

# THE Verdict ON JURIES

More States Are Adopting Jury Reforms, Freeing Jurors to Take Notes and Ask Questions. But Some Judges Are Slow to Embrace the Changes.

TERRY CARTER

**A**S THE TWO-WEEK TRIAL IN A CONDEMNATION CASE WAS winding down, a juror asked a question. This being Arizona, which 11 years ago embraced much of the jury reform now picking up speed as it moves across the country, Judge Pendleton Gaines accepted it in written form through the bailiff and read it to the lawyers: “How much repetition do we have to listen to during closing argument?”

“I was laughing as I read it,” says Gaines, a Maricopa County Superior Court judge in Phoenix. “I didn’t ask the lawyers for an answer—just told them to think about it overnight.”

That was a few years ago, and the concept of letting jurors ask questions already had reached a level of acceptance in Arizona such that the joke wasn’t lost on anyone—and the justice system didn’t crumble.

Still, permitting juror questions is probably the most controversial innovation on a laundry list being considered—wholesale, à la carte or in selected combinations—more and more around the country in recent years.

The overhaul seeks to improve the jury system from several angles. First, there is an increased effort to get more people into jury pools and bring a representative cross-section of the community into the jury box. For example, as

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a result of all occupational exemptions from jury duty being abolished in New York state in the mid-1990s, an appellate judge served on a jury in a criminal case in 2001.

Many jurisdictions are going beyond voter registration and driver's licenses to compile jury lists, even relying on welfare and unemployment rolls. Greater use of technology and automation is making that easier, and some jurisdictions have created specialty courts to enforce jury summonses.

In addition to those prods and sticks, carrots are being added to the mix. There is greater concern for juror convenience, ranging from day care to one-day, one-trial arrangements that shorten terms of service.

Looming larger and perhaps thornier in the near future is juror pay. It now ranges from \$6 a day in Texas to \$50 a day in Connecticut, hardly enough for a juror to sustain a household during a trial that becomes a months-long marathon.

Arizona recently enacted legislation imposing small surcharges on civil court filings to create a trial fund to ease the financial burden on jurors, though now only for civil cases. The income-based formula isn't triggered until the tenth day of trial, and most trials average just four days. One juror in a two-month trial last year received more than \$7,000.

More recently, efforts are under way to ensure jurors know what they're doing in the courtroom and are better able to evaluate testimony and evidence. The concern is with how jurors absorb and process complex information that often comes at them in strange language and disjointed presentations.

These changes and experiments have ramped up the debate over justice and the role of juries. The jury is out on the jury itself.

In February, the ABA House of Delegates adopted the ABA Principles Relating to Juries and Jury Trials, a set of 19 standards incorporating much of the reform that has bubbled up in various jurisdictions during the past decade or so. The principles were developed with an understanding that, because of varying statutes and rules in jurisdictions around the country, they are to be viewed as an aspirational gold standard. (For more on the House action, see "Man on the Go," page 61.)

#### 'A MOVEMENT WITH MOMENTUM'

THE JURY PRINCIPLES CALL FOR, AMONG OTHER THINGS:

- Permitting note-taking by jurors.
- Allowing questions in civil cases and, possibly, in criminal cases.
- Returning to 12-person juries.
- Requiring unanimous verdicts.
- Showing greater care and concern for jurors, including protections for their privacy.

"I'm hoping that we develop a movement with momentum, and [with] the profession leading in the adoption of rules and procedures to implement these principles and demonstrate our commitment to improving the jury system," says ABA President Robert J. Grey Jr., who has made jury reform his signature project.

At the same time, the National Center for State Courts is conducting a state-of-the-states survey to develop a catalog of practices nationwide. The Williamsburg, Va.-based center plans to put the results online in such

fashion that the information can be parsed and packaged in any way by any user. Want to know the percentage of courts that permit juror questions? The database would have the answer.

That survey is aimed at a moving target. The pace of jury reform is quickening with a variety of efforts, such as a yearlong pilot project on juror comprehension in New York, completed in December. The study concerned 112 trials (68 civil, 44 criminal) in 14 counties, including New York County (Manhattan). The trials were heard by 26 judges, with 210 lawyers and 926 jurors.

In each trial, one or more of the following innovative techniques were used: juror note-taking; juror questions; written copies of the charge, or instructions, for jurors during deliberations; brief statements or mini-openings by lawyers in voir dire; and substantive preliminary instructions for the jury at the outset of trial.

After the trials were completed, the judges, lawyers and jurors answered lengthy questionnaires about the innovative practices they used. All received favorable ratings.

A final report has not been completed, but preliminary findings show that note-taking by far was the one used most often—in 91 trials. Juror questions came next—in 74 trials.

While note-taking already is permitted in New York, it is not widespread. The survey found that judges who had not experienced it nevertheless came to favor the practice, according to Elissa Krauss, a researcher with the state court system. Those judges tended to fear that note-taking would be a distraction and instead found that jurors became more attentive.

Fears of juror questions also proved unfounded. In all, jurors asked 347 questions, with lawyers objecting to 41 and only four surviving the objections. Overall, Krauss says, attorneys and judges believed jurors asked appropriate questions.

The mover behind jury reform in New York has been Judith S. Kaye, chief judge of the New York Court of Appeals, the state's highest court. Shortly after becoming chief judge in 1993, Kaye began pushing for jury reform. She wanted to begin with administration and called in the director of court research and technology.

"I told him I wanted to do this, and he looked me in the eye and said, 'People before you have said that. Are you really serious?'"

She was. And, as they say, the tone is set at the top. Kaye has written about, spoken publicly about and otherwise pushed for jury reform at every opportunity. Grey acknowledges her as being one of those who suggested he take it to the bully pulpit that comes with the ABA presidency.

"We started with the nuts and bolts of how you get a jury to the courthouse, and then we moved to how they're treated," Kaye says. "Now we've moved on to utilization and comprehension—how jurors can best go about their work."

Kaye is the hands-on co-chair—with U.S. Supreme Court Justice Sandra Day O'Connor as honorary co-chair—of the blue-ribbon Commission on the American Jury, which Grey created in conjunction with the task force that developed the jury principles. The commission has begun

outreach to the public, the bench and the bar to help implement jury reform.

According to those involved in research and experiments, the public is an easy sell. Lawyers and, particularly, judges are a different matter. Innovations such as note-taking or juror questions often are optional and go unused.

"It tends to be a generational thing," says B. Michael Dann, the former chief judge of Maricopa County who was the prime mover behind reform in Arizona. "The more-senior judges and some lawyers tend to be resistant to change. If you look a little deeper, it comes down to power issues and control."

In recent years Dann has been a research fellow on jury reform with the National Center for State Courts. He just completed a two-year stint with the Justice Department's research arm, the National Institute of Justice.

"One could say that jury reform has been proceeding in courtrooms funeral by funeral," Dann says. "But in some states, the courts or the public have been stepping in with their own studies and moving things along."

Much of the action is in the states. There is no centralized effort in the federal court system to consider these kinds of changes in the systematic way being done in a number of states, Dann says.

"So, in this case, the federal system is working as it should—with the states experimenting and getting out in front and hopefully the feds will follow," Dann says.

Depending on the jurisdiction, some of the reforms can simply be adopted. Others require rule changes or legislation.

Following is a look at some of the most significant reforms, as stated in the newly adopted ABA jury principles, and how they have played out or are playing out in various states.

#### QUANDARY OVER QUESTIONS

PROBABLY THE MOST CONTROVERSIAL OF THE 19 JURY

principles is 13(C): "In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses. 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.

"1. Jurors should be instructed at the beginning of the trial concerning their ability to submit written questions for witnesses."

## ABA Connection



#### PROGRAM

Begins at 1 p.m. (ET) April 20 and discusses changes in the jury system.

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#### REGISTRATION INFORMATION

While the practice of letting jurors ask questions is not widespread, most states permit it in some form. So do the 10 federal circuits that have considered the issue.

The Vermont Supreme Court recently surveyed the various rules and rulings in the states and federal circuits and noted most jurisdictions that permit juror questions nevertheless also discourage them. *State v. Doleszny*, 844 A.2d 773 (2004).

The Vermont court ruled that questions should be permitted and noted "a significant recent trend toward endorsement of the practice and emphasis on its benefits."

The Vermont ruling was in a criminal case, where the argument against juror questions, even its proponents admit, is more serious. Opponents argue that the justice system is adversarial, and that by asking questions jurors become adversaries themselves; thus, they might help the prosecution establish its burden of proof.

"If a juror question affects someone's right to a fair trial just one time, that's one time too many," says Carrie Lynn Thompson, a public defender in Denver for 18 years.

Thompson was a member of what is now called the Colorado Standing Jury Committee, whose report to the state supreme court recommending the practice of juror questions led to a rule, effective July 1, 2003, permitting questions in criminal cases. Thompson had disagreed and issued a dissenting minority report. The court had earlier adopted a rule permitting questions in civil cases.

Research showed Colorado judges and lawyers, after experimenting with juror questions in criminal cases, favored the practice. However, the research showed a significant percentage of public defenders opposed.

Nevertheless, proponents say the questions often help lawyers get inside the minds of jurors.

"As a lawyer I'd have loved to have known, even if it was going against me, what the jurors were thinking so I could try to persuade them to my point of view," says Judge Gaines of Arizona.

The research also stressed that the judge represented a key factor in making it work.

"One of the biggest differences is the demeanor of the judge and how the judge handles questions in the courtroom," says Mary Dodge, a criminal justice professor at the University of Colorado at Denver, who conducted a study of the use of juror questions in 239 criminal trials for the project.

Thompson, the naysayer, is not giving up. A judge still can, for good cause, prohibit juror questions—and she and others are filing motions asking just that. If they lose but are successful on appeal, some cases might be sent back for retrial.

"I don't think they'll change back because it's the right thing to do," Thompson says. "But I do hope that we can get a few reversals and show that it is costing the system more. That gets their attention."

Meanwhile, the supreme courts in two states, Mississippi and Nebraska, have prohibited juror questions in both civil and criminal cases. *Wharton v. State*, 734 So. 2d 985 (Miss. 1998), and *State v. Zima*, 468 N.W.2d 377 (Neb. 1991).

Texas, Georgia and Minnesota prohibit juror questions in criminal trials but permit them in civil trials.

In the federal system, the 9th U.S. Circuit Court of Appeals at San Francisco states explicitly in its Jury Procedure Manual (Rule 3.5) what is simply understood elsewhere in the federal system: “Questions by jurors during trial should not be encouraged or solicited.”

“There’s no question it takes getting used to,” says Patricia Lee Refo, a litigator who moved to Phoenix in 1996 from Chicago, where permitting questions is not common practice. Refo chaired the ABA American Jury Project, which developed the 19 jury principles, and is chair of the ABA Litigation Section. “But if you were the trial lawyer, how could you not want to know that a juror didn’t understand something?”

#### SUPPORT FOR NOTE-TAKING

ACCORDING TO ABA JURY PRINCIPLE 13(A): “JURORS SHOULD be allowed to take notes during the trial.

“1. Jurors should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence and should receive appropriate cautionary instructions on note-taking and note use. Jurors should also be instructed that after they have reached their verdict, all juror notes will be collected and destroyed.”

“A lot of people think this one is a no-brainer, but it’s only done in about half the courtrooms in the country,” says Dann, the former judge and proponent of reform. “So the ABA going on record recommending it is a big change.”

The reason the practice is not more widespread isn’t that judges discourage it, but that they don’t affirmatively inform juries of the possibility and don’t provide pads and pens.

There is a long and rich line of case law concerning how jurors go about their work. There likely will be more. One member of the task force that developed the ABA’s principles says the recommendation that juror notes be destroyed after the trial may prove problematic.

“It goes against rulings by federal courts that it violates the First Amendment to say jurors can’t talk about a case when it’s over,” says Mark Curriden, a Dallas lawyer and former journalist. “This is in the same line as those cases.”

Perhaps more significant than note-taking is the ABA’s recommendation that jurors be given trial notebooks that might include the court’s preliminary instructions, and certain exhibits and stipulations. That would occur in conjunction with giving them copies of the jury instructions to take into deliberations—which some courts already do—and, possibly, mini- or interim opening or closing statements as a complex trial progresses.

“There can be a good deal of improvement in juror comprehension when a case is well-trying, but there can be much more in an environment in which jurors are free to learn,” says Northwestern University law professor Shari S. Diamond, a researcher with the American Bar Foundation and member of the ABA’s American Jury Project.

While the tide in recent decades has swept away the long-held notions that juries should have 12 members and reach unanimous verdicts, scholarship and research have been trying to tug it back.

In another of its more controversial recommendations,

the ABA jury principles call for 12-person, unanimous juries in most instances, but especially in felony criminal cases.

The overwhelming weight of research indicates that smaller juries tend to be less representative of the community, says Stephan Landsman, a professor at DePaul University College of Law and reporter for the project that developed the ABA’s principles. Such juries also are more likely to return verdicts at variance with testimony, evidence and the law, he adds.

“An assessment of empirical data rather than anecdotes is that if we don’t move back toward 12-person, unanimous juries we are undercutting the real benefit of jury trials,” Landsman says.

Much of the impetus for the more frequent use of smaller juries over the years has been cost savings.

But the U.S. Supreme Court, in two cases in the early 1970s, supported the notion that a jury does not have to be made up of 12 citizens.

“[T]he fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance ‘except to mystics,’ ” the court said in a state criminal case. *Williams v. Florida*, 399 U.S. 78 (1970). A six-person jury did not violate the defendant’s Sixth Amendment rights, the court said, also pointing out that the Constitution does not specify a number.

Three years later the court ruled similarly concerning civil cases in federal courts. It found that a six-person jury did not violate the Seventh Amendment rights of litigants and noted, based on a survey of six civil trials using either 12 or six jurors, that there was “no discernible difference between the results reached by the two different-sized juries.” *Colgrove v. Battin*, 413 U.S. 149 (1973).

Yet the court ruled in 1978 that a jury of five in a criminal case violated defendants’ Sixth and 14th Amendment rights. *Ballew v. Georgia*, 435 U.S. 223.

Justice Harry A. Blackmun seemed to reverse the court’s reasoning in the earlier jury-size cases when he wrote for the majority: “Recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts.”

Blackmun did not, however, call for a reversal of *Williams*.

“I’m guessing that he did that strategically because he wouldn’t be able to get a majority view,” says Arizona State University law professor Michael Saks. “The court had been doing bad law and bad social science in the first two cases.”

The New Hampshire Supreme Court made that leap of logic in 1981 with an advisory opinion for its state legislature as it considered legislation that would permit six-person juries. The state high court noted that in 1860, when the legislature was drafting the state constitution, it had issued an advisory opinion that a jury should have 12 members—the numerical specificity lacking in the U.S. Constitution.

“We reaffirm this decision, believing that the vitality of its conclusion remains today, especially in light of the number of empirical studies that have questioned the im-

pact of the six-member jury on our court system,” the court said. *Opinion of the Justices*, 431 A.2d 135 (N.H. 1981). The court noted that parties could stipulate to a smaller jury.

The same sort of fractionating has taken place in the debate over whether jury verdicts should be unanimous or delivered with a specified majority. The New Jersey Superior Court requested friend-of-the-court briefs in a case pitting recent legislation permitting a three-fourths verdict, such as six out of eight jurors, against the state constitution’s requirement for a five-sixths verdict.

*LaManna v. Performance Insurance Co.*, 837 A.2d 384 (2003).

“That case could tee up some change in the unanimity debate,” says Landsman, the reporter for the project that developed the ABA’s jury principles.

The new principles call for unanimous verdicts “whenever possible” in civil cases and in all criminal cases heard by juries.

One of the key arguments against a requirement for unanimous juries is that it would increase the number of hung juries and retrials. On the other side, proponents of unanimous juries note that non-unanimous juries often shorten deliberations because they’ve reached a quorum and realize they don’t need to consider the voices, or votes, of one or two holdouts.

The U.S. Supreme Court, just a year after it found in *Ballew* that a jury may not number fewer than six, ruled that a non-unanimous jury verdict in a criminal case violated the defendant’s Sixth and 14th Amendment rights. The court said that concerns with trial length and court budgets, while substantial, were “insufficient justification” for less than unanimous verdicts.

But academics have been arguing ever since that the court had used anecdotal evidence and misused empirical data in that string of cases during the 1970s in which it tinkered with jury size and the need for unanimity.

“The court was simply wrong,” says Landsman, the ABA jury project reporter. “And with these jury principles we’re trying to get back to the fundamentals that made jury trials such a durable and valuable part of the justice system. We know we’re not going to get back by tomorrow but we hope to turn it around.”

#### POINTERS FOR PICKING JURORS

A METRO COLUMNIST FOR *THE WASHINGTON POST* RECENTLY wrote about his experience on a jury in the District of Columbia Superior Court. Among his complaints was how obvious it was to the jurors themselves that the lawyers were using peremptory challenges to remove potential jurors by race and ethnicity.

“This happens a lot, despite what the Supreme Court has said about the constitutionality of certain automatic strikes,” says Dann, the former Phoenix trial judge. “It’s as if the lawyers have a tacit agreement of ‘you take yours and I’ll take mine,’ and the judge sits there with hands tied.”

The U.S. Supreme Court ruled in 1986 that when a prosecutor struck four blacks from serving on a jury in the trial of a black defendant, resulting in an all-white jury, it violated the man’s Sixth Amendment right to a fair trial and his 14th Amendment right to equal protec-

tion under the law. *Batson v. Kentucky*, 476 U.S. 79.

ABA jury principle 11(F)5 recommends that “the court on its own initiative, if necessary, shall advise the parties on the record of its belief that the challenge is impermissible,” and that the lawyer must show “a nondiscriminatory basis” for it.

“This is significant because for the first time, this standard is saying the court may, on its own motion, intervene in the strike procedure to raise the *Batson* issue even if there is no objection from the other side,” Dann says.

#### A QUESTION OF REPRESENTATION

BUT THERE STILL IS THE QUESTION OF WHETHER JURY venires, the groups of potential jurors summoned to jury duty, are representative of the community. The ABA jury principles say courts should use two or more source lists and update them regularly. Further, principle 10 says that the percentages of “cognizable groups” in source lists and jury pools should be roughly equal to their percentages in the community.

That issue is looming larger. Lawyers at Houston’s Vinson & Elkins recently picked up where founding partner William Vinson left off more than six decades ago with a stunning Supreme Court victory in a case in which he represented, pro bono, a black man convicted of rape. *Smith v. Texas*, 311 U.S. 128 (1940). The grand jury that indicted him was all white, and the jury that convicted him and sentenced him to death was all white.

Vinson had used statistical evidence to convince the court that the Texas jury selection laws violated the defendant’s 14th Amendment right to due process under the law. He had found that while 22 percent of Harris County’s population was black, fewer than 3 percent of those called for grand jury and jury service were black.

“It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community,” wrote Justice Hugo Black for the majority.

Vinson & Elkins recently looked at more than two dozen felony trials in Harris County (Houston) and Dallas County, including capital cases, and found that Latinos were significantly underrepresented in jury venires and on juries.

The firm filed a habeas petition in Texas state court arguing that, in a capital case, both the defendant and the community were denied justice because the state laws for jury pools and jury summonses are insufficient for reaching appropriate percentages of three cognizable groups: Latinos, young adults and people with low incomes. *State v. Prible*, No. 921126-A, (351st Jud. Dist. Ct., Harris Co.).

“The difference is that we think historically there was systematic exclusion of certain groups, and now it’s unintentional,” says Robert C. Walters, a commercial and antitrust litigator with the firm who is working on the case pro bono. “But it has the same impact. You cut out those groups of people, and you can be certain criminal defendants will not have juries of their peers.”

The case may have legs. Curriden, a V&E lawyer, has received several requests from public defender offices around the country, and other criminal defense groups, to offer workshops on this case.

“I think you’ll be seeing a lot of these challenges around the country,” Curriden says. ■