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Justice Recounts Success With Juror Questioning

BY JOHN CAHER

ALBANY — An Upstate judge testing the controversial practice of permitting jurors to ask questions yesterday told a continuing legal education audience that the experiment has proven a success.

Supreme Court Justice Joseph M. Sise of Montgomery County, speaking at a forum in Albany, said the numerous fears expressed primarily by attorneys—that permitting jurors to ask questions would be disruptive, that jurors would tend to advocate, and that they would over-emphasize the importance of their own questions—have failed to materialize.

"It is something the jurors just love," Justice Sise said.

The judge said he permits juror questions only upon the consent of both parties in a civil case. He said that after the attorneys have completed their questioning of a witness, he asks the jurors if they have any questions of the witness. Written questions are then reviewed by the court and attorneys and, if there are no sustainable objections, directed to the witness by the judge. Attorneys get another chance to question the witnesses regarding his or her answers to the jurors' questions, Justice Sise said.

"The attorney then has the advantage, when jurors ask questions, of getting an idea of what the jury is thinking," he said. "It is a chance to look inside the juror's mind."

Justice Sise is a member of the State Jury Trial Project, which is examining various innovations with the goal of making jury service a more meaningful, less onerous and more productive experience.

When jurors ask questions, it is a chance for lawyers "to look inside the juror's mind," said Supreme Court Justice Joseph M. Sise.

He was among the panelists at a CLE forum yesterday at the New York State Bar Association. The forum, "Trial by Jury: Improving Community Justice Through Reform and Innovation," was sponsored by the State Bar and the Fund for Modern Courts, according to Modern Courts' Capital District Director Anne Marie Couser.

Other panelists included Mark C. Zauderer, chairman of Chief Judge Judith S. Kaye's Commission on the Jury and a partner at DLA Piper Rudnick Gray Cary US; Terence L. Kindlon, a criminal defense attorney and partner at Kindlon and Shanks in Albany; and Elissa Krauss, staff coordinator for the State Jury Trial Project.

A handful of judges, pioneered by Supreme Court Justice F. Dana Winslow of Nassau County and former Westchester County Judge Kenneth Lange, began experimenting with juror-driven questions in 2003. Justice Sise said the practice, which is common in many states, appears workable in New York.

Justice Sise said he is also attempting to engage jurors by providing each with a personalized binder, in which they can take notes and store copies of exhibits if the attorneys agree to make them available.

"I give them notebooks so they feel important, and they are," he said.

However, the judge also said he cautions jurors to pay close attention, to not only listen to witnesses but to look at them and to not allow their note-taking to interfere with their fundamental role. He said the notebooks are kept in the courthouse and the notes are destroyed without inspection once the trial is over.

Justice Sise said involving jurors more in the process enhances their

"almost unique experience as a citizen...to be the ultimate finder of fact."

Jury reform has been a priority for Chief Judge Kaye since she became the state's top judge in 1993. She has repeatedly stressed the need to better utilize the 650,000 New Yorkers who are summoned annually for jury service, and to essentially turn out 650,000 good-will ambassadors yearly for the judicial system.

To that end, Chief Judge Kaye successfully worked to increase pay, decrease terms of service, eliminate exemptions that excluded many from duty and to generally make jury service a positive experience. She has also appointed a couple of commissions, the most recent of which is Mr. Zauderer's, to investigate reforms such as preliminary and interim summations, juror note-taking, juror questions and other proposals.

Mr. Zauderer said yesterday that a proposal to greatly reduce or even eliminate peremptory challenges—which the chief judge has advocated in both policy statements and judicial opinions (see *People v. Brown*, 97 NY2d 500 (2002)—is essentially a dead issue, at least with the commission. He said the commission did not recommend changes in peremptories in its interim report after it could not come to a consensus and it is not inclined to do so in an upcoming final report.

However, Mr. Zauderer said several issues remain on the table, including a proposal that would give judges more responsibility in handling voir dire.

He said New York is the only state that permits attorneys to conduct voir dire, without any involvement of the judge, in civil cases. Mr. Zauderer said that practice, which is apparently widespread in the New York City area but not Upstate, can alienate jurors and prolong the process.

He also said the common practice of procrastinating serious settlement discussions until a jury is selected is often an unnecessary waste of jurors' time. Jurors are too often in a "hurry up and wait" mode, he said. Since there is roughly an 80 percent chance they will never actually sit on a jury, many leave the courthouse disgruntled, having never served and, from their perspective serving no purpose, Mr. Zauderer said.

"You've not seen anyone in a black robe, nobody has expressed appreciation and you may be dissatisfied with the experience," he said.

Innovations Considered

Ms. Krauss said the State Jury Project is focusing on five potential innovations:

- Permitting attorneys to deliver a brief opening at the start of voir dire, so prospective jurors know something about the case before it starts;
- Having judges deliver a short but substantive preliminary charge so jurors are aware of the legal concepts they will be encountering;
- Providing jurors with a written copy of the final instructions—a practice approved by the Appellate Division, Third Department, but rejected by the Second Department;
- Juror note-taking which, under a 1998 Court of Appeals opinion, can be permitted at the discretion of the trial judge,
- Letting jurors ask questions.

She said that in the several dozen trials where jurors were permitted to ask questions, there were virtually no problems. Ms. Krauss said one or two questions was the norm, and added that the majority of the questions were legitimate queries to which the witness could respond.

Mr. Kindlon cautioned against streamlining the jury selection process to the point where lawyers do not know what they are getting. He opposes any reduction in peremptory challenges.

"There are some people, some in high places, who think that the first 12 jurors are just fine," Mr. Kindlon said.

But he said that is not the case and attorneys should have wide latitude to reject jurors who cannot be excused for cause.

Mr. Kindlon pointed to a recent criminal case he handled where the judge refused a for cause challenge to one juror who happened to be an active police officer in the community where the crime allegedly occurred and who had cases pending with the district attorney prosecuting the case. Mr. Kindlon said he had to use a peremptory challenge to keep the police officer off the jury. However, he said his client's murder conviction was later overturned by the Third Department because of voir dire issues (see *People v. Powell*, 10373, and NYLJ, Jan. 5, 2005, "Defense Gets Final Say on Jury Picks.")

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