STATE OF MINNESOTA

IN SUPREME COURT

C6-84-2134
CX-89-1863

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF CIVIL PROCEDURE AND THE MINNESOTA CIVIL TRIALBOOK

ORDER

IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on February 26, 1997 at 2:00 p.m. to consider the petition of the Minnesota State Bar Association to amend the Rules of Civil Procedure and the Minnesota Civil Trialbook. A copy of the petition containing the proposed amendments is annexed to this order and may also be found at the Court's World Wide Web site: (www.courts.state.mn.us).

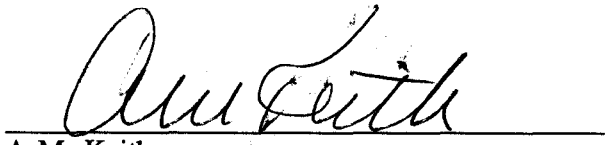
IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before February 20, 1997 and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before February 20, 1997.

Dated: December 18, 1996

BY THE COURT:



A.M. Keith
Chief Justice

No. CX-84-2134
No. CX-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

In re:

Amendments to Rules of Civil Procedure and the General Rules of Practice (Civil Trialbook)

Petition of Minnesota State Bar Association

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association ("MSBA") respectfully petitions this Honorable Court to amend the Rules of Civil Procedure and the Minnesota Civil Trialbook to implement the following recommendations of the MSBA:

1. The six person jury should be considered the minimum but not the maximum (amending Minn. R. Civ. P. 48);

2. All alternates remaining at the close of a civil trial should deliberate and vote (striking Minn. R. Civ. P. 47.02 and amending Minn. R. Civ. P. 48);

3. Jurors should be permitted to question witnesses during trial with appropriate safeguards (inserting new subsection in Minn. Civ. Trialbook § 10);

4. The judge should read the substantive instructions to the jury before closing arguments (amending Minn. R. Civ. P. 51);

5. Civil juries should be provided with written copies of all instructions (amending Minn. R. Civ. P. 51).

In support of this Petition, MSBA would show the following:

1. Petitioner MSBA is a not-for-profit corporation of attorneys and judges admitted to practice law before this Court and the other courts of the State of Minnesota.

2. This Court has the exclusive and inherent power and duty to administer justice and to adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the legislature. *See* Minn. Stat. § 480.05 (1996).

3. This Court has adopted the Rules of Civil Procedure to govern the procedure in all suits of a civil nature. The Rules are to be construed to secure the just, speedy, and inexpensive determination of every action. *See* Minn R. Civ. P. 1. This Court has since amended those rules from time to time.

4. As part of the General Rules of Practice, this Court adopted the Minnesota Civil Trialbook, effective January 1, 1992. While not mandatory, the Trialbook is a declaration of the practical policies and procedures to be followed in the civil trials in all the trial courts in Minnesota. *See* Minn. Civ. Trialbook § 1 (1996).

5. In January of 1994, the Governing Council of the Civil Litigation Section of the MSBA established the Committee on Civil Juries and instructed it to investigate ways to improve the civil jury system in Minnesota. The Committee, made up of practitioners and judges from throughout the state, consulted with court administrators, judges who have used innovative jury participation techniques in their courtrooms, experts in jury research, and jurors themselves. The Committee

also conducted focus groups. *See* Appendix A (Committee on Civil Juries Report). After substantial study and deliberation, the Committee issued numerous recommendations in its report. The Civil Juries Report was adopted by the Governing Council of the Civil Litigation Section of the MSBA in June 1995.

6. The Civil Litigation Section, together with the Court Rules and Administration Committee of the MSBA, submitted proposals for amendments of the Rules of Civil Procedure and the Civil Trialbook based on the Civil Juries Report to the MSBA General Assembly in June 1996. On June 21, 1996 those proposals were approved and are submitted herein to this Court. The proposed amendments are attached hereto as Appendix B.

7. The MSBA respectfully recommends and requests that this Court amend the Rules of Civil Procedure and the Minnesota Civil Trialbook as follows:

The Six-Person Jury Should Be Considered
The Minimum But Not The Maximum

8. This recommendation affects the present Rule 48 that "[t]he parties may stipulate that the jury shall consist of any number less than 12, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury." *See* Minn. R. Civ. P. 48.

9. The MSBA's research shows that 8 to 12 person juries resulted in more consistent and predictable verdicts with less variability. Studies indicate that any additional costs are not appreciable. Many scholars have concluded that the change in the 1970's from a constitutional jury of 12 to 6 has depreciated the jury's value. *See* Richard Lempert, *Uncovering Nondiscernable Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L. Rev. 644 (1975); Hans Zeisel, *The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710 (1971); *see also*

Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability,* 79 Judicature 263 (March - April 1996).

10. The report shows that increasing jury size results in more consistent verdicts, more well considered verdicts and greater citizen participation in the jury process.

11. This recommendation also addresses the frustration of potential jurors who complain of reporting for service, waiting for days or weeks and never being called to serve.

12. The MSBA accordingly respectfully recommends and requests that this Court amend Rule 48 of the Rules of Civil Procedure as follows:

Rule 48. Juries Of Less Than Twelve; Majority Verdict

The parties may stipulate that the jury shall consist of any number less than 12, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. If the parties do not stipulate as to the number of jurors, the court shall seat a jury of not fewer than six and not more than twelve members. All jurors shall participate in the verdict unless excused from service by the court for good cause. If the number of jurors falls below six, then the court shall declare a mistrial unless the parties have stipulated or do stipulate that the trial may proceed with fewer than six jurors, in which case the trial shall so proceed unless the court finds that manifest injustice will result.

All Alternates Remaining At The Close Of A Civil Trial Should Deliberate And Vote

13. Allowing alternate jurors to deliberate at the close of trial is consistent with the encouragement of larger juries. The alternate is treated like every other juror and has heard the entire case. Allowing the alternates to deliberate would avoid the frustration of the juror who is discharged without participating in the deliberation process.

14. Rule 47.02 of the Rules of Civil Procedure currently provides that the alternates be discharged once the jurors retire to deliberate.

15. The MSBA respectfully recommends and requests that this Court strike Rule 47.02 in its entirety and amend Rule 48 as follows:

Rule 48: Jurors Of Less Than Twelve; Majority Verdict

. . . All jurors shall participate in the verdict unless excused from service by the court for good cause.

Jurors Should Be Permitted To Question Witnesses During Trial With Appropriate Procedural Safeguards

16. Juror studies verify that questions by jurors are an important device for jury deliberation and participation. Permitting questions gives jurors a greater sense of participation, avoids confusion, and allows jurors to pursue relevant information not solicited by lawyers. In addition, jurors are more alert and focused on the issues. *See* Judge Michael Dann, *Learning Lessons and Speaking Rights: Creating Educated and Democratic Jurors*, 68 Ind. L. J. 1229 (1993); *see also* Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 Judicature 256 (March - April, 1996).

17. This proposal would allow jurors to submit written questions to the court. The court would then have the opportunity to review the questions to determine their propriety before directing them to counsel and the witnesses.

18. This proposal was drafted by drawing from the present Civil Trialbook section on questioning by the judge (Section 10(j)) and the present section on questions by jurors during deliberations (Section 16).

19. The MSBA respectfully requests that this Court insert in the Civil Trialbook a new Section 10(j) and that the following subsections be renumbered accordingly:

Section 10. Examination Of Witnesses

(j) Questioning by Jury. A juror may submit a question for a witness through the judge. The juror shall submit the question in writing through appropriate court personnel. Upon receipt of such a written question, the court shall review the propriety of the question with counsel, on the record outside the presence of the jury. The court shall then ask the question, in which case all parties shall have the opportunity to examine the matters touched upon by the question; or shall tell the jury that the law prevented the question from being asked.

The Judge Should Read The Substantive Instructions To The Jury Before Closing Arguments

20. Studies have demonstrated that jurors' comprehension of the applicable legal standards is raised if they are instructed on the substantive law prior to closing arguments. *See* ABA Litigation Report, *Jury Comprehension in Complex Cases* (1989).

21. The Rules of Civil Procedure already allow this practice. However, the MSBA proposes an amendment to the rule to make this practice mandatory instead of discretionary. The current rule provides: "The court shall instruct the jury before or after closing arguments of counsel except, in the discretion of the court, preliminary instructions need not be repeated." *See* Minn. R. Civ. P. 51 (1996).

22. The MSBA respectfully recommends and requests this Court amend Rule 51 of the Rules of Civil Procedure as follows:

Rule 51: Instructions To The Jury; Objections

. . . The court shall instruct the jury as to the substantive law before ~~or after~~ closing arguments of counsel ~~except, in the discretion of the court, preliminary instructions need not be repeated~~. The court shall instruct the jury after closing arguments of counsel as to the procedure for the jury's deliberations and may then repeat some or all of the preliminary instructions given under Rule 39.03. The closing instructions may also repeat some or all of the instructions as to the substantive law.

Civil Juries Should Be Provided With Written Copies Of All Instructions

23. The American Bar Association conducted a study of the practice of giving jurors written instructions and concluded that written instructions increase jurors' understanding of the instructions. In addition, written instructions facilitate deliberations, reduce the number of questions about the instructions during deliberations, and increase the confidence of jurors in their verdict. *See* ABA Litigation Report, *Jury Comprehension in Complex Cases* (1989).

24. This recommendation affects the present rule that "[t]he instructions may be in writing and, in the discretion of the court, one complete copy may be taken to the jury room when the jury retires to deliberate." Minn. R. Civ. P. 51. The MSBA recommends that the rule be amended to require each juror be given a copy of the instructions.

25. The MSBA respectfully requests that Rule 51 be amended as follows:

Rule 51: Instructions To The Jury; Objections

. . . The instructions ~~may~~ shall be in writing and~~, in the discretion of the court, one complete copy may be taken~~ each juror shall be given a copy that the juror may take to the jury room when the jury retires to deliberate.

WHEREFORE, Petitioner MSBA respectfully petitions this Honorable Court to:

1. Strike Rule 47.02 of the Minnesota Rules of Civil Procedure and amend Rule 48 as set forth in paragraphs 12 and 15 above.

2. Adopt Section 10(j) to the Minnesota Civil Trialbook as set forth in paragraph 19 above.

3. Amend Rule 51 of the Minnesota Rules of Civil Procedure as set forth in paragraphs 22 and 25 above.

Dated: November 22, 1996

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By _____
John N. Nys
Its President

MASLON EDELMAN BORMAN & BRAND
A Professional Limited Liability Partnership

By _____
Laurie A. Kindel (#243929)
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90 South Seventh Street
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ATTORNEY FOR PETITIONER

94757

APPENDIX A

MSBA Civil Litigation Section

Committee on Civil Juries Report

June, 1995

MSBA Civil Litigation Section

Committee on Civil Juries

Report

co-chairs: Peter W. Riley
Martha M. Simonett

Tyrone P. Bujold
Robert J. Feigh
Hon. Roberta K. Levy
Stephen F. Rufer
Hon. John M. Stanoch
Hon. Kathleen Weir

Mary G. Grau, MSBA Staff

June, 1995

Introduction

The MSBA Civil Litigation Section's Committee on Civil Juries grew out of a panel discussion debating the merits of the jury system that took place at the Bar Association's 1993 convention. It was clear after this meeting that most Minnesota lawyers strongly believe in the importance and continued existence of the civil jury, while also believing that the system could be changed in ways that would benefit all participants.

In January of 1994, the Civil Litigation Section council appointed the Jury Committee and instructed it to investigate ways to improve the civil jury system in Minnesota. The Committee adopted the following mission statement as a guide to its work:

1) The jury system is fundamental to the American justice system;
2) Membership on juries should be open to all citizens;
3) The goals of the Committee on Civil Juries are to seek ways to preserve the jury system, improve its efficiency, and improve the quality of service for jurors and the communication of information to jurors.

The Committee, made up of both practitioners and judges from throughout the state, met regularly for over a year. It consulted with court administrators, judges who have used innovative jury participation techniques in their courtrooms, experts in jury research, and jurors themselves. The Committee also reviewed some of the growing body of scholarly literature in this area.

The Committee is especially indebted to G. Thomas Munsterman of the National Center for State Courts, the Honorable B. Michael Dann of the Superior Court in Maricopa County, Arizona, and Professor Steven Penrod, formerly of the University of Minnesota Law School, all of whom have done groundbreaking work in the field of civil jury reform. The recommendations which follow, while tailored to the specific conditions found in Minnesota, are heavily influenced by their efforts. The Committee would also like to thank the staff of the Midwest Office of the National Jury Project for conducting several informative juror focus groups and the Fourth Judicial District Court Administrator's Office for its assistance. A summary of the focus group findings is attached to this report.

While some of the Committee's recommendations may be considered controversial, lawyers, judges and juries that have tried them like them, for the simple reason that they work: they make it easier for jurors to do their job and to do it well. Taken as a body, the recommendations reflect the Committee's determination to enhance the vitality of the civil jury system rather than to diminish its stature or denigrate its effectiveness.

The recommendations have the advantage of being cost-effective. Most will not require any additional funding in order to be implemented. For those few that do, the benefits are clearly substantial enough to warrant the necessary financial commitment.

Although the Committee gathered information from a number of sources on the jury summons process and on the issues of jury diversity and representativeness, the group decided not to make any specific recommendations in this area. These issues have been thoroughly addressed in the Minnesota Supreme Court's Racial Bias Task Force Report, and the Committee understands that the Office of the State Court Administrator is currently working to implement the Racial Bias Task Force recommendations.

Finally, while the Committee realizes that some of its recommendations may be most useful to juries in especially lengthy or complex cases, the Committee believes that, except where specifically qualified, they should be applied across the board in all civil trials.

The Committee also recognizes that several of the recommendations are already being implemented in courtrooms in some jurisdictions; the Committee urges that implementation be uniform statewide.

Before Trial

1. *To the extent practical, the court system, including judges, administrators and other court staff, should take all possible steps to assure that jurors are called only when needed and that, when called, time spent waiting is kept to an absolute minimum.*

Comment

Early on in its work, the Committee noted that a common complaint of jurors is that they spend too much "down time." Jurors do not seem troubled by the disruption in their lives caused by being called for jury service, but often object if they do not feel their time is being used wisely and productively.

In meeting with Professor Steven Penrod, it was suggested that jurors be called on a "one day-one trial" basis. Under this system, a juror would be called for one day and, if not selected for a trial, would be released from further obligation. In addition, after sitting on one trial, the juror would be released. The advantages of this system are that it calls in more jurors more often, and obviously reduces to a minimum any time the jurors spend sitting in a general pool without being called to a particular panel. The Committee noted significant potential logistical difficulties with this proposal, however, particularly for court administrators in greater Minnesota.

The Committee is also cognizant that efforts are being made by various administrators throughout the state to address the concerns in this recommendation. Nonetheless, the Committee felt it important to reiterate that all feasible steps be taken to minimize the time jurors spend not actively involved in the business of being jurors.

2. *Child care should be made available to jurors who would otherwise be unable to serve.*

Comment

In 1993 the Minnesota Conference of Chief Judges established a state wide child care reimbursement policy with funding provided by the state legislature.

The Committee strongly recommends that funding for this innovative program be continued. Without such a policy, many potential jurors must be excused because of their inability to afford child care, and access to jury service for all citizens suffers.

Jury Selection

3. *Lawyers should retain the right to voir dire in all civil cases.*

Comment

The Committee feels that it is critical that lawyers retain the right to question jurors. The Committee discussed the fact that a number of commentators have suggested that state courts adopt the federal system of judicial voir dire as a way to speed up the process of jury selection. While the Committee recognized that many trial judges are extremely skilled in jury questioning, it is the lawyers who are usually intimately familiar with all of the facts of the case, including subtle nuances. This means that the lawyers are more likely to pick up signals of bias and prejudice uniquely relevant to the issues in controversy, whereas the trial judge may not be as aware of the importance of a juror's substantive answer or the manner in which the answer is delivered. Further, the lawyers are more likely to follow up on questions which raise some doubt as to the jurors' impartiality. The length of questioning can be controlled by availability to the lawyers of detailed questionnaires which will render unnecessary fundamental inquiries. The trial judge is in an excellent position to control voir dire that has as its purpose advocacy rather than selection of an impartial jury and can, and should, be diligent in preventing lawyers from using voir dire as a form of opening statement.

4. *To reduce the time taken up by juror questioning and to increase juror privacy, the use of case specific written questionnaires for voir dire should be encouraged.*

Comment

Information available to the Committee indicated that jurors are more willing to be forthcoming in answers if they can do so in written question form, and if jurors are assured that their answers are confidential. In addition, having jurors complete written questionnaires can significantly shorten the time taken in oral voir dire, and will help counsel and the court focus the questioning.

5. *The current system of peremptory strikes should be retained.*

Comment

The Committee discussed the possibility of recommending the abolition of the peremptory challenge, but ultimately determined that peremptory strikes are necessary for the selection of a fair jury, and should be retained in their present number. In light of Batson safeguards, it cannot be said that peremptory strikes are inherently discriminatory or arbitrary. Rather, they are essential to the seating of an impartial

jury. There is no need to increase or decrease the number of peremptory challenges allowed under the present rules.

6. *Batson safeguards should be rigorously enforced.*

Comment

Trial judges should be vigilant and, where necessary, take the initiative to assure that there is an objective, verifiable and race, ethnic, and gender-neutral basis for every peremptory strike of a potential juror. Such protection is necessary to protect the rights of the parties and potential jurors. Under existing law, peremptory strikes cannot be used to remove potential jurors on the basis of race, ethnicity or gender. Batson v. Kentucky, 476 U.S. 79 (1986); J.E.B. Petitioner v. Alabama, ex rel. T.B., 1994 WL 132232. Judges should, however, take an active role in enforcing such protections – to this end, judges could, for example, require the party using a peremptory strike to remove a person accorded Batson protection to make the required showing, i.e. that there is an objective, verifiable and race, ethnic, and gender-neutral basis for the strike. Such judicial safeguards should be at the court's own initiative, if necessary.

7. *The six person jury should be considered the minimum but not necessarily the maximum.*

Comment

Committee research showed that 8 to 12 person juries result in more consistent and predictable verdicts with less variability. Importantly as well, studies indicate that any additional costs are not appreciable. Most scholars have concluded that the change in the 1970's from a constitutional jury of 12 to 6 has depreciated the jury's value and perhaps paves the way for ill-considered change. See, e.g. Richard Lempert, "Uncovering Nondiscernable Differences: Empirical Research and the Jury-Size Cases," 73 Michigan Law Review, 644 (1975); Hans Zeisel, "... And then there were None," The Diminution of the Federal Jury, 38 Univ. of Chicago Law Review 710 (1971).

The Committee recommends that court rules be amended to provide that in the discretion of the trial judge and with the consent of trial counsel, the civil jury in appropriate cases should be expanded from six to eight or ten. Six should be considered the minimum but not necessarily the maximum. The advantages to such an amendment include more consistent verdicts, more well-considered verdicts and promotion of the goal of greater citizen participation. This recommendation also responds to the frustration of those potential jurors who report for service, are paid, and wait for days or weeks or months in some counties but are never called to serve.

Trial

8. *The preliminary instructions given to juries should be expanded.*

Comment

In most cases judges should be encouraged to include elements of the claims and defenses in the preliminary instructions to aid jurors in processing the evidence as it is received.

In complex or technical cases, definitions of terms and other information to help orient the jury should be included.

Jurors should be given a specific trial schedule for the duration of the trial. Jurors should be told when trial begins and ends each day, the time and length of the morning and afternoon break, the time and length of the lunch recess. The court should reassure the jury that the schedule will be kept barring unforeseen emergencies.

Jurors should be told that the court will keep interruptions to the absolute minimum. The judge should explain the reasons for bench or chamber conferences and jurors should be reassured that most motions and/or discussions will be held either before or after the regular trial day. Every attempt should be made not to waste jurors' time.

9. *Jurors should be permitted to take notes in all civil cases.*

Comment

Research reviewed by the Committee reflects that juror note-taking improves the quality of juror deliberations. When accompanied by clear instructions on the proper use of notes, this is an effective way of improving juror service.

Many of the objections to juror note-taking – that the juror who takes notes will have a disproportionate impact on jury decision-making, for example – have been shown to be groundless in random assignment studies of juror deliberations . See Heuer and Penrod, "Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking," 12 Law and Human Behavior, 231 (1988).

10. *Jurors should be permitted to question witnesses during trial with appropriate procedural safeguards.*

Comment

The Committee research on this issue included meeting with scholars, members of the trial bench and a review of legal commentary. Judge Ann Alton of Hennepin County District Court spoke to the group and provided us with documentation on her success in permitting jurors to ask questions. In addition, Professor Steven Penrod

spoke to the group in support of this recommendation. The Committee recommends that jurors should be allowed to ask questions with the following judicial safeguards:

> "Informing jurors in advance of trial of the procedures to be followed; having questions put in writing and left unsigned; discussing the question with the attorneys and allowing them to object to the question out of the jury's presence; the asking of the question of the witness by the judge; and telling the jurors that the law may prevent some of their questions from being asked."
>
> *– Arizona Supreme Court Committee on More Effective Use of Juries.*

11. The judge should read the substantive instructions to the jury before closing arguments.

Comment

The Committee believes that it would assist the jurors comprehension of the applicable legal standards if they could hear the substantive legal instructions prior to counsels' summations. It would also assist counsel in drawing the jurors' attention to the particularly applicable portions of the instructions, and generally make it easier for the jury to understand just what legal standards are applicable to the particular evidence they have heard. The Committee recommends that following the summations, the Court would then deliver the standard final instructions regarding selection of the foreperson, what to do with a non-unanimous verdict, etc. In that fashion the Court would still have the "last word" to the jury, as opposed to either counsel.

The Committee believes that using this procedure, the jurors' attention will be better focused on the relevant issues, reducing the chances of the jurors applying the wrong rule or standard to the evidence, which hopefully in turn would result in more informed verdicts.

Both federal law and the Minnesota Rules of Civil Procedure explicitly permit this practice. (Rule 51 MRCP; Rule 51 (a) FRCP.)

See also, ABA Litigation Section Report, "Jury Comprehension in Complex Cases" (1989).

12. Civil juries should be provided with written copies of all instructions.

Comment

Judges should give juries written copies of both preliminary and final instructions. A copy should be given to each juror, and the jurors should be allowed

to take their copies of the instructions into the jury room, especially during deliberations. The ABA has conducted a study of the practice of giving jurors written instructions. The ABA report concludes that providing written instructions helps to increase jurors' understanding of the instructions, facilitate deliberations, reduce the number of questions about the instructions during deliberations, and increase confidence of the jurors in their verdict. "Jury Comprehension in Complex Cases," 1989, A.B.A. Litigation Section Report at 51-52 and 622-26.

Rule 51 of the Minnesota Rules of Civil Procedure now provides that one copy of the instructions may be taken into the jury room; the Committee recommends that the rule be amended as described here.

13. Jury instructions should be in plain English.

Comment

The Committee feels that slavish adherence to JIG instructions, even though the instructions may be submitted in writing to the jury, does not necessarily promote a clear understanding by the jurors of the principles of law involved. Trial judges and trial counsel should make every effort to modify JIG instructions where they are arcane and legalistic in language so that clearer communication is effected.

The Committee understands that work on the fourth edition of the Civil JIG is scheduled to begin soon, and urges the drafters to apply plain English principles to their efforts.

14. With appropriate safeguards, jurors should be permitted to ask questions about the meaning of instructions.

Comment

Jurors should be informed that questions are welcomed. Research studies verify that the advantages to jurors and the trial as a whole outweigh any feared risks and that questions by jurors are an important device for permitting needed jury participation. Judge Michael Dann, in his article entitled: "'Learning Lessons' and 'Speaking Rights:' Creating Educated and Democratic Jurors," notes that studies have shown that encouraging questions gives a jury a greater sense of active participation; avoids or ends confusion and allows jurors to pursue relevant information not solicited by lawyers. Jurors remain more alert and their attentions are better focused. Finally, questions may reveal a jury's mistaken notion of fact or law, or even juror misconduct. 68 Indiana Law Journal 1229 (1993).

The safeguards described in Recommendation Ten should also be applied here. Thus, questions should be written and unsigned, and should be discussed with the attorneys with an opportunity for objection. Jurors should be informed that some of their questions may be legally impermissible.

15. Jurors should receive trial notebooks in complex cases.

Comment

For any complex or lengthy trial the Committee recommends use of multiple-purpose juror notebooks. Among the contents suggested for the notebooks are the following:

1) Copy of the preliminary jury instructions.
2) Section for jurors' notes.
3) A list of witnesses' names, including descriptions or photos.
4) Copies of key documents.
5) A glossary of technical terms.
6) A copy of the final jury instructions.
7) A list of the parties and their attorneys.
8) A seating chart for the courtroom.
9) An ongoing index containing brief descriptions of the exhibits by number.

See Dann, and ABA report, supra.

The Committee would leave it up to the parties and the trial court to determine when a particular case was sufficiently complex or lengthy to merit the use of the juror notebook. Presumably the contents of the notebook would be a result of pretrial stipulation.

16. All alternates remaining at the close of a civil trial should deliberate and vote.

Comment

There is little reason not to permit the alternate juror to deliberate. The alternate is treated like every other juror and has heard the entire case. It would provide the advantages of a larger jury discussed earlier, including increased representativeness and more consistency in verdicts, and would avoid the frustration of the juror who is discharged.

The Committee recognizes that this recommendation would require modification of the Minnesota Rules of Civil Procedure, which currently provides that alternates who do not replace a principal juror shall be discharged once the jury retires (MRCP Rule 47).

Post Trial

17. Jurors should always be thanked for their service at the close of a trial.

Comment

After receiving the verdict at the end of the trial, the jurors should be thanked for their contribution to the efficient administration of justice. The Committee recommends that a standard jury instruction be developed to be read by the judge or court officer who receives the verdict.

18. The judge should offer to meet with any jurors who wish to do so after trial.

Comment

After receiving the verdict and thanking the jurors for their service, the trial judge should offer to meet with the jurors for an informal conversation. While the Committee acknowledges that it would be inappropriate for the judge to discuss the basis for the verdict, the judge and jurors may benefit from general conversation relating to such topics as the court proceedings and any delays experienced during trial. Jurors should also be given the opportunity to offer their suggestions on how to improve the judicial process and jury service.

19. In cases where post-trial emotional distress is likely, the court should provide jurors with a list of community resources.

Comment

Increasingly, jurors are asked to serve in difficult cases that are either extremely complex or emotionally draining. Although juror sensitivities are somewhat screened during voir dire, the court system has an obligation to ensure that individuals serving on juries are not overly traumatized by their experience. Human compassion demands that at the end of traumatic trials jurors be given a list of community resources they can contact if they are abnormally affected by their jury service. A list of local resources should be developed and maintained by court administrators in each judicial district.

20. *Jurors should be informed that post trial contact with the media and lawyers for the parties is optional, and that they have the right to refuse to discuss the verdict.*

Comment

In certain cases the lawyers or members of the media wish to contact jurors. The trial judge should inform all jurors that they may be contacted and that they have a right to speak to the lawyers or media. The jurors should also be informed that they have a right to decline to speak to the lawyers and media. The purpose of informing all jurors at the end of trial is to put the jurors on notice that such contact may be made and to allow them to consider the matter and make an informed decision before the contact occurs.

21. *Guidelines on appropriate post-verdict contact with jurors should be developed for both attorneys and the media.*

Comment

The Committee feels that there is considerable confusion among jurors and attorneys as to what is appropriate and permissible post-trial contact. The Committee recommends the following guidelines, but whatever guidelines are ultimately adopted, they should, as mentioned above, be communicated to the jurors at the conclusion of the case so the jurors understand their options. The Committee's guidelines would be as follows:

1) In a civil case after the verdict has been reached the jurors are free to discuss the case with the parties, the attorneys for the parties, or members of the media if they choose to, but are under no obligation to do so.
2) Post-verdict contact with jurors by attorneys or by the media, whether by mail, by telephone, or in person, is permissible as long as the juror consents to the contact.
3) Once a juror expresses an unwillingness to discuss the case either verbally or in writing, any further attempt to contact the juror by any means is inappropriate.
4) If a juror does not respond to an initial attempted contact, one follow-up attempt is permissible, but repeated attempts to speak with a juror who is not responsive to two inquiries violate the privacy of the juror and are not permissible.
5) Jurors should be informed that if impermissible contacts are being made with them, they may inform the court administration and/or trial judge.

Appendix

Civil Ligitation Section Juror Focus Groups

Mary G Grau, MSBA

APPENDIX B

Amendments to Minnesota Rules of Civil Procedure

Rule 48. Juries Of Less Than Twelve; Majority Verdict

The parties may stipulate that the jury shall consist of any number less than 12, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. If the parties do not stipulate as to the number of jurors, the court shall seat a jury of not fewer than six and not more than twelve members. All jurors shall participate in the verdict unless excused from service by the court for good cause. If the number of jurors falls below six, then the court shall declare a mistrial unless the parties have stipulated or do stipulate that the trial may proceed with fewer than six jurors, in which case the trial shall so proceed unless the court finds that manifest injustice will result. . . . All jurors shall participate in the verdict unless excused from service by the court for good cause.

Rule 51: Instructions To The Jury; Objections

. . . The court shall instruct the jury as to the substantive law before ~~or after~~ closing arguments of counsel ~~except, in the discretion of the court, preliminary instructions need not be repeated~~. The court shall instruct the jury after closing arguments of counsel as to the procedure for the jury's deliberations and may then repeat some or all of the preliminary instructions given under Rule 39.03. The closing instructions may also repeat some or all of the instructions as to the substantive law.

Rule 51: Instructions To The Jury; Objections

. . . The instructions ~~may~~ shall be in writing and~~, in the discretion of the court, one complete copy may be taken~~ each juror shall be given a copy that the juror may take to the jury room when the jury retires to deliberate.

Amendment to Minnesota Civil Trialbook

Section 10. Examination Of Witnesses

(j) Questioning by Jury. A juror may submit a question for a witness through the judge. The juror shall submit the question in writing through appropriate court personnel. Upon receipt of such a written question, the court shall review the propriety of the question with counsel, on the record outside the presence of the jury. The court shall then ask the question, in which case all parties shall have the opportunity to examine the matters touched upon by the question; or shall tell the jury that the law prevented the question from being asked.

The MSBA Civil Litigation Section's Committee on Civil Juries sponsored four focus groups with jurors at the Oakridge Conference Center in Chaska on June 15, 1995. This report is in three parts: an explanation of the format; a summary of the content of the discussions organized by report recommendation; and some general observations on the process and the results.

Format

The staff of the National Jury Project Midwest organized the groups and facilitated the discussions. Focus group participants were drawn from jury lists for civil trials of at least a week that took place in Hennepin County during the last year. The NJP staff first contacted participants by phone to determine level of interest and ability to attend, then followed up with a confirming letter. Twenty-nine people originally signed up; twenty-seven participated on June 15th.

Participants were divided into four groups with between six and eight people in each group. The facilitators all followed a prearranged discussion format. The sessions were videotaped, and members of the Civil Litigation Section who were present were able to view the discussions on tape from adjoining rooms. The sessions lasted approximately two and a half hours, although several ran over. Participants were asked to complete a brief exit questionnaire at the close of the discussion period. All participants received thank-you notes from the jury committee afterwards.

Discussion Summary

The focus group participants began by discussing their general impressions of jury service and then moved to a discussion of the specific recommendations in the jury committee report. The overall response of the jurors was positive, both toward their experience as jurors and toward the recommendations in the committee report. A summary of the jurors' comments regarding each of the recommendations follows.

1. *To the extent practical, the court system, including judges, administrators and other court staff, should take all possible steps to assure that jurors are called only when needed and that, when called, time spent waiting is kept to an absolute minimum.*

    * there was some concern about downtime, but this was not perceived as a big problem during the jury selection phase: jurors seemed more frustrated with the delays that occur *during* trial.
    * one-day-one-trial: no strong feelings one way or another. Several jurors in different groups pointed out that it will always be difficult to design a system that accommodates everyone – "do what works best for the greatest number of people."
    * juror orientation – no major complaints.

* at least one juror expressed appreciation at being able to reschedule his time of service and commented on how helpful the court personnel were: another juror in a different group knew of someone who had run into difficulty trying to postpone his service.

2. *Child care should be made available to jurors who would otherwise be unable to serve.*

* there was consistent support for the principle that child care shouldn't be an obstacle to service.
* some feeling that reimbursement shouldn't necessarily be limited to those who don't ordinarily have child care expenses.
* support for on-site care expressed in several groups; balanced with concern over cost.

3. *Lawyers should retain the right to voir dire in all civil cases.*

* no problems with having lawyers do voir dire; but "droning questions" from the lawyers are distracting and annoying.
* skill level of the lawyer makes a big difference in whether or not voir dire is effective.

4. *To reduce the time taken up by juror questioning and to increase juror privacy, the use of case specific written questionnaires for voir dire should be encouraged.*

* there were many comments about the fact that jurors were a bit surprised at the personal nature of the questioning in voir dire – it was more intimidating than they expected.
* case specific written questionnaires are a good idea; people may be more comfortable answering sensitive personal questions in writing.
* not sure that written questionnaires would actually save time, though.

5. *The current system of peremptory strikes should be retained.*

* there's a need for peremptories – the system has worked reasonably well for a long time; why change?

6. *Batson safeguards should be rigorously enforced.*

* not much discussion – no objection.
* several jurors commented on the need to ensure that juries are racially representative.

7. *The six person jury should be considered the minimum but not necessarily the maximum.*

* no significant objection.
* some concern, expressed in a couple of the groups, that a larger jury would have a harder time reaching consensus than a smaller group.

8. *The preliminary instructions given to juries should be expanded.*

* yes
* it's very important for judges to explain the reasons for delays during trial; once jurors understand the reasons for interruptions they are much more willing to accept them.
* some concern about the fact that some Hennepin County courtrooms don't have a nearby jury room – jurors have to wait in the hallway during recesses. Often there is no place to sit and the witnesses and parties are also milling around. This came up in several groups.

9. *Jurors should be permitted to take notes in all civil cases.*

* yes
* it appeared that all of these jurors were allowed to take notes, although one judge discouraged it.
* notes generally are helpful.
* some indication in one group that note-takers were more influential in deliberations than those who did not; otherwise no evidence of this.
* consensus that generally notes were consistent.
* information in advance about why and for what purpose notes can be helpful would be good; some jurors thought they'd get a transcript, others didn't know whether or not they'd have exhibits during deliberations.

10. *Jurors should be permitted to question witnesses during trial with appropriate procedural safeguards.*

* yes
* there was consensus that procedural safeguards are desirable; jurors understand that some questions might be disallowed.
* several comments that questions are useful primarily for clarification.
* several comments that juror questions can give lawyers insight into what jurors are thinking.
* jurors more engaged in the trial if they know they can ask questions.
* some concern about adding to the length of the trial.

11. *The judge should read the substantive instructions to the jury before closing arguments.*

* yes, definitely before closing arguments.
* some preference for reading the substantive instructions at the beginning of the trial.

12. *Civil juries should be provided with written copies of all instructions.*

* absolutely
* being limited to one copy of the instructions in the jury room is an unnecessary time waster, especially in more complex cases.

13. *Jury instructions should be in plain English.*

* of course – and the judges shouldn't read them in a monotone, either.

14. *With appropriate safeguards, jurors should be permitted to ask questions about the meaning of instructions.*

* yes – several comments that jurors thought they understood instructions when they heard them, but that confusion arose later.

15. *Jurors should receive trial notebooks in complex cases.*

* reaction was generally favorable.
* glossary of technical terms a great idea.
* concern expressed in two different groups about effect of photos of parties and witnesses: they might lead jurors to prejudge; may be too much like a "rogue's gallery;" danger of bias; if photos are provided, it shouldn't be until after the witness has testified.

16. *All alternates remaining at the close of a civil trial should deliberate and vote.*

* yes
* all the groups talked about the frustration for alternates of being dismissed at the close of the evidence.

17. *Jurors should always be thanked for their service at the close of a trial.*

* absolutely no disagreement.
* jurors have total recall on this point – they all remembered if they had been thanked.

* some judges also sent thank-you notes to jurors after the trial; this was much appreciated.

18. *The judge should offer to meet with any jurors who wish to do so after trial.*

* no disagreement here either.
* jurors definitely liked having the opportunity to meet with the judge; several commented that it provided a needed sense of closure to the trail.

19. *In cases where post-trial emotional distress is likely, the court should provide jurors with a list of community resources.*

* a list would be helpful, but only if the people on it have pertinent qualifications; a general list of community resources is useless.
* recognition that trauma is more likely in certain kinds of cases than others.
* some preference for on-site debriefing; but there was also concern about the expense to taxpayers involved in this sort of arrangement.

20. *Jurors should be informed that post trial contact with the media and lawyers for the parties is optional, and that they have the right to refuse to discuss the verdict.*

* most jurors were comfortable with the idea of contact with the lawyers; very few thought they would want to talk to the media.
* agreement that it's important to let jurors know that they don't have to talk to anyone; also that it's okay to discuss the case if they want to.

21. *Guidelines on appropriate post-verdict contact with jurors should be developed for both attorneys and the media.*

* there was consensus that guidelines are a good idea; most jurors would have placed more restrictions on the media.
* some concern over how the information obtained in post trial contacts is used; lawyers should explain why they want to speak with jurors – jurors have an interest in knowing beforehand what the consequences of talking to lawyers or the media might be.

Observations

* the format – having jurors discuss their overall impressions of jury service and the general concepts addressed in the task force report before they were asked to respond to the specific recommendations – worked well. The result was that many of the recommendations were suggested spontaneously during the general discussion without any prompting from the facilitators. In a couple of groups, the

participants laughingly asked the facilitator if she had snuck out during the break and made up the recommendations based on their earlier comments.

* where the jurors weren't unanimously in favor of a particular recommendation, they seemed to produce many of the same arguments pro and con that are generally made by people who study these issues at length (for example, with the one-day one-trial proposal).

* the conduct of the judge had a greater effect on jurors' overall perceptions of jury duty than the lawyers did. Judges who stressed the importance of the jurors' role, explained how the system works (why delays occur during trial, for example), thanked jurors for their service, and met with jurors after the trial, had juries that reported jury duty as a positive and rewarding experience in spite of the inevitable frustrations.

* many of the jurors -- almost half in each group -- commented that the case they heard was weak and should never have gone to trial. These comments were frequently made during the initial discussion when jurors were asked to talk about the things that surprised them during jury duty. It appeared that a significant number of these jurors had a great deal of personal sympathy for the plaintiffs but thought the case for the defense was overwhelming.

* there was a general desire for more guidance in determining damages; jurors seemed more uncertain and confused about this than anything else.

* in three of the four groups the jurors thought they should be permitted to discuss the case during trial, in the fourth several people implied that they had done so. The jurors seemed to understand, but reject, the arguments that are typically made against such discussions.

* there was very little lawyer bashing; lawyers who "drone on" were the main irritant (but there was also consensus that taped testimony is bad, and that depositions read into the record are worse).