total	49	64	113

Attorneys in trials where substantive preliminary instructions were given included six defenders and six Assistant District Attorneys in criminal trials and 15 plaintiffs' counsel and 18 defense counsel in civil trials. A clear majority (80%) of all attorneys thought the practice was very helpful to jurors' understanding of the law. Nevertheless, formal comments from public defense bar leaders and from the Queens County District Attorney disapprove of the practice.

Like judges, most attorneys felt that substantive preliminary instructions had a positive effect on the fairness of the trial. Criminal trial attorneys were more positive than were civil trial attorneys. Some attorneys who approve of preliminary instructions commented:

> "Since jurors are lay people, the more times they hear what the law is the better the chance they will understand it."
>
> "They focus jurors' attention on what the people must prove and allow jurors to understand openings better. "
>
> "Anything that helps the jury understand why they are there helps the whole process."

Attorneys who were skeptical about the innovation commented:

> "I have a concern over which elements instructions are given in preliminarily instructions. It can help the jury understand the case but can have them thinking about that while they hear proof. "
>
> "Until the case is tried, we do not know the relevance and can we discuss it in opening."
>
> "I believe this might hamper jurors' ability to objectively hear all the testimony and review of evidence."

For a complete listing of all attorneys' opinions about preliminary instructions, see Appendix K, at page 160, *infra*.

Apparently, substantive pre-instructions were more useful to jurors in civil cases than in criminal cases. In civil cases, jurors who heard pre-instruction on the law were more likely than those who did not have such instruction to say that the "early explanation of the law" was very helpful to their understanding of what the plaintiff(s) had to prove. By contrast, data from jurors in criminal cases revealed that there was little difference between those who did and did not hear preliminary instructions.

Table 13: Preliminary Instructions: Helpfulness to Jurors

Jurors thought the early explanation of the law was very helpful to their understanding the burden of proof.		
	Criminal	Civil
Had substantive preliminary instruction	82%	87%
Did not have substantive preliminary instruction	80%	74%

Written Final Instructions: Summary of Findings

Ten judges in 39 trials gave the deliberating jury a written copy or copies of the final charge. There were 80 attorneys and 286 jurors involved in these 11 criminal and 28 civil trials.

- In a majority of trials, judges felt that the written instructions had a positive impact on fairness and were very helpful to jurors.

- Attorneys were less enthusiastic than judges about written final instructions, with civil attorneys being more positive than criminal attorneys. Though barely a majority of attorneys approve of this practice, nearly two-thirds of those who actually used the practice in a trial approved of it.

- The 286 jurors who sat on trials where written instructions were used overwhelmingly believed that the written instructions helped them in understanding the law, understanding the evidence and reaching a decision.

- More than half of the jurors sitting on civil trials and three-quarters of the jurors sitting on criminal trials who did not have written instructions said they would like to have such instructions in the future. The jurors who did not have the judge's instructions in writing, but wished they had, rated their trials as more complex than did jurors who were given instructions in writing.

Judges' Views of Written Final Instructions

In 39 trials (Criminal: 11; Civil: 28), the jury received the judge's entire charge in writing. In three additional criminal trials, written instructions were provided to jurors on limited issues at their request. In all of the criminal trials and 16 of the civil trials, judges sought agreement from counsel before providing written instructions to the jurors.

In most of these trials judges thought written instructions had a very positive impact on fairness (Criminal: 82%; Civil: 89%). In 100% of the criminal trials and 96% of the civil trials, the judges thought the written instructions were very helpful to jurors' understanding of the law. In 91% of the criminal trials and 93% of the civil trials, the judges thought the written instructions were very helpful to jurors in reaching a decision.

Table 14: Written Final Instructions: Judges' Opinions

In what percentage of trials where jurors were given written copies of the final instructions, did judges think that providing instructions in writing …		
	Criminal	Civil
Had a very positive effect on the fairness of the trial	82%	89%
Were very helpful to jurors in understanding the law	100%	96%
Were very helpful to jurors in reaching a decision	91%	93%

Surrogate Judge Marianne Furfure of Steuben County provided jurors with written copies of her charges in three criminal and three civil trials, during the course of the Jury Trial Project. She continues to use the practice. She always obtained consent from counsel for both parties. Judge Furfure sees the written final charge as an important tool for jurors: "They take their responsibility seriously. Judges should be allowed to give them the tools they need to make decisions in accordance with the law." In her experience:

> "Giving the jurors the charge in writing to review while I'm reading makes them more attentive. They tell me post-trial that they use the charge throughout their deliberations. It saves time during deliberations by avoiding multiple requests from jurors to repeat the elements of a crime or cause of action. It's well worth the extra time it takes to prepare the charge for distribution."

In post-verdict discussion with Judge Furfure, jurors referred positively to the written charge.

Attorneys' Views of Written Final Instructions

Though providing instructions in writing to deliberating juries was less popular among attorneys than individual voir dire questioning, voir dire openings or preliminary substantive instructions, more than half of attorneys approve of providing the judge's final instruction to the deliberating jury in writing (Criminal: 53%; Civil:63%).

As with other innovations, attorneys in trials where the deliberating jury was given a written copy of the judge's charge gave slightly higher approval ratings to this practice than did attorneys in trials where the written charge was not given to the jury. Many attorneys had no opinion about the practice.

Table 15: Written Final Instructions: Attorneys' Opinions

	Instructions Given to the Jury in Writing	Instructions NOT Given to the Jury in Writing	Overall Opinion
Criminal Trials			
Approve	56%	53%	53%
Disapprove	28%	40%	36%
Total	18	40	58
Civil Trials			
Approve	67%	58%	63%
Disapprove	25%	38%	32%
Total	49	55	104

Overall, civil trial attorneys were more likely to approve of written final instructions than criminal trial attorneys. This finding may result from the fact that civil attorneys have more experience with the procedure.[39] Representatives of the public defense bar approve of providing jurors with a written copy of the charge with two caveats:

1. The jury should be informed that they may request the written charge, the charge should not be provided unless they request it.

2. Copies of the charge as delivered should be provided to all jurors.

Attorneys' most common concern about allowing jurors to have the instructions in writing is that jurors will pay more attention to the written instructions than to the evidence or that jurors who have better reading skills will play a more influential role in the decision-making process. The most common positive remarks are that written instructions minimize or eliminate readbacks, provide clarity, address the reality that it is impossible for a judge to adequately simplify and that it is unfair to expect jurors to memorize the instructions on one hearing. A complete record of attorney comments is attached as Appendix L, at page 163, *infra*. Some attorneys who approved of providing written instructions stated:

[39] The procedure is authorized in civil trials by Uniform Rule – Trial Courts, 22 NYCRR §220.11. In addition, 43 civil trial attorneys said that they had experience in federal courts where jury instructions are routinely provided to deliberating juries in writing.

> "No one can remember all of a jury charge and it is critical that the jury know the elements of a criminal charge or civil claim."
>
> "Giving instructions allows jurors to apply the law without readbacks."
>
> "Might help them understand the law or at least remember the instructions."

Some attorneys who disapproved of providing instructions in writing stated:

> "I would prefer the jurors spend more time reviewing the evidence than reviewing the jury instructions."
>
> "Allowing unsupervised laypersons to ponder legal language on a printed page may lead to confusion and incorrect verdicts."
>
> "Would allow jurors to become distracted during instructions and would extend time of deliberation."

Ironically, jurors are permitted to take notes while the judge is giving the charge orally and to take those possibly inaccurate notes into their deliberations but are at the same time prevented from receiving the correct charge in writing. Among attorneys involved in trials where deliberating jurors were provided instructions in writing, three-quarters of civil trial attorneys and more than half of criminal trial attorneys thought the practice was very helpful to the jury in understanding the law. Very few (less than 25% of criminal or civil trial) attorneys felt that written instructions were not helpful to the jurors' understanding the law.

With regard to reaching a decision, attorneys trying civil cases were again more positive about the impact of providing jurors a written copy of the charge. Two-thirds of civil attorneys (65%) compared to less than half (42%) of criminal attorneys participating in trials where the deliberating jury received the judge's charge in writing thought this innovation was very helpful to the jury in reaching a decision.

Table 16: Written Final Instructions: Attorneys' Opinions of Impact

In trials where jurors were given written copies of the final instructions, what percentage of attorneys thought providing final instructions in writing…		
	Criminal (21)	Civil (59)
Had a very positive impact on the fairness of the trial	50%	66%
Was very helpful to jurors in understanding the law	57%	72%
Was very helpful to jurors in reaching a decision	42%	65%

Ten criminal trial attorneys gave their view on the impact on fairness of using written instructions: six prosecutors and four defense attorneys. Four of the six prosecutors thought the written instructions had a positive impact on the fairness of the trial, while only one of the four defense attorneys shared that view. By contrast, among the civil attorneys, eight of the 13 plaintiffs' attorneys and seven of the 12 defense attorneys thought that written instructions had a very positive impact on the fairness of the trial.

Jurors' Views of Written Final Instructions

Two hundred and eighty-six (286) jurors participated in the 39 trials where instructions were provided in writing: 99 in criminal trials and 187 in civil trials.

Jurors who received instructions in writing overwhelmingly found the written copy very helpful in understanding the evidence, understanding the law and in making a decision. Clear majorities of jurors thought the process was very helpful:

Table 17: Written Final Instructions: Jurors' Opinions of Impact

In trials where jurors were given written copies of the final instructions, what percentage of jurors found final written instructions to be very helpful in…		
	Criminal	Civil
Reaching a Decision	95%	76%
Understanding the Evidence	88%	77%
Understanding the Law	95%	84%

Among the 393 jurors in trials where written instructions were not provided, more than half said they would like to have the instructions in writing if they sit on a trial in the future.

Notably, more criminal trial jurors than civil trial jurors expressed interest in having written instructions (Criminal: 76%; Civil: 59%). Also, criminal trial jurors with higher education levels (four-year degree or higher) were more likely than jurors with lower education to want written final instructions in the future. There was a significant relationship between wanting to have written instructions and views of trial complexity. That is, the more complex a juror thought the trial was, the more likely the juror was to want written instructions.

Interim Commentary: Summary of Findings

Two judges permitted interim commentary of evidence by counsel in six civil trials. Twelve attorneys and 39 jurors from these trials completed questionnaires.

Judges' and Attorneys' Views of Interim Commentary

Both judges consistently felt that the attorneys' statements were very helpful to jurors' ability to understand each side of the case, remember the witnesses and remember the evidence. Attorneys were less certain of the value of the procedure.

Table 18: Interim Commentary: Judges' and Attorneys' Opinions

In civil trials where attorneys were permitted to make short statements about evidence, what percentage of judges and attorneys thought the short statements were very helpful to jurors in…		
Understanding each side of the case	Judges (2)	100%
	Attorneys (12)	50%
Remembering the witnesses	Judges (2)	100%
	Attorneys (12)	50%
Remembering the evidence	Judges (2)	100%
	Attorney (12)	75%

In contrast to the judges' positive view of this innovation, eight of the 12 attorneys who had the opportunity to make statements about evidence during the trial said they disapproved of the procedure. A complete record of all attorney comments is attached as Appendix M, at page 167, *infra*.

Notwithstanding these differing opinions, when asked to rate on a "one" to "seven" scale (from none to positive) the effect that short summary statements had on the fairness of the trial, in five out of six trials the judges felt that the effect was positive and six of the 12 attorneys agreed.

Jurors' Views of Interim Commentary

Jurors who have not been exposed to the interim commentary were generally skeptical of its value. Overall, 48% of jurors who sat on trials where there attorneys did not give interim commentary said they would *not* like to hear short explanations of the evidence or the arguments from the attorneys during the course of the trial. A higher proportion of criminal trial jurors (58%) expressed interest in short statements by attorneys during the course of trial. While no recommendation is made about the procedure, this finding emphasizes the importance of providing criminal trial jurors with comprehension tools.

By contrast 80% of the jurors who actually heard interim commentary thought these short summary statements were very helpful to remembering the evidence and 82% said the statements were helpful to understanding the case. Thus, despite the hesitation about this innovation, it appears that short summary statements were apparently very helpful to jurors.

Table 19: Interim Commentary: Jurors' Opinions

In the six trials where jurors heard interim commentary, what percentage of jurors found these summaries very helpful in …	
	Civil
Remembering the evidence	**80%**
Understanding the case	**82%**

CHAPTER 5: REPORT OF THE COMMITTEE ON JUROR QUESTIONS

Recommendations

The Committee proposes a new trial court rule, explaining the trial court's discretion to permit jurors to submit questions in writing to witnesses. Before outlining the proposed Rule, the Committee will spell out its rationale.

Rationale for Proposed Rule

1. The First Department has held several times that the issue of jurors' submitting written questions is a matter within the trial judge's discretion. *See People v. Miller*, 8 A.D.3d 176 (1st Dep't 2004), *People v. Bacic*, 202 A.D.2d 234 (1st Dep't 1994), *lv. denied* 83 N.Y.2d 1002 (1st Dep't 1994), *People v. Wilds*, 141 A.D.2d 395 (1st Dep't 1988), *People v. Knapper*, 230 A.D. 487 (1st Dep't 1930).

2. Several Civil Part Supreme Court judges (including Erie County Supreme Court Justice John P. Lane, New York County Supreme Court Justices Eileen Bransten, Karla Moskowitz, Alice Schlesinger and Stanley Sklar and Nassau County Court Justice Dana Winslow) and one Criminal Part Supreme Court judge (Westchester County Court Justice Kenneth Lange) routinely permitted jurors to submit written questions for witnesses for years prior to the initiation of the JTP.

3. During the Project, jurors were allowed to submit written questions in 27 criminal trials and 47 civil trials. Reactions of participating judges and jurors were overwhelmingly positive. Attorneys remain concerned about this innovation but those who participated in trials where juror questions were permitted were twice as likely to approve of the procedure as those who had no experience with the procedure. These trial participants' experiences and reactions are discussed at page 60.

4. Allowing jurors to submit written questions to witnesses is widespread: 31 states permit the practice and only five prohibit it. No federal circuit prohibits the practice. The ABA *Principles Relating to Juries and Jury Trials* provide that jurors in civil cases "should, ordinarily, be permitted to submit written questions" and that: "In deciding whether to permit jurors to submit written questions in criminal cases, the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it. [40]

[40] Principle 13-C.

Proposed Trial Court Rule

SUBPART C. UNIFORM RULES FOR
JUROR QUESTIONING

§220.20 Juror Questions to Witnesses[41]

(a) Application

This section shall apply to all cases, both civil and criminal, heard by a jury in any court.

(b) Procedure

(1) The court may determine that jurors be allowed to pose written questions to witnesses. This determination shall be made after considering the views of counsel.

(2) If the court determines that juror questioning will be permitted, the court shall provide jurors with writing materials for the purpose of recording their questions.

(3) Any question by a juror for a witness shall be submitted, in writing, to the court and marked as a Court Exhibit.

(4) Outside the hearing of the jury, the court shall show the questions to counsel, afford them an opportunity to object to any question and rule on such objection. If the court determines to permit a question to be asked, the court shall ask the question to the witness.

(5) The court may afford counsel the opportunity to ask appropriate follow-up questions.

Proposed Rule Continues on Next Page

[41] The ABA PRINCIPLES FOR JURIES AND JURY TRIALS suggest procedures similar to those outlined in the Committee's Proposed Rule including: instructing jurors about their ability to submit written questions at the beginning of the trial; making every juror question a part of the court record; providing the parties an opportunity to object or suggest modifications to the question; and permitting parties an opportunity to follow up.

(c) Instructions to jurors

If the court authorizes questioning of witnesses by jurors, it shall instruct the jurors, prior to the taking of testimony, on the questioning process. Such instructions shall include, but not be limited to, the following:

(1) Jurors should not consult with each other in the preparation of questions.

(2) Jurors' questions should seek only relevant information, usually of a clarifying nature.

(3) Jurors' questions shall be submitted to the court in writing. Jurors may not question witnesses directly.

(4) The lawyers are principally responsible for questioning witnesses. Jurors are neutral fact-finders and should not assume the role of investigators or advocates.

(5) The court will make the final determination whether or not to ask any question. Jurors should not attach any significance to the fact that a particular question was or was not asked.

(6) The answers to jurors' questions should be evaluated by the jury in the same manner as the answers to questions asked by counsel or by the court.

Frequently Asked Questions

Many questions arise when a judge considers whether to allow jurors to submit written questions. The Committee concluded that a rule concerning juror questions should allow flexibility in implementing the practice. This is consistent with other states' rules concerning juror questions. See Appendix P, at page 177, *infra*, for sample rules concerning juror questions from Arizona, Colorado, New Jersey and Indiana. Because the procedure is unfamiliar to many in New York State, the Committee shares its thinking on these issues in the form of this "Frequently Asked Questions" list.

How should jurors be told about the opportunity to submit written questions? Should questions be encouraged? Permitted? Permitted but discouraged?

In the experimental phase of the Project the Committee offered two suggested instructions to JTP judges. (See Appendix Q, at page 179, *infra*.) Neither instruction encouraged jurors to ask questions. Instruction B permitted but discouraged juror questions. Judges told us which instructions they used in 32 trials: four judges used Instruction A in 17 trials, four used Instruction B in six trials and seven used their own instructions in nine trials.

Should jurors who submit questions be identified?

The Committee made no suggestion on this issue during the experimental phase of the project. The proposed rule remains silent on this topic. The Committee was divided on this topic as are the other jurisdictions that permit questioning. Arizona and Colorado instruct jurors NOT to identify themselves. Massachusetts asks jurors to include their seat number on the question. The ABA Civil Trial Practice Standards recommended that the juror's name and juror number be included with the question. The ABA *Principles Relating to Juries and Jury Trials*, which supercede the Civil Trial Practice Standards, make no mention of this issue. The rules concerning juror questions in Indiana or New Jersey are also silent. A summary of the arguments on both sides of this issue follows.

Arguments for requiring that jurors identify themselves:

- Makes it easier to identify a juror whose question(s) suggest some impropriety;

- Makes for a more complete record of the trial;

- The court and counsel will know from observation which jurors are submitting questions so why not include the information in the official records; and

? If jurors are sent out of the courtroom to write their questions (and maintain anonymity), the procedure will become too time consuming and may unintentionally encourage improper juror discussion.

Arguments against requiring jurors to identify themselves:

? Jurors may be more comfortable asking questions anonymously;

? Attorneys might try to play up to or pitch their arguments to particular jurors if they know who submitted the questions;

? Asking jurors to identify themselves might intrude on the privacy of the jury's thought process; and

? If the content of a juror's question(s) requires that a juror be identified, this can always be accomplished with appropriate questions to identify the juror without revealing the potentially prejudicial details of the question.

When should jurors' questions be submitted?

Some judges instruct jurors to submit a question when the question occurs to them by catching the attention of a court officer. Others instruct jurors to hold their questions until the witness's testimony is complete as the question may be answered by later testimony. Among judges who encourage jurors to wait until after the witness' testimony is complete, some provide a short break when witness finishes testifying in order to give jurors time to formulate questions. Others simply glance over to the jury to see if any juror has a question to write down.

Once questions are submitted, where should the judge consult with counsel about the questions?

Routine practice has been to consult at the bench while the jury remains in the jury box. If there are extensive questions, or extensive argument is necessary, it may be appropriate to excuse the jury to the jury room.

How should a judge decide whether or not to pose a juror's question?

Some judges rely solely upon evidentiary rules to determine whether or not a question is proper and ask any question that they determine is proper. They mention in their instructions that decisions about which questions are actually asked are guided by evidentiary rules. Other judges have determined that where both parties object to a question, they will not ask it even if the question might be legally proper. Still others have informed counsel that they will refuse to ask any question to which either party objects. This latter approach encourages counsel to go along with the process. In many such cases, where juror questions were submitted, neither counsel objected and the questions were addressed to the witnesses. Regardless of the factors that underlie a judge's decisions whether or not to ask jurors' questions, judges always instruct the jury that this decision ultimately rests with the judge.

Should counsel be allowed follow-up?

Appropriate follow-up questions are generally limited to the specific subject matter addressed in the juror's question.

Juror Questions: Prior Experience

National Summary

The vast majority of state courts have concluded that juror questioning is a matter committed to the sound discretion of the trial court.[42] Moreover, juror questioning has long been permitted in American courtrooms with appellate decisions permitting or approving the practice going back as far as 1889.[43]

Every federal circuit has addressed the issue and concluded that the practice of allowing jurors to question witnesses is a matter within the trial court's discretion.[44] Several federal circuits discourage the practice of allowing jurors to question witnesses.[45] Other federal circuits, by contrast, liberally permit such questioning.[46] Several jurisdictions

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[42] *See, e.g., Prather v. Nashville Bridge Co.*, 286 Ala. 3, 4-5, 236 So.2d 322 (1970); *Linden v. State*, 598 P.2d 960, 962-63 (Alaska 1979); *State v. LeMaster*, 137 Ariz. 159, 163-64, 669 P.2d 592 (1983); *Nelson v. State*, 257 Ark. 1, 4, 513 S.W.2d 496 (1974) ; *People v. McAlister*, 167 Cal.App.3d 633, 643-46, 213 Cal. Rptr. 271 (1985); *People v. Milligan*, 77 P.3d 771, 779 (Col. Ct. App. 2003); *Gurliacci v. Mayer*, 218 Conn. 531, 559-60, 590 A.2d 914 (1991); *Yeager v. Greene*, 502 A.2d 980, 985-86 (D.C. 1985); *Ferrara v. State*, 101 So.2d 797, 801 (Fla. 1958); *Lance v. State*, 275 Ga. 11, 560 S.E.2d 663, 676 (2002); *State v. Culkin*, 97 Haw. 206, 225-26, 35 P.3d 233 (2001); *Trotter v. State*, 733 N.E.2d 527, 531 (Ind. Ct. App. 2000); *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 555-56 (Iowa 1980); *State v. Hays*, 256 Kan. 48, 61, 883 P.2d 1093(1994); *Transit Auth. of River City v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992); *Commonwealth v. Britto*, 433 Mass. 596, 744 N.E.2d 1089, 1105 (2001); *People v. Heard*, 388 Mich. 182, 186-88, 200 N.W.2d 73(1972); *Hancock v. Shook*, 100 S.W. 3d 786, 795-96 (Mo. 2003) (*en banc*); *State v. Graves*, 274 Mont. 264, 270, 907 P.2d 963 (1995); *Flores v. State*, 114 Nev. 910, 912-13, 965 P.2d 901 (1998); *State v. Jumpp*, 261 N.J. Super. 514, 530, 619 A.2d 602 (1993); *State v. Rodriguez*, 107 N.M. 611, 614, 762 P.2d 898 (1988); *State v. Howard*, 320 N.C. 718, 725-27, 360 S.E.2d 790 (1987); *State v. Fisher*, 99 Ohio St. 3d 127, 789 N.E.2d 222, 229 (2003); *Freeman v. State*, 876 P.2d 283, 288-89 (Okla. Crim. App. 1994); *Boggs v. Jewell Tea Co.*, 266 Pa. 428, 434, 109 A. 666 (1920); *Day v. Kilgore*, 314 S.C. 365, 444 S.E.2d 515 (1994); *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978); *State v. Johnson*, 784 P.2d 1135, 1144-45 (Utah 1989); *State v. Doleszny* 2004 Vt. 9, 844 A.2d 772 (2004); *Williams v. Commonwealth*, 24 Va. App. 577, 484 S.E.2d 153 (1997); *State v. Munoz*, 67 Wash. App. 533, 837 P.2d 636 (1992); *Sommers v. Friedman*, 172 Wis. 2d 459, 473-78, 493 N.W.2d 393 (1992).

[43] *See White v. Little*, 131 Okla. 132, 134, 268 P. 221 (1928), *citing Schaefer v. St. Louis & S. Ry. Co.*, 128 Mo. 64, 30 S.W. 331 (1895); *Chicago, Milwaukee & St. Paul Ry. Co. v. Harper*, 128 Ill. 384, 21 N.E. 561 (1889).

[44] *See United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992); *United States v. Bush*, 47 F.3d 511, 514-15 (2d Cir. 1995) ; *United States v. Hernandez* , 176 F.3d 719, 723 (3d Cir. 1999); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985) (civil case); *United States v. Callahan* , 588 F.2d 1078, 1086 n. 2 (5th Cir. 1979); *United States v. Collins*, 226 F.3d 457, 461- 65 (6th Cir. 2000); *United States v. Feinberg*, 89 F.3d 333, 337 (7th Cir. 1996); *United States v. Lewin*, 900 F.2d 145, 147 (8th Cir. 1990); *United States v. Gonzales*, 424 F.2d 1055 (9th Cir. 1970); *Willner v. Soares*, No. 02-1352, 2003 WL 254327 (10th Cir. Feb. 5, 2003); *United States v. Richardson*, 233 F.3d 1285, 1288-91 (11th Cir. 2000); *Dobbins v. United States*, 157 F.2d 257, 260 (D.C. Cir. 1946).

[45] *See, e.g., United States v. Feinberg*, 89 F.3d at 336 ("We agree that the practice is acceptable in some cases, but do not condone it.").

[46] *See, e.g., United States v. Callahan, 588* F.2d at 1086 ("If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it.").

permit juror questioning only where procedural safeguards are employed.[47] Only five jurisdictions prohibit jurors from questioning witnesses. [48]

Court rules on the subject of juror questions are difficult to find and tend to be limited in scope. Arizona, Colorado, Connecticut, Ohio and Indiana permit or require juror questions, with virtually no direction to the trial court. New Jersey, which allows questions in civil cases, provides somewhat more guidance. Massachusetts, where juror questions are encouraged as a result of their jury trial innovations project through a publication called "Jury Trial Innovations in Massachusetts" (1999), has no formal court rule. See Appendix P, at page 177, *infra*, for court rules on juror questions from Arizona, Colorado, Indiana and New Jersey.

Criminal Trials in New York State

Neither the Civil Procedure Law nor the Uniform Rules for the Trial Courts address juror questions of witnesses. The Court of Appeals has implied approval of juror questioning of witnesses in criminal cases.[49] The Court noted that "the use of interrogatories rather than 'live' testimony, restricts the opposing parties in the effectiveness and extent of examination... [and] prevents jurors from asking questions where proper."[50] The Court cited a 1930 First Department decision, which held that "to what extent under the circumstances peculiar to the trial of each cause, questions should be permitted by jurors is a matter that should be left to the discretion of the trial court."[51] In reaching this conclusion, the *Knapper* Court quoted and relied upon the Supreme Court of Oklahoma.[52]

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[47] *See, e.g., State v. LeMaster*, 137 Ariz. at 164-65, 669 P.2d 592; *Gurliacci v. Meyer*, 218 Conn. at 560-61, 590 A.2d 914; *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d at 556 (Iowa); *State v. Graves*, 274 Mont. at 270-71, 907 P.2d 963; *State v. Jumpp*, 261 N.J. Super. at 531-33, 619 A.2d 602; *State v. Munoz*, 67 Wash. App. at 536-38, 837 P.2d 636. Other jurisdictions leave the procedure by which jurors submit questions to the trial court's discretion. *Nelson v. State*, 257 Ark. at 4, 513 S.W.2d 496; *Transit Auth. of River City v. Montgomery*, 836 S.W.2d at 416 (Kentucky); *People v. Heard*, 388 Mich. at 187, 200 N.W.2d 73; *Krause v. State*, 75 Okla. Crim. 381, at 387, 132 P.2d 179 (1942).

[48] *See Minnesota v. Costello*, 646 N.W.2d 204, 214 (2002) (prohibiting juror questions in criminal trials); *Wharton v. State*, 734 So.2d 985, 990 (Miss. 1998); *State v. Zima*, 237 Neb. 952, 956, 468 N.W.2d 377 (Neb. 1991); *Morrison v. State*, 845 S.W.2d 882, 889 (Tex. Crim. App. 1992) (prohibiting juror questions in criminal trials); *Matchett v. State* 257 Ga. 785, 786, 364 S.E.2d 565 (Ga. 1988). Among these jurisdictions, only Texas and Minnesota hold that juror questioning is not subject to harmless error analysis. *Morrison v. State*, 845 S.W.2d at 889; *Minnesota v. Costello*, 646 N.W.2d at 215.

[49] *People v. Carter*, 37 N.Y.2d 234, 371 N.Y.S.2d 905 (1975).

[50] *Id*. at 239,

[51] *People v. Knapper* 230 A.D. 487, 492, 245 N.Y.S.2d 245 (1930).

[52] *Id*. at 492, quoting *White v. Little*, 131 Okla. 132, 134, 268 P. 221, 222 (1928).

In 1988 the First Department cited *Knapper* in reversing a conviction where the trial court over defense objection permitted jurors to comment upon and question the defendant's testimony. The court held that:

> [T]he best practice is for the trial court to instruct the jury, prior to the taking of testimony, to submit all inquiries, comments or questions in writing, in order that the trial court can insure that the inquiry, comment or question is in legally proper form and not prejudicial.[53]

In 1994, the First Department, again citing *Knapper*, held that "it was within the trial court's discretion to permit jurors to submit written questions of a witness, striking those it deemed improper and posing the rest to the witness*** even if the purpose of the questions was to elicit facts overlooked by counsel."[54] The First Department reaffirmed this view in June 2004.[55]

The Second Circuit has also considered this issue at great length. In *United States v. Bush*, the court affirmed a conviction holding that juror questioning of witnesses lies within the trial judge's discretion.[56] While strongly discouraging its use, the Court suggested:

> If trial court encounters extraordinary circumstances warranting allowance of juror questioning of witnesses, following procedure is endorsed: jurors should be instructed to submit their questions in writing to the judge; outside presence of jury, judge should review the questions with counsel, who may then object; and court itself should put approved questions to witnesses.[57]

In sum, no statute or relevant case law, appears to prohibit a criminal trial judge from allowing jurors to submit written questions for witnesses during trial. Indeed, courts that have addressed the issue have generally recognized that juror questioning is permissible with appropriate safeguards.

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[53] *People v Wilds*, 141 A.D.2d 395, 397, 529 N.Y.S.2d 325 (1st Dep't 1988).

[54] *People v. Bacic*, 202 A.D.2d 234, 235 (1st Dep't 1994) *lv. denied*, 83 N.Y.2d 1002 (1994); *see also People v. Riley*, 92 A.D.2d 576, 549 N.Y.S.2d 332 (2nd Dep't 1983) (finding to be erroneous trial court's statement that "[t]here is no procedure whereby a juror can, during the course of a trial, if he has a question about something, raise the question" [citing *Knapper*]).

[55] *People v. Miller*, 8 A.D.3d 176, 779 N.Y.S.2d 187 (1st Dep't 2004).

[56] *United States v. Bush, 47 F.3d 511* (2d Cir. 1995).

[57] *Id.* at 515-16.

Civil Trials in New York State

Though the Civil Practice Law and Rules are silent on the issue, New York's Pattern Jury Instructions for civil cases contain a general instruction for courts to give if a juror seeks to ask a question of a witness.[58] Only one reported case mentions juror questions in civil matters. An Oneida County court held in 1962, on a defense motion to set aside the verdict, that questioning of expert witness by jurors in a trial for damages arising out of an automobile accident was not prejudicial to the defense, noting that the practice of permitting juror questioning of witnesses has in most cases either been approved or found not to constitute error.[59]

Research in Other Jurisdictions

An extensive body of research has examined the impact of juror questions of witnesses on trials.[60] The highlight of the findings is that jurors who are permitted to ask questions *do not* become advocates. Nor do they react negatively when their questions are not asked or overemphasize the answers to their own questions.[61] Judges report that jurors who are permitted to ask questions often appear to be more engaged and attentive when allowed to ask questions and they have more confidence in their verdicts than do jurors not permitted to ask questions.

The judge's screening procedures eliminate troublesome or improper inquiries. Juror questions add an average of no more than 30 minutes to a typical trial.[62] Counsel ask an average of two follow-up questions. Moreover the Colorado jury study found that

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[58] PJI3d 1:104 (2001)

[59] *Sitrin Brors, Inc. v. Deluxe Lines*, 35 Misc. 2d 1041, 1042-1043 (County Ct., Oneida Co.1962)

[60] *See e.g.* Penrod and Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, PSYCHOLOGY, PUBLIC POLICY, & LAW 1997, Vol. 3, No. 2/3, 259-84; Dodge, SHOULD JURORS ASK QUESTIONS IN CRIMINAL CASES? A REPORT SUBMITTED TO THE COLORADO SUPREME COURT'S JURY SYSTEM COMMITTEE (2002) (a study of 118 trials where questions were permitted and 121 where they were not permitted.); Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask: That is the Question*," 768 CHICAGO-KENT L. REV. 1099 (2003). Other sources include the New Jersey and Massachusetts experiments with juror questions.

[61] A recent study of Arizona juries looked specifically at jurors' discussion of rejected juror questions. The study relied on videotapes of jurors discussions made with our approval as part of a larger study examining the effects of anonymous rules permitting jurors to discuss the evidence if they wish to do so prior to deliberation as long as all jury members are present. The study touched specifically at jurors' relations to having questions rejected and found that "the most common reaction from jurors was no reaction at all, either during the trial itself or during the deliberation." Diamond, *et. al., Jurors' Unanswered Questions*, 41 COURT REV. 20, 25 (Spring 2004).

[62]The Colorado Study of juror questions in criminal trials reported an average of 18 minutes added to trial for jurors to prepare and submit questions and 22 minutes added to trial for court and counsel to discuss and rule upon objections. The New Jersey study of juror questions in civil trials reported an average of 30 minutes added overall as a result of juror questions.

permitting jurors to submit questions *did not* influence a defendant's decision to testify nor do they appear to prejudice either party.

Massachusetts, Colorado and New Jersey published reports of local studies of juror questions. The numbers of trials and questions involved are summarized below.

Table 20: Experience with Juror Questions In Other Jurisdictions

	Massachusetts[63] 1998-1999	Colorado[64] 1999-2001	New Jersey[65] 2000
Number of Trials	62	118	127
Criminal	19	118	-
Civil	43	-	127
Average number of questions			
Submitted	13	9	21
Asked	10	7	16
Declined	-	2	-
Median number of questions			
Submitted by jurors	-	7	9
Asked	-	5	7
Attorney follow-up questions	-	-	2
		Minutes	Minutes
Average time spent	-	40	30
Prepare/submit questions	-	18	-
Deal with Objections	-	22	-

Attorneys and judges with trial experience where jurors were permitted to submit questions, are more likely to approve the practice than those without such experience. Judges also report being pleasantly surprised by the "good quality" of the questions.

[63] In the Massachusetts Project, 16 judges experimented with 16 procedures. *See* FINAL REPORT OF THE MASSACHUSETTS PROJECT ON INNOVATIVE JURY TRIAL PRACTICES (2001).

[64] In Colorado, 239 criminal trials were studied: 118 were randomly assigned to a "questions permitted" condition and 121 were randomly assigned to a "questions not permitted" condition. Questionnaires were completed by judges, attorneys and jurors involved in both experimental conditions to compare the impact of the question procedure. *See Dodge*, SHOULD JURORS ASK QUESTIONS IN CRIMINAL CASES? A REPORT SUBMITTED TO THE COLORADO SUPREME COURT'S JURY SYSTEM COMMITTEE (2002) available at http://www.courts.state.co.us/supct/committees/juryreformdocs/dodgereport.pdf. Last visited April 22, 2005.

[65] In the New Jersey study there were seven trials in which 50 or more questions were asked and six trials in which no questions were asked. Thus, approximately 10% of trials (13 out of 127) were at the extremes with equal numbers of trials in which jurors asked an extraordinarily large number of questions and jurors asked no questions. New Jersey Pilot Project on Allowing Juror Questions, FINAL REPORT OF JURY SUB-COMMITTEE OF THE CIVIL PRACTICES COMMITTEE (2001).

Juror Questions: Summary of Findings

Jurors were permitted to submit written questions to witnesses in 74 trials (27 criminal trials and 47 civil trials). Sixteen judges, 130 attorneys and 564 jurors who participated in these trials completed questionnaires.

Table 21: Juror Questions Summary

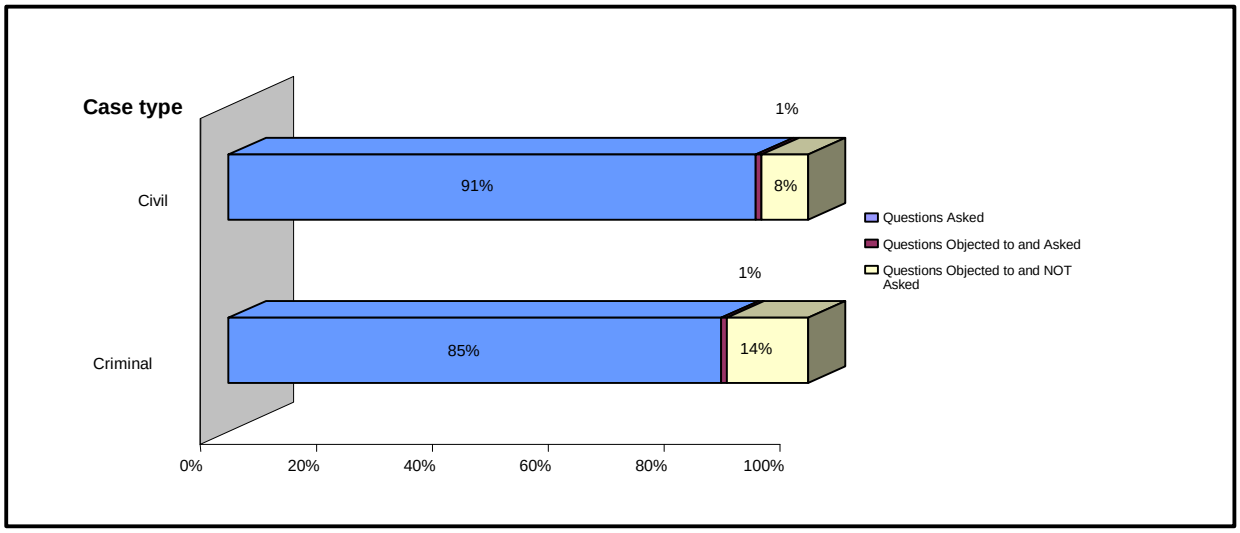
	Criminal	Civil
Judges	6	10
Attorneys	42	88
Jurors	232	332
Trials	27	47

Jury Question Data Forms tracking the numbers of questions submitted, objected to and asked were completed for 19 criminal trials and 38 civil trials. Data on the number of questions submitted and asked comes from those forms,

- Jurors rarely submit improper questions; and, there is overwhelming agreement between attorneys and judges about which juror questions are improper. See Figure 4.

    - Overall, 347 questions were submitted and 41 were objected to; 37 of those objected to were not asked.
    - In criminal trials, 157 questions were submitted, 25 were objected to and of those, two were asked.
    - In civil trials, 190 questions were submitted, 16 were objected to and of those, two were asked.

Figure 4: Jurors' Questions: How Many Were Objected to and Asked?



? Jurors did not go on evidentiary fishing expeditions. The average number of questions asked was low.

  - o In civil trials an average of 2.5 questions were asked.[66]

  - o In criminal trials an average of 4.7 questions were asked.

? Slightly more than one-third of the jurors who completed questionnaires said they asked questions: A majority asked one or two questions.

? Juror questions added less than 10 minutes to civil trials and 15 minutes to criminal trials.

? In clear majorities of both civil and criminal trials where jurors were permitted to ask questions, judges said the procedure had a positive effect on the fairness of the trial. A majority of judges also believed that the process was helpful to jurors in paying attention, understanding the evidence and reaching a decision.

? A majority of attorneys disapprove of the procedure. Attorneys' most common concern is that jurors will become advocates or usurp the attorneys' adversary role in

[66] In two civil trials presided over by the Nassau County Supreme Court Justice F. Dana Winslow who allows jurors time after each witness to write down their questions, more than 40 questions were asked. In one criminal trial, 67 questions were asked. These three trials were excluded from the analysis because they were outliers for which complete data were not available.

defining trial strategy, though there is no evidence that this has occurred in the New York trials where juror questioning was permitted or in other jurisdictions where jurors have been permitted to submit questions.

? Attorneys who participated in a trial where jurors were permitted to ask questions were twice as likely to approve of the process as those who participated in trials where the process was not used.

? Two-thirds of attorneys in trials where juror questions were permitted felt that no improper questions were submitted.

? A majority of both judges and attorneys involved in trials where jurors were permitted to submit questions agreed that the jurors' questions provided information about juror comprehension of case issues, gave insight into jurors' understanding of the evidence and alerted the court and counsel to missing information desired by the jury.

Questions Asked in JTP Trials

The 27 criminal trials in which jurors were permitted to ask questions were tried by seven judges in seven counties.[67] These included 11 misdemeanors, 5 Class D Felonies, 3 Class B Felonies, 1 Class A Felony and 7 trials reported for which the crime charged is unknown. For the 19 trials for which outcome data is available, 50% resulted in acquittal.[68]

Table 22: Criminal Trial Types Where Juror Questions Were Permitted

Class A Felony	**1**
Class B Felony	**3**
Class D Felony	**5**
Misdemeanor	**11**
Unknown	**7**

Table 23: Criminal Trial Outcomes Where Juror Questions Were Permitted

Conviction	**6**
Acquittal	**9**
Split Verdict	**3**
Hung Jury	**1**
Unknown	**8**

[67] Bronx (2), Cayuga (7), Essex (1), Kings (9), Montgomery (1), Schenectady (5) and Westchester County (2). Westchester County Court Judge Kenneth Lange permitted juror questions in criminal trials for many years before joining the Jury Trial Project.

[68] The average length for criminal trials was six days.

The 47 civil trials in which jurors were permitted to ask questions were tried by ten judges in seven counties.[69] Of the 40 civil trials for which outcome data is available; thirty-three were tried to verdict.

Table 24: Civil Trial Types[70] Where Juror Questions Were Permitted	
Contract	**1**
Medical Malpractice	**3**
Motor Vehicle	**7**
Other Tort	**3**
Other	**0**

Table 25: Civil Trial Outcomes Where Juror Questions Were Permitted	
Plaintiff's Verdict	**8**
Defense Verdict	**25**
Split Verdict	**1**
Hung Jury	**0**
Unknown	**6**

In 11 of the 19 criminal trials for which the number of juror questions was reported, 3 or fewer questions were submitted. In 23 of the 38 civil trials for which the number of juror questions is reported, 2 or fewer questions were submitted. The conclusions that can be drawn from this experience are similar to that drawn elsewhere:

- Questions submitted by jurors were overwhelmingly considered to be proper both by counsel and judges.

- Jurors asked questions sparingly. See Appendix R, at page 187, *infra*, for a complete report.

- Thus, jurors did not appear to be using the opportunity to ask questions as an opportunity to go on fishing expeditions.

[69] Bronx (2) Erie (12), Fulton (1), Montgomery (1), Nassau (4), New York (23), Steuben (3). Judges Lane in Erie County and Winslow in Nassau County permitted jurors to submit written questions before joining the Jury Trial Project.

[70] Case type categories provided in form UCS 114, Civil Voir Dire Trial Data Form.

Table 26: Juror Questions Asked in 19 Criminal Trials

- 157 questions were submitted.
- 25 questions were objected to by one or both counsel. One was asked.
- 67 questions were asked in one trial.
- For the remainder the average number of questions per trial was 4.7.

HOW MANY QUESTIONS ASKED PER TRIAL?	
Number of questions	**Number of trials**
0	**6**
1 – 3	**5**
4 – 7	**3**
11 or more	**5**

Table 27: Juror Questions Asked in 38 Civil Trials

- 190 questions were submitted.
- 16 questions were objected to by one or both counsel; two were asked.
- 92 questions were asked in 2 trials.
- For the remainder the average number of questions per trial was 2.5.

HOW MANY QUESTIONS ASKED PER TRIAL?	
Number of questions	**Number of trials**
0	**8**
1 – 2	**15**
3 – 6	**7**
7- 9	**5**
13	**1**
>40	**2**

Judges' Views of Juror Questions

Sixteen judges permitted jurors to submit questions in 27 criminal and 47 civil trials. Jurors were told they could submit questions in different ways. Judges reported using Jury Trial Project suggested Instruction A in 17 trials and suggested Instruction B in six trials.[71] In nine trials, judges' reported using their own instructions. In four trials, judges reported that they "encouraged" jurors to submit questions.

In most trials where jurors were permitted to submit questions, the judge sought counsel's consent before allowing jurors to submit questions. However, one criminal trial judge and five civil trial judges reported allowing jurors to submit questions without first obtaining counsel's consent. During the course of the project several judges concluded that counsel's consent to the procedure was not necessary. All that was necessary was that the court consult with counsel concerning the propriety of individual juror questions.

Several judges persuaded attorneys to agree to allow jurors to submit questions in exchange for a promise that no juror question would be propounded if either party objected to the question.

In trials where jurors were permitted to submit questions, judges generally felt the procedure was very helpful to jurors in paying attention, understanding the evidence and reaching a decision.[72]

Table 28: Juror Questions: Judges' Opinions about Helpfulness to Jurors

In what percent of trials did judges think the opportunity to submit questions was very helpful to jurors in…		
	Criminal	**Civil**
Paying attention	**87%**	**77%**
Understand the evidence	**82%**	**74%**
Reaching a decision	**68%**	**69%**

[71] *See* Appendix Q at page 180, *infra*, for instructions suggested during the research phase of this project.

[72] Answers were given on a scale ranging from 1 (not at all helpful) to 7 (very helpful). Our analysis summarizes their responses and considers ratings from 5 to 7 as very helpful and from 1 to 3 as not helpful.

Judges also felt that the juror questions provided information about jurors' comprehension of case issues, gave insight into how well the jurors understood the evidence and alerted the court or counsel to missing information desired by the jury.[73]

Table 29: Juror Questions: Judges' Views About Impact on Trial

In what percent of trials did judges think the opportunity to submit questions…		
	Criminal	**Civil**
Provided information about jurors' comprehension of case issues	**90%**	**81%**
Gave insight into how well jurors understood the evidence	**78%**	**84%**
Alerted the court or counsel to missing information	**75%**	**78%**

Finally, all of the criminal trial judges who permitted jurors to ask questions and more than three-quarters of judges in civil trials thought the questions clarified witnesses' testimony and provided relevant information.

[73] Again using a 1 to 7 scale, and summarizing ratings of 5 – 7 as agreed.

Attorneys' Views of Juror Questions

Of the 130 attorneys who completed questionnaires in 74 trials where juror questions were permitted, only 87 told us which side they represented and also gave their opinion of the practice. Plaintiffs' attorneys were most likely to approve of juror questions; 13 out of 27 said they approved of the practice. In both criminal and civil trials, defense attorneys were more likely to disapprove of juror questions.

As with other studies of juror questions, attorneys who had experience with the innovation were more likely to approve of it. One half of both civil and criminal trial attorneys participating in trials where jurors were permitted to submit questions approved of the procedure, as compared to only one-quarter of those participating in trials where jurors were not permitted to submit questions.

Table 30: Juror Questions: Attorneys' Opinions Where Permitted or Not

	Questions Permitted	Questions NOT Permitted	Overall Opinion
Criminal Trials			
Approve	49%	26%	39%
Disapprove	43%	63%	52%
Total	35	27	62
Civil Trials			
Approve	51%	24%	42%
Disapprove	41%	73%	52%
Total	80	41	121

Attorneys who approved of allowing jurors to submit written questions during the trial felt that it contributed to jurors' paying attention and provided attorneys with useful information about the jurors' thought processes and concerns. For example, some criminal attorneys who approved of allowing juror to submit questions stated:

> "It kept them interested, improved understanding and promoted trial efficiency."

> "It gave terrific insight into how the jurors were thinking about the trial."

> "Contributed to jurors paying attention; makes them feel part of the proceeding."

Some civil attorneys who approved of allowing jurors to submit questions stated:

> "Opportunity to address relevant issues that jury wants to hear about."

> "The questions asked during trial were good ones."

> "Terrific insight into juror minds helps strategically."

> "The questions for the most part displayed interest and paying attention to the case."

Among attorneys who disapproved, the most common concern was that jurors would become advocates and interfere with counsel's control of the trial. Here's one comment that says appears to sum up this position:

> "It is my job to try the case and not the jurors. Juror questions interfere with the strategy of the counsel since certain questions are not asked on purpose."

Another opponent of juror questions commented:

> "Generally it's bad enough when judges help out my adversary - who needs the jury helping out?"

Attorneys who disapproved of jurors submitting questions also expressed the view that the questions could cause delays, be distracting and might be inappropriate. See Appendix N, at page 169, *infra*, for a complete record of attorney comments.

Attorneys were also asked how helpful they felt the opportunity to submit written questions were to jurors in paying attention, understanding the evidence and reaching a decision. Experience with the innovation did little to minimize attorneys' skepticism. However, attorneys trying civil cases were more positive.

A majority of civil and criminal attorneys who participated in trials where jurors were permitted to submit written questions thought the procedure was very helpful to jurors in paying attention. Less than one-third of both criminal and civil attorneys felt the opportunity to submit questions did not help jurors to pay attention.

Slightly more than one-third of criminal attorneys and half of civil attorneys in trials where jurors were permitted to submit written questions felt the procedure was very helpful to jurors in understanding the evidence. Finally, less than half of criminal and civil trial attorneys who participated in trials where jurors were permitted to submit written questions felt it was very helpful to jurors in reaching a decision.

Table 31: Juror Questions: Attorneys' Views of Helpfulness to Jurors

What percent of attorneys in trials where jurors were permitted to submit questions think the opportunity to submit questions is very helpful to jurors in…		
	Criminal	Civil
Paying attention	52%	54%
Understand the evidence	36%	50%
Reaching a decision	41%	46%

Despite their hesitation about juror questions, a majority of attorneys who participated in trials where jurors were permitted to submit questions agreed that the practice was helpful to jurors and that it provided information about juror comprehension of issues, gave insight into how well jurors understood the evidence and alerted the court or counsel to missing information.

Table 32: Juror Questions: Attorneys' Views of Impact on Jurors

What percent of attorneys in trials where jurors were permitted to submit questions think the opportunity to submit questions…?		
	Criminal	**Civil**
Provided information about jurors' comprehension of case issues	81%	71%
Gave insight into how well jurors understood the evidence	69%	72%
Alerted the court or counsel to missing information	75%	66%

Half of the attorneys in trials where jurors were permitted to ask questions agreed that the jurors' questions clarified witnesses' testimony and provided relevant information.

Table 33: Juror Questions: Attorneys' Views of Impact on Trial

In trials where juror were permitted to submit questions, what percent of attorneys thought jurors' questions….		
	Criminal	**Civil**
Clarified witnesses' testimony	50%	51%
Provided relevant information	56%	55%

Finally, attorneys were asked what effect they felt juror questions had on the fairness of the trial. More than half of the attorneys who participated in trials where jurors were permitted to submit questions gave a rating of five or greater on a 1 to 7 scale where 1 was "no impact on fairness."

Despite their skepticism about permitting jurors to submit written questions, more than 90% of both criminal and civil trial attorneys said there were no logistical or implementation problems encountered during their trials when jurors were permitted to submit questions.

Jurors' Views of Juror Questions

More than 80% of jurors who were permitted to submit questions thought the opportunity was very helpful to understanding evidence, clarifying witnesses' testimony and providing relevant information.

Table 34: Juror Questions: Jurors' Opinions

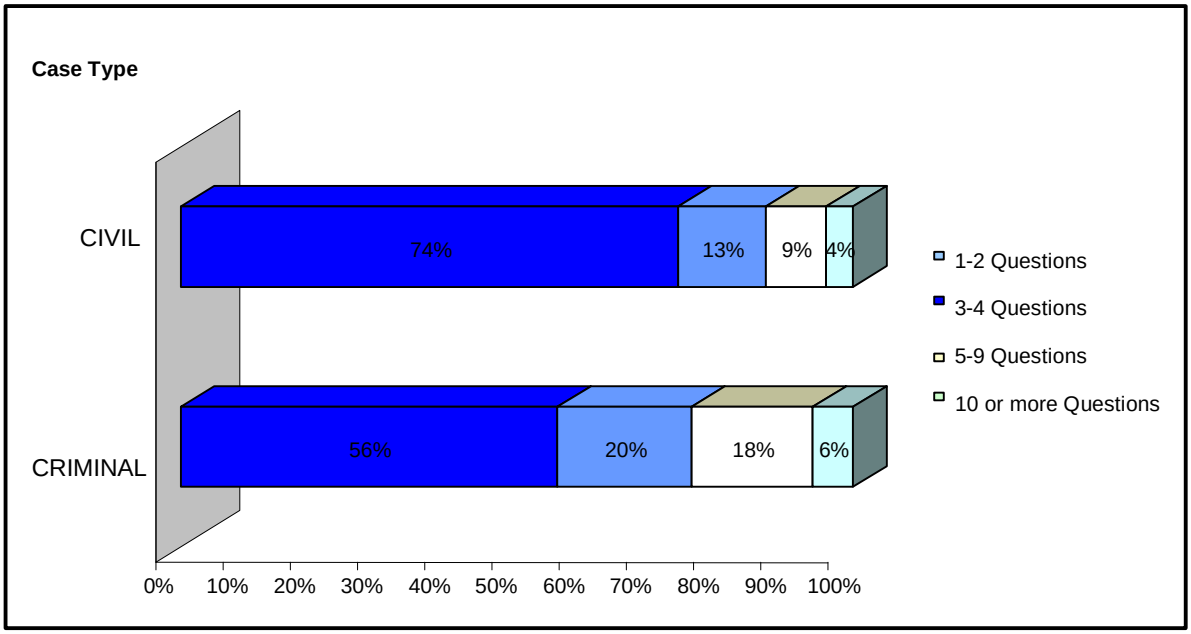
What percentage of jurors found the juror questions to be very helpful in …?		
	Criminal	Civil
Understanding the evidence	83%	87%
Clarifying witnesses' testimony	83%	88%
Providing relevant information	80%	88%

Among jurors who sat on trials where juror questions were not permitted, two-thirds said they would like to have the chance to submit written questions in the future.

The 147 jurors who said they submitted questions were asked how many questions they had asked. Figure 5 below shows that the majority of jurors who asked questions (74% criminal; 56% civil) asked 1 or 2 questions. Six jurors reported asking ten or more questions. Jurors with higher educations were more likely to submit questions: 54% of the jurors who submitted questions completed 4 years of college or more.

Sixteen jurors in criminal trials and 23 jurors in civil trials said that one or more questions they submitted were not asked.[74]

Figure 5: How Many Questions Do Jurors Ask?



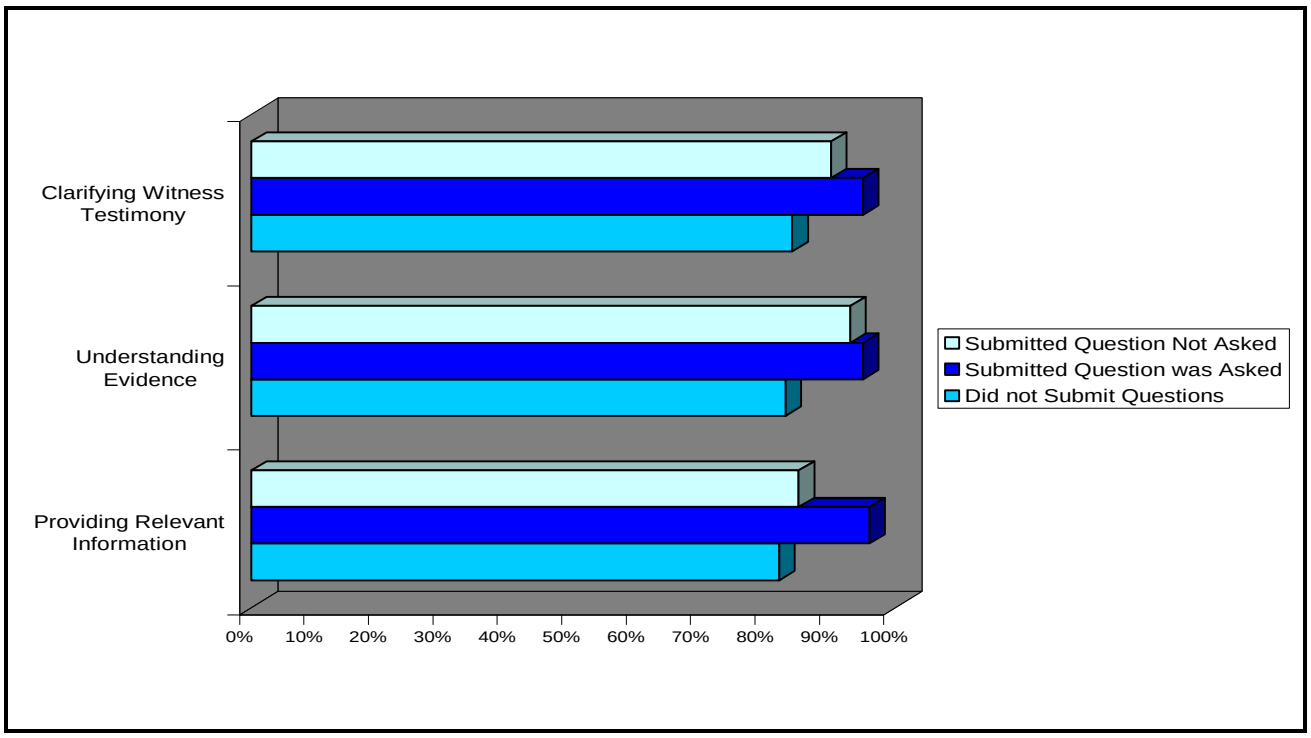
As in other research, this data shows that failure to have a question asked does not impact jurors' views of the procedure or their reaction to jury service.[75] More than 80% of jurors in criminal and civil trials where jurors where permitted to ask questions found the

[74] The Jury Questions Data Forms (filled out by judges or other court personnel) reported only 21 questions objected to and not asked. However, these forms were not submitted for every trial.

[75] There were no statistically significant differences between views of jurors who reported submitting a question that was not asked and those who did not have a question declined. A similar finding was made in research conducted with Arizona juries whose mid-trial and deliberations discussions were videotaped. *Compare* Diamond, *Jurors' Unanswered Questions*, 41 COURT REV. 21 (Spring 2004).

procedure very helpful to providing relevant information, understanding the evidence and clarifying witness testimony. Those who submitted questions that were not asked were as likely to find the procedure helpful as were those who did not submit questions, or those whose questions were not asked.

Figure 6: Juror Questions: Jurors' Views of Helpfulness



See Appendix S at page 187, *infra*, for additional data summarizing jurors' opinions of helpfulness of juror questions.

CHAPTER 6: REPORT OF THE COMMITTEE ON NOTE-TAKING

Recommendations

JTP judges were encouraged to permit jurors to take notes during trial. The Committee gave no specific procedural recommendations relying instead on the existing Trial Court rule and standard jury instructions.[76]

As a result of the JTP research effort involving 91 trials, the Committee now recommends that all judges permit jurors to take notes if they wish to do so. All jurors should be provided with writing materials. Judges should neither encourage nor discourage juror note-taking. Judges should caution against jurors trying to be a scribe for all and being distracted from the testimony while taking notes.[77]

This recommendation is consistent with New York's Uniform Rules for the Trial Courts, the ABA *Principles Relating to Juries and Jury Trials* and current practice in courts the country.[78]

There was considerable discussion among judges about what note-taking tools to give to the jurors. Some judges prefer steno pads or marble cover note books, others prefer legal pads, others recommended the use of ring binders with three-hole punch paper (the binders are easily reused).[79]

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[76] JTP judges were provided with copies of *People v. Hues*, 92 N.Y.2d 413 (1998), 22 NYCRR §220.10, the text of CJI instructions on juror note-taking and a summary of prior research findings.

[77] This is consistent with New York's standard jury instructions on note-taking. *See http://www.nycourts.gov/cji/1-General/CJI2d.Jury-Note-taking.wpd.* Last visited April 26. 2005.

[78] Principle 13-A. recommends that jurors be permitted to take notes, that they be supplied with note-taking materials, and that jurors' notes be collected each day and destroyed at the end of the trial. The Federal Circuits are unanimous in holding that juror note-taking is within the discretion of the trial court. Every state has some provision allowing juror note-taking. The American Judicature Society has compiled all federal and state court cases and rules at http://www.ajs.org/jc/juries/jc_improvements_notetaking_statutes.asp . Last visited April 22, 2005.

[79] If the preferred materials are not available at the court, they can be obtained through the Office of Court Research.

Rationale for Note-Taking Recommendation

There recommendations are based on the following JTP research results:

- Questionnaires were collected for 91 JTP trials in which note-taking was permitted (54 civil trials and 37 criminal trials).

- Eleven criminal trial judges, 14 civil trial judges, 167 attorneys and 757 jurors participated in the 91 trials.[80] In most of these trials, note-taking was permitted during opening, closing and the judge's charge, as well as during the presentation of the evidence

- Judges in a majority of cases in which note-taking was permitted thought that it was helpful to jurors in paying attention and understanding evidence.

- Attorneys remain skeptical of the practice with fewer than one-quarter of those in trials where it was not used approving of juror note-taking. Attorneys involved in trials where note-taking was permitted were more likely to approve of the practice than attorneys who were not. However, less than one-half of attorneys involved in trials where jurors were permitted to take notes approved of the procedure.

- Jurors were enthusiastic about note-taking. Clear majorities believed that note-taking were very helpful to them in recalling evidence, understanding the law and reaching a decision.

- Jurors with four years of college or more were more likely than other jurors to take notes. No data was collected about jurors' perceptions of the role played by note-takers during deliberations.

- No judge or attorney reported that the procedure interfered with the trial. Many judges reported anecdotal impressions that note-taking increased jurors' attentiveness.

- Sixty percent of jurors who were not permitted to take notes reported that they would like to do so in future trials.

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[80] Several of the Jury Trial Project judges who routinely permit jurors to take notes did not participate in the data collection phase of the project. Many of the 24 judges who permitted note-taking had not allowed it in the past.

Note-taking: Background

A substantial body of research in other jurisdictions has examined the impact of note-taking on a juror's role in the trial, recall, participation in deliberations and effect on other jurors. Major conclusions are summarized below.[81]

Research in Other Jurisdictions

Note Takers

- ? Do not emphasize evidence they have noted over other evidence.
- ? Do not distract other jurors.
- ? Keep pace with the trial.
- ? May be aided by note-taking in recall of the evidence.
- ? Report greater satisfaction with the trial process.
- ? Remember more case facts than non-note-takers in mock jury trial research but do not have an undue influence on them.

The Notes

- ? Researchers report that jurors' notes are an accurate record of the trial.

The Trial

- ? Note-taking does not favor one side.
- ? Juror note-taking does not consume too much time in trial or deliberations.
- ? Not all jurors given an opportunity to take notes will do so.
- ? Jurors who do not take notes appreciate having had the opportunity to do so.

[81] *See* Penrod and Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOLOGY, PUBLIC POLICY, & LAW 259 (1997)*;* FINAL REPORT OF THE MASSACHUSETTS PROJECT ON INNOVATIVE JURY TRIAL PROCEDURES (2001)*;* Rosahn, *et. al., Note-taking Can Aid Juror Recall*, 18 LAW & HUMAN BEHAV. 53 (1994)*;* ForsterLee and Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 JUDICATURE 184 (Jan-Feb 2003).

The ABA's *Principles for Juries and Jury Trials* recommend, without qualification, that "Jurors should be allowed to take notes during the trial."[82] The Principles also recommend, as does the New York State Trial Court Rule, that "after the jurors have returned their verdict, all juror notes should be collected and destroyed."[83]

New York State Law

Though juror note-taking was endorsed by the New York Court of Appeals in 1998 many judges and attorneys remain hesitant about the practice.[84] Its use is by no means universal. For example, only 29 out of 48 judges surveyed in the kickoff of this Project said they permit jurors to take notes. Among judges who did not permit note-taking, the most common concern is that note-taking will be distracting – jurors will pay attention to their notes instead of the witness's demeanor. In the Project pretest, which included 74 attorneys, just over half disapproved of the practice. Like judges, attorneys were concerned that note-taking could be distracting or misleading.

During the project, questionnaires were received from 91 trials where note-taking was permitted – 54 civil trials and 37 criminal trials. Eleven criminal judges and 14 civil judges conducted these 91 trials. An additional 16 judges who routinely permit jurors to take notes did not participate in the data collection phase of the project. Six criminal trial judges and four civil trial judges participating in the study had not previously permitted note-taking.

The 91 trials involved 25 judges, 167 attorneys and 757 jurors. See Table 35.

Table 35: Note-Taking Summary: Number of Trials, Judges, Attorneys, Jurors

Number of	Criminal	Civil	Total
Trials	37	54	91
Judges	11	14	25
Attorneys	60	107	167
Jurors	357	400	757

[82] Principle 13-A.

[83] Principle 13-A.5.

[84] *People v. Hue*, 92. N.Y.2d 413 (1998).

Note-Taking: Summary of Findings

Judges' Views of Juror Note-Taking

In these cases note-taking began in three ways:

In 21 trials, judges reported using the standard instruction.

In 54, judges reported using their own version of the standard instruction.

In 2 civil trials, judges reported that jurors started taking notes on their own.

In all but one of these trials, jurors were permitted to take their notes into deliberations. When note-taking was allowed it was usually permitted during openings, closings and the judge's charge to the jury. In 79 of the trials, judges reported they permitted note-taking during opening and/or closing statements and/or instructions. For example, Nassau County Supreme Court Judge F. Dana Winslow reported that he routinely allows jurors to take notes during opening statement and closing arguments. He instructs jurors to draw thick lines in their notes after the opening and before the closing to help them remember that only what is between the lines is evidence.

A majority of judges in trials where note-taking was permitted concluded that the procedure was very helpful to jurors in paying attention, understanding the evidence, understanding the law and reaching a decision.

Table 36: Note-Taking: Judges' Opinions

In what percent of trials where jurors were permitted to take notes did judges think the opportunity to take notes was very helpful to jurors in…		
	Criminal	**Civil**
Paying attention	79%	74%
Understanding the evidence	77%	64%
Understanding the law	69%	51%
Reaching a decision	65%	65%

Many judges who previously did not allow jurors to take notes reported that they were pleasantly surprised with the use of the procedure. Five criminal trial judges and two civil trial judges who had no previous experience allowing juror note-taking reported in committee meetings that they had changed their practice as a result of the JTP. Both criminal and civil trial judges reported anecdotally that note-taking seemed to cause jurors to pay closer attention and even improved the quality of questions during deliberations. In most trials only a small number of jurors actually took notes. The judges who allowed juror note-taking for the first time concluded that their concerns about note-taking might be distracting or interfere with jurors' concentration were unfounded.[85]

Attorneys' Views of Juror Note-Taking

Note-taking is the JTP practice that meets with the most skepticism from attorneys and was opposed by a majority of them. As with other innovations, however, attorneys involved in trials where note-taking was permitted were more likely to approve of the procedure. On a scale ranging from 1 (disapprove) to 7 (approve), attorneys who participated in trials where note-taking was permitted gave an average approval rating of 4.1. Of the attorneys who were not involved in trials where note-taking was permitted, the average approval rating was only 2.7.

Like judges, attorneys' biggest concern about juror note-taking is that it will be distracting to jurors. (See attorney comments on note-taking in Appendix O, at page 173, *infra*.) However, attorneys who approve of note-taking commented that it seemed to improve jurors' attention, would aid in recall and might even enhance deliberations. Attorneys' comments include:

> "Note-taking appears to fix important testimony in the memory of jurors and helps to clarify their questions and aids in swifter deliberations, found many benefits to the procedure."
>
> "Some people need to take notes…. As long as they're adequately instructed, it's a good idea."
>
> "Trials are long, with delays. Jurors' note-taking makes them more active in the process."

[85] One judge who allowed note-taking for the first time in this project (but did not participate in data collection), continued to feel that the note-taking was distracting to jurors and said he would not allow jurors to take notes in the future.

Among attorneys who disapprove of juror note-taking, nearly every one believed that note-taking would be distracting. For example,

> "Jurors will focus more on taking notes than listening to the evidence or paying attention to the witnesses."
>
> "When a juror is taking notes they're not paying attention to the witness."
>
> "They are distracted from testimony."

The only other areas of concern mentioned by attorneys who disapprove of juror note-taking was the fear that note-takers will play an unfair role in the jury's deliberations or that note-taking might give note-takers an advantage in the deliberations.[86]

Table 37: Note-Taking: Attorneys' Opinion

	Note-Taking Permitted	Note-Taking NOT Permitted	Overall Opinion
Criminal Trials			
Approve	53%	13%	44%
Disapprove	43%	73%	50%
Total	49	15	64
Civil Trials			
Approve	46%	22%	41%
Disapprove	42%	70%	48%
Total	84	23	107

Attorneys were not persuaded that note-taking was a useful tool for jurors. Less than one-half of the attorneys concluded that note-taking was very helpful to jurors on any one of four measures: paying attention, understanding the evidence, understanding the law or reaching a decision. Only a small majority (53%) of criminal trial attorneys felt that note-taking was very helpful to jurors in paying attention.

[86] Research elsewhere has proved these fears to be unfounded. *See* Penrod and Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making,* 3 PSYCHOLOGY, PUBLIC POLICY, & LAW 259 (1997).

Table 38: Note-Taking: Attorneys' Views of Helpfulness to Jurors

What percentage of attorneys in trials where juror note-taking was permitted, thought the opportunity to take notes was very helpful to jurors in…		
	Criminal	**Civil**
Paying attention	49%	40%
Understanding the evidence	33%	41%
Understanding the law	29%	21%
Reaching a decision	42%	35%

Jurors' Views of Juror Note-Taking

Given the opportunity to do so, a majority of jurors reported that they took notes. In trials where note-taking was permitted, 68% of the jurors in criminal trials and 75% in civil trials reported that they took notes. An average of five jurors took notes in each trial – criminal or civil. Not surprisingly, jurors with higher education were more likely to take notes than those with less education. College graduates accounted for 56% of the note-takers compared to 44% of the pool as a whole.

Table 39: Note-Taking and Level of Education

Education	All Jurors	Took Notes	Did NOT Take Notes
Less than High School	2%	2%	2%
High School Graduate	23%	16%	29%
Tech/Some College	14%	12%	15%
Completed 2-year college	15%	15%	15%
Completed 4-year college	29%	33%	25%
Graduate School	19%	23%	14%

Among jurors in trials where note-taking was permitted, between two-thirds and three-quarters felt that note-taking was very helpful to them in recalling the evidence, understanding the law and reaching a decision. There was virtually no difference

between the perceived helpfulness of note-taking for jurors who actually took notes during the trial and those jurors who decided not to take notes.

Table 40: Note-Taking: Jurors' Views of Helpfulness

What percentage of jurors in trials where note-taking was permitted, thought the opportunity to take notes was very helpful to them in…		
	Criminal	Civil
Recalling the evidence	75%	79%
Understanding the law	71%	63%
Reaching a decision	78%	74%

Jurors believe that note-taking helps them to perform their job. A majority of jurors in trials where they were not permitted to take notes said they would like to be able to do so if they sit as jurors in the future. Interestingly, more of the civil trial jurors (76%) than criminal trial jurors (50%) who did not have an opportunity to take notes would like to be able to do so in the future.

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CHAPTER 7: SCOPE OF THE JURY TRIAL PROJECT RESEARCH

The Trials

Questionnaires were completed by participants in 112 trials, including 68 civil trials and 44 criminal trials. Of those, the trial outcome was not reported in 21 trials and 11 cases settled before trial concluded. The remaining cases were tried to verdict with one criminal trial hung on all counts and one hung jury on some counts. There were split verdicts in five civil trials.

Table 41: Outcomes of Jury Trial Project Trials

	Criminal		Civil	
	Number	**Percent**	**Number**	**Percent**
Settled before verdict	-	0%	10	15%
Verdict for plaintiff/prosecutor	12	28%	12	17%
Verdict for defense	14	32%	35	51%
Split verdict	5	11%	1	2%
Hung jury on all counts	1	2%	-	0%
Hung jury on some counts	1	2%	-	0%
No Response	11	25%	10	15%
Total	44	100%	68	100%

Just over half of the criminal trials (56%) lasted four days or less and 20% lasted more than 7 days. The civil trials tended to be slightly longer, with 28% lasting more than seven days and 42% four days or less.

Judges, attorneys and jurors had different perceptions about the amount of documentary evidence used in the trials. All participants were asked:

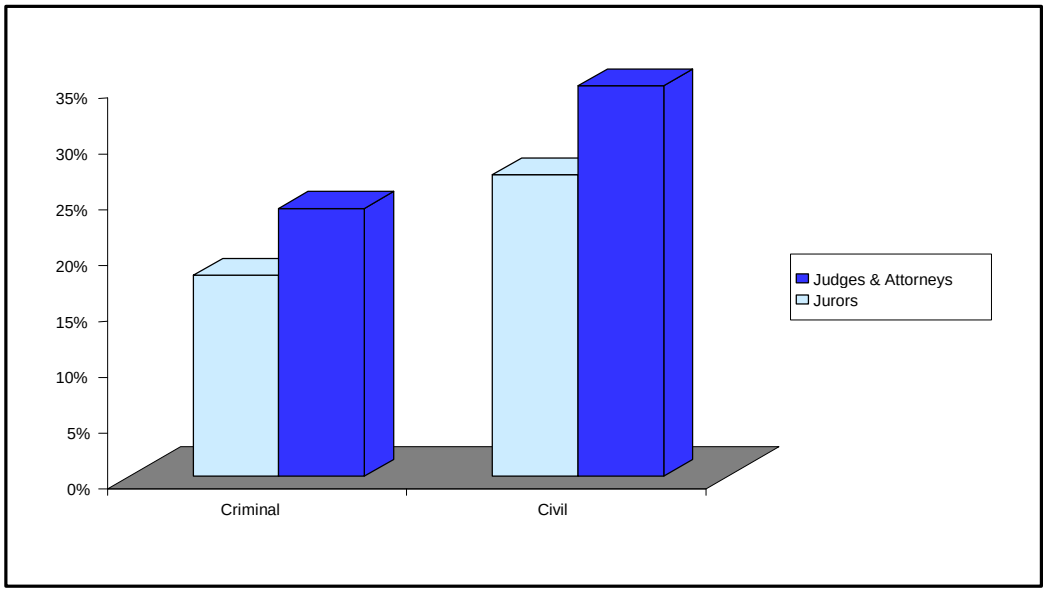
> In most trials there is some documentary evidence. How many documents were there in this trial?
> ? A lot ? Some ? A few ? None

Judges reported that there were "A lot" or "some" documents in 45% of the criminal trials. By contrast, 61% of jurors thought there were "A lot" or "some" documents. Just over one-third of attorneys in criminal trials (36%) reported that there were "A lot" or

some documents. A similar, more striking, pattern is evident in civil trials where 58% of judges, 67% of attorneys and 76% of jurors thought there were "A lot" or "some" documents in the trials.

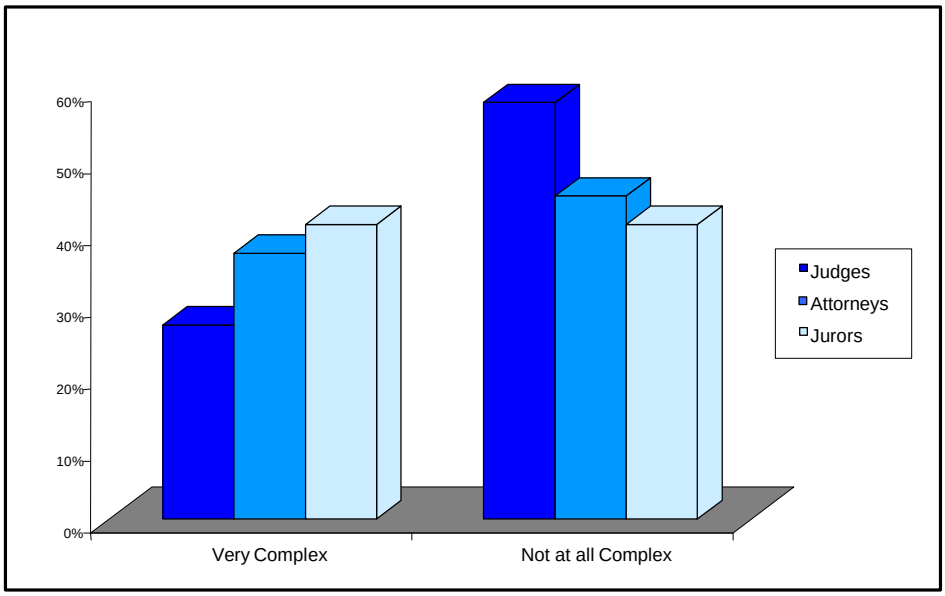
These differences are most notable when judges and attorneys are combined and contrasted with jurors. In criminal trials between 16% and 19% of judges and attorneys thought there were "A lot" of documents in criminal trials, while 24% of jurors said there were "A lot" of documents. In civil trials, 27% of both judges and attorneys thought there were a lot of documents, while 35% of jurors thought there were "A lot" of. Though the differences between jurors' perceptions and judges and attorneys perceptions are small – they are consistent: jurors think there are more documents than do the other trial participants.

Figure 7: How Many Documents: Judges/ Attorneys Compared to Jurors



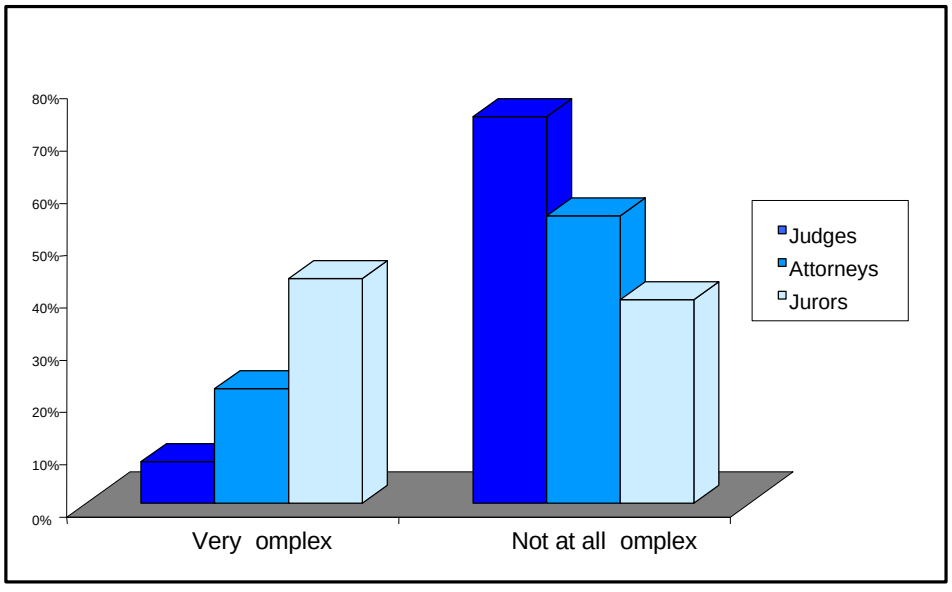
This difference in perception extends to the participants' views of the very nature of the trial itself. All trial participants were asked to assign a rating from 1 to 7 for "not at all complex" to "very complex" in response to the question: "Overall, in your opinion, how complex was this case?" there are notable differences among the three groups with 58% of judges, 45% of attorneys and 41% of jurors saying that the trials were not complex (1-3). By contrast, 41% of jurors, 37% of attorneys and 27% of judges thought the trials were very complex (5 - 7 rating).

Figure 8: Trial Complexity: Judges', Attorneys' and Jurors' Views



The differences in perception of complexity are greater for criminal trial participants. In criminal trials, 74% of judges, 55% of attorneys and only 39% of jurors rated the trial as not very complex. While 27% of judges, 37% of attorneys and 41% of jurors rated the trial as very complex (5 - 7).

Figure 9: Complexity of Criminal Trials: Judges', Attorneys' and Jurors' Views



There is less of a pattern and less difference among the groups when it comes to civil trials.

The difference between jurors' perceptions of trial complexity on the one hand and attorneys' and judges' perceptions on the other support the argument that jurors need access to tools that will enhance their comprehension of the material presented to them.

Attorneys and judges, but not jurors, were asked how easy or difficult they thought it was for jurors to understand the evidence and the law. Three-quarters of attorneys and judges thought it was easy (5 to 7 rating) for jurors to understand the evidence while two-thirds thought it was easy for jurors understand the law. Similarly, overwhelming numbers of attorneys and judges concluded that evidence was very clearly presented.

Thus, judges and attorneys tend to think that the trials were not very complex, that the evidence is clearly presented and that both the evidence and the law are easy to understand. Jurors, by contrast, tend to think that trials are complex. One is can only wonder what the jurors' responses would have been had they been asked about the clarity of evidence presented or the ease of understanding the evidence and the law.

The Attorneys

A total of 210 attorneys participated in the 112 trials included in the Project data collection: 76 criminal trial attorneys and 134 civil trial attorneys. For most of them the trial in which they participated was typical for their practice: Seventy (34%) practice primarily in criminal trials, 124 (59%) practice primarily in civil trials and sixteen (8%) practiced in both.

As can be seen in Table 42 below, the geographic distribution of attorneys is similar to the overall geographic distribution of cases among the project trials. Notably, 47% of participating attorneys were involved civil trials in New York or Erie County.

Table 42: JTP Attorneys by County

	Criminal		Civil	
County	**Frequency**	**Percentage**	**Frequency**	**Percentage**
Bronx	14	18%	4	3%
Cayuga	13	17%	-	-
Erie	-	-	38	29%
Essex	2	3%	0	0%
Fulton	-	-	2	2%
Kings	11	15%	-	-
Montgomery	2	3%	4	3%
Nassau	9	12%	11	8%
New York	6	8%	62	46%
Niagara	-	-	4	3%
Queens	-	-	2	2%
Schenectady	9	12%	-	-
Steuben	6	8%	7	5%
Westchester	4	5%	-	-
Totals	**76**	**100%**	**134**	**100%**

Overall, attorneys participating in civil trials have more years and variety of trial experience than those in criminal trials.

- While half (52%) of criminal trial attorneys have practiced for 10 years or more, about half (46%) of civil trial attorneys have practiced for 20 years or more.

- While 86% of civil trial attorneys have had practice experience in federal court, only 38% of criminal trial attorneys reported such experience.

- Only 26% of the criminal attorneys compared to 45% of the civil attorneys have practice experience in other states' courts.

Not surprisingly, attorneys are split roughly 50/50 in terms of the side they represented at trial. Though as can be seen in Table 43, below, in criminal trials, slightly more prosecutors completed questionnaires and in civil trials slightly more defense attorneys completed questionnaires.

Table 43: JTP Attorneys by Side Represented

Side Represented	**Criminal**	**Civil**
Plaintiff/Prosecution	54%	47%
Defense	46%	53%

Nearly all (92%) of the attorneys participate in the bar organizations. As can be seen in Table 45 below, most common was membership in the New York State Bar Association, followed by the New York State Trial Lawyers Association and the ABA. One in ten mentioned other Bar memberships including: Association of the Bar of the City of New York, Monroe County Bar Association, Nassau County Bar Association and Schenectady County Bar Association.

Table 44: Bar Memberships of JTP Attorneys	
	Number
ABA	51
ATLA	33
NACDL	7
NLADA	2
NYSBA	105
NYSTLA	59
NYACDL	17
NYSDA	15
NONE	16
OTHER	45

Attorneys' Overall Opinions about the JTP Innovations

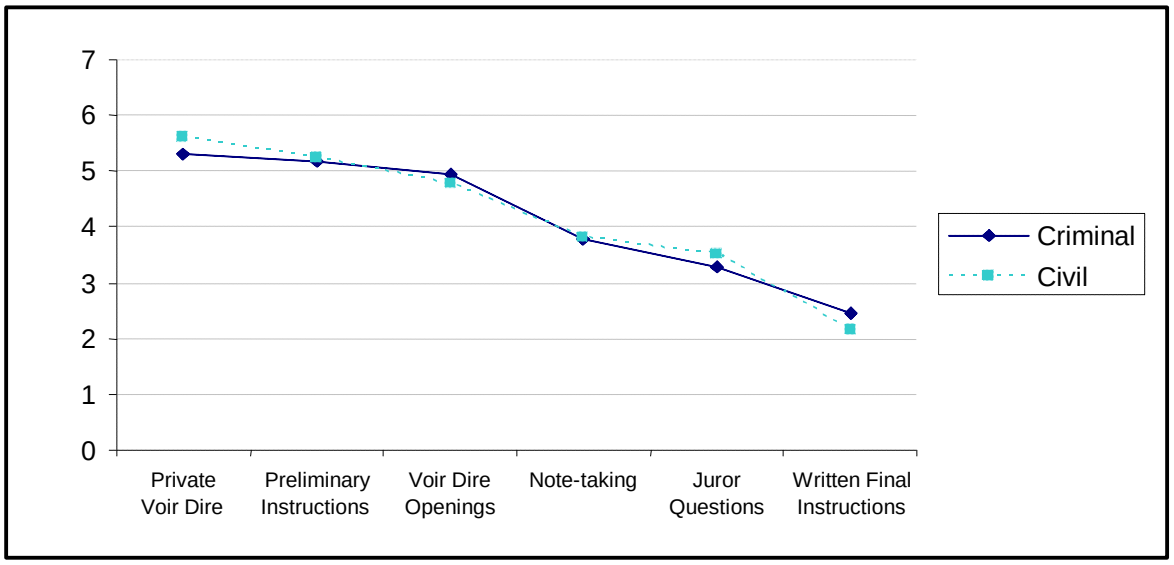
Whether or not they participated in a trial where an innovation was used, attorneys were asked their opinion about each innovative practice examined by the Project. Table 45 shows the overall average level of approval for each innovation beginning with the most approved practice to the least approved.

The practice most widely approved by attorneys was individual voir dire questioning of jurors outside the presence of others, followed by preliminary instructions and then voir dire openings. Attorneys in criminal and civil trials differed on the innovation of which they least approved. Criminal trial attorneys most disapproved of trial notebooks while civil trial attorneys were most likely to disapprove of providing jurors with written final instructions.

Individual questioning during voir dire and substantive preliminary instructions to the jury are the two practices receiving the highest approval ratings from both criminal and civil trial attorneys. Notebook and written final instructions received the lowest rating.

The most controversial innovation – allowing jurors to submit written questions to witnesses – received an overall average rating of 3.44 on the 1 to 7 scale, while written final instructions received the lowest ratings from both criminal and civil trial attorneys.

Figure 10: Attorneys' Average Approval Ratings (1-7 Scale)



As in other studies of attorney reactions to jury trial innovations, attorneys involved in trials where innovations were used were more likely to approve of those practices than those involved in trials where the innovations were not used. The rank order of the most approved innovation also changes with experience.

Civil trial attorneys in trials where substantive preliminary instructions were used gave the highest average approval rating to this innovation, while criminal trial attorneys rated voir dire openings the highest. Both criminal and civil trial attorneys gave the lowest approval ratings to final written instructions. Though notebooks were rarely used, they were given very high approval ratings from the attorneys who had the opportunity to use them. More information needs to be obtained on the use of trial notebooks as only seven trials involved such notebooks and logistical issues are often the greatest impediment to their use.

Attorneys who did not have the opportunity to use an innovation were less likely to approve of it – and the rank order of their approvals also differs from those who had experience using one or more of the innovations. Overall, individual questioning was rated the most favored by those who were not exposed to the innovations. This was followed by voir dire openings then preliminary instructions. Final written instructions received the lowest overall score by attorneys practicing in criminal and in civil trials. Attorneys practicing in criminal trials least approved of juror notebooks (Average rating =2.13) while attorneys practicing in civil trials least approved of final written instructions (Average rating =2.12).

The impact of experience with an innovation on attorneys' approval of that innovation is best examined by comparing those who were in trials where an innovation was used with those in trials where the innovation was not used. Figures 11 and 12 graphically depict the differences in views of those attorneys who participated in trials where innovations were used and those who gave their opinions of the innovation without experiencing it.

Although both groups are skeptical about note-taking, juror questions and final written instructions, where these innovations were used, both civil and criminal trial attorneys were more likely to approve their use.

Figure 11: Civil Trial Attorneys' Approval of Each Innovation

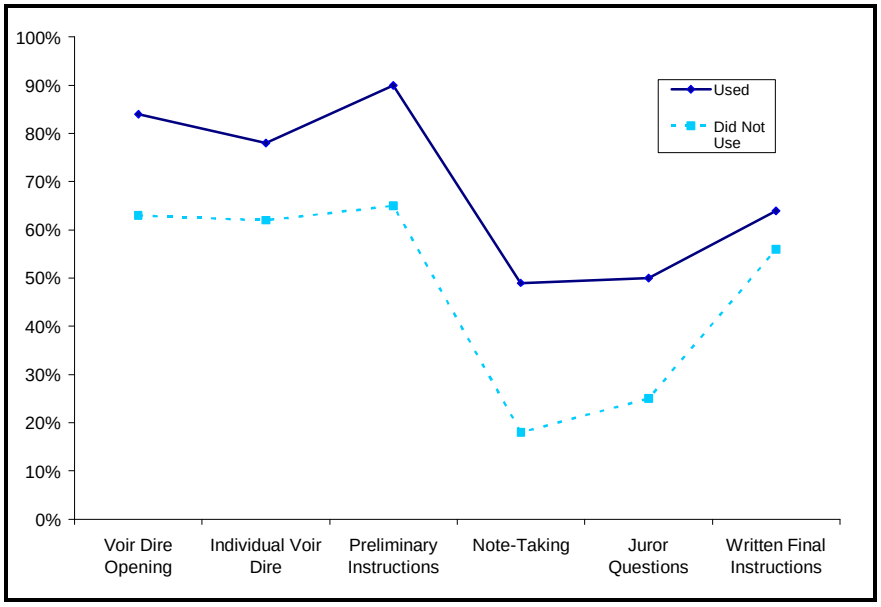
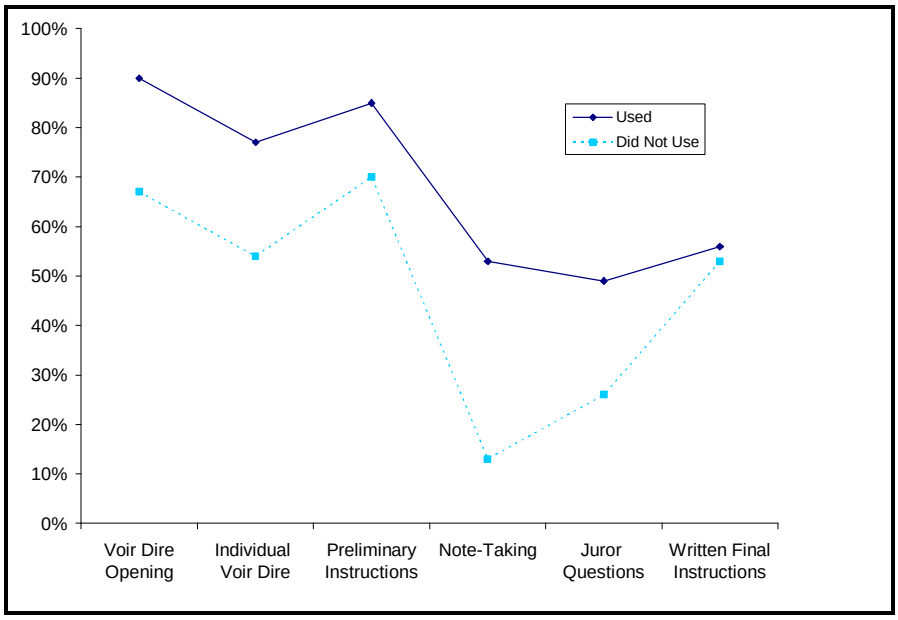


Figure 12: Criminal Trial Attorneys' Approval of Each Innovation



11

The Jurors

The 926 jurors who participated in this study are almost evenly divided between civil and criminal trials: 480 civil trials and 446 criminal trials. They were distributed across the 16 counties in the study, proportional to the number of trials in those counties.

Table 45: JTP Jurors by County

County	Case Type		Percent
	Criminal	Civil	
Bronx	102	14	12%
Cayuga	42	0	4%
Erie	0	109	12%
Essex	12	0	1%
Fulton	0	9	1%
Kings	54	0	6%
Montgomery	12	21	4%
Nassau	67	42	12%
New York	37	253	31%
Niagara	0	7	1%
Queens	0	7	1%
Schenectady	62	0	7%
Steuben	37	18	6%
Westchester	21	0	2%
Totals	446	480	100%

Less than one third (29%) of the jurors had served in the past. The majority of those who served in the past (62%), served only once before.

As in other studies of jurors' reactions to their service more than two-thirds (69%) of jurors serving on criminal cases and three-quarters (75%) of the jurors serving on civil cases said their overall reaction to their service was very favorable.

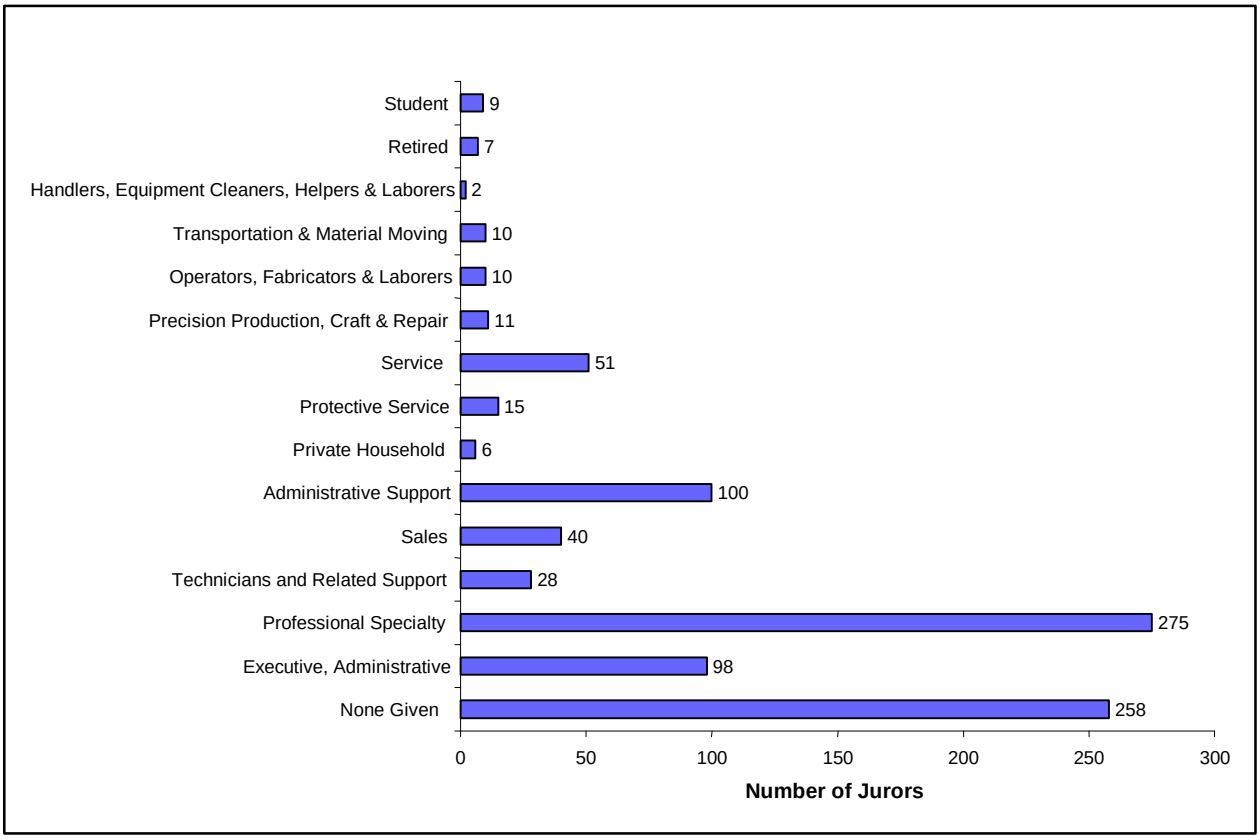
Information was collected about the jurors' backgrounds to assure that they are representative of the jury pool. Jurors' ranged from under 25 to over 65 years old. The table below summarizes the distribution of ages across 879 jurors who reported their age.

Table 46: JTP Jurors' Ages

Age	Number	Percent
Under 25	76	9%
25-34	166	19%
35-44	216	25%
45-54	219	25%
55-64	136	15%
65 or over	66	7%
Total	879	100%

Three-quarters (72%) of the jurors reported their occupations. One-third were employed in professional specialty occupations which include such jobs as teachers, nurses, engineers, artists and scientists. See Figure 13 for a complete distribution of occupations.

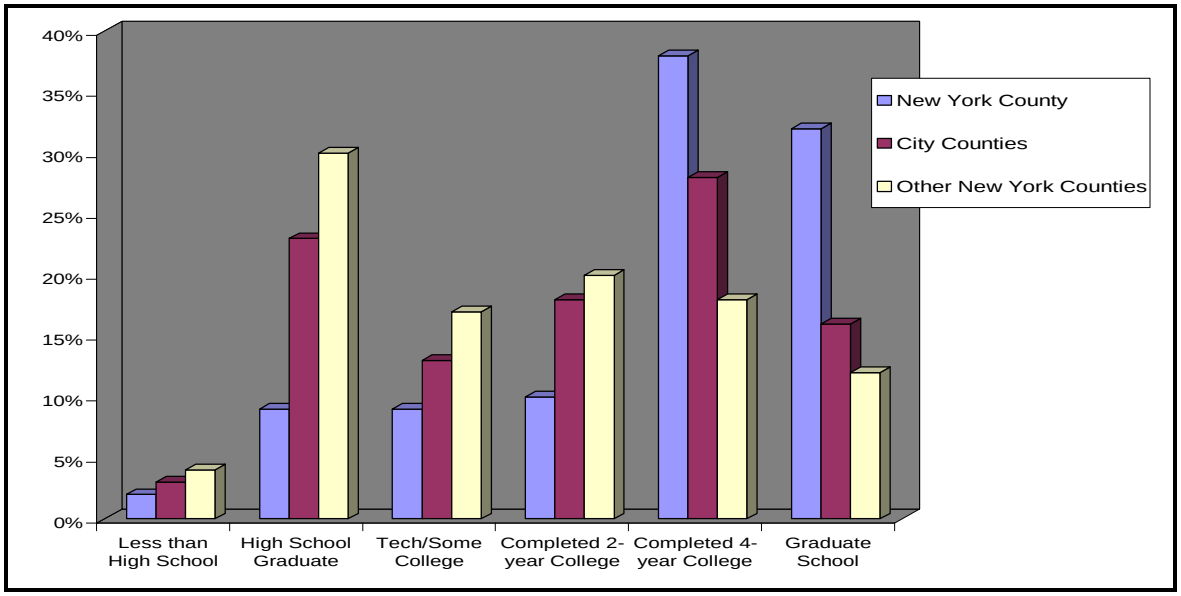
Figure 13: JTP Jurors' Occupations



Education levels also varied: 46% of the jurors said they had completed four years of college or more. There were notable differences between New York County jurors' education levels and the educational levels of jurors from other metropolitan area counties (Brooklyn, Queens, Bronx, Nassau and Westchester) and from counties outside of the New York metropolitan area. While 70% of New York County jurors had completed 4 years or more of post-secondary school education, 44% of the jurors from other New York City counties and 30% of jurors outside of the city had attained the same education level.

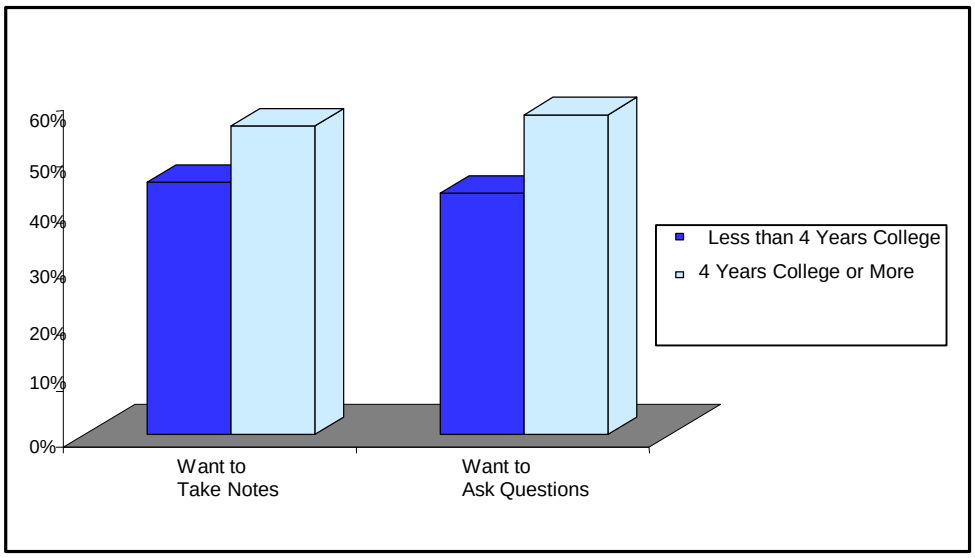
Education was examined to assess whether jurors with higher education were more likely to make use of innovations such as note-taking or asking questions and whether they were more likely than jurors with lower education to want access to innovations in future trials. As detailed below, jurors' use of innovations such as note-taking and juror questions varied by educational level but not by geography.

Figure 14: Distribution of Jurors' Education Levels by Location



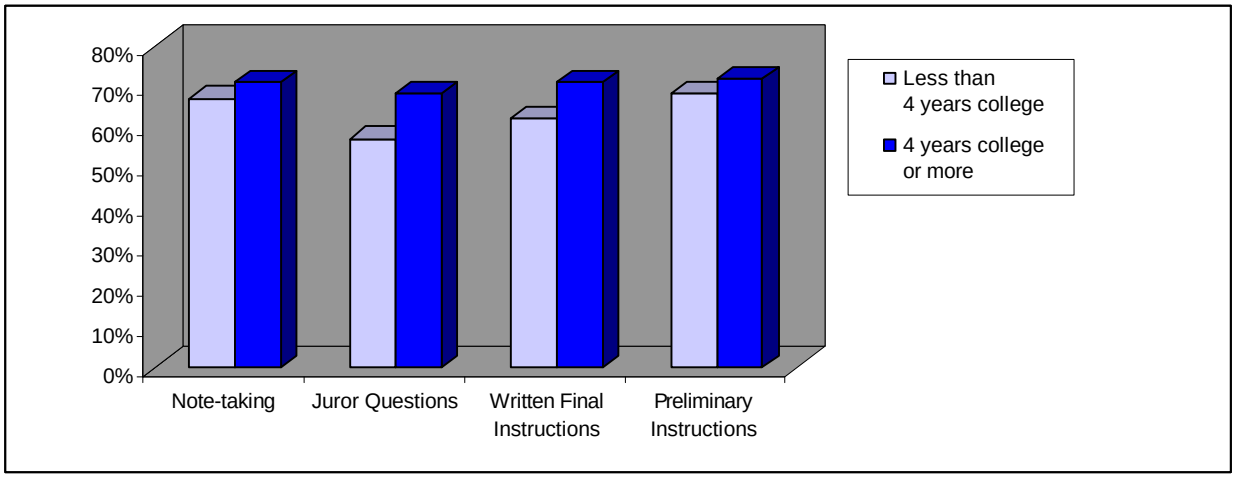
Jurors with higher education were more likely to take notes and to ask questions. That is to say a juror's decision to take notes or to ask questions was directly related to his or her educational level. There was no relationship, however, between jurors' use of these innovations and geography alone.

Figure 15: Jurors Who Want to Take Notes/Ask Questions by Education



Jurors' interest in using jury trial innovations in the future was also impacted by educational level. In general, approximately two-thirds of all jurors who were not given an opportunity to use five innovations would like to use them in the future. These five innovations are: note-taking, asking questions, substantive preliminary instructions, written final instructions and use of notebooks. Again, a pattern emerged with respect to education. Those with four or more years of post-secondary education were more likely to want access to these tools in the future. But these differences were not statistically significant.

Figure 16: Jurors' Interest in Using Practices by Education



Finally, jurors were asked to rate the complexity of the trial on a 1 to 7 scale from not at all complex to very complex. Jurors' complexity ratings are compared to judges' ratings in Figures 17, 18 and 19. Notably, nearly half (41%) of the jurors assign high complexity ratings of 5 to 7 to the trials on which they sat, while more than half (58%) of judges say that the trials are not complex and assigned ratings of 1 to 3. This difference in perception is stronger in criminal trials where nearly half (43%) of jurors assign complexity ratings of 5 to 7 while three-quarters of judges (74%) say that the same trials are not very complex.

Figure 17: Trial Complexity: Comparison of Judges and Jurors in Criminal Trials

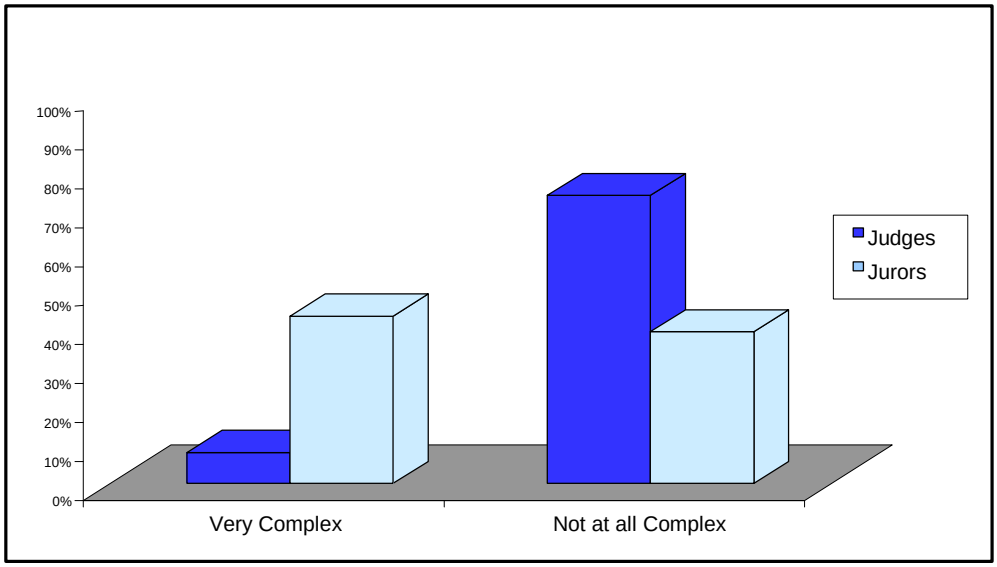
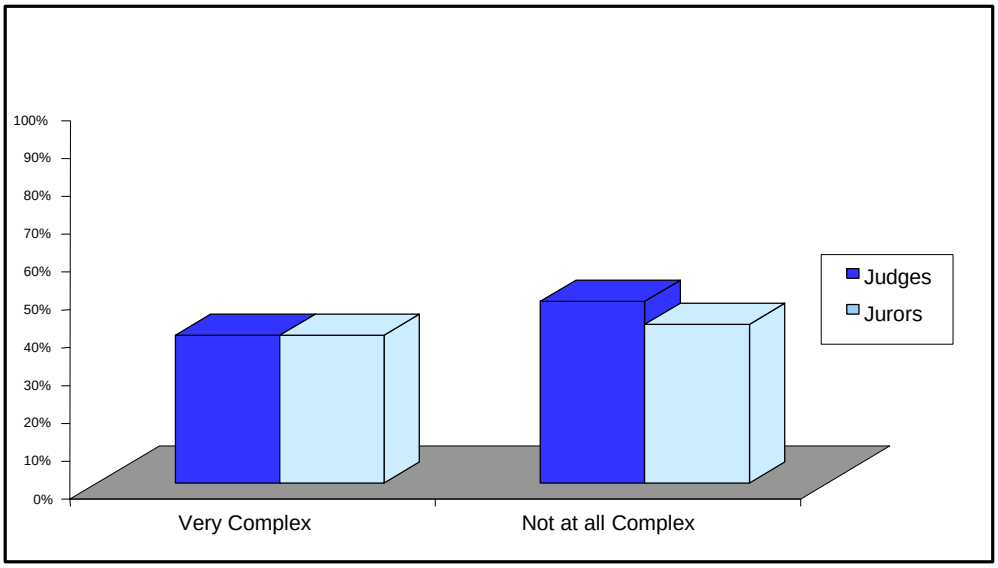


Figure 18: Trial Complexity: Comparison of Judges and Jurors in Civil Trials



CHAPTER 8: REPORT OF THE COMMITTEE ON ALTERNATIVES TO TRIAL

Recommendations

The Committee recommends that the Unified Court System (UCS) adopt the Summary Jury Trial (SJT) as a recommended Alternative Dispute Resolution method for resolving civil cases.

The Committee further recommends that the UCS allow attorneys to request a Summary Jury Trial when suit is filed. Where appropriate, courts should create a separate trial part for the trial of Summary Jury Trial cases.

The Committee also recommends that all New York State judges and attorneys in civil litigation be encouraged to access the Eighth District's website explaining and promoting the Summary Jury Trial[87] and view the Eighth District's educational DVD which provides a step by step explanation of implementation of Summary Jury Trials. [88]

Finally, the Committee recommends adoption of a multi-disciplinary approach providing three tracks of access to a summary jury trial: automatic, voluntary and ADR referral.

Rationale

The Summary Jury Trial Procedure has been successfully used in New York's Eighth Judicial District for six years. The procedure has been used in many other state and federal district courts since it was pioneered by Judge Thomas Lambros in the Northern District of Ohio in 1980.[89] In the Summary Jury Trial, as practiced in the Eighth Judicial District, a jury is selected and the parties present evidence and arguments in one day before a judge and jury. The jury is instructed and typically provided the instructions in writing before its deliberations. By the end of the day, the jury renders its verdict. The verdict may be binding or non-binding and damages on the binding cases can be floored and capped on a high/low basis. A binding SJT is similar to formal arbitration, except in a summary jury trial jurors rather than arbitrators render the decision. The court and counsel can modify the process to fit each case.[90]

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[87] http://nycourts.gov/8jd/internet/html/sjt.html. Last visited April 26, 2005.

[88] The DVD is attached to this report as Appendix T.

[89] McDonough, Summary Time Blues, 90 A.B.A.J. 18 (October 2004).

[90] With a formal SJT program, attorneys can channel cases involving small amounts of damages away from the regular court docket even before filing a Note of Issue. For example, as soon as a case is filed, attorneys can stipulate to use a binding Summary Jury Trial.

Summary Jury Trials are cumbersome on an ad hoc basis. Substantial coordination and cooperation among many levels of court personnel are necessary: Administrative Judges, Trial Judges, Calendar Judges, Jury Commissioners, Court Managers and Attorneys. Therefore, standardized rules may be necessary to encourage more widespread adoption of the Summary Jury Trial procedure.

Cases suitable for Summary Jury Trials. Any case that can be presented to a jury in one day is suitable for a SJT. Even very complex cases with potentially large damages can be effectively presented in an SJT. [91] For especially complex or lengthy trials, the SJT format has sometimes been extended to several days.

Summary Jury Trials can be a wake-up call for lawyers and clients. Sometimes people who refuse to discuss settlement even when the evidence is tilted against them, need to hear from a jury that they have a bad case. With summary jury trials, the courts can send this message more quickly and economically.

Summary Jury Trials further the mission of the Unified Court System. By successfully resolving nearly cases for only a fraction of the resources typically allocated to dispose of a case, the SJT is a potent tool. SJTs preserve a core value of our legal system: trial by a jury of one's peers. Furthermore, jurors benefit by fulfilling their civic duty with a minimum of inconvenience. Courts benefit by freeing up valuable space on their calendars and parties benefit by resolving their disputes in a prompt and cost-effective manner. The mission of the Unified Court System is to promote the rule of law and to serve the public by providing just and timely resolution of all matters before the courts. Formal and consistent utilization of the SJT process can help accomplish this mission.

[91] Nancy J. Bennett, *Mini-Trials and Summary Jury Trials*, Better Business Bureau Dispute Resolution Division, BBB Solutions, Vol 4, Issue 3. Available at http://www.dr.bbb.org/autoline/pub_jury.asp . Last checked on April 26, 2005.

Experience with Summary Jury Trials in New York State

In addition to six years' experience with SJTs in Chautauqua County, the procedure has been used successfully in Putnam, Orange, Saratoga, Monroe and Genesee Counties. The Supreme Court of Kings County, as of February 2005, has initiated a voluntary non-binding SJT program by local rule. The rules of the program are set forth in the Court Notes of the *New York Law Journal* of February 10 and February 14, 2005. SJTsd are being discussed in several other counties including: Bronx, Clinton, Montgomery, Dutchess, Schenectady, Ulster and New York. Further, the Association of Supreme Court Justices unanimously endorsed the SJT concept at its 2004 Fall meeting.

Between 1998 and December 2004, the Supreme Court in Chautauqua County disposed of 183 cases in one-day, binding SJTs. The court also disposed of 144 cases scheduled for non binding SJTs: 101 settled upon scheduling of the SJT; 43 settled after the non-binding SJT verdict; and 9 were discontinued after the SJT verdict. All non-binding SJTs in Chautauqua County from 2002-2004 were resolved without a full trial.

Table 47: Eighth Judicial District Summary Jury Trial Update
Oct. 1998 – Dec. 2004

Settled by binding SJT	183
Settled when SJT scheduled	101
Settled after non-binding SJT	43
Discontinued after SJT	9

Summary Jury Trials improve juror utilization. The SJT process involves jurors in their traditional roles with less down time for court personnel and jurors. Fewer jurors sit idly in the jury assembly room awaiting a call to voir dire that may never come. In one week, one judge in one courtroom can engage 35 jurors to hear five Summary Jury Trials, compared to seven jurors sitting on one 4 or 5 day jury trial. For example, in Chautauqua County 14 cases were scheduled for SJTs during the week of June 9, 2003: five cases settled before the SJT date; two were stayed by bankruptcy; two were tried in binding SJTs; and five non-binding verdicts led to settlements.

Where justified by caseload, judges or JHOs to whom SJTs are assigned might conduct one summary trial per day throughout the entire court year. Based on the Chautauqua County Jury Week 2003 experience, a judge could schedule 10 to 15 cases a week, thus assuring juries would be used every day even if two of the three cases settled before trial.

Jurors and attorneys react favorably to Summary Jury Trials. Over 90% of jurors who participated in Chautauqua County SJTs reported in a local poll that they received adequate information to make a decision and they believed the SJT is a practical way to resolve disputes. A majority said they would consider using the procedure themselves. They also reported that the written copy of the charge was useful, especially in no-fault cases.[92]

During jury deliberations, before the juries announce their verdicts, attorneys participating in SJTs in Chautauqua County completed questionnaires giving their opinions and also giving recommendations to improve the SJT process. Eighty 80% percent reported satisfaction with the format, 96% would consider submitting cases for binding SJTs on a high/low basis and 86% thought the non-binding SJT was a useful tool for settlement. Only two attorneys trying a non-binding SJT in a medical malpractice case reported feeling that the SJT format was not appropriate for such cases.

Experience with Summary Jury Trials in Other Jurisdictions

Judge Thomas Lambros conducted the first Summary Jury Trial in the Northern District of Ohio in 1980. He said that "virtually any civil case can be subjected to the Summary Jury Trial Process."[93] Between 1980 and August 1, 1985, 139 cases were channeled to Summary Jury Trial in the Northern District of Ohio: 59 or 42% settled before the SJT, 70 or 50% settled after the SJT. One was stayed due to bankruptcy; three went to full trial and 3 cases were in negotiation, for a settlement rate of 96%.[94]

SJTs have been used in 13 states and several federal jurisdictions to resolve large and small cases including commercial disputes, toxic torts, negligence and medical malpractice actions, product liability, anti-trust and fraud cases in which there were sharp factual issues requiring testimony from only a few witnesses and the attorneys presented the remaining expert opinions, reports and arguments in synopsis form to the jury. In Federal Court, use of the summary jury trial is premised on Rule 16(c)(12)of the Federal Rules of Civil Procedure, which empowers the court to use "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."

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[92] *See* Eighth Judicial District Program Manual at http://nycourts.gov/8jd/internet/html/sjt.html and Caruso & Krauza, *October 1999 Chautauqua County Summary Jury Trial Program Report.*

[93] Short, *Summary Jury Trials*, THE HENNEPIN LAWYER, May-June, 1984, at 20.

[94] Bremere and Simmer, *One Day in Court: Suggestions for Implementing Summary Jury Trials in Iowa*, 36 DRAKE L. REV. 297, 313 (1986).

Jurisdictions in addition to New York that have permitted SJTs in one form or another include: Arizona, Michigan, Massachusetts, Nevada, Florida, Nebraska, New Hampshire, New Jersey, North Carolina, Pennsylvania, Texas, Virginia and the District of Columbia.[95]

Others have reported success with of Summary Jury Trials. Texas Judge Anne Ashby used an SJT in *Intellect Communications, Inc. v. Cadance,* a medical malpractice suit against Kaiser Permanente's north Texas HMO which was settled for $5.35 million after an SJT jury made a $62 million non-binding award.[96] Georgia Judge Susan B. Forsling used an SJT to bring about an $87.5 million settlement in an accounting malpractice dispute that would have taken three months to try.[97] Federal Magistrate J. Gregory Wehrman of Eastern District of Kentucky recently use a one-day summary jury trial procedure in which two six-person juries were empanelled to hear summary arguments in a product liability and medical malpractice claim. The case settled to both parties' satisfaction after the two juries rendered two verdicts of $1 million and $5 million.[98]

[95] Florida, Texas and Virginia have incorporated SJTs into their civil practice rules. Tooher, *Summary Jury Trial Save Time and Money*, LAWYERS WEEKLYUSA, April 25, 2005, 1.

[96] Harrison, *Settlement Through Summary Jury Trials*, THE ADVOCATE, Summer 2003, 22-24. See also Boston, *The Use of Non-Binding Summary Jury Trial in Texas*, THE ADVOCATE, Summer 2003, 25-28.

[97] Pollak, *PwC Settlement of $87.5M*, FULTON COUNTY DAILY REPORT, Jan 25, 2005. http://www.law.com/jsp/article.jsp?id=1106573717062 Last visited April 26, 2005.

[98] Tooher, *Summary Jury Trials Save Time and Money*, LAWYERS WEEKLY USA, April 25, 2005, 1.

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APPENDICES

Appendix A: Civil Trial Outcomes

Date	County	Trial #	Case Type	Trial Days	Outcome*
4/29/2004	Erie	224	Motor vehicle	3	Tried to Verdict
3/12/2004	Queens	225	Motor vehicle	4	Tried to Verdict
3/11/2004	New York	307	Medical Malpractice	10	Case settled during trial
2/9/2004	New York	504	Other Tort	3	Case settled during trial
2/11/2004	Steuben	529	Motor vehicle	6	Tried to Verdict
4/8/2004	New York	547	Motor vehicle	5	Other
2/24/2004	New York	563	Other Tort	13	Missing
2/6/2004	Erie	592	Other Tort	5	Tried to Verdict
6/29/2004	Steuben	595	Motor vehicle	2	Tried to Verdict
3/16/2004	Erie	661	Other Tort	2	Tried to Verdict
2/2/2004	Erie	662	Motor vehicle	3	Tried to Verdict
2/3/2004	Erie	707	Motor vehicle	1	Tried to Verdict
3/17/2004	Bronx	724	Motor vehicle	3	Missing
9/21/2004	New York	755	Contract	3	General/Special Verdict
5/19/2004	Montgomery	780	Motor vehicle	4	Case settled during trial
5/3/2004	New York	783	Medical Malpractice	10	Tried to Verdict
6/23/2004	Niagara	785	Other	2	Tried to Verdict
11/29/2004	New York	820	Medical Malpractice	10	Tried to Verdict
7/23/2004	Steuben	829	Medical Malpractice	6	Tried to Verdict
6/17/2004	New York	833	Medical Malpractice	9	Tried to Verdict
8/6/2004	New York	853	Motor vehicle	5	Tried to Verdict
7/1/2004	Montgomery	880	Motor vehicle	4	Tried to Verdict
5/27/2004	New York	883	Medical Malpractice	9	Tried to Verdict

* Outcome information is available for only 23 of the 68 trials in the civil JTP study.

Appendix B: Civil Trials – Use of Innovations

Civil Trials			Voir Dire Opening	Preliminary Instruction	Individual Voir Dire	Note-taking	Note - book	Juror Question	Interim Summation	Final Written Instruction
Date	County	Trial #								
4/29/2004	Erie	224	1			1				
3/12/2004	Queens	225			1	1				
4/21/2004	New York	251		1				1		1
3/11/2004	New York	307		1				1		1
4/5/2004	New York	321		1		1		1		1
6/4/2004	Erie	366		1		1		1		1
1/22/2004	New York	384				1		1		1
8/26/2004	Erie	410		1				1		1
5/29/2004	New York	484		1						1
8/16/2004	Erie	494		1				1		1
6/10/2004	New York	503	1	1			1		1	
2/9/2004	New York	504	1	1						
3/15/2004	New York	509	1	1	1	1		1		1
2/11/2004	Steuben	529						1		1
2/27/2004	Bronx	533			1	1		1		1
2/24/2004	Erie	536				1		1	1	
8/9/2004	New York	540		1		1		1		1
3/5/2004	Nassau	543						1		1
4/8/2004	New York	547	1	1	1	1		1		1
8/30/2004	New York	553	1			1	1	1		
4/16/2004	Nassau	559	1	1	1	1	1	1		
2/24/2004	New York	563	1			1	1	1		
4/6/2004	Erie	571	1			1	1	1		
4/5/2004	New York	576				1		1	1	
2/6/2004	Erie	592	1	1	1	1		1	1	
6/29/2004	Steuben	595	1	1	1	1		1	1	
3/29/2004	New York	604		1	1	1		1	1	
3/1/2004	New York	610		1		1		1		
4/28/2004	New York	633	1	1	1	1		1		
6/2/2004	New York	642		1		1		1		
9/11/2004	New York	659		1	1	1		1		
3/16/2004	Erie	661			1	1		1		
2/2/2004	Erie	662		1	1	1		1		1
5/25/2004	Fulton	692		1	1	1		1		
6/17/2004	New York	695			1	1		1		
2/11/2004	New York	704	1		1		1	1		
2/3/2004	Erie	707				1		1		
3/17/2004	Bronx	724				1		1		
5/23/2004	Nassau	726				1				1

			Voir Dire Opening	Preliminary Instruction	Individual Voir Dire	Note-taking	Note book	Juror Question	Interim Summation	Final Written Instruction
7/16/2004	New York	736				1				
7/20/2004	New York	735		1		1		1		1
9/17/2004	Erie	738			1	1				1
3/12/2004	New York	742	1		1	1		1		
3/23/2004	New York	743				1		1		
2/19/2004	New York	744				1				
9/21/2004	New York	755			1	1		1		
6/11/2004	Erie	763				1				1
8/12/2004	Erie	769		1	1	1		1		
5/7/2004	Nassau	772			1	1		1		
5/19/2004	Montgomery	780				1				
5/3/2004	New York	783				1				1
6/23/2004	Niagara	785				1				1
6/18/2004	Erie	813				1				1
6/28/2004	Erie	819			1	1		1		
11/29/2004	New York	820				1		1		
2/13/2004	Nassau	822	1	1	1	1		1		
7/23/2004	Steuben	829			1	1		1		
6/25/2004	Montgomery	830	1		1	1		1		
6/17/2004	New York	833				1				
8/6/2004	New York	853				1		1		
7/1/2004	Erie	863			1	1		1		1
6/15/2004	New York	867		1	1		1	1		1
8/25/2004	Erie	869				1				
7/14/2004	New York	870				1				
2/27/2004	Nassau	872								1
7/1/2004	Montgomery	880			1					1
5/27/2004	New York	883			1					1
6/14/2004	Niagara	903			1	1				1

Total Civil	68	16	26	29	54	7	47	6	28
Total Criminal	44	2	24	0	14	0	0	0	11
Combined Total	112	22	35	64	91	7	74	6	39

Appendix C: Criminal Trial Outcomes

Criminal Trials			Top Charge	Class	Trial Days	Outcome
Date	County	Trial #				
4/26/2004	Montgomery	247	Forgery in the 2d Degree	Class D Felony	4	Hung jury on all counts
2/6/2004	Bronx	260	Burglary in the 3d Degree	Class D Felony	-	Missing
12/12/2003	Kings	264	Sexual Abuse in the 2d Degree	Misdemeanor	4	Tried to verdict on all counts
1/12/2004	Kings	276	Petit Larceny	Misdemeanor	3	Tried to verdict on all counts
3/8/2004	Bronx	299	Attempt to commit a crime- Murder in the 2d Degree	Class B Felony	21	Tried to verdict on all counts
5/24/2004	Schenectady	304	Criminal Sale of A Controlled Substance in the 3d Degree	Class B Felony	8	Other mistrial
5/4/2004	Nassau	324	Attempt to commit a crime; Robbery in the 1st Degree	Class C Felony	15	Tried to verdict on all counts
7/22/2004	Bronx	329	Burglary in the 3d Degree	Class D Felony	7	Tried to verdict on all counts
10/5/2004	Schenectady	370	Missing	Missing	-	
2/4/2004	Kings	394	Criminal possession of a weapon in the 4th Degree	Misdemeanor	3	Missing
6/18/2004	Kings	411	Missing		-	
1/16/2004	Kings	428	Missing	Missing	4	Tried to verdict on all counts
4/16/2004	Bronx	527	Burglary in the 1st Degree	Class B Felony	15	Tried to verdict on all counts
4/2/2004	West Chester	541	Attempt to commit a crime; assault in the 2d Degree	Class D Felony	9	Tried to verdict on all counts
3/23/2004	New York	589	Criminal Possession of a Controlled Substance in the 3d Degree	Class B Felony	4	Tried to verdict on all counts
4/27/2004	Cayuga	594	Missing		-	
3/11/2004	Steuben	597	Criminal Contempt in the 1st Degree	Class E Felony	3	Tried to verdict on all counts
4/28/2004	Cayuga	626	Criminal mischief in the 2d Degree	Misdemeanor	1	Tried to verdict on all counts
2/26/2004	Cayuga	630	Criminal contempt in the 2d Degree	Misdemeanor	1	Tried to verdict on all counts
1/27/2004	Cayuga	656	Missing		-	
1/28/2004	Cayuga	668	Missing		-	
2/5/2004	Nassau	688	Missing		-	
3/29/2004	Kings	720	Criminal contempt in the 2d Degree	Misdemeanor	4	Tried to verdict on all counts
6/24/2004	Kings	761	Missing		-	
7/19/2004	Schenectady	762	Course of sexual conduct against a child in the 1st Degree	Class B Felony	5	Tried to verdict on all counts
7/29/2004	Cayuga	765	Hindering prosecution in the 3d Degree	Misdemeanor	1	Verdict on some counts; hung on some counts

Date	County	Trial #	Top Charge	Class	Trial Days	Outcome*
9/29/2004	Nassau	777	Attempt to Commit A Crime; Murder in the 2d Degree	Class D Felony		Verdict for defense
10/19/2004	Steuben	779	DWI	Vehicle/Traffic	3	Tried to verdict on all counts
5/14/2004	Bronx	784	Robbery in the 1st Degree	Class B Felony	5	Tried to verdict on all counts
6/22/2004	West Chester	788	Murder in the 2d Degree	Class A Felony	14	Tried to verdict on all counts
5/24/2004	New York	795	Attempt to commit a crime; Assault in the 2d Degree	Class D Felony	6	Missing
2/25/2004	Bronx	798	Murder in the 2d Degree	Class A Felony	-	Missing
6/7/2004	Kings	811	Petit Larceny	Misdemeanor	6	Tried to verdict on all counts
7/6/2004	Schenectady	812	Rape in the 1st Degree	Class B Felony	12	Verdict on some counts; hung on some counts
8/27/2004	Cayuga	815	Missing	Missing	2	Tried to verdict on all counts
10/20/2004	Nassau	827	Murder in the 2d Degree	Class A Felony	12	Verdict on some counts; hung on some counts
9/21/2004	Schenectady	845	Assault in the 2d Degree	Class D Felony	8	Tried to verdict on all counts
9/24/2004	Bronx	848	Missing		-	
5/14/2004	Kings	861	Assault in the 3d Degree	Misdemeanor	3	Tried to verdict on all counts
8/26/2004	Essex	862	Assault in the 2d Degree	Class D Felony	8	Tried to verdict on all counts
10/27/2004	Nassau	877	DWI	Vehicle/Traffic	7	d. Plea during trial or deliberation
6/25/2004	Steuben	879	Burglary in the 2d Degree	Class C Felony	4	Tried to verdict on all counts
5/11/2004	New York	895	Robbery in the 1st Degree	Class B Felony	5	Tried to verdict on all counts
10/13/2004	Bronx	898	Missing		-	

Appendix D: Criminal Trials – Use of Innovations

Criminal Trials			Voir Dire Opening	Preliminary Instruction	Individual Voir Dire	Note-taking	Juror Question	Final Written Instructions
Date	**County**	**Trial #**						
4/26/2004	Montgomery	247			1	1	1	1*
2/6/2004	Bronx	260			1	1		
12/12/2003	Kings	264				1	1	
1/12/2004	Kings	276			1	1	1	
3/8/2004	Bronx	299			1	1		1*
5/24/2004	Schenectady	304			1	1	1	1
5/4/2004	Nassau	324	1		1	1		
7/22/2004	Bronx	329			1	1	1	
10/5/2004	Schenectady	370			1	1	1	
2/4/2004	Kings	394				1	1	
6/18/2004	Kings	411			1	1	1	
1/16/2004	Kings	428			1	1	1	
4/16/2004	Bronx	527	1		1	1		
4/2/2004	West Chester	541			1	1	1	
3/23/2004	New York	589		1	1			
4/27/2004	Cayuga	594		1		1	1	1
3/11/2004	Steuben	597			1			1
4/28/2004	Cayuga	626		1		1	1	1
2/26/2004	Cayuga	630		1		1	1	1
1/27/2004	Cayuga	656		1		1	1	1
1/28/2004	Cayuga	668		1		1	1	1
2/5/2004	Nassau	688			1	1		
3/29/2004	Kings	720				1	1	
6/24/2004	Kings	761			1	1	1	
7/19/2004	Schenectady	762			1	1	1	
7/29/2004	Cayuga	765				1	1	
9/29/2004	Nassau	777	1		1	1		
10/19/2004	Steuben	779			1			1

Date	County	Trial #	Mini Opening	Preliminary Instruction	Individual Voir Dire	Note-taking	Juror Question	Final Written Instructions
5/14/2004	Bronx	784						
6/22/2004	West Chester	788			1	1	1	
5/24/2004	New York	795			1			
2/25/2004	Bronx	798	1		1			
6/7/2004	Kings	811			1	1	1	
7/6/2004	Schenectady	812			1	1	1	
8/27/2004	Cayuga	815		1	1	1	1	1
10/20/2004	Nassau	827			1	1		
9/21/2004	Schenectady	845			1	1	1	1
9/24/2004	Bronx	848	1	1	1	1	1	
5/14/2004	Kings	861			1	1	1	
8/26/2004	Essex	862			1	1	1	
10/27/2004	Nassau	877			1	1		
6/25/2004	Steuben	879			1			1
5/11/2004	New York	895			1			
10/13/2004	Bronx	898	1	1	1	1		

Total Criminal	**44**	**6**	**9**	**35**	**37**	**27**	**11**
Total Civil	**68**	**16**	**26**	**29**	**54**	**47**	**28**
Combined Total	**112**	**22**	**35**	**64**	**91**	**74**	**39**

Appendix E: Draft Rules for Summary Jury Trials

THE SUMMARY JURY TRIAL:
SUGGESTED RULES AND PROCEDURE

A. Nature of the Summary Jury Trial

1. The Summary Jury Trial is one of many alternatives to an ordinary trial as part of the Unified Court System's ADR program.

2. A summary jury trial is a one-day binding or non binding proceeding in which a jury decides factual issues as a jury would in a traditional trial of the case.

3. The court will obtain counsel's consent to participate in any summary jury trial.

4. The court may hold a non-binding summary jury trial at the request of all parties.

5. With consent or rule of the Administrative Judge of the judicial district, a trial judge may order non-binding trials as an extension of the settlement process without consent of counsel.

6. In the absence of a written agreement of counsel approved by the trial court on procedure and manner of presentation of the case, the process and rules that follow shall apply.

B. Process of the Summary Jury Trial.

1. Jury Selection: By counsel with strict time limits or by the Court. If the trial is non-binding, the court, after consulting with counsel should determine whether jurors should be so informed during the voir dire. The court may advise the jurors that the SJT is an ADR procedure similar to arbitration designed to obtain a bona fide verdict from an actual jury without the need for parties to go the expense of a regular trial that could take days or weeks. The court should stress that it is important for the jury to reach a decision based on the evidence and the law as they would in a full scale regular trial because the court and the parties will rely on their decision to resolve the case. The court may advise the jury that even after a traditional or regular trial, any party that can prove the verdict was not based on a fair

interpretation of the facts and law by the judge or jury has the right to appeal and seek a new trial.

2. Time: Ten minute openings; ten minute closings; plus one hour to each side. Adjustments to time limits and the format may be allowed by the Court to insure full exploration of the issues.
3. Case Presentation: Counsel may present summaries of evidence, factual allegations, inferences from discovery, quotes from video tapes and depositions and pre-marked exhibits such as police and medical reports. Counsel may use power points and overhead projectors. Each side is permitted up to two witnesses, live or by video. On application of a party and good cause shown, the court may allow an increase in the number of witnesses. Plaintiff proceeds first. Plaintiff may be granted a ten (10) minute rebuttal following defendant's presentation. The time spent by counsel on direct and cross examinations counts against their allotted time unless Court directs otherwise. Counsel may stipulate evidence to be submitted.

3. Jury Verdict: After the Court charges the jury, the jury deliberates and completes the Jury Verdict Sheet. The verdict is advisory unless parties agree it is to be binding as rendered or on a high/low basis. After the verdict, the court may question the jurors as to their rationale. Counsel may submit questions to be put to the jury or be permitted to ask questions directly. After the verdict has been rendered in a non binding SJT, the court may advise the jury that because the concept is revolutionary and the trial is abbreviated, the parties have the right to demand a new, full scale trial should they feel the jury verdict or rulings of the court were not supported by the facts or law, just as they would have the right to appeal the verdict of a regular on those grounds. In a non binding SJT, if the jury does not reach an agreement within a reasonable time, the Court can poll the jurors individually and allow counsel to submit questions.

4. Limited Right to Appeal: The right to appeal from a binding SJT is limited to the same grounds as appeals from arbitration awards and the parties must so stipulate in writing or on the record. All other rights of appeal are waived. Prior to trial, the parties may stipulate to waive any rights to appeal.

C. When a Binding Summary Jury Trial is recommended

1. Generally, limited coverage and small damage cases where cost of bringing in medical experts would be prohibitive.

2. Any case where it is cost effective for all concerned, i.e., all cases involving demands up to and including $50,000 and most cases where the demands are between $50,000 and $200,000.

3. Cases dealing with larger amounts but where the parties are close in their negotiations and a SJT can resolve the relatively small dollar disagreement.

4. Cases where injuries may result in verdicts in excess of policy limits and defense counsel desires to cap the verdict at those limits to protect the insured against an excess judgment.

5. All slip and fall cases and no fault threshold cases.

6. Uncomplicated contract or commercial cases.

D. Cases suited for non binding Summary Jury Trials.

1. All personal injury, contract and commercial cases involving large or small damages that can be presented and understood by a jury in an abbreviated trial and in which a jury's advisory verdict has the potential of assisting the parties in reaching a settlement is suitable for the summary jury trial. A non-binding verdict will indicate how a jury might decide the issues in a full trial. The non-binding decision provides the parties with an understanding of the relative strengths and weaknesses of their respective positions and increases the potential for an early settlement.

2. Cases where liability is either admitted or the defense concedes that liability is likely to be found by a jury so that damages are the only real issue. For purposes of the Summary Jury Trial, without waiver at a later regular trial, counsel may concede liability for a non binding jury opinion on damages.

3. Cases where either side has an unrealistic settlement position, or value, so that the Summary Jury Trial can serve as a reality check, viz: a case in which the plaintiff refuses to move from an unrealistic settlement demand, despite counsel's urging and the insurance carrier refuses to make a good faith offer in the face of the unrealistic demand, or, where the demand is reasonable but the carrier refuses to counter offer.

4. No fault threshold cases where parties cannot agree on a binding high/low SJT.

5. Cases likely to require several days or weeks of trial time and great expense for a traditional trial, especially for medical and other expert testimony.

6. Small ticket negligence cases likely to involve considerable expense, especially for medical testimony, where parties cannot agree on settlement in spite of pretrials and/or mediation.

7. The amount in controversy is sufficient to justify the SJT in the strong likelihood the SJT will result in settlement.

8. The non binding summary jury trial may be used in complex commercial, patent, trademark, copyright, trade secrets, unfair competition and other intellectual property disputes to bring about a cost-effective and time saving settlement.

9. Cases that present complex credibility questions, i.e., a case where there is conflicting testimony of numerous witnesses on several different factual issues may be candidates for Summary Jury Trials with appropriate stipulations of counsel and more trial time than one day.

10. The summary jury trial may be used to present one or more fact questions to a jury to assist the court and counsel to settle complex cases, such as medical malpractice cases.

E. Summary Jury Trial Procedures.

The following procedures shall apply to all Summary Jury Trials unless otherwise modified by the trial court or by stipulation of counsel to suit the needs of a particular case.

1. Scheduling summary jury trials. Summary jury trials will be placed on the court calendar for trial at the earliest possible date or referred to a Judicial Hearing Officer or Summary Jury Trial Part.

2. Attendance of Parties. Individual parties and an officer or other responsible representative of a corporate party shall attend the non binding Summary Jury Trial, unless excused by the Court. Claims adjusters for insurance carriers are also encouraged to attend non binding trials.

3. Non-Binding Trials. Non binding Summary Jury Trials are for settlement purposes only. Nothing done or omitted by counsel, with reference to a non-binding Summary Jury Trial, shall be binding on counsel or the parties or shall constitute a waiver at any future regular trial of the case. There will be no

official record of testimony by court reporters or tape records, nor will a transcript of a trial be produced. Oral statements made by counsel or testimony by parties at the non binding trial, may not be referred to or quoted to impeach the parties at the regular trial.

4. Pre-trial submissions. No later than five business days prior to the jury selection date, all parties shall submit to the Court a list of witnesses that may be called, or mentioned, during trial, for use during jury selection; jury charge requests; and proposed verdict sheets. Charge requests that deviate from the standard Pattern Jury Instructions, as well as standard verdict sheets, should be submitted on computer disk, preferably in WordPerfect format.

5. Jury Selection. Summary juries shall consist of no less than six jurors unless the parties stipulate to fewer jurors. The jury will be selected either by counsel, under strict time limitations, or, if the parties so stipulate, by the Court alone, in which case counsel need not be present at jury selection. If counsels are not present, responses by prospective jurors remotely suggesting a bias will likely result in the prospective juror being excused. There will be no concerted effort by the court to rehabilitate jurors.

6. Peremptory Challenges: The Court may allow up to two peremptory challenges by each party.

7. Presentation of the Case by Counsel. Each side shall be entitled to a ten minute opening and closing and one hour for presentation of its case. The Court may allot more time if counsel presents a compelling reason to do so.
Unless the Judge directs otherwise, the court clerk should keep track of the time and remind counsel of allotted time at appropriate intervals.

    a. Counsel may quote from depositions and may use exhibits, affidavits, power points and video tapes. Counsel should not refer to evidence which would not be admissible at trial.

    b. No more than two witnesses for each side may be called for direct and cross- examination.

    c. Time spent by counsel in direct and cross-examination of witnesses will count against their respective one hour allotted times.

    d. The plaintiff shall proceed first and may be permitted a ten minute rebuttal, with permission of the court. If the plaintiff has exhausted the one hour presentation time, the court may allow plaintiff to use part, or all, of the rebuttal time for cross-examination and allow

defense the same privilege.

e. Jurors will be permitted to ask questions of the attorneys. The questions must be presented in writing to the court for approval. If the court approves the question, attorneys will be given two minutes to respond.

7. Jury Verdict. Five out of six jurors must agree on the verdict. If counsel stipulate, the court may allow alternate jurors to deliberate with or without the right to vote on the verdict. The Court shall give the jury a written copy of the jury charge for use during deliberations.

8. Length of Deliberations. If the jury does not reach a verdict within a reasonable time, after consultation with counsel, the Court may consider polling the jurors in an attempt to assist the jury to reach a verdict.

9. Oral Questions to the Summary Jury. After the verdict has been rendered, the Court may propound questions in open court to the jury. The court may allow counsel to present questions to the court or jury.

10. Settlement Conference. A settlement conference shall be scheduled within thirty days of the non binding Summary Jury Trial. Representatives of corporate parties or claims adjusters with authority to settle the case are required to personally attend the settlement conference or be available by telephone the day of the conference.

11. Regular Trial Date Unaffected. Submission of a case to a non-binding Summary Jury Trial shall in no way affect the scheduling of the case for regular trial.

12. Existing Offer and Demand. The parties may stipulate that the pre-trial offer and demand remain unaltered through the Summary Jury Trial and the post trial settlement conference. Either party may agree to accept the last settlement proposal of the opponent at any time before the non binding summary jury trial verdict is announced.

13. Non-release of Summary Verdict to the Media. The non-binding Summary Jury Trial is an extension of the settlement conference and as such, the verdict shall not be released to the public or news media.

14. Stipulation: If the parties agree to a binding summary jury trial, a written stipulation shall be signed by the parties and their attorneys reciting any high/low parameters and the agreement to the limited rights of appeal provided in these rules. To insure secrecy, the binding agreement shall be sealed by counsel and marked by the court reporter as an exhibit. It shall

not be unsealed until after the verdict.

15. Record: A binding summary jury trial will be recorded either by a court reporter, the use of a tape recorder in the courtroom, or a combination of the two as the presiding judge prefers. If the trial is non-binding, the Court will dispense with a formal record.

16. Infant Plaintiff: In a binding SJT involving an infant, the Court must approve any high/low parameters prior to trial

17. Right of appeal. Unless the parties stipulate on the record to waive the right to appeal and/or move against the verdict, the right to move to set aside the verdict, or to appeal, in a summary jury trial is limited to instances in which the rights of a party were significantly prejudiced by 1) corruption, fraud or misconduct in procuring the verdict; 2) a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the verdict; 3) the verdict being imperfect in a matter of form, not affecting the merits of the controversy; or 4) an error of law that occurred during the course of the trial. All other rights of appeal are waived..

18. These rules may be modified by the Court on a case by case basis to suit the circumstances. The guidelines provided in the rules govern absent any other agreement or court order.

PROPOSED ORDER OF THE COURT

It is hereby ORDERED, that a Summary Jury Trial of the Issues of liability and damages is hereby scheduled for jury selection on _____, at 9:00 A.M., before this Court, and it is further

ORDERED, that unless the Court directs otherwise, the Court and Counsel will apply and follow the Chautauqua County Court Summary Jury Trial Program Rules in the conduct of the Summary Jury Trial.

DATED:

So Ordered.

_____

Supreme Court Justice

PROPOSED STIPULATION OF COUNSEL AND PARTIES

STATE OF NEW YORK:
SUPREME COURT: COUNTY OF CHAUTAUQUA

_____

Plaintiff,
STIPULATION OF HIGH/LOW BINDING

SUMMARY JURY TRIAL

Index No.

Defendant.

_____

It is hereby stipulated and agreed that this action shall be resolved by submission to a summary jury trial and that all parties shall be bound by the summary jury trial verdict [except that if the verdict is more than $, the plaintiff shall recover $, and if the verdict is less than $, the plaintiff shall recover $].

It is also stipulated and agreed that the right to move to set aside the verdict, or to appeal, is limited to instances in which the rights of a party were significantly prejudiced by 1) corruption, fraud or misconduct in procuring the verdict; 2) a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the verdict or judgment; 3) the verdict or judgment being imperfect in a matter of form, not affecting the merits of the controversy; or 4) an error of law that occurred during the course of the trial. All other rights of appeal are waived.

Plaintiff(s): Defendant(s):

Counsel for Plaintiff(s): Counsel for Defendant(s):

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Judge ☐

Appendix F: Judge Questionnaire

THE JURY TRIAL PROJECT
JUDGE QUESTIONNAIRE

Questions about specific innovative procedures are included in shaded boxes. If your answer to a question in a shaded box is NO, skip to the next shaded box.

1. Date: Month _____ Day _____ Year _____

2. County: _____

3. Type of case: ❒ Criminal ❒Civil

4. How long was this trial? ❒ 1- 2 days ❒ 3 - 4 days ❒ 5 - 7 days ❒ More than 7 days

5. In most cases there is some documentary evidence. How many documents were in evidence in this case?

   ❒ A lot ❒ Some ❒ A few documents ❒ None

6. If this was a criminal case:

   6a. Do you include a short summary statement about the case in your introductory remarks to the panel before voir dire questions are asked?

   ❒ Yes ❒No ❒ Doesn't apply - only try civil cases

   6b. Do you normally read the indictment to the jury panel before voir dire questions are asked?

   ❒ Yes ❒No ❒ Doesn't apply - only try civil cases

7. In this trial did you allow each attorney to make short statement describing the case before any voir dire questions were asked? (This is sometimes called a "mini-opening".)

   ❒ Yes **GO TO 7A** ❒ No - **SKIP TO 8** - NEXT BOX ❒ Does not Apply **SKIP TO 8**

7A. What time limit, if any, did you impose on counsel for these statements?

   ❒ 3 Minutes ❒ 3 - 5 minutes ❒ 5 Minutes ❒ 5 - 10 Minutes ❒ Other

7B. In your opinion, how well-presented were the attorneys' summary statements?

   Not at well 1 2 3 4 5 6 7 Very well

7C. How complete a picture of the case would you say the attorneys gave the jury in these early statements?

Not at all complete 1 2 3 4 5 6 7 Very complete

7D. How helpful would you say these short summary statements were to jurors':

	Not at all helpful						Very helpful
(1) candor during voir dire?	1	2	3	4	5	6	7
(2) willingness to serve?	1	2	3	4	5	6	7
(3) understanding of why they were being questioned	1	2	3	4	5	6	7

7E. In your opinion, what effect did these short summary statements have on selecting a fair jury in this case?

None 1 2 3 4 5 6 7 Positive

7F. Were any logistical, implementation or other problems encountered with allowing attorneys to make short summary statements before voir dire?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

8. During voir dire in this trial **were any jurors questioned individually and outside the hearing of other jurors?**

❒ Yes - **GO TO 8A** ❒ No - **SKIP TO 9** ❒ Doesn't Apply - **Not Present for Voir Dire SKIP TO 9**

8A. Was an *Antommarchi* waiver obtained? ❒ Yes ❒ No ❒ Does not apply - civil case

8B. Which jurors were questioned out of the hearing of others?

❒ Only those who requested an opportunity to answer questions in private
❒ Only those (or some of those) who the attorneys asked to question in private
❒ Only those who gave answers to certain questions leading me to believe that individual questioning would be appropriate
❒ All jurors on the panel answered some questions in private
❒ Other, Explain:_____

8C. Where was the questioning outside of the hearing of other jurors conducted?

❒ At sidebar - while other jurors remained in the courtroom
❒ In the courtroom - while other jurors waited outside the courtroom
❒ In the jury room
❒ In the robing room
❒ Other. Explain._____

8D In your opinion what effect did individual questioning outside of the hearing of other jurors have on juror candor?

❒ Increased juror candor. ❒ Had no effect on juror candor. ❒ Decreased juror candor.

8E. What effect do you think the individual questioning of jurors outside of the hearing of other jurors had on seating a fair jury in this trial?

None 1 2 3 4 5 6 7 Positive

8F. Were any logistical, implementation or other problems encountered with allowing private questioning of jurors?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

9. After the jury was seated but before the jury heard any evidence did you give **preliminary instructions** to the jury that included explicit discussion of the elements of the claims or substantive charges?

❒ Yes - **GO TO 9A** ❒ No - **SKIP TO 10**

9A. Did you consult with counsel about the content of the preliminary instructions?

❒ Yes ❒ No

9B. How helpful do you think the preliminary instructions were to jurors' understanding of the law?

❒ No opinion

Not at all helpful 1 2 3 4 5 6 7 Very helpful

9C. What effect do you think the preliminary instructions had on the fairness of the trial?

None 1 2 3 4 5 6 7 Positive

9D. Were any logistical, implementation or other problems encountered in developing or giving these preliminary instructions?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

10. In this trial, **were jurors permitted to take notes**?

❒ Yes - **GO TO 10A** ❒ No - **SKIP TO 11**

10A. How was note taking made available to the jury?

❒ Jurors were encouraged to take notes
❒ Jurors were told that they were permitted to take notes
❒ Without being told they could take notes, one or more jurors started taking notes or asked if they could do so.
❒ The standard jury instruction on note taking was given to the jury before presentation of evidence

10B. Were jurors permitted to take notes during:

(1) opening statement? ❒ Yes ❒ No
(2) closing agreement? ❒ Yes ❒ No
(3) Judge's charge? ❒ Yes ❒ No

10C. Were jurors permitted to bring their notes into deliberations? ❒ Yes ❒ No

10D. Did you seek agreement of counsel before permitting jurors to take notes?

❒ Yes ❒ No

10E. How helpful do you think the opportunity to take notes was to the jury in :

	Not at all helpful						Very helpful
(1)paying attention	1	2	3	4	5	6	7
(2) understanding the evidence.	1	2	3	4	5	6	7
(3) understanding the law.	1	2	3	4	5	6	7
(4) reaching a decision.	1	2	3	4	5	6	7

10F. What effect do you think the opportunity for jurors to take notes had on the fairness of the trial?

None 1 2 3 4 5 6 7 Positive

10G. Were any logistical, implementation or other problems encountered with allowing jurors to take notes?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

11. Was the jury given **notebooks or binders** with trial documents or other information about the case?

❒ Yes - **GO TO 11A** ❒ No - **SKIP TO 12**

11A. When was counsel informed they would be permitted to compile a notebook for the jury?

❒ More than a month before trial

❒ At the final pretrial conference

❒ On the eve of trial

❒ On the first day of trial

❒ Other. Explain _____

11B. How difficult or easy was it to reach agreement between court and counsel about the content of the notebook or binder?

Very difficult 1 2 3 4 5 6 7 Very easy

11C. How helpful would you say the notebook or binder was for jurors' ability to

	Not at all helpful						Very helpful
(1) understand the case?	1	2	3	4	5	6	7
(2) remember the witnesses?	1	2	3	4	5	6	7
(3) remember the evidence?	1	2	3	4	5	6	7

11D. What effect, if any, do you think the availability of notebooks or binders had on the fairness of this trial?

None 1 2 3 4 5 6 7 Positive effect

11E. Were any logistical, implementation or other problems encountered with compiling, duplicating or distributing the notebook?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

12. Were jurors permitted to **submit written questions to witnesses** during the trial?

❒ Yes - **GO TO 12A** ❒ No - **SKIP TO 13**

12A. How was the opportunity to submit questions made available to the jury? (Check all that apply.)

❒ Jurors were encouraged to submit questions
❒ Jurors were told that they were permitted to submit questions
❒ Without being told they could ask questions, one or more jurors raised their hands to ask questions
❒ JTP recommended jury instruction A was used
❒ JTP recommended jury instruction B was used
❒ Used my own instruction (attach copy, if available)

12B. Did you seek counsel's agreement before allowing jurors to submit questions? ❒ Yes ❒ No

12C. Were any improper questions submitted by jurors? ❒ Yes ❒ No

12D. How helpful would you say the opportunity to submit questions was to jurors in:

	Not at all helpful						Very helpful
(1) paying attention?	1	2	3	4	5	6	7
(2) understanding the evidence in this trial?	1	2	3	4	5	6	7
(3) reaching a decision in this trial?	1	2	3	4	5	6	7

12E. Do you disagree or agree that jurors' questions, whether or not they were actually asked and answered

	Disagree						Agree
(1) Provided information about jurors' comprehension of case issues?	1	2	3	4	5	6	7
(2) Gave insight into how well the jurors understood the evidence?	1	2	3	4	5	6	7
(3) Alerted the court or counsel to missing information desired by the jury?	1	2	3	4	5	6	7

12F. Do you disagree or agree that answers to questions posed by jurors:

(4) Clarified a witness's testimony?	1	2	3	4	5	6	7
(5) Provided relevant information?	1	2	3	4	5	6	7

12G. What effect do you think the opportunity to ask questions had on the fairness of this trial?

None 1 2 3 4 5 6 7 Positive

12H. Were any logistical, implementation or other problems encountered with allowing juror questions?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

IF THIS WAS A CIVIL TRIAL ANSWER QUESTION 13
IF THIS WAS A CRIMINAL TRIAL SKIP TO QUESTION 14

13. Was counsel permitted to make short statements about evidence during the course of the trial?

❒ Yes - **GO TO 13A** ❒ No - **SKIP TO 14**

13A. When was counsel informed they would be permitted to make these statements?

❒ More than a month before trial

❒ At the final pretrial conference

❒ On the eve of trial

❒ On the first day of trial

13B. How many summary statements was counsel permitted to make? _____

13C. At what point(s) in the trial were the statement(s) made? (Check all that apply.)

❒ After plaintiff's testimony

❒ After defendant's testimony

❒ After expert testimony

❒ Other, please explain_____

13D. How helpful would you say these short statements were to jurors' ability to

	Not at all helpful						Very helpful
(1) understand each side of the case?	1	2	3	4	5	6	7
(2) remember the witnesses?	1	2	3	4	5	6	7
(3) remember the evidence?	1	2	3	4	5	6	7

13E. What effect, if any, do you think these short statements had on the fairness of this trial?

None 1 2 3 4 5 6 7 Positive

13F. Were any logistical, implementation or other problems encountered with allowing counsel to make these short statements?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

14. Was the jury given a **written copy or audiotape of the judge's final instructions on the law**?

❒ Yes - written copy or copies of the full charge given to the jury - CONTINUE TO 14A

❒ Yes - audiotape of the full charge given to the jury - CONTINUE TO 14A

❒ No - no written copy or tape of instructions provided to jury - SKIP TO QUESTION 15

❒ No - written instructions provided to jury only on limited issue(s)about which the jury asked question(s) - CONTINUE TO 14A

14A. Did you seek agreement of counsel before providing jurors with a written copy or audiotape of the final instructions?

❒ Yes ❒ No

14B. How helpful would you say the written copy or audiotape of the judge's final was instructions to the jury in:

	Not at all helpful						Very helpful
(1) understanding the law in this trial.	1	2	3	4	5	6	7
(2) reaching a decision in this trial.	1	2	3	4	5	6	7

14C. What effect do you think the written copy or audiotape of the instructions had on the fairness of this trial?

None 1 2 3 4 5 6 7 Positive

14D. Were any logistical, implementation or other problems encountered developing or giving the written copy or audiotape of the instructions to the jurors?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

ALL JUDGES - ALL TRIALS - PLEASE ANSWER THESE QUESTIONS

15. Overall, in your opinion, how complex was this case?

Not at all complex	1	2	3	4	5	6	7	Very complex

16. Overall, in your opinion, how clearly was the evidence presented in this trial?

Not at all clearly	1	2	3	4	5	6	7	Very clearly

17. How difficult or easy do you think it was for jurors to understand the evidence in this trial?

Very difficult	1	2	3	4	5	6	7	Very easy

18. How difficult or easy do you think it was for jurors to understand the law in this trial?

Very difficult	1	2	3	4	5	6	7	Very easy

19. Did you have any discussion with the jurors after their verdict was rendered and their service was complete?

❒ Yes ❒ No

20. Please indicate trial outcome:
    - ❒ Settled, pled, mistrial before verdict
    - ❒ Verdict for plaintiff/prosecution
    - ❒ Verdict for defense
    - ❒ Split verdict
    - ❒ Hung jury on all counts/claims
    - ❒ Hung jury on some counts/claims

        If verdict was reached on some counts, please indicate:
        - ❒ For plaintiff/prosecution
        - ❒ For defense
        - ❒ Split verdict

21. Please use the space below to describe any logistical, implementation or other problems encountered in using any of the jury trial project practices and share any comments from juries. Please be sure to explain how any problems were handled or solved and to add any comments you have about the Jury Trial Project or jury trial innovations. Include discussion of any innovative practices you used that were not included in the recommendations list. Feel free to use the back of this page or attach extra sheets if necessary.

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Appendix G: Attorney Questionnaire

THE JURY TRIAL PROJECT
ATTORNEY QUESTIONNAIRE

INSTRUCTIONS

The judge presiding over this trial is participating in The Jury Trial Project, a statewide initiative testing innovative trial practices. For every trial in the program the judge, attorneys and jurors are asked to fill out a questionnaire commenting upon the trial and the various practices that were used. Whether or not an innovative practice was used in your trial, we would like to know your opinion of practices that are included in the project. Please take the time to complete this questionnaire. Your answers should relate to this trial. Please begin completing this questionnaire while the jury is deliberating.

Throughout this questionnaire you are asked to circle a number to indicate your answer. For example, many of the questions include the following response categories:

Very difficult 1 2 3 4 5 6 7 Very easy

To answer "very difficult" you would circle 1 or 2. To answer "very easy" you would circle 6 or 7.

Thank you for taking the time to complete this questionnaire. Your participation is completely voluntary and your answers are completely anonymous. No data reported in this project will identify specific cases, parties, judges, attorneys or jurors. By participating in this study you are helping to improve the quality of jury trials.

1. Date: Month _____ Day _____ Year _____

2. County_____ _____

3. Type of case: ❒ Criminal ❒ Civil

3a. Did you represent? ❒ Plaintiff/Prosecutor ❒Defense

4. How long was this trial? ❒ 1- 2 days ❒ 3 - 4 days ❒ 5 - 7 days ❒ More than 7 days

5. In most cases there is some documentary evidence. How many documents were in evidence in this case?

   ❒ A lot ❒ Some ❒ A few documents ❒ None

6. Is your trial practice primarily in:

   ❒ Criminal cases ❒ Civil cases ❒ Both

Jury Trial Procedures

The next part of the questionnaire is about various trial procedures. Each shaded box concerns one procedure. If you answer "yes" to the last question in the box continue and answer questions immediately following the box. If you answer "no" to the last question in a shaded box, skip to the next box.

7. What is your opinion about having the opportunity to make a **short statement describing your case to the entire panel of jurors** before the attorneys ask any voir dire questions? (This is sometimes called a "mini-opening".)

❒ Check here if no opinion

Disapprove 1 2 3 4 5 6 7 Approve

7A. What are the main reasons for your opinion? _____

_____

_____

7B. Would you like to have an opportunity to make a short statement describing your case to the entire panel of jurors before asking voir dire questions?

❒ Yes ❒ No

7C. In this trial did each counsel make a short statement describing his/her case before any voir dire questions were asked?

❒ Yes - **GO TO 7D** ❒ No - **SKIP TO 8**

7D. Did you have enough time to prepare the statement? ☐ Yes ☐ No

7E. How complete a picture of your case do you think you gave the jury in this early statement?

Not at all complete 1 2 3 4 5 6 7 Very complete

7F. How complete a picture of the other side's case would you say your opponent gave the jury in this early statement?

Not very complete 1 2 3 4 5 6 7 Very complete

7G. How helpful do you think these short summary statements were to jurors':

	Not at all helpful						Very helpful
(1) candor during voir dire?	1	2	3	4	5	6	7
(2) willingness to serve?	1	2	3	4	5	6	7
(3) understanding of why they were being questioned?	1	2	3	4	5	6	7

7H. What effect do you think these short summary statements had on seating a fair and impartial jury in this trial?

None 1 2 3 4 5 6 7 Positive

7I. Were there any logistical, implementation or other problems encountered in connection with the short summary statements?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

8. What is your opinion of the practice of including individual questioning of jurors **outside of the hearing of other jurors** in every jury selection?

❒ Check here if no opinion

Disapprove 1 2 3 4 5 6 7 Approve

8A. What are the main reasons for your opinion? _____

_____

_____

8B. **In this trial, were any jurors questioned outside of the hearing of other jurors?**

❒ Yes **GO TO 8C** ❒ No **SKIP TO 9**

IF ANY JURORS WERE QUESTIONED OUTSIDE THE HEARING OF OTHER JURORS IN THIS TRIAL:

8C. Which jurors were questioned out of the hearing of others? (Check all that apply.)

❒ Only those who requested an opportunity to answer questions in private
❒ Only those (or some of those) who the attorneys asked to question in private
❒ Only those who gave answers to certain questions leading the judge to believe that individual questioning would be appropriate
❒ All jurors on the panel answered some questions in private
❒ Other, Explain:_____

8D. In your opinion did the individual questioning:

❒ increase juror candor? ❒ have no effect on juror candor? ❒ decrease juror candor?

8E. In your opinion did the individual questioning improve your ability to intelligently exercise challenges, have no effect on your ability to intelligently exercise challenges or decrease your ability to intelligently exercise challenges?

❒ improved ❒ had no effect ❒ decreased

8F. What effect do you think the individualized questioning **outside the hearing** of others had on seating a fair and impartial jury in this trial?

None 1 2 3 4 5 6 7 Positive

8G. Were there any logical, implementation or other problems encountered with the individual questioning of jurors?

❒ Yes ❒ No If yes, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED

9. What is your opinion of the practice of giving preliminary instructions on the law that include the elements of the claim(s) or charge(s) after the jury is selected but before jurors hear evidence?

❒ Check here if no opinion

Disapprove 1 2 3 4 5 6 7 Approve

9A. What are the main reasons for your opinion?_____

_____

_____

9B. Did the judge's **preliminary instructions** to the jury in this trial include explicit discussion of the elements of the claims or charges?

❒ Yes **GO TO 9C** ❒ No **SKIP TO 10**

IF PRELIMINARY INSTRUCTIONS INCLUDED ELEMENTS OF THE CLAIM(S) or CHARGE(S) :

9C. How helpful do you think the preliminary instructions were to:

	Not at all helpful						Very helpful	No Opinion
(1) jurors' understanding of the law?	1	2	3	4	5	6	7	❒
(2) your trial presentation?	1	2	3	4	5	6	7	❒

9D. What effect do you think the preliminary instructions had on the fairness of this trial?

None 1 2 3 4 5 6 7 Positive

9E. Were any logistical, implementation or other problems encountered in developing or giving these preliminary instructions?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE OF THIS QUESTIONNAIRE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

10. What is your opinion about juror note-taking?

❒ Check here if no opinion

Disapprove 1 2 3 4 5 6 7 Approve

10A. What are the main reasons for your opinion? _____

_____

_____

10B. In this trial, **were jurors permitted to take notes**?

❒ Yes **GO TO 10C** ❒ No **SKIP TO 11**

IF NOTE TAKING WAS PERMITTED:

10C. Did you have any hesitation about allowing jurors to take notes in this trial?

❒ Yes ❒ No

10C(1) If yes: Did your opinion about juror notetaking change by the end of the trial?

❒ Yes ❒ No

10C(2) If yes: Please explain: _____

_____

10D. In your opinion, how helpful do you think the opportunity to take notes was to the jurors in :

	Not at all helpful						Very helpful
(1) paying attention?	1	2	3	4	5	6	7
(2) understanding the evidence?	1	2	3	4	5	6	7
(3) understanding the law?	1	2	3	4	5	6	7
(4) reaching a decision?	1	2	3	4	5	6	7

10E. What effect do you think the opportunity for jurors to take notes had on the fairness of this trial?

None 1 2 3 4 5 6 7 Positive

10F. Were any logistical, implementation or other problems encountered in connection with juror note-taking?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

11. What is your opinion about giving jurors notebooks or binders containing substantive information?

❒ Check here if no opinion

Disapprove 1 2 3 4 5 6 7 Approve

11A What are the main reasons for your opinion? _____

_____

11B In this trial, were the jurors supplied with **notebooks or binders** with trial documents or other information about the case?

❒ Yes **GO TO 11C** ❒ No **SKIP TO 12**

IF JURORS WERE SUPPLIED WITH NOTEBOOKS OR BINDERS:

11C. How difficult or easy was it to reach agreement between counsel about the content of the notebook or binder?

Very difficult 1 2 3 4 5 6 7 Very easy

11D. How helpful do you think the notebook or binder was for jurors' ability to:

	Not at all helpful						Very Helpful
(1) understand the case?	1	2	3	4	5	6	7
(2) remember the witnesses?	1	2	3	4	5	6	7
(3) remember the evidence?	1	2	3	4	5	6	7

11E. What effect do you think the availability of notebooks or binders had on the fairness of this trial?

None 1 2 3 4 5 6 7 Positive

11F. Would you recommend the use of trial notebooks or binders for jurors in the future?

❒ Yes ❒ No

Please explain: _____

_____

11G. Were there any logistical, implementation or other problems encountered in connection with the juror notebooks?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

12. What is your opinion about permitting jurors to submit written questions to witnesses during trial?

❒ Check here if no opinion

Disapprove 1 2 3 4 5 6 7 Approve

12A. What are the main reasons for your opinion? _____

_____

_____

12B. Were jurors permitted to **submit written questions to witnesses** during this trial?

❒ Yes **GO TO 13C** ❒ No **SKIP TO 8 14**

IF JURORS WERE PERMITTED TO SUBMIT WRITTEN QUESTIONS TO WITNESSES:

12C. In your opinion, did jurors submit any improper questions in this trial? ❒ Yes ❒ No

12D. How helpful would you say the opportunity to submit questions was to jurors in:

	Not at all helpful						Very helpful
(1) paying attention?	1	2	3	4	5	6	7
(2) understanding the evidence?	1	2	3	4	5	6	7
(3) reaching a decision?	1	2	3	4	5	6	7

12E. Do you disagree or agree that jurors' questions, whether or not they were actually asked and answered:

	Disagree						Agree
(1) Provided information about juror comprehension of case issue	1	2	3	4	5	6	7
(2) Gave insight into how well jurors understood the evidence	1	2	3	4	5	6	7
(3) Alerted the court or counsel to missing information the jury desired	1	2	3	4	5	6	7

12F. Do you disagree or agree that answers:

(1) Clarified a witness's testimony	1	2	3	4	5	6	7
(2) Provided relevant information?	1	2	3	4	5	6	7

12G. At the beginning of this trial, did you have any hesitation about permitting jurors to submit written questions?

❒ Yes ❒ No If yes: Did your opinion change by the end of the trial?

❒ Yes ❒ No

Explain: _____

_____

12H. What effect do you think the opportunity for jurors to submit questions had on the fairness of this trial?

None 1 2 3 4 5 6 7 Positive

12I. Were any logistical, implementation or other problems encountered in connection with juror questions?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

13. Have you heard of the practice where counsel in civil cases are given an opportunity to make short statements about evidence during the trial?

❒ Yes ❒ No

13A. What is your opinion about the practice of allowing counsel in civil cases to make short statements about evidence during the trial?

❒ Check here if no opinion

Disapprove 1 2 3 4 5 6 7 Approve

13B. What are the main reasons for your opinion?_____

_____

13C. Was counsel permitted to make short statements about evidence during the course of this trial?

❒ Yes ***GO TO 13D*** ❒ No ***SKIP TO 14***

IF COUNSEL WAS PERMITTED TO GIVE SHORT SUMMARY STATEMENTS DURING THE TRIAL:

13D. Did you have enough time to prepare the(se) short statement(s)? ❒ Yes ❒ No

13E. How helpful would you say these short statements were to jurors' ability to

	Not at all helpful						Very helpful
(1) understand your case?	1	2	3	4	5	6	7
(2) remember the witnesses?	1	2	3	4	5	6	7
(3) remember the evidence?	1	2	3	4	5	6	7

13F. At the beginning of this trial, did you have any hesitation about making short statements during trial?

❒ Yes ❒ No If yes, Did your opinion change by the end of the trial?

❒ Yes ❒ No Explain:_____

_____

13G. What effect do you think the short statements had on the fairness of this trial?

None 1 2 3 4 5 6 7 Positive

13H. Were any logistical, implementation or other problems encountered in implementing the use of summary statements by counsel during trial?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE OF THIS QUESTIONNAIRE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

14. What is your opinion about providing a written copy of the judge's final instructions to the deliberating jury?

❒ Check here if no opinion

Disapprove 1 2 3 4 5 6 7 Approve

14A. What is your opinion about providing an audiotape of the judge's final instructions to the deliberating jury?

❒ Check here if no opinion

Disapprove 1 2 3 4 5 6 7 Approve

14B. What are the main reasons for your opinions about providing written or audiotaped instructions to jurors?

_____

_____

14C. Was the jury given a **written copy or audiotape of the judge's final instructions on the law**?

❒ Written copy or copies of the full charge given to the jury - GO TO 14D

❒ Audiotape of the full charge given to the jury - GO TO 14D

❒ Selected instructions provided in writing in response to jury questions - GO TO 14D

❒ The jury was not given any written copy or audiotape of instructions - SKIP TO 15

IF A WRITTEN COPY OR AUDIOTAPE OF THE JUDGE'S CHARGE OR ANY PORTION OF THE CHARGE WAS GIVEN TO THE JURY:

14D. How helpful would you say the written copy or audiotape of the judge's final instructions was to the jury in:

	Not at all Helpful						Very Helpful
(1) understanding the law in this trial?	1	2	3	4	5	6	7
(2) reaching a decision in this trial?	1	2	3	4	5	6	7

14E. At the beginning of this trial, did you have any hesitation about providing jurors with a written copy or audiotape of the judges charge?

❒ Yes ❒ No

14 F. If yes: Did your opinion change by the end of the trial?

❒ Yes ❒ No

Explain:_____

_____

14G. What effect do you think the written copy or audiotape of the judge's final instructions had on the fairness of this trial?

None 1 2 3 4 5 6 7 Positive

14H. Were any logistical, implementation or other problems encountered in connection with developing or giving the written copy or audiotape of the instructions to the jurors?

❒ Yes ❒ No IF YES, PLEASE USE THE LAST PAGE TO EXPLAIN THE PROBLEMS AND HOW THEY WERE SOLVED.

OVERVIEW OF THIS TRIAL

15. Overall, in your opinion, how complex was this case?

Not at all complex 1 2 3 4 5 6 7 Very complex

16. Overall, how clearly was the evidence presented in this trial?

Not at all clearly 1 2 3 4 5 6 7 Very clearly

17. Overall, how difficult or easy do you think it was for jurors to understand the evidence in this trial?

Very difficult 1 2 3 4 5 6 7 Very easy

18. How difficult or easy do you think it was for jurors to understand the law in this trial?

Very difficult 1 2 3 4 5 6 7 Very easy

BACKGROUND INFORMATION

19. For how many years have you been a member of the bar? ☐ 1 - 5 ☐ 6 - 10 ☐ 11 - 15 ☐ 16 - 20 ☐ More than 20

20. About how many criminal jury trials have you tried: ☐ None ☐ Up to 25 ☐ 26 - 50 ☐ 51 - 75 ☐ 76 - 100 ☐ More than 100

21. About how many civil jury trials have you tried: ☐ None ☐ Up to 25 ☐ 26 - 50 ☐ 51 - 75 ☐ 76 - 100 ☐ More than 100

22. Have you practiced in Federal court? ☐ Yes ☐ No

23. Have you practiced in any other state courts? ☐ Yes ☐ No

24. To which professional bar associations do you belong?

❒ ABA ❒ ATLA ❒ NACDL ❒ NLADA ❒ NONE
❒ NYSBA ❒ NYSTLA ❒ NYACDL ❒ NYSDA ❒ OTHER. Explain_____

25. This is the end of this questionnaire. Please use the space below and the back of this page to describe any problems encountered implementing or using jury trial innovations. Please give any comments about this questionnaire or the trial. Don't hesitate to use the back of this page if you need more space.

Appendix H: Juror Questionnaire

JUROR QUESTIONNAIRE

The jurors, attorneys and judge in this trial are being asked to complete questionnaires as part of a statewide study of jury trials. Please take the time to complete this questionnaire. It will probably take about 10 minutes. Your participation is completely voluntary and your answers are completely anonymous. Do not write your name or other identifying information on this questionnaire. Throughout the questionnaire you are asked to circle a number to indicate your answer. For example, some questions include the following response categories:

Not at all well 1 2 3 4 5 6 7 Very well

If your answer to the question is "Not at all well" you circle 1 or 2. If your answer is "Very well" you circle 6 or 7.
Thank you for taking the time to complete this questionnaire.

INTRODUCTION

1. Date completing this questionnaire: Month_____ Day_____ Year

2. County_____ Please fill in the bubble below that is next to your county.

3. Type of case: ❒ Criminal ❒ Civil

4. How long was this trial? ❒ 1- 2 days ❒ 3 - 4 days ❒ 5 - 7 days ❒ More than 7 days

5. In most trials there is some documentary evidence. How many documents were there in this trial?

   ❒ A lot ❒ Some ❒ A few ❒ None

OVERVIEW OF THE TRIAL

6. Overall, in your opinion, how complex was this case?

   Not at all complex 1 2 3 4 5 6 7 Very complex

7. What was your overall reaction to jury service?

   Very unfavorable 1 2 3 4 5 6 7 Very favorable

TRIAL PROCEDURES

8. Think back to the selection of the jury in this case. Before any questions were asked of the jurors, the case was **briefly described.**

8A. Was the case briefly described by:

❒ Judge ❒ Attorneys ❒ Judge and Attorneys ❒ Don't recall

8B. How well do you remember the brief description(s) of the case that you heard during the jury selection?

Not at all well 1 2 3 4 5 6 7 Very well

8C. How helpful would you say these brief descriptions were to your understanding of :

	Not at all helpful					Very helpful		Don't recall well enough to comment
(1) what was expected of you as a juror?	1	2	3	4	5	6	7	❒
(2) what the trial would be about?	1	2	3	4	5	6	7	❒
(3) why the attorneys were asking questions during jury selection?	1	2	3	4	5	6	7	❒

9. Still thinking about the selection of the jury, think about, **when questions were asked of the jurors.**

9A. Were questions asked by:

❒ Judge ❒ Attorneys ❒ Judge and Attorneys ❒ Don't recall

9B. Did you answer any questions outside of the hearing of other jurors? ❒ Yes ❒ No

9C. IF NO TO 9B:
Was there anything you would have preferred to discuss in private? ❒ Yes ❒ No

9D. Were questions asked of other jurors that you wished had been asked in private?

❒ Yes❒ No

10. After the jury was selected, but before you heard the attorneys' opening statements, the judge explained aspects of the law.

10A How well do you remember the explanation of the law that the judge gave at the beginning of the trial?

Not at all well 1 2 3 4 5 6 7 Very well

10B How helpful would you say this early explanation of the law was to your understanding of:

	Not helpful					Very helpful		Don't recall well enough to comment
(1) what was expected of you as a juror?	1	2	3	4	5	6	7	❒
(2) what the plaintiff(s) or the prosecution had to prove to the jury?	1	2	3	4	5	6	7	❒

10C. ***IF THE LAW WAS NOT EXPLAINED AT THE BEGINNING OF THE TRIAL:*** Do you think it would have been helpful to you if the judge had explained the law at the beginning of the trial?

❒ Yes ❒ No

11. In this trial, **were jurors permitted to take notes**?

❒ Yes **ANSWER QUESTIONS 11A - 11B IN SHADED BOX BELOW**

❒ No **SKIP TO UNSHADED BOX BELOW AND ANSWER QUESTIONS 11C -11D**

NOTE TAKING PERMITTED. ANSWER THESE QUESTIONS IF YOU ANSWERED YES TO QUESTION 11:

11A. Did you take notes? ❒ Yes **CONTINUE TO QUESTION 11B**

❒ No **SKIP TO QUESTION 12 NEXT PAGE**

IF YES TO QUESTION 11A:

11B. How helpful would you say the opportunity to take notes was to you in:

	Not at all helpful						Very helpful
(1) recalling the evidence?	1	2	3	4	5	6	7
(2) understanding the law?	1	2	3	4	5	6	7
(3) reaching a decision?	1	2	3	4	5	6	7

SKIP TO QUESTION 12 - NEXT PAGE

NOTE-TAKING *NOT* PERMITTED. ANSWER THESE QUESTIONS IF YOU ANSWERED NO TO QUESTION 11.

11C. Would you have taken notes if note-taking was permitted?

❒ Yes ❒ No

11D. If you sit on a jury in the future, would you like to take notes during the trial?

❒ Yes ❒ No

CONTINUE TO QUESTION 12 - NEXT PAGE

12. Was the jury given **notebooks or binders** containing trial documents or other information about the case?

❒ Yes **ANSWER QUESTIONS 12A - 12B IN SHADED BOX BELOW**

❒ No **SKIP TO UNSHADED BOX AND ANSWER QUESTION 12C**

THE JURY WAS GIVEN NOTEBOOKS OR BINDERS WITH TRIAL DOCUMENTS OR OTHER INFORMATION. ANSWER THESE QUESTIONS IF YOU ANSWERED YES TO QUESTION 12.

12A. How helpful was the notebook or binder to you in:

	Not at all helpful						Very helpful
(1) understanding the case?	1	2	3	4	5	6	7
(2) remembering the witnesses?	1	2	3	4	5	6	7
(3) remembering the testimony?	1	2	3	4	5	6	7
(4) remembering the evidence?	1	2	3	4	5	6	7
(5) answering questions during deliberations?	1	2	3	4	5	6	7

12B. Did members of the jury review materials in the binder during deliberations?

❒ Yes ❒ No

SKIP TO QUESTION 13 - NEXT PAGE

THE JURY WAS NOT GIVEN NOTEBOOKS OR BINDERS WITH TRIAL DOCUMENTS OR OTHER INFORMATION. ANSWER THIS QUESTION IF YOU ANSWERED NO TO QUESTION 12.

12C. If you sit on a jury in the future, would you like to have a notebook or binder containing trial documents for reference during trial and deliberations?

❒ Yes ❒ No

CONTINUE TO QUESTION 13 - NEXT PAGE

13. Were jurors permitted **to submit written questions to witnesses during the trial?**

❒ Yes **ANSWER QUESTIONS 13A - 13B IN SHADED BOX BELOW**

❒ No **SKIP TO UNSHADED BOX AND ANSWER QUESTION 13C**

JURORS PERMITTED TO SUBMIT QUESTIONS. ANSWER THESE QUESTIONS IF YOU ANSWERED YES TO QUESTION 13.

13A. Whether or not you asked any questions, how helpful would you say the opportunity for jurors to ask questions was to you in:

	Not at all helpful						Very helpful
(1) understanding the evidence?	1	2	3	4	5	6	7
(2) clarifying testimony?	1	2	3	4	5	6	7
(3) providing relevant information?	1	2	3	4	5	6	7

13B. Did you submit any questions for any witness? ❒ Yes **CONTINUE TO QUESTION 13B(1)**

❒ No SKIP **TO QUESTION 14 NEXT PAGE**

IF YES: 13B(1)How many questions did you submit? _____

❒1 ❒2 ❒3 ❒4 ❒5 ❒6 ❒7 ❒8 ❒9 ❒10 ❒More than 10

13B(2) Was any question that you submitted, or a similar question, asked of a witness?

❒ Yes ❒ No

13B(3) Was any question that you submitted not asked?

❒ Yes ❒ No

SKIP TO QUESTION 14 - NEXT PAGE

JURORS *NOT* PERMITTED TO ASK QUESTIONS. ANSWER THESE QUESTIONS IF YOU ANSWERED NO TO QUESTION 13.

13C. If you sit on a jury in the future, would you like to submit written questions to witnesses?

❒ Yes ❒ No

CONTINUE TO QUESTION 14 - NEXT PAGE

14. Did the attorneys make any summary statements during the course of the trial separate from the opening statements and closing arguments?

❒ Yes **ANSWER QUESTION 14A IN SHADED BOX BELOW**

❒ No **SKIP TO UNSHADED BOX AND ANSWER QUESTION 14B**

ATTORNEYS MADE SHORT SUMMARY STATEMENTS DURING THE TRIAL. ANSWER THESE QUESTIONS IF YOU ANSWERED YES TO QUESTION 14.

14A. How helpful would you say these short summary statements were to you in:

	Not at all Helpful						Very Helpful
(1) understanding the evidence?	1	2	3	4	5	6	7
(2) understanding each side's case?	1	2	3	4	5	6	7

SKIP TO QUESTION 15- NEXT PAGE

ATTORNEYS DID NOT MAKE SUMM*ARY* STATEMENTS DURING THE TRIAL. ANSWER THS QUESTION IF YOU ANSWERED NO TO QUESTION 14.

14B. If you sit on a jury in the future, would you like to hear explanations or arguments from the attorneys during the course of the trial?

❒ Yes ❒ No

CONTINUE TO QUESTION 15 - NEXT PAGE

15. During deliberations, was the jury given a **written copy** or **audiotape of the judge's final instructions on the law**?

❒ Yes **ANSWER QUESTION 15A IN SHADED BOX BELOW**

❒ No **SKIP TO UNSHADED BOX AND ANSWER QUESTION 15B**

WRITTEN COPY OR AUDIOTAPE OF THE JUDGES' FINAL INSTRUCTIONS GIVEN TO THE JURY. ANSWER THESE QUESTIONS IF YOU ANSWERED YES TO QUESTION 15.

15A. How helpful was the written copy or audiotape of the judge's final instructions to you in:

	Not at all helpful						Very helpful
(1) understanding the evidence?	1	2	3	4	5	6	7
(2) understanding the law?	1	2	3	4	5	6	7
(3) making a decision?	1	2	3	4	5	6	7

SKIP TO QUESTION 16

ANSWER THIS QUESTION IF YOU ANSWERED NO TO QUESTION 15

15B. If you sit on a jury in the future, would you like to have a written copy or audiotape of the judges' final instructions during deliberations?

❒ Yes ❒ No

CONTINUE TO QUESTION 16

EVERYONE PLEASE ANSWER QUESTIONS 16 - 22

BACKGROUND

16. Did you ever sit on a jury before? ❒ Yes ❒ No

17. If you sat on a jury before:

(a) How many times? ❒ 1 ❒ 2 ❒ 3 ❒ 4 or more

(b) What kind of case(s): ❒ Civil ❒ Criminal ❒ Both

18. What is your age? _____

❒Under 25 ❒25- 34 ❒35 -44 ❒45 - 54 ❒55 - 64 ❒ 65 or over.

19. Are you currently employed? ❒ Yes ❒ No

20. If you are currently employed, what is your occupation? _____

21. What is the last level of school you completed?

❒ Less than high school
❒ High School Graduate
❒ Tech School / Some College
❒ Completed 2 - year college
❒ Completed 4 - year college
❒ Graduate School

Appendix I: Attorney Opinions: Voir Dire Openings

VOIR DIRE OPENINGS - REASONS ATTORNEYS APPROVE

? So jurors don't sit in a vacuum when answering questions about their ability to serve on this case.
? It would give counsel the extra opportunity to observe facial expressions, etc which may help in voir dire.
? An early opportunity to influence the jury.
? It would help eliminate unsuitable jurors early on.
? So you are not asking questions in a vacuum. You can relate some questions to the facts.
? Allow narrowing of scope what jurors are to embark upon.
? Clarify the issues to jury.
? Helps weed out jurors who can't possibly sit.
? Speeds up jury selection.
? Gives jurors more information to decide whether they can be fair and another opportunity to begin to persuade jury.
? Clarifies many voir dire issues and may shorten process.
? Do it now makes questions more direct, less wasted time.
? Focus potential jurors on the nature of the case and any possible biases
? So the jurors can get a better idea of what the case is about, allowing them to volunteer any prejudices.
? It is important for prospective jurors to know something about the case so they may consider whether they can be fair in this case.
? Depends who is making the statement- I believe a Judge should be making the statement, not the attorneys.
? It allows counsel to identify jurors who have similar experiences quickly.
? Allows jurors to begin considering whether they could be fair in their particular type of case.
? Explore jury opinion about contentions and facts in case.
? Gives you background to work Voir Dire questions
? Streamlines Jury selection and avoids unnecessary questions.
? If a juror has an issue with the facts, juror can ask to be excused prior to voir dire.
? We do it anyway.
? Weeds out problem jurors early on.
? May bring to light juror difficulties with your specific case.
? Jurors are in a better position to decide whether they could be fair in the case.
? It gives me the opportunity to tell the jury of what the case is about.
? It allows the attorney to give a short concise statement about the case and to hear opposing counsels view of the case.

- Being able to tell the jurors more about the case would allow for more specific questioning.
- It let the jury understand where voir dire was going and it helped them to help us in responding more openly.
- It also helped eliminate jurors who should not be on this panel.
- The short statement allowed the court and litigants to identify unsuitable prospective jurors earlier than would otherwise be possible.
- Sometimes voir dire jurors don't know where you're coming from if you haven't told them about the case.
- To orient the jurors to the main issues in the case.
- Would make voir dire more meaningful.
- Jury can determine if case is right for them. Also, parties can more sufficiently select impartial jurors.
- Weeds out jurors who may have had similar experience that would affect their judgment.
- Acquaints jurors with issues in the case when voir dire questions or the form there of may be insufficient.
- To see if there is bias.
- Bias will be expressed easier if they know the case.
- Screen jurors as to medical conditions connected to the facts of the case.
- Helps expedite voir dire by informing jurors of nature of case.
- I would have liked to have.
- Gives lawyers a chance to speak informally more or less to entire panel.
- It educates the jury.
- It is good to give the jury some idea of what the case is about to keep interest and prepare them to address any concern they have about hearing the case.
- Gives jury feel for case.
- Helps focus jury; helps identify issues that may pertain to jurors own life experiences.
- It would allow prospective jurors a fuller consideration as to whether they could be fair and impartial.
- Important, critical notice to prospective jurors; re: type of case and issues to be considered.
- It allows the jurors the opportunity to answer questions in something other than the hypothetical; ex - "would you follow the law if the judge told you to?"
- Saves time in the voir dire.
- Explains to jury what case is about.
- Efficiency and the time saved in the selection process by not having to repeat opening remarks to each panel individually.
- Get more juror reaction.

? Jurors need to know something about case to figure out if they are appropriate for case.
? Explanation of preliminary facts is useful.
? Proposed jury members should not work in a vacuum. They should know the "Bare Bones of the Case."
? The more the jury knows about the case, the better.
? It sets them up nicely.
? It would be helpful to the jurors to understand what the case is about.
? Help to get the juror in tuned to the case.
? It helps to orient the jurors and possibly remove jurors that would not be appropriate.
? It is helpful to give the prospective jurors as much information as possible to determine their views and impartiality.
? Essentially same statement is made during jury selection.
? A very short summary is needed to give a frame of reference to the jury panel.
? Helps jurors determine if they have bias.

VOIR DIRE OPENINGS - REASONS ATTORNEYS DISAPPROVE

? Has nothing to do with jurors' ability to be fair and impartial and seems unnecessary.
? Depends on the case.
? Lawyers tend to use this to "try their case in the jury room."
? Attorneys will argue about what can/should be said. It will degenerate into a quarrel. Too important. Too short.
? In civil practice, I would disapprove unless the court reviewed the prospective mini-openings and was present when statements made.
? In my experience, civil attorneys repeatedly overstep the bounds of voir dire because usually the judge does not oversee it.
? Not necessary, and can result in a run on a room of jurors.
? First the judge read a prepared paragraph for each side. I feel that the statement may cause additional reason for a juror not to sit.
? Jurors may formulate an opinion right at the start.
? Another chance to preheat jury and prolong jury selection.
? Opportunity for attorneys to taint the jury pool.
? Would cause jury selection to be longer than it already is.
? The mini-opening will make it easier for prospective jurors to tailor their responses and hide biases.
? It will lengthen the process.
? Jury selection becomes a trial with the attorneys arguing about the facts.

- Many attorneys will take the opportunity to state inflammatory facts that may not be admissible in evidence.
- Potential confusion.
- Here, the judge read a statement approved by both attorneys and the trial judge. Making a short statement would lead to making your opening.
- Becomes to confusing to jurors, allows the jurors to think up more excuses to get off duty.
- I think it's better if the judge gives the intro to avoid any content fairness between parties.
- Rules of evidence are not yet in play and it is possible that something referred to could be misleading or end up being precluded.
- Not proof, cult of personality more solemn at beginning.
- The statements are often not accurate.
- I believe the jury system works best with the jurors finding our details of the case at the opening statement stage.
- They might start forming opinions.
- Created too much room for advocating during voir dire.
- The prosecution should be allowed to lay out the case in its entirety before defense gets to speak.
- It's the people's burden.
- Did not like.
- Divulging the defense prematurely - may be not theory yet or it may change.
- Describing facts of case during voir dire is not essential as the judge makes a brief description.
- Too many attorneys will say too much leading to objections and confusion.

Appendix J: Attorney Opinions: Individual Voir Dire

INDIVIDUAL VOIR DIRE - REASONS ATTORNEYS APPROVE

? More open.
? Allows juror to be frank.
? Promote open responses.
? Prevents one juror from tainting the rest of the jury pool.
? Jurors speak candidly; explosive topics.
? Many, many questions are asked in voir dire to influence the other jurors. This would eliminate some of that.
? Can clear up any problems or misunderstanding a juror may have.
? It is essential in order to make the prospective jurors comfortable with the process of selecting juror.
? Prevents poisoning entire panel.
? Jurors can inadvertently say prejudicial things which prejudices entire panel.
? So they do not affect other jurors.
? Jurors privacy, and avoid influences over other jurors.
? It encourages jurors to speak freely.
? Gives you better insight to a juror. They tend to be more opened.
? Many times- statements can influence others improperly - also to be respectful of people's privacy.
? Certain information may only be disclosed by some jurors outside the presence of other.
? Depends on circumstances- usually take a juror separately when may affect the panel- otherwise time does not allow for questioning just one juror.
? It avoids tainting other jurors.
? I like a nice leisurely pace to my trials and it adds time to the process. It also increases juror candor and honesty.
? Gives a chance to get 100% honest answer without fear of embarrassment.
? If juror has concern that could taint the panel.
? Prevents prejudicing the whole panel.
? Prevent prejudice.
? I believe jurors would be more candid. On the other hand, the process would delay.
? So as to not potentially contaminate the panel.
? Juror privacy and candor.
? So that they are willing to volunteer biases they have and not contaminate the other jurors.
? Sometimes it is needed to prevent contamination of the jury pool.
? Increases honesty and took pressure off of some of the shy prospective jurors.

- Questioning of this type aids getting honest, unedited answers from prospective jurors and hence, a fair petit jury.
- Allows jurors to respond to questions that may otherwise embarrass them or taint the panel. (ex. defendant's criminal history).
- Jurors are reluctant to answer sensitive questions in the presence of others.
- The jurors would be more honest without having to force judgment by fellow jurors about their feelings.
- I believe that this promotes candor.
- Allow jurors to be more candid regarding personal problems.
- Jurors will be more candid.
- If there is a problem, better to lose one juror than entire panel.
- Jurors can be more candid with respect to personal things.
- Some jurors are uncomfortable addressing certain issues in front of others.
- Safeguard for candor.
- Avoid poisoning panel.
- To avoid prejudice to entire panel, but done in a way so as not to embarrass the juror.
- Not to prejudice the jury.
- Practice does not therefore contaminate other jurors with expressed opinions.
- People are more open in private.
- Avoids any issue of tainting entire jury pool.
- Promotes openness and full disclosure.
- Protect the panel.
- Jurors do not contaminate the rest of the pool.
- Necessary to explore potential bias.
- Sometimes needed to avoid strong opinions which will taint the panel.
- Will encourage fuller responses.
- Promotes discussion; re: issues personal to jurors.
- There are certain issues that the entire panel should not hear.
- It can prevent the poisoning of panel.
- So as not to poison the entire panel.
- To avoid tainting other members of the pool.
- Jurors may be willing to voice concerns in front of the other jurors, but the practice would take time.
- Good idea so other jurors are not poisoned.
- The jury is a group and voir dire should educate all the jurors - but this be used only if a juror requests.
- More likely to illicit true response. No pack mentality.
- Jurors should be permitted to discuss personal issues without presence of other jurors.

? Otherwise there's always the fear of contamination and that the judge will not agree there was any.
? There are things that should not have to be discussed in front of other people, e.g., prior abuse as a victim.
? Protection of juror privacy and potential embarrassment is avoided.
? Certain topics can prejudice the entire panel and should be discussed separately.
? Jurors tend to be more forth coming.
? Avoids tainting the panel.
? Allows jurors to be candid. They may not want to discuss certain items in front of others.

INDIVIDUAL VOIR DIRE – REASON ATTORNEYS DISAPPROVE

? It should only be done if necessary, jury selection takes long enough.
? Unnecessarily prolongs jury selection.
? Time consuming.
? Too time consuming. Only appropriate if juror will pollute the jury pool. If all jurors present there is give and take and they refer to each others comments.
? Things come up during one juror's questioning that relate to other jurors.
? Issues raised by a particular juror may prompt similar concerns in another juror. The process is more efficient questions if everybody is present.
? I would think it would take too much time.
? Will take too long.
? I would like the other jurors to hear the answers of the juror being questioned.
? Time constraints.
? Would take too much time.
? Take too long should only be done in special cases or if juror requests it.
? Expressions of answer and opinions may prompt recollections from other jurors.
? Does not appear to be necessary absent special circumstances.
? Would slow practice down too much. No need.
? Waste of time if not individually necessary.
? Assuming the questions subject to this question are general, I highly approve of individual examinations of jurors who express reluctance, reservation, shame, etc. of answering particular questions publicly.
? Hearing other jurors' responses encourage more juror reaction to attorneys' questions.

Appendix K: Attorney Opinions: Preliminary Instructions

PRELIMINARY INSTRUCTIONS – REASONS ATTORNEYS APPROVE

? I think it helps focus their attention on various aspects of the evidence.
? Preliminary brief instructions help the jurors understand what they will be hearing.
? Jurors have a framework to put evidence in context.
? Enhances juror's ability to listen for what evidence is truly important in this case.
? Gives an overview of case.
? Makes for a smarter jury.
? Gives the juror's insight into why attorneys do certain things or ask certain questions during trial.
? Gave jurors an idea of the issues they would have to evaluate. I saw them perk up when our questions would parody the instructions they had heard.
? Juror gets a better idea of the law so that they can concentrate on the important testimony.
? It gives jurors some idea of what the case is about.
? Gives jury good background.
? Helps lay persons understanding law.
? Keep the jury's attention on the law - important in more complicated cases.
? To ease the jurors into a proper understanding of what they are about to hear and later decide.
? Gives the jurors a frame of reference.
? Instructions helped jurors to be alerted to the case.
? Focus jury on legal responsibility vs. sympathy factors.
? Helps jurors focus.
? Jurors would understand why certain evidence is being presented to them.
? Would get the jury take the evidence and know what is important.
? Jurors unfamiliar with trial procedure need orientation.
? Seems logical /helpful.
? Educates and prepares jurors for certain terminology.
? Anything that helps the jury understand why they are there helps the whole process.
? Help's jury to follow case.
? To orient jurors during the trial. to have a legal "roadmap"
? Get them use to thinking about the process.
? Gives jurors the proper framework to receive the outcome.
? Will aid all parties and jurors focus on claims.
? So jurors can focus on important parts of evidence.
? They should have a perspective going in.

? Gives the jury some general framework to evaluate evidence.
? So that the jurors may receive evidence in some context.
? Clarify matters for jury.
? Permits jurors to know in advance areas of pertinence.
? Assists jurors in performing their function.
? Helps the jury interpret the evidence during the trial.
? Could help if fair and neutral.
? Although I have not given this proposal a lot of thought, I believe it would be a great idea.
? Gives juror a basis with which to understand the evidence.
? Every task we do, we get instructions before hand.
? So the jurors can see where the case is headed and where the evidence fits in the end.
? Gives the jurors some idea of what to listen for and what information is important.
? The law is explained to them before they lose interest.
? Should be done in every criminal case.
? Given the jurors understanding of criminal charge before evidence begins.
? Gives jury law and background when hearing facts- Improves awareness during trial.
? Keeps issues focused and make testimony more meaningful.
? More efficient and juror friendly way to focus jurors on the law.
? Gives jurors an idea of what to be looking for during case.
? Focuses juries' attention on what people must prove and allows jury to understand openings better.
? It gives the jurors elements of which to focus on.

PRELIMINARY INSTRUCTIONS – REASON ATTORNEYS DISAPPROVE

? Will cause jurors to focus concentration narrowly and possible miss other important information
? Jurors will attach significance to certain proof and may begin "private deliberations" i.e. Begin to form opinions during the proof.
? It could distract the jury from focusing on the testimony and evidence at trial.
? It invites the risk that the jury may apply or start to apply the law to the facts of the case prior to the judge's instructions on the law in the court's charge at the end.
? Speaking about the law prior to selection wastes time, since it does not help to identify suitable jurors.
? Confusing to the jurors unnecessarily.
? May be incorrect by end of case.

- Could be confusing especially if facts come in differently then at first thought when law 1st stated.
- Elements must be proven. Might mislead without hearing evidence first-developing pre-conceived notions during the course of trial.
- This would in my opinion keep the jurors from having an open mind.
- Until the case is tried we do not know the relevance and can we discuss it in opening.
- I believe this might hamper jurors' ability to objectively hear all the testimony and review of evidence.
- There is an imbalance between the judge and defense giving liability instructions three times.
- Jurors should not hear law before facts. Can't apply law without facts.
- Substantive charges should await the end of the case when the court is more familiar with it.
- Like it better at the end.
- Summary sometimes gives the wrong impression.
- Confuses jury members as it is, may apply wrong standard at close of case.
- Too time consuming.
- Don't want jurors focusing on how what they're hearing applies to law during trial better to sort it out after charge.
- Burden to jurors' memory. If juror remembers elements and hears evidence supporting the elements they may make their mind up at that point.
- Evidence may not come in to support charge.

Appendix L: Attorney Opinions: Written Final Instructions

WRITTEN FINAL INSTRUCTIONS – REASONS ATTORNEYS APPROVE

? Assists jurors.
? Written aids the jury.
? Written instructions can be reviewed in jury room
? Can help jurors understand and save time in deliberations.
? Can only improve clarity.
? Changes are usually somewhat confusing & difficult to retain when just read once.
? Easier to understand with instructions.
? Eliminates the need for readbacks.
? For clarity and better understanding.
? Giving instructions allows jurors to apply law and prevents them from having to be read back
? Giving the jury written instructions allows then to refer to it directly if they have any questions.
? Having written charges prevents confusion and aids in deliberations.
? Helpful to jurors to have law for reference instead of relying on memory
? Helps them understand.
? Helps to answer potential questions by jurors.
? I can't imagine how they remember all the elements and I have a terrible memory my self!
? I don't see how it could hurt and I think it will help resolve issues in their minds more quickly.
? I would approve of written instructions & an audiotape if a juror could not read or had difficulty reading the courts find instruction.
? If they want to hear some part again, it would be easier and more efficient if they have access to the material.
? In federal court they do this, fewer questions, less readbacks.
? Instructions and readbacks are cumbersome. If they have the instructions in the jury room it would be more efficient.
? Instructions are long and written in legalize. Having the written instructions allows better understanding of the task at hand.
? Instructions are too lengthy and complicated, usually, to be fully understood at one pass. Providing written copies helps keep jurors attention during the instruction process and saves time during deliberations if there are questions during the charge.
? It is probably difficult to understand the charges in "one reading".

- ? It may be helpful to them in coming to a verdict versus having to have readbacks by the judge.
- ? It would save time and unnecessary readbacks
- ? It would save time!
- ? Jurors don't absorb the law in the charge - no prejudice to anyone if they see it in writing.
- ? Jurors may not recall specific, key language, definitions.
- ? Jurors need a guide on the law- nothing like back and white.
- ? Jurors will know correctly how to apply the instructions to the facts of the case.
- ? Makes it easier for jurors to apply law some people need to see it.
- ? May prevent unnecessary readbacks.
- ? Might help them understand the law or at least remember the instructions.
- ? No matter how you try to simplify, must be overwhelming to jurors to remember what the judge said.
- ? No one can remember all of a jury charge and it is critical that the jury know all of the elements of a criminal charge or civil claim.
- ? Possible inappropriate attention or discussion of charge or attention to judge inflation on certain words.
- ? Promotes efficiency and comprehension.
- ? Provide written for clarification
- ? Provides clarity, eliminates some roadblocks.
- ? Provides direction on which elements to focus on.
- ? Refocus jury - in written form about legal standards.
- ? Should lessen the possibility of error in recalling the law charged.
- ? The charges are the guidelines; saves the jury trouble of coming back to be recharged.
- ? The instructions are not evidence and absolutely crucial to the process. Why take a chance they will screw up the law?
- ? The law is difficult to follow- this would help the jurors.
- ? They can not comprehend law in single rapid hearing of it.
- ? They need that information in order to remember a verdict.
- ? They should be able to read it.
- ? Very confusing to jury hearing information only once.
- ? Why is the law a memory contest?
- ? Will take forever to go back and forth.
- ? Written can be referred to easier.
- ? Written copies will enable jurors to better understand the law.
- ? Written instruction provides a reference & might improve understanding.
- ? written instructions allow jurors to read the instructions
- ? Written instructions give jurors opportunity to focus on what they may have missed or misunderstood.

? Written instructions save time if the jury wants to hear the charge.
? Written instructions would be fine.
? Written less burdensome- easier to refer to a particular portion.
? Written questions will keep jurors on track.

WRITTEN FINAL INSTRUCTIONS – REASONS ATTORNEYS DISAPPROVE

? Again, confusion helps the defense.
? Can have things reread.
? Could be confusing to jurors; judge can clarify any issues
? Could be distracting.
? Depends upon the nature of the charges in the case. If complex/complicated- yes.
? I'm traditional and old fashioned. It is their best recollection.
? I believe allowing unsupervised layperson to ponder legal language on a printed page may lead to confusion and incorrect verdicts.
? I believe it would distract some jurors from thoroughly discussing the facts of the case. Also, it magnifies the problem if an erroneous jury instruction is given.
? I have full faith in the judge's ability to instruct the jury on the law.
? If a jury needs an explanation they can ask for one. This is better than written word; the judge may still have to explain!!
? If jurors have questions about instructions, judge should be able to read back instructions.
? If the jury needs s to hear it again hey do ask for readbacks.
? If the law needs to be read back, the jurors can ask otherwise they get or may get too bogged down reading the law (the court's province).
? If you stare at legal terms long enough they will add confusion.
? Judge should give clear instructions in person to jury to avoid errors.
? Jurors should concentrate on facts. Lessons importance of fact finding and of summations.
? Jury could get bogged down in legalese.
? Let jurors come back into court room and have portion of charge re-read.
? The communication between jury and jury should be carefully monitored by the trial judge only.
? The instructions read by court are sufficient. We have trouble understanding them.
? The judge loses control of legal advisor.
? The jurors will look at certain charges first, inconsistent with verdict sheet.
? The jury should not get bogged down in going over instructions twice.
? There is a risk that the jury or some members could put more emphasis on who gave instructions than evaluating the oral testimony. It is not necessary.

- They should hear the whole charge so no particular part is focused on to the exclusion of other parts.
- Time consuming and confusing.
- Too much focus on technical words.
- Too much information, they would get lost in the language.
- Too time consuming; jurors then interpret inflictions, etc of courts remarks with audiotapes; jurors focus on interpreting law, not evidence.
- Want to know what jurors are concerned about.
- Will lead to too much analysis.
- Would rather have jurors ask for readbacks which gives attorneys insight into trial progress.
- Written instructions will cause jurors with good reading skills to interpret the instructions for others.
- Written: can direct too much attention to the charge and distract jurors' views of the evidence.

Appendix M: Attorney Opinions: Interim Commentary

INTERIM COMMENTARY – REASONS ATTORNEYS APPROVE

? Again, it clarifies issues and evidence presentation.
? Allow issues to be raised.
? Anything to make the facts and evidence clear is good.
? Argument made while jury's memory fresh during rehash on summation.
? Can't hurt.
? Gives counsel a chance to keep jury understanding where he is going.
? Gives defendant an opportunity to rebut position.
? Help organize the evidence in juror's minds.
? Keep jury focused on facts.
? Makes the proof clearer as the case goes on.
? More information only helps jurors.
? So that the jury has an outline of what to expect.
? To provide an overview.

INTERIM COMMENTARY– REASONS ATTORNEYS DISAPPROVE

? Affects flow of trial and takes away from fact that evidence is evidence and lawyers talking is lawyers talking.
? An unnecessary exercise in non-evidence enhancement.
? Case and proof not complete.
? Comments regarding evidence are properly together in summation. Interim comments may improperly give undue weight to particular evidence.
? Confusion of jurors between lawyer opinion and fact testimony.
? Counsel’s comments are not evidence, only the court should make statements on the law as an aide to the jury about how to consider evidence.
? Distracting. Can be misleading. Likely only impermissible opinions of counsel.
? Evidence is evidence.
? Fluidity of the trial and attorneys trying to counter what others attorney says.
? I believe that it is more appropriate to wait until proof is closed before permitting attorneys to comment on evidence.
? I think it might confuse the jurors into thinking counsels statements are evidence.
? Impinges continuity.
? Influence jurors while their focus is supposed to be on evidence, keeping open mind.
? Invades part of judges role.
? It serves no purpose and if, for some reason, you are unable to marshal that evidence you have jeopardized the case.

? Jurors will not be able to keep an open mind until conclusion of trial. They will begin to formulate opinions and may not listen as carefully to some evidence because it doesn't fit with their opinion.
? Lawyers have ample opportunity to express themselves.
? Leave to summation.
? No basis till end.
? Not necessary.
? Not sure it is fair to those without burden of proof.
? Ok if both sides agree to what is to be said and no "ad libbing."
? Possible issues of fairness.
? Prejudicial in non-bifurcated trials.
? Proper place for comments is during summation.
? Province of the jury and the court.
? Seems inappropriate- opening & closings are enough.
? Seems like unsworn testimony.
? Statement not pre-approved by court can lead to abuse.
? Stupid.
? That would be "lawyers word" not evidence. There is more than enough opportunity to explain in closing arguments.
? That's what closings are for
? The judge will charge them as to the law. If counsel is in disagreement with the judge the attorney can lose the jury.
? This should be at closing.
? Too choppy. Things could change. Jurors must wait until end.
? Too much of a distraction by advocacy when evidence should govern.
? Trial goes too long already.
? Until all of the evidence is closed it is inappropriate.
? We have an opportunity to sum up at the end of trial.
? What attorneys say is not evidence and invades privacy of jury.
? What purpose could it serve other than to distract from the evidence.
? Why?
? Will just lead to arguing.
? Witnesses and evidence should explain any question - not attorneys.

Appendix N: Attorney Opinions: Juror Questions

JUROR QUESTIONS- REASONS ATTORNEYS APPROVE

? Given clarification to witnesses, more understanding and helpful during deliberations cuts down on witness speculation.
? I believe it is a good idea in more complicated trials, such as felonies. In simple cases jurors do not appear to utilize it and the added instructions prolong trial.
? No matter how thorough one may try to be, there is always something that seems to be missed. A keen eye could turn the case.
? Permits counsel to get "a pulse" on jury thinking.
? Keep jury interested in case. They may have a good question.
? It is probably a good idea but will undermine an attorney's ability to ask tight, leading questions and cross.
? Questions asked during trial were good ones.
? It helps clarify things for the jury. However, attorneys have reasons for omitting or emphasizing points. Those reasons can be undermined by jury questions.
? It will allow the jury to hear responses to questions which were not asked by counsel which may be important to decision making.
? It can be helpful to learn what jurors are thinking as long as judge monitors.
? Avoids odd speculation by jurors of certain common sense item lawyers have a tendency to overlook.
? Novel situation which worked without consuming too much time in this trial.
? Gives focus to issues I was not aware of but important to jurors. Helps with next witness and closing.
? Gives counsel insight into what jurors understand.
? This allows the attorneys to clear up areas confusing to the jurors.
? To clarify any confusion.
? Allowing jurors to submit written questions would obviate speculation in the jury room and lessen the number of questions during deliberations.
? Jurors need their curiosities satisfied even when it’s not necessarily relevant but I think the judge should review questions for relevance 1st before they are asked.
? Questions give the attorneys a feeling of how the jury is leaning.
? Contributed to jurors paying attention; makes them feel part of the proceeding.
? Opportunity to address relevant issues that jury wants to hear.
? Think it helps lawyers as well.
? Keeps them interested.
? It would help the jurors achieve their ultimate goal of judging the case, subject to the court's determination of relevance.
? I think the one question asked helped resolve the case and effectuate settlement.
? Let’s lawyers know where case is going.

? Cover areas they may be confused about. Help the jurors focus/crystallize their opinion.
? Promote trial efficiency and juror understanding.
? Worked well for me in this trial
? Helps me to see where case is going. I believe that this would give the attorneys a better view of jury's assessment of proof and could lead to settlement during trial.
? I don't have a reason yet, just a feeling.
? They shouldn't be confused.
? As long as we can object there is no downside.
? It helps the attorneys to understand how the jurors are thinking about the trial.
? It's cumbersome but it gives me some insight into what a jury might be thinking before the trial ends.
? It helps to focus the jury and provides the jury with an opportunity to ask questions that bother them.
? Very helpful in resolving the case and informing the attorneys what to focus on.
? Terrific insight into juror minds helps strategically

JUROR QUESTIONS – REASONS ATTORNEYS DISAPPROVE

? Opens door to inappropriate answers and upsetting jurors if questions are objectionable.
? Undermines the roles of the attorney in presenting evidence
? They are not lawyers. I want them to pay attention to what we are saying.
? Likelihood of the inability to answer juror questions due to inadmissibility of answers.
? Invades porcine of counsel and disrupts the system.
? The lawyers should control the trial not the jurors.
? Not their function.
? In theory, sounds good. In practice many juror questions would be off- point and irrelevant. Might show prejudice- "how much insurances do the D have.
? Jurors inject personal beliefs and feelings into case.
? They may tend to ask things which are completely irrelevant.
? By experience has been the questions can not be answers.
? Can mess up strategy, can confuse jurors if inadmissible.
? Too intrusive.
? Gives you an idea but most questions gives you insight on a juror's prejudice especially if early in case a question is framed.
? It will alter the "playing field" in an unforeseeable manner.
? Why have counsels?
? It is the function of the attorney to prevent evidence in a case, including eliciting testimony.

? The case may go out of control.
? Distracts jurors
? Prejudicial to both sides - imposes on trial lawyers the ability to try case according to set strategy.
? It would likely lead to implementation problems involving the rules of evidence, i.e. hearsay.
? This should be left to the advocacy of the attorneys.
? The lawyers should try the cases.
? Depending on whether their question is answered affects their continuing to listen to testimony.
? Jurors will substitute their roles. Jurors may attach too much importance to the Q & A.
? Questions asked refer to inadmissible evidence.
? Jurors often ask questions which are improper, and refusal by the court to ask them may create unnecessary questions and opinions jurors' minds.
? Time consuming questions are usually not proper and awkward.
? Fear of a runaway jury. Loss of control over the case.
? Loss of control of the case by attorneys. Juror questions may open the door to rebuttal evidence that was specifically kept closed.
? They tend to delve into areas of proof already decided by the court.
? To do so will blur the jurors' true function of being the tryer of the facts.
? No. Their role is not to ask questions that would be improper.
? Delays trial, jurors ask inappropriate questions; jurors ask irrelevant questions.
? It will delay the entire trial.
? Slow process of trial.
? May provide an advantage- focuses trial on minor issue and may make it look major.
? Want jurors to focus on case and not on formulating questions.
? The jurors may ask excellent questions but sometimes - in trial strategy - you don't ask a question where you know the answer will cause you problems.
? Jurors don't know the facts of the case, from either side and ask irrelevant, meaningless questions.
? Were unable to ask follow up questions.
? Slows down process- questions will be objectionable and jurors will not understand why and will become frustrated with the process.
? Not their job. There are too many reasons why jurors are not permitted all information and it would be too hard to explain.
? Risk legal standard- jurors start about facts they consider important, and possibly irrelevant and then the judge has to get involved.
? Jurors are not attorneys.

- Let lawyers try their cases. Sometimes questions not asked on purpose. Also, can increase chance of mistrials.
- That's the lawyer's job.
- Takes some of strategy out of trial, I don't ask questions for certain reasons
- End up trying to explain why certain questions can't be answered - may not be relevant.
- Examination of witnesses is the province of counsel and, on occasion, the court. Trial strategy, and thus questioning, must be left to counsel.
- It interferes with the trial strategy of counsel.
- The court is tempted to get involved in colloquy with jurors; the jurors are encouraged to think up questions unnecessarily.

- Again, this is a distraction. They should be listening and observing, not thinking about questions, that's the lawyer's job.
- Subverts lawyering process. Jurors should judge evidence, not see it.
- Risk of assuming the role of prosecutor.
- Generally it's bad enough when judges help out my adversary - who needs the jury helping it?
- I worry about jurors becoming advocates for one side over the other. The procedure was also awkward.
- The questions went beyond the scope of direct and cross examination and in several instances were prejudicial.
- Expert witnesses should not be cross examined by lay jurors.
- Pressure to allow question to be asked even if neither lawyer wants it asked.
- Interferes with attorney's presentation of evidence.
- It is the parties' case to try.

Appendix O: Attorney Opinions: Juror Note-Taking

NOTE-TAKING – REASON ATTORNEYS APPROVE

Improves attention

- ? Pay more attention during trial.
- ? It may help juror pay attention.
- ? Pay better attention if take notes.
- ? Increases some jurors' attention to the trial.
- ? Believe it contributed greatly (combined with the ability to pose questions) to juror participation/ attention.
- ? I think it helps jurors focus
- ? I think it helps jurors pay close attention to details they find important

Aids Memory and Recall

- ? Helps jurors remember critical facts during trial.
- ? To help jurors remember key points.
- ? I have never understood why they cannot. It is ludicrous to force them to remember everything that they hear.
- ? Improve recollection.
- ? Help, juror, remember details, especially in longer case.
- ? Helps in remembering what happened - can always call for testimony to be read back if unclear.
- ? Helps focus, helps them retain/ remember things they felt were significant during the

Keeps Jurors Involved

- ? Trials are long with delays, jurors note-taking makes them more active in the process.
- ? Kept them in the game.

May Enhance Deliberations

- ? Note-taking appears to fix important testimony in the memory of jurors and helps to clarify their questions and aid in swifter deliberations
- ? I like jurors who pay attention; this allows them/ gives them a better opportunity to do that.
- ? Jurors can note their questions about evidence for later discussion, otherwise they might forget.

Miscellaneous

- ? All intelligent people take notes during a complex task to build on a discussion.

- ? In long case not a short 5 days.
- ? Some people need to take notes, and are more comfortable in that setting. As long as they're adequately instructed, it's a good idea.
- ? Can't hurt I approve in complex cases - I don't believe it interferes with jurors' assessment of witness demeanor course of trial.
- ? Willing to try it
- ? Helps jurors keep track of confusing facts - lessens roadblocks.
- ? Cuts both ways, if done properly though, can be good.
- ? Provides clarification.
- ? I think for long trials it is a good idea. I think, however, jurors should be looking at the witnesses instead of looking down taking notes.

NOTE-TAKING – REASONS ATTORNEYS DISAPPROVE

Distracting

- ? Though no notes were taken by this jury, taking notes takes jurors focus away from witness.
- ? I hold to the traditional view that it distracts jurors and is superfluous in light of read backs. Also it necessitates additional instructions which prolong trial.
- ? If a juror is focused on writing something, they may miss an important follow up question.
- ? When a juror is taking notes they're not paying attention to the witness. They can have testimony read back to them. They don't need to take notes.
- ? They are distracted from testimony and place too much reliance on notes vs. recollection.
- ? May spend time note-taking and not listening.
- ? Distracts jurors.
- ? Can distract jurors from hearing all evidence.
- ? Can't listen, watch & write all at same time.
- ? They do not pay attention.
- ? It distracts the note taker from carefully listening to the testimony.
- ? Distracts jurors from listening to evidence and observing witnesses.
- ? Distracts them from paying.
- ? It distracts the jurors from the testimony.
- ? Don't listen to testimony.
- ? My main concern is the risk that jurors may not pay close enough attention to the testimony and may miss absorbing some of the demeanor of the witnesses.
- ? Diverts attention; accents what individual juror finds important trial should be conducted by lawyers, not juries, the decide cases on the facts, good or bad.
- ? Distracts juror.

- Jurors won't listen.
- Don’t listen well and rely on notes vs. evidence.
- Improper focus.
- Jurors will focus more on notes than on listening to evidence.
- I feel jurors may miss something or make a mistake writing something down then give it undue weight later.
- Diverts their attention from witnesses - jurors need to focus on witness testimony and demeanor to assess credibility.
- Too distracting. Important for jurors to watch witnesses. Very bad idea.
- They miss what's going on and don't know what is important and what is not.
- It is easier for me to understand an argument without taking away from it by taking notes.
- Note-taking is too distracting and may give undue influence to the note taker.
- If you are writing you miss the next question and answer.
- Not watching the witnesses and possibly missing material when writing.
- Distracts jurors from witnesses; court reported has transcription.
- This is a total distraction. The jury should be totally focused on testimony and evidence, not note-taking.
- It distracts the jurors from the testimony that is being taken.
- It might be a distraction causing jurors to over emphasize their notes and miss or minimize other testimony.
- Hard to take notes and concentrate on the testimony.
- Distracting and disturbing.
- Distracting to jurors attention to the testimony and lengthens the trial.
- Inaccurate Notes
- Jurors can paraphrase, get it wrong, and put down opinion.
- Notes are not always accurate and distract jurors’ attention while they are taking them.

Misleading to Other Jurors

- I think other jurors would rely on it instead of transcripts and exhibits.
- Reliance on someone else’s notes and they miss things.
- We have the court reporter.
- A lawyer cannot possibly know the ability of jurors to take notes. If juror does so incorrectly, that juror will rely on incorrect information.
- Some pay attention & some take better notes than others relying on others to take notes to tell them what happened.
- It may have the tendency of intimidating non-note-taking jurors.
- Juror with notes becomes expert - notes become the issue.
- Makes me very nervous - whether they really do use notes only for themselves and whether they still use the offered record.

Miscellaneous

- I think it can assist them but in a simple case it could be counterproductive.

- The jurors requested no testimony or documents/evidence. I believe the note-taking was prejudicial to the jury function in this trial

Appendix P: Selected State Court Rules – Juror Questions

Arizona, 16 A.R.S. Rules of Civil Procedure, Rule 39(b)(10) Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.

Colorado Rules of Civil Procedure, CHAPTER 5. TRIALS, RULE 47 (u) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for good cause. Effective July 1, 2003.

Colorado Rules of Criminal Procedure , CHAPTER 29. RULE 24. (g) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause. Effective, July 1, 2004.

Connecticut Rules of Court, §16-7 (Civil Matters), §42-9 (Criminal Matters). The members of the jury may, in the discretion of the judicial authority, take notes and submit questions to be asked of witnesses during the trial of a civil action. Practice Book 1998.

RULE 20 PRELIMINARY INSTRUCTIONS, Indiana Rules of Court, Jury Rules (Effective August 1, 2003)

(a) The court shall instruct the jury before opening statements by reading the appropriate instructions which shall include at least the following:

(1) the issues for trial;
(2) the applicable burdens of proof;
(3) the credibility of witnesses and the manner of weighing the testimony to be received;
(4) that each juror may take notes during the trial and paper shall be provided, but note-taking shall not interfere with the attention to the testimony;
(5) the personal knowledge procedure under Rule 24;
(6) the order in which the case will proceed;
(7) that jurors may seek to ask questions of the witnesses by submission of questions in writing.

(b) It is assumed that the court will cover other matters in the preliminary instructions.

(c) The court shall provide each juror with the written instructions while the court reads them.

Rules Governing the Courts of the State of New Jersey, Part 1. Rules of General Application, 1:8-1 c) Juror Questions. Prior to the commencement of the *voir dire* of prospective jurors in a civil action, the court shall determine whether to allow jurors to propose questions to be asked of the witnesses. The court shall make its determination after the parties have been given an opportunity to address the issue, but they need not consent. If the court determines to permit jurors to submit proposed questions, it shall explain to the jury in its opening remarks that subject to the rules of evidence and the court's discretion, questions by the jurors will be allowed for the purpose of clarifying the testimony of a witness. The jurors' questions shall be submitted to the court in writing at the conclusion of the testimony of each witness and before the witness is excused. The court, with counsel, shall review the questions out of the presence of the jury. Counsel shall state on the record any objections they may have, and the court shall rule on the permissibility of each question. The witness shall then be recalled, and the court shall ask the witness those questions ruled permissible. Counsel shall, on request, be permitted to reopen direct and cross-examination to respond to the jurors' questions and the witness's answers. (Added July 12, 2002 to be effective September 3, 2002)

Appendix Q: Juror Questions: Procedures Suggested to Jury Trial Project Judges

Suggested Procedures for Juror Questions

1. **Discuss with counsel, prior to trial, the plan to permit jurors to submit written questions.** The Committee makes no recommendation as to whether judges should seek consent of counsel. Most Committee members felt that obtaining consent is the better approach and some conclude that consent might not be necessary. (See discussion of New York law on this subject in Legal Memo distributed to judges at May 15, 2002, Section VII, Tab 6, recommending that consent of counsel be sought. This section is also available on the JTP website in the section of the Committee on Juror Questions.)

2. **Assure that each juror has paper and a pen throughout the trial.** If the judge distributes paper/notebooks for note-taking, these can be used for submission of questions. An alternative is to use a prepared form for submission of juror questions. (A copy is attached.) The name and number of the case and the county could be inserted by hand or by word processing. Jurors could each be supplied with several copies of the form at the beginning of the trial.

3. **All juror questions should be submitted in writing, marked as court exhibits and preserved for the record whether or not the question is actually asked.**

4. **Preliminary instructions should explain that jurors will be permitted to submit written questions.** The Committee offers two alternative approaches for preliminary instructions. PRELIMINARY INSTRUCTION OPTION A encourages questions, by starting out: I am going to allow you the opportunity to pose questions to the witnesses.... PRELIMINARY INSTRUCTION OPTION B informs jurors that question will be permitted, but attempts to minimize the questions by emphasizing that: In very rare instances a juror may wish to pose a question.

5. **Preliminary instructions should inform the jury of the procedure for submitting questions.** The Committee recommends that judges use one of the following three procedures for collecting proposed questions. Instructions should be modified accordingly. These are not offered in any order of preference.

   OPTION A[1]: Jurors may submit their questions at any time during the testimony by passing the question to a court officer or clerk. The judge will determine whether the question will be asked and, if so, when it will be asked.

[1]Refers to "options" in suggested jury instructions.

OPTION B: There will be a brief break at the end of each witness's testimony to give jurors an opportunity to write and submit their questions. Although some judges permit the jurors to go to the jury room to write their questions, the Committee generally felt that such a procedure would be overly disruptive and might encourage jurors to discuss their questions. One member of the Jury Trial Project experimented with both procedures in a trial and found it better ***not*** to send the jurors to the jury room to prepare their questions. Judge Dana Winslow has been using, with great success, the procedure of allowing jurors to write their questions while they remain in the jury box during a few minutes break at the end of each witness for years.

OPTION B ALTERNATIVE: Jurors will be asked to hold questions to the end of the witness' testimony, at which point the judge will glance over to the jurors to see if any have a question to submit or need a moment to write a question. If it appears that no juror has written out a question, the proceedings will simply move on to next witness.

6. **Obtaining identifying information about jurors who ask questions:** The Committee was divided on this issue, and makes no recommendation. Arizona and Colorado instruct jurors NOT to identify themselves. The ABA Civil Trial Practice Standards recommend that juror's name and be included and Massachusetts (civil and criminal trials) asks jurors to include their seat number on the question. New Jersey's standard instruction concerning juror questions in civil trials makes no mention of the issue.

   *Arguments **for** requiring that jurors identify themselves:*

   - Makes it easier to identify a juror whose question(s) suggest(s) some impropriety

   - Makes for a more complete record of the trial

   -Since the court and counsel will know from observation which jurors are asking questions, the better approach is to have them identify themselves so the information is included for all concerned with the record of the trial.

   *Arguments **against** requiring jurors to identify themselves:*

   - Jurors might hesitate to ask questions if they thought they could be identified or singled out.

   - Attorneys might play up to or pitch their arguments to particular jurors.

-Asking jurors to identify themselves might be an intrusion on the privacy of the jury's thought processes.

-If the content of a juror's question(s) requires that a juror be identified this can always be accomplished with appropriate questions to identify the juror without revealing the potentially prejudicial details of the question.

7. **Jurors' questions should be reviewed with counsel outside of the hearing of the jury.** The judge should ensure that the parties have an opportunity to make a record of any objections or to propose revisions which might resolve their objections. The suggested juror question form allows for space on which the judge can indicate any objections raised by the parties. The Committee makes no recommendation on whether or not to ask a question if either one or both parties objects.

8. **Generally, if a juror's question is asked, it should be asked by the judge.**

9. **Counsel should be permitted an opportunity to ask reasonable follow-up questions concerning the subject matter of any juror question that is asked of a witness.**

10. **When the judge decides not to ask one or more questions submitted by jurors a "rejection of question" instruction may be given.** A suggested instruction is attached.

11. **The judge's charge may include a "final instruction" addressed to the role of jurors' questions.** Jurors should be reminded not to be offended or upset if a question is not asked and not to hold it against the parties. The instruction also should indicate that undue weight should not be given to answers given in response to jurors' questions. A suggested instruction is attached.

Suggested Instructions Concerning Juror Questions to Witnesses

The following are suggested instructions to be used by Jury Trial Project judges in connection with permitting jurors to ask questions. There are four instructions here: two alternative preliminary instructions, an instruction that may be used when a question is rejected, and a final instruction.

I. PRELIMINARY INSTRUCTION: OPTION A

Ladies and gentlemen, I am going to allow you to pose questions to the witnesses who will be testifying in this case. Let me therefore tell you the procedure that we will follow with respect to any questions that you may have of a witness.

First: Any questions that you would like to ask a witness must be written down on a piece of paper and then passed to me for review. Please be sure [OPTION A: to include] [OPTION B: not to include] your name and/or juror number on your question. Please hold your questions until the witness has finished answering all of the questions put to him/her by the attorneys *(Eliminate the first sentence if you are allowing jurors to submit questions during the witness' testimony.)* You will often find that a question that you would like to ask is eventually asked by one of the parties *and therefore you may not need to ask a question immediately as it occurs to you. (Section in italics only applies if you are allowing questions during the testimony).* You are not to discuss the questions among yourselves, but rather each juror must decide independently any questions that you may have for the witness. I will: *(Judge must choose an option)*

OPTION A: allow jurors to submit questions during the testimony.

OPTION B: allow jurors to write out questions during the testimony but not to submit them until the end of the testimony.

OPTION C: take a short break at the end of each witness's testimony to allow any of you who wish to do so, the opportunity to write down and submit a question.

OPTION C ALTERNATIVE: Glance over to you at the end of each witness's testimony to see if anyone has a question to submit or needs a moment to write out a question.

Second: Your questions should be addressed to important matters or seek clarification of the witness's testimony. Your questions should also be relevant to the issues presented in this trial, so that we don't get bogged down or distracted from those issues. When you ask questions, keep in mind that you are a judge of the facts. Your questions must be consistent with that role. Among other things, this means that you should not seek to discredit a witness or argue with a witness.

Third: I will review any questions that you may submit with the attorneys at the side of the bench or at a break. Your questions, like those of the attorneys, are governed by the rules of evidence, and I may therefore be required to alter or even not to ask your question. If so, you are not to be offended or upset, or hold it against either of the parties, or speculate as to what the answer to your question might have been.

Fourth: If I allow the question, then I will pose it to the witness. The attorneys will be allowed to ask follow up questions of the witness limited to the subject matter of your questions.

Now ladies and gentlemen, although I am permitting you to pose questions in this case, you are not to allow yourselves to become aligned with any party, and your questions are not to be directed at helping or responding to any party. Nor are you to

assume the role of investigator or advocate in this case. Your role and responsibility as jurors is to remain neutral and impartial fact-finders. You will have to consider all of the evidence fully, fairly and thoroughly in order to arrive at a true and a just verdict in this case.

Fifth, and finally: While you may give the answer to a question such weight as you believe is appropriate, you must not give the answers to any of your own questions any greater or lesser weight, just because you asked the questions, either when you consider the witness's testimony or in your deliberations. You must remember that you are NOT [emphasize with voice] advocates, and must remain neutral fact finders throughout the trial You will have to consider ALL [emphasize with voice] of the evidence fully, fairly, and thoroughly in order to arrive at a true and just verdict.

II. PRELIMINARY INSTRUCTION: OPTION B

> This instruction is recommended for use by those judges who are willing to permit jurors to address questions but prefer not to encourage jurors to do so. It would be helpful to the jury to supplement this instruction with some comment about the procedure to be followed if a juror has a question to submit.

Members of the jury, in a trial it is the duty of the attorneys to adduce evidence by questioning witnesses. The jury's duty during the presentation of testimony is to listen carefully to the evidence in order to be able to reach a proper verdict.

In very rare instances a juror may wish to pose a question to a witness in order to clarify something in the testimony. Such a question, if submitted, must be in writing. It

is subject to the same evidentiary rules which govern attorneys' questions, which means the question might or might not be put to the witness.

As I indicated, it is rare that such a question is asked. Such a question must be limited to the clarification of testimony in the case and your time would likely be better spent listening carefully to the testimony. If such a question is asked, is legally proper, and has not already been clarified by subsequent testimony, it will be asked of the witness at or near the conclusion of that person's testimony.

III. REJECTION OF QUESTION

Members of the jury, earlier I advised you that some of your questions may not be permitted under law. I have decided not to ask this witness a particular question because the question is not legally proper. I must direct the juror who submitted the question not to guess or speculate about the answer, because it is not proper for your consideration of this case.

IV. FINAL INSTRUCTION

Ladies and gentlemen, I have allowed you the opportunity to pose questions of the witnesses who have testified in this case.

Since your questions, like those of the attorneys, are governed by our rules of evidence, I may have altered or failed to ask a question of a witness that you sent to me. It is my responsibility as the judge to determine whether a question is relevant and appropriate to be asked of a witness. If your question was not asked, you must not be offended or upset, or hold it against either of the parties, or speculate as to what the answer to your question might have been.

You also must not give the answers that were given by a witness to any of your own questions any **greater or lesser** weight **just because you asked the questions**, either in considering that witness's testimony or in your deliberations. As I instructed you at the outset of this trial, you are not to allow yourselves to become aligned with any party by reason of your questions, nor were you to assume the role of investigator or advocate in this case. Your role and responsibility is to remain neutral and impartial fact-finders. In your deliberations, you must consider all of the evidence fully, fairly and thoroughly in order to arrive at a true and a just verdict in this case.

Appendix R: How Many Questions Do Jurors Ask?

	Criminal Trials			Civil Trials		
Number of Questions Submitted	Number of Jurors	Total # of Questions Asked	% of Juror Questions	Number of Jurors	Total # of Questions Asked	% of Juror Questions
1	29	29	43%	49	49	49%
2	9	18	13%	24	48	25%
3	7	21	10%	8	24	8%
4	7	28	10%	5	20	5%
5	3	15	4%	3	15	3%
6	4	24	6%	5	30	5%
7	1	7	2%	0	0	-
8	3	24	4%	0	0	-
9	1	9	2%	1	9	1%
10	1	10	2%	1	10	1%
>10	3	33	4%	3	33	3%
Total	**68**	**218**	**100%**	**99**	**238**	**100%**

Appendix S: Jurors' Opinions: Helpfulness of Juror Questions

Helpfulness of Juror Questions in Providing Relevant Information						
	All Jurors		Jurors who Submitted Questions		Jurors who Submitted Questions that were Not Asked	
	Criminal	Civil	Criminal	Civil	Criminal	Civil
Very Helpful	80%	88%	88%	95%	82%	87%
Not at all helpful	6%	5%	3%	4%	6%	9%
Number of Jurors	197	249	60	83	17	23

Helpfulness of Juror Questions Understanding the Evidence						
	All Jurors		Jurors who Submitted Questions		Jurors who Submitted Questions that were Not Asked	
	Criminal	Civil	Criminal	Civil	Criminal	Civil
Very Helpful	83%	87%	93%	92%	94%	91%
Not at all helpful	8%	8%	5%	7%	0%	4%
Number of Jurors	199	252	59	84	17	23

Helpfulness of Juror Questions Clarifying Witness Testimony						
	All Jurors		Jurors who Submitted Questions		Jurors who Submitted Questions that were Not Asked	
	Criminal	Civil	Criminal	Civil	Criminal	Civil
Very Helpful	83%	88%	88%	95%	88%	87%
Not at all helpful	6%	6%	5%	4%	13%	9%
Number of Jurors	197	250	59	84	17	23

Appendix T: Eighth District Summary Jury Trial Project DVD