Jury Innovations Project

An Effort to Enhance Jury Trials in Texas State and Federal Courts

Pilot Program Manual

TABLE OF CONTENTS

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INTRODUCTION

In recent years, the American Bar Association has recognized the need to refine and improve jury practice so that the right to a jury trial is preserved and juror participation is enhanced. To this end, the ABA launched the American Jury Project (AJP) in 2005. The goal of the AJP is to improve jury comprehension during jury trials and thus increase the reliability of verdicts and public and business confidence in the system. The AJP also hopes to improve jurors' appreciation for the service they render.

The AJP developed nineteen general principles regarding all aspects of jury trials—from summons to post-verdict interviews. The AJP's principles and accompanying commentary are available online at http://www.abanet.org/juryprojectstandards/principles.pdf.

The Seventh Circuit Bar Association has successfully tested several of the jury innovations proposed by the AJP, including juror note taking, preliminary substantive jury instructions on the law, trial time limits, juror questions, and interim statements to the jury by counsel. The project received very positive reviews from jurors, lawyers, and judges.

In the fall of 2009, Judge Nancy Atlas formed a committee of lawyers, judges, and professors in Houston (the "Committee") to devise a pilot program to test jury innovations in state and federal courts in the area. After studying the pilot programs in other jurisdictions, the Committee has selected the following four jury innovations to test locally in civil trials:

- Questions by the Jurors During Trial
- Interim Statements or Arguments to the Jury by Counsel
- Preliminary Substantive Jury Instructions and
- Trial Time Limits

The Committee anticipates that trial judges participating in the program will, in their discretion, use one or more of these concepts as they conduct civil jury trials during the 24-month test period. The Committee has prepared surveys to administer to the judges, jurors, and attorneys about the value of the four concepts implemented in these trials and asks that participating judges encourage jurors and lawyers to complete these important surveys. At the end of the test period, the Committee will publish a report summarizing the efficacy of the four pilot innovations. The Committee hopes that publishing these results will lead to the widespread adoption of any innovations that prove to be effective during the test period.

This manual is designed to provide guidelines for judges who opt to participate in the pilot program. Section I of the manual describes the four innovations that will be tested, including the potential benefits of utilizing the innovations. Section I also provides suggested procedures and best practices for implementing the innovations in civil trials. Where appropriate, sample jury instructions regarding the innovations are included.

Section II of this manual contains logistical information that will be useful to trial courts that choose to participate in this project. Section II(A) contains an "Innovations Survey Checklist," which provides step-by-step guidance for administering the project surveys. Section II(B) includes project materials, such as copies of the surveys that judges, jurors, and attorneys will be asked to complete as a part of the project.

Section III of this manual contains bench memoranda outlining the legal authority for implementing the four proposed innovations. The memoranda conclude that it is within the trial court's sound discretion to implement the proposed innovations in civil trials in Texas state and federal courts.

SECTION I: DESCRIPTION AND BENEFIT OF THE PROPOSED INNOVATIONS/SUGGESTED PROCEDURES FOR IMPLEMENTING THE INNOVATIONS

Section I of this manual describes the four innovations that will be tested in the pilot program, including the benefits cited by proponents of the innovations. It also provides suggested procedures for implementing the innovations in civil trials. Where appropriate, sample jury instructions regarding the innovations are included.

A. QUESTIONS BY THE JURORS DURING TRIAL

Description and Benefit of the Innovation

The first concept selected for testing is juror questions. Allowing jurors to submit written, clarifying questions to the judge after the parties have asked their own questions of each witness increases the likelihood that jurors will concentrate on the evidence being presented.

In addition, as the Fifth Circuit has observed, "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. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop the truth." *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979). Allowing jurors to submit questions is especially appropriate in trials where witness testimony is complex or is likely to be confusing.

If you find that a case is appropriate for juror questions, please use the procedure, instruction, and form provided below. Please also refer to the "Innovations Survey Checklist" at page 19 of this manual for detailed instructions about how to administer surveys regarding this innovation to counsel and the jurors during trial.

Suggested Procedure

1. Before voir dire or, at the latest, before the presentation of any evidence begins, the trial court should inform the parties whether juror questions will be allowed.

2. If juror questions will be allowed, the trial court should read the instructions included as Attachment A to the jury after the jury is seated and may repeat any or all of these instructions to remind the jury of its role. These instructions explain the procedure that will be used to allow jurors to submit written questions. The trial court may modify these instructions as the circumstances of the particular case may require.

3. After the parties have asked their own questions of each witness who appears and testifies, jurors should be given the opportunity to write any questions they may have for the witness on the juror question form included below as Attachment B. The trial court may modify this form as the circumstances of the particular case may require.

4. To the extent possible, the trial court should take steps to maintain the anonymity of any juror who asks a question. Thus, it is advisable to instruct jurors not to put their names on juror question forms. The trial court also should decide whether to take a break after each witness to allow jurors to write any questions in the privacy of the

jury room. Alternatively, the trial court may want each juror to have a juror question form in the jury box and ask each juror to pass the form to the bailiff at the end of the witness examination. If the trial court chooses to have juror questions handed to the bailiff in the courtroom, as opposed to taking a break for the jury to retire to the jury room to submit questions, it may be advisable to have every juror pass down his or her juror question form—even if the juror did not write a question on the form—in order to preserve anonymity.

5. Upon receipt of a written question from the jury, the trial court should allow the parties, outside the hearing of the jury, to make objections to the question on the record and obtain a ruling. On its own initiative or upon a party's request, the trial court may remove the witness from the courtroom before reviewing the question or allowing the parties to object to the question.

6. In its discretion, the trial court may reword the question or decide that the question should not be asked. If the trial court rewords the question, the trial court should read the reworded question and allow the parties to make objections to the reworded question on the record and obtain a ruling outside the jury's hearing.

7. If the trial court allows a verbatim or reworded juror question, the trial court may either ask the question or allow a party to ask the question of the witness. The parties should be allowed to ask any follow-up questions.

8. The trial court should include any completed juror question form in the record.

Attachments: A) Instruction on Juror Questions
B) Juror Question Form

Attachment A

INSTRUCTION ON JUROR QUESTIONS

After the parties have asked their own questions of each witness and before each witness is excused, you may submit in writing any questions you have for that witness. Any questions you submit should be about the testimony the witness has given. Your questions should not give an opinion about the case, criticize the case, or comment on the case in any way. You should not argue with the witness through a question.

I will review all your questions with the parties privately. Keep in mind that the rules of evidence or other rules of court may prevent me from allowing some questions. I will apply the same rules to your questions that I apply to the parties' questions. Some questions may be changed or rephrased, and others may not be asked at all. If a question you submitted is not asked, do not take it personally and do not assume it is important that your question is not asked.

You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give to particular testimony.

Remember that you are neutral fact finders and not advocates for either party. You must keep an open mind until all the evidence has been presented, the parties have finished their summations, and you have received my instructions on the law. Then, in the privacy of the jury room, you will discuss the case with the other jurors.

Any question you submit should be yours alone and not something you got from another person. That is because of my overall instruction that you must not discuss the case among yourselves or with anyone else until you have heard my final instructions on the law, and I have instructed you to begin your deliberations.

Attachment B

JUROR QUESTION FORM

You may submit one or more questions about the witness's testimony. Your questions should be short. You may not give an opinion about the case, criticize the case, or comment on the case in any way. You may not argue with the witness through a question. Your questions should be yours alone and not something you got from another juror.

Write your questions, if any, on this form. Do not put your name on the form. The judge will apply the same rules to your questions that the judge applies to the parties' questions. These rules are based on various rules of law and procedure. Some questions may be changed or rephrased, and others may not be asked.

You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give particular testimony. And you must not discuss this case with a fellow juror until the judge has told you to begin your deliberations.

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B. INTERIM STATEMENTS OR ARGUMENTS TO JURY BY COUNSEL

Description and Benefit of the Innovation

The second innovation selected for testing is interim statements or arguments. Interim statements allow counsel to summarize the evidence previously presented or outline forthcoming evidence at various times throughout the trial. The purpose of interim statements is to aid the trier of fact in understanding and remembering the evidence—not to argue the case. The purpose of interim arguments, in contrast, is more akin to closing arguments. Through interim arguments, counsel can emphasize certain testimony and make arguments related to that evidence throughout trial. Trial courts that opt to test this innovation may decide whether to permit interim arguments or only interim statements.

There are several possible approaches to utilizing interim statements and arguments. One approach is to allow each side an allotment of time (perhaps 60 minutes), which counsel can use throughout the trial at their own discretion. Alternatively, the court could allow each side a short period of time (perhaps 3-5 minutes) at the beginning or end of each day to make interim statements or arguments.

If you find that a case is appropriate for interim statements or arguments, please use the procedure and jury instructions provided below. Please also refer to the "Innovations Survey Checklist" at page 19 of this manual for detailed instructions about how to administer surveys regarding this innovation to counsel and the jurors during trial.

Suggested Procedure

1. The court should announce in advance of trial whether interim statements or arguments will be allowed. Generally speaking, interim statements and arguments are more appropriate in lengthy and complex cases.

2. If interim statements or arguments will be allowed, the court should notify counsel that it will seek their recommendations for the procedure and overall time limits for interim statements or arguments during the pretrial conference. These recommendations should not be detailed and may, but need not, be in writing.

3. The court should then decide what procedure is most appropriate—i.e., whether each side will receive an allotment of time to be used in its discretion throughout trial or whether each side will be permitted a short time at the beginning or end of each day to summarize that day's proceeding.

4. The court should also set an overall time limit for interim statements or arguments in advance of trial. In setting limits, the court should consider the recommendations of counsel, the anticipated length of the trial, the complexity of the case, and the nature of the evidence to be submitted.

5. Interim statements and arguments should be given outside the presence of witnesses except for those witnesses not subject to the witness exclusionary rule found in Federal Rule of Evidence 615 or Texas Rule of Evidence 614.

6. If interim statements or arguments are allowed, the trial court should read the instruction included below as Attachment A to the jury after the jury is seated and read the instruction included below as Attachment B immediately before each party makes its first interim statement or argument. The trial court may repeat any or all of these instructions as necessary throughout trial. During the court's final instructions to the jury at the end of trial, the court should read the instruction included below as Attachment C. The trial court may modify these instructions as the circumstances of the particular case may require.

Attachments:
- A) Preliminary Instruction on Interim Statements/Arguments
- B) Instruction to Be Read Before First Interim Statement/Argument by Each Side
- C) Final Instruction on Interim Statements/Arguments

Attachment A

PRELIMINARY INSTRUCTION ON INTERIM STATEMENTS/ARGUMENTS

From time to time during the case, you will hear directly from the lawyers who will preview, highlight, or summarize the evidence. Nothing the lawyers say directly to you during the trial is evidence. These statements by the lawyers are merely their efforts to put the evidence in context and make the case more understandable to you, the jury.

Attachment B

INSTRUCTION TO BE READ BEFORE FIRST INTERIM STATEMENT/ARGUMENT BY EACH SIDE

At the beginning of trial, I advised you that from time to time during the case, you will hear directly from the lawyers who will preview, highlight, or summarize the evidence. These statements by counsel are called ["interim statements"/"interim arguments"]. As a reminder, nothing the lawyers say directly to you during the trial is evidence. These interim [statements/arguments] by the lawyers are merely their efforts to put the evidence in context and make the case more understandable to you, the jury. With that said, counsel for [Plaintiff(s)/Defendant(s)] will now make their first interim [statement/argument].

Attachment C

FINAL INSTRUCTION ON INTERIM STATEMENTS/ARGUMENTS

At various times during the trial, the lawyers addressed you directly. At the beginning of trial, you heard the lawyers' opening statements. At the end of trial, you heard the lawyers' closing arguments. In between, you heard the lawyers' interim [statements/arguments]. If at any time you find that the lawyers said something to you that was not shown by the evidence, you should disregard what the lawyers have said. None of the [statements/arguments] made by the lawyers is evidence.

C. PRELIMINARY SUBSTANTIVE JURY INSTRUCTIONS

Description and Benefit of the Innovation

The third concept selected for testing is providing preliminary substantive jury instructions at the beginning of the trial. Although detailed instructions on the law are generally given at the close of evidence or after closing arguments, it is often helpful to provide a brief introduction to the applicable law at the outset of trial. Preliminary instructions on the law orient jurors about the basic elements of the claims and defenses at issue in the case, allowing the jurors to evaluate the evidence with more focus and direction. Preliminary instructions may also reduce juror bias and reliance on stereotypes, reduce juror confusion, and improve juror understanding of the final jury charge.

If you find that a case is appropriate for preliminary substantive jury instructions, please use the procedure provided below. Please also refer to the "Innovations Survey Checklist" at page 19 of this manual for detailed instructions about how to administer surveys regarding this innovation to counsel and the jurors during trial.

Suggested Procedure

1. Before trial, the court should request that the parties submit proposed preliminary substantive jury instructions that will be given after the jury is sworn but before opening statements. These instructions should briefly address the key substantive issues the jury must decide, including the basic elements of the lead claims and defenses.

2. Where possible, the parties should be instructed to submit their proposed preliminary instructions jointly. If the parties are unable to agree on the preliminary instructions, then the court should hold a preliminary jury instruction conference as a part of the other pretrial proceedings. As a general matter, disputed or controversial items should not be included in the preliminary instructions.

3. After the jury is sworn and before opening statements, the court should read the preliminary instructions to the jury, and inform the jury that lawyers can refer to and quote the instructions in opening statements as well as closing arguments.

4. Of course, giving preliminary instructions does not relieve a court of its duty to comprehensively instruct the jury at the close of evidence or after closing arguments. The court should still follow traditional practices when delivering the formal charge to the jury.

D. TRIAL TIME LIMITS

Description and Benefit of the Innovation

The final innovation selected for testing is trial time limits—i.e., setting a maximum number of trial hours per party. Trial time limits should be set by the trial court in consultation with trial counsel. Often, courts set time limits after the close of discovery, but they can be set earlier to help focus discovery.

Time limits are helpful because trials are more effective for the jury and the court when the parties get to the point. Jurors have short attention spans; they compare real courtrooms to television. Attorneys and their clients thus benefit from efficient presentations of evidence and focused arguments. Trial time limits, particularly in long trials, require counsel to focus and conserve judicial resources.

If you find that a case is appropriate for trial time limits, please use the procedure provided below. Please also refer to the "Innovations Survey Checklist" at page 19 of this manual for detailed instructions about how to administer surveys regarding this innovation to counsel and the jurors during trial.

Suggested Procedure

1. The court should announce *as early as possible* (at least several weeks in advance of trial or the due date for the pretrial order) that there will be time limits on the parties' presentations at trial and advise the parties to provide their recommendations for the time limits to be used. These recommendations should not be detailed and may, but need not, be in writing.

2. Generally, the time limit per party should include the following: (a) voir dire, (b) opening statement, (c) direct examination of the party's own witnesses, (d) cross-examination of the opponent's witnesses, and (e) closing argument. Sometimes courts also include in the limit the time parties spend advocating on objections and limine matters once trial commences.

3. If not established earlier in the case, the court should conduct a pretrial conference (sometimes referred to as "docket call" or "final pretrial conference") at which the parties present their time limit recommendations. At the conference, before setting the time limits, the court should challenge the parties to justify the hours/days they seek for their respective trial presentations and obtain reasons for the quantity of time requested. The court may want to pare down counsel's time estimates; courts often cut counsel's estimates by 25% to 30%. On occasion, however, with very skilled counsel, no cut is necessary.

4. Most courts grant time limits that are relatively equal for plaintiffs and defendants, but not always. Primary factors to consider for time limits are (a) the number of parties with meaningfully distinct claims or defenses, (b) the amount in controversy, (c) the number of fact witnesses and experts genuinely necessary for each party, (d) the trial time the court has available for the case, and (e) the time the jury will tolerate details on the issues presented.

5. The court should decide and announce at the conference the total number of hours each party will be able to use. The court's time allocation need not be a detailed mathematical or statistical analysis performed witness by witness.

6. Chess clocks can come in handy in implementing the limits.

SECTION II: LOGISTICAL INFORMATION AND MATERIALS

Section II of this manual contains logistical information that will be useful to trial courts that choose to participate in this project. Section II(A) contains an "Innovations Survey Checklist," which provides step-by-step guidance for administering project surveys. Section II(B) includes project materials, such as copies of the surveys that judges, jurors, and attorneys will be asked to complete as a part of the project.

The Committee enlisted Professors Lonny Hoffman and Amanda Baumle of the University of Houston to devise these surveys. Professors Hoffman and Baumle will also assist in accumulating the results of the surveys and preparing a final report summarizing the perceived value of the four innovations.

A. INNOVATIONS SURVEY CHECKLIST

At the Beginning of the Project:

- If a judge decides to participate in the project, he or she should complete the "Consent to Participate in Research: Judges" form, which is attached at page 24, and the "Letter of Cooperation," which is attached at page 27.

    - A court administrator should email or fax a copy of the "Consent to Participate in Research: Judges" form and the "Letter of Cooperation" to Professor Lonny Hoffman at LHoffman@Central.UH.EDU or 713-743-2238 (fax).

- The judge should then complete the "Judge Pre-Test Survey" before testing any of the innovations in trial. If possible, the survey should be completed online at the following link: http://www.surveymonkey.com/s/judgepretest. If the judge would prefer to complete the survey in hard copy format, a copy of the "Judge Pre-Test Survey" is attached at page 28.

Before Trial of Each Case in Which an Innovation Will Be Tested:

- The court should select which of the four proposed innovations will be tested during the trial. No more than two innovations should be tested in a single trial.

- For each innovation the court chooses to test, please consult the step-by-step suggested procedures for implementing the innovation included in this manual.

    - If testing questions by the jurors during trial, see page 6.
    - If testing interim statements or arguments, see page 10.
    - If testing preliminary substantive jury instructions, see page 15.
    - If testing trial time limits, see page 16.

- A court administrator should complete and submit the "Case Cover Sheet Form" for each case in which one or more innovations will be tested. A copy of the "Case Cover Sheet Form" is attached at page 23.

    - A court administrator should email or fax a copy of the Case Cover Sheet Form to Professor Lonny Hoffman at LHoffman@Central.UH.EDU or 713-743-2238 (fax).

- Professors Baumle and Hoffman are also available to answer any questions about compiling and administering the project surveys. Professor Baumle is available by phone (713-743-3944) or email (akbaumle@Central.UH.EDU). Professor Hoffman is available by phone (713-743-5206) or email (LHoffman@Central.UH.EDU).

- The court should notify counsel at the pretrial conference, if not before, that the court is participating in the Jury Innovations Project and which innovation(s) the court plans to test during trial.

- Either at the pre-trial conference or no later than the beginning of trial, the court should distribute to lead counsel for each side the "Consent to Participate in Research: Attorneys" information sheet, which is attached at page 33. The Court should also instruct lead counsel for each side to complete the "Attorney Pre-Test Survey." If possible, the attorneys should complete the survey online at http://www.surveymonkey.com/s/attorneypretest. If necessary, the court administrator may provide copies of the "Attorney Pre-Test Survey" to counsel to fill out in paper form. A copy of the survey is attached at page 35. The court administrator should hold any paper copies of the judge and attorney pre-test surveys and forward them to Professor Hoffman at the end of trial.

- A court administrator should compile the surveys that will be given to jurors after they have delivered a verdict. The juror surveys will be made up of: (1) the "Consent to Participate in Research: Jurors" information sheet, (2) the "Juror Survey: Background," and (3) the survey(s) specific to the innovation(s) that will be tested during trial.

    - For example, if the court plans to test "trial time limits" during trial, then the court administrator should compile the "Consent to Participate in Research: Jurors," the "Juror Survey: Background," and the "Juror Survey: Time Limits" and make copies of these materials to provide to each juror after the jury has delivered a verdict. If two innovations will be tested in a trial, the court administrator should include the survey for both of the innovations to be tested.

    - The "Consent to Participate in Research: Jurors" information sheet is attached at page 39. The "Juror Survey: Background" is attached at page 41. The juror surveys on the particular innovations are attached at pages 44-51 of this manual. Electronic copies of these materials are included in a folder on the enclosed CD.

During Trial in Each Case in Which an Innovation Is Tested:

- While the jury is deliberating, the court should direct counsel to complete the "Attorney Survey." If possible, the survey should be completed online at http://www.surveymonkey.com/s/attorneysurvey. A copy of this survey is also attached at page 52 of this manual.

- After a jury returns a verdict, the court should read the jury instruction attached at page 38, which asks the jurors to complete the project surveys. The court should then distribute the project surveys to the jury.

- The judge may complete the "Judge Survey" at this time or may complete this survey after the courtroom proceedings have concluded. If possible, the survey should be completed online at http://www.surveymonkey.com/s/judgesurveys. A copy of this survey is also attached at page 59 of this manual.

Returning Hard Copies of the Surveys

- A court administrator should collect all paper copies of the completed surveys, clip them together behind the completed Case Cover Sheet Form, and mail them to:

Professor Lonny Hoffman
University of Houston Law Center
4800 Calhoun
Houston, TX 77204

B. PROJECT MATERIALS

(1) Case Cover Sheet Form
(2) Consent to Participate in Research: Judges
(3) Letter of Cooperation
(4) Judge Pre-Test Survey
(5) Consent to Participate in Research: Attorneys
(6) Attorney Pre-Test Survey
(7) Jury Instruction Regarding the Surveys
(8) Consent to Participate in Research: Jurors
(9) Juror Survey: Background
(10) Juror Survey: Juror Questions
(11) Juror Survey: Interim Statements
(12) Juror Survey: Preliminary Instructions
(13) Juror Survey: Time Limits
(14) Attorney Survey
(15) Judge Survey

JURY INNOVATIONS PROJECT
CASE COVER SHEET FORM

Case Name & Number: _____

Presiding Judge: _____

Court: _____

Jury Innovation(s) Selected for Testing During Trial (select up to two):

____ Questions by the Jurors During Trial
____ Interim Statements or Arguments to the Jury by Counsel
____ Preliminary Substantive Jury Instructions
____ Trial Time Limits

List of Counsel:

Name	Email Address	Phone Number

UNIVERSITY of HOUSTON

CONSENT TO PARTICIPATE IN RESEARCH:
JUDGES

PROJECT TITLE: Jury Innovations Project: An Effort to Enhance Jury Trials in Texas State and Federal Courts

You are being invited to participate in a research project conducted by Amanda K. Baumle from the Department of Sociology at the University of Houston, and Lonny Hoffman from the Law Center at the University of Houston.

NON-PARTICIPATION STATEMENT

Your participation is voluntary and you may refuse to participate or withdraw at any time without penalty or loss of benefits to which you are otherwise entitled. You may also refuse to answer any question.

PURPOSE OF THE STUDY

The purpose of this study is to test several jury practices in an effort to improve juror experience, and increase confidence in the jury system. These jury practices include things such as setting trial time limits and permitting jurors to ask questions of the witnesses. We anticipate the entire study, from collection of data through the analysis of data, will last approximately 2.5 years.

PROCEDURES

Judges located within Harris County, as well as other parts of Texas, will be asked to participate in this project.

Judges who agree to participate in this study will review the administrative guidelines contained in the project manual. These guidelines provide instructions for the manner in which judges will select innovations to be tested, inform attorneys of participation in the project, and administer the testing of the innovation during a trial. Further, judges will complete the pre-test survey at the beginning of involvement with the project, one trial survey at the completion of each trial in which an innovation is tested, and will receive a post-test survey when the project is completed (approximately one year later). The surveys cover basic demographic information (sex, race, education, etc.) and information about experiences with the innovation prior to becoming a part of this project (pre-test survey), during the trial in which the innovation was tested (trial survey), and following completion of involvement in the project (post-test survey). The pre-test and post-test surveys will take approximately 5-10 minutes to complete, while the trial survey will take approximately 20-30 minutes to complete. After the completion of the post-test survey, your part in the study comes to an end.

Subject's Initials_____

CONFIDENTIALITY

Every effort will be made to maintain the confidentiality of your participation in this project. Each subject's name will be paired with a code number by the principal investigator. This code number will appear on all written materials and voice recordings. The list pairing the subject's name to the assigned code number will be kept separate from all research materials and will be available only to the principal investigator. Confidentiality will be maintained within legal limits.

RISKS/DISCOMFORTS

We believe there to be no risks associated with participation in this study. Your participation in this project is, however, confidential; this means no names or other identifying information will be linked in any fashion with your participation in this project.

BENEFITS

While you will not directly benefit from participation, your participation may help investigators better understand how to improve the jury process for jurors, lawyers, and judges.

ALTERNATIVES

Participation in this project is voluntary and the only alternative to this project is non-participation.

PUBLICATION STATEMENT

The results of this study may be published in professional and/or scientific journals. The results may also be used for educational purposes or for professional presentations. However, no individual subject will be identified.

SUBJECT RIGHTS

1. I understand that informed consent is required of all persons participating in this project.

2. All procedures have been explained to me and all my questions have been answered to my satisfaction.

3. Any risks and/or discomforts have been explained to me.

4. Any benefits have been explained to me.

5. I understand that, if I have any questions, I may contact Amanda K. Baumle at 713-743-3944. I may also contact Lonny Hoffman at 713-743-5206.

6. I have been told that I may refuse to participate or to stop my participation in this project at any time before or during the project. I may also refuse to answer any question.

Subject's Initials_____

7. ANY QUESTIONS REGARDING MY RIGHTS AS A RESEARCH SUBJECT MAY BE ADDRESSED TO THE UNIVERSITY OF HOUSTON COMMITTEE FOR THE PROTECTION OF HUMAN SUBJECTS (713-743-9204). ALL RESEARCH PROJECTS THAT ARE CARRIED OUT BY INVESTIGATORS AT THE UNIVERSITY OF HOUSTON ARE GOVERNED BY REQUIREMENTS OF THE UNIVERSITY AND THE FEDERAL GOVERNMENT.

8. All information that is obtained in connection with this project and that can be identified with me will remain confidential as far as possible within legal limits. Information gained from this study that can be identified with me may be released to no one other than the principal investigators. The results may be published in scientific journals, professional publications, or educational presentations without identifying me by name.

I HAVE READ (OR HAVE HAD READ TO ME) THE CONTENTS OF THIS CONSENT FORM AND HAVE BEEN ENCOURAGED TO ASK QUESTIONS. I HAVE RECEIVED ANSWERS TO MY QUESTIONS. I GIVE MY CONSENT TO PARTICIPATE IN THIS STUDY. I HAVE RECEIVED (OR WILL RECEIVE) A COPY OF THIS FORM FOR MY RECORDS AND FUTURE REFERENCE.

Study Subject (print name): _____

Signature of Study Subject: _____

Date: _____

I HAVE READ THIS FORM TO THE SUBJECT AND/OR THE SUBJECT HAS READ THIS FORM. AN EXPLANATION OF THE RESEARCH WAS GIVEN AND QUESTIONS FROM THE SUBJECT WERE SOLICITED AND ANSWERED TO THE SUBJECT'S SATISFACTION. IN MY JUDGMENT, THE SUBJECT HAS DEMONSTRATED COMPREHENSION OF THE INFORMATION.

Principal Investigator (print name and title): _____

Signature of Principal Investigator: _____

Date: _____

LETTER OF COOPERATION
TO THE UNIVERSITY OF HOUSTON
COMMITTEE FOR THE PROTECTION OF HUMAN SUBJECTS

Date: _____

To the Committee for the Protection of Human Subjects:

This Court has agreed to participate in the research study titled "Jury Innovations Project: An Effort to Enhance Jury Trials in Texas State and Federal Courts." Please allow this letter to serve as the required letter of cooperation for research to be conducted at this site.

_____
Signature of Presiding Judge

_____
Name of Court

Judge Pretest Survey

Demographic Background

1. What is your current age, in years?

Age

2. What is your sex?

- ◯ Male
- ◯ Female

Please answer both question 3 and 4.

3. Are you Hispanic/Spanish/Latino?

- ◯ Yes.
- ◯ No.

4. What is your race? Mark more than one box if necessary.

- ☐ White
- ☐ Black
- ☐ American Indian
- ☐ Asian Indian
- ☐ Asian
- ☐ Other (please specify)

Prior Experience with Jury Innovations

Judge Pretest Survey

5. Prior to today, have you used any of the following practices in your courtroom (please mark all that apply)?

- ☐ Permitting jurors to submit questions for the witnesses.
- ☐ Allowing attorneys to make interim statements.
- ☐ Using preliminary instructions on the law.
- ☐ Implementing time limits.

Please enter any comments here.

6. How would you classify your overall opinion regarding the following practices:

	1 Disapprove	2	3	4 Neutral	5	6	7 Approve	Don't know/No opinion
Juror Questions to Witnesses	◯	◯	◯	◯	◯	◯	◯	◯
Interim Statements	◯	◯	◯	◯	◯	◯	◯	◯
Preliminary Instructions on Law	◯	◯	◯	◯	◯	◯	◯	◯
Time Limits	◯	◯	◯	◯	◯	◯	◯	◯

Concerns Regarding Jury Innovations

7. Please check any of the following concerns that you have regarding permitting jurors to submit written questions to the witnesses (check all that apply):

- ☐ I do not have any concerns.
- ☐ The questions would be irrelevant.
- ☐ The questions would take up too much time.
- ☐ The questions would not increase jurors' understanding of the trial.

Other (please specify)

8. Please check any of the following concerns that you have regarding interim statements (check all that apply):

- [ ] I do not have any concerns.
- [ ] The statements would take up too much time.
- [ ] The statements would be irrelevant.
- [ ] The statements would not increase jurors' understanding of the trial.
- [ ] Other (please specify)

9. Please check any of the following concerns that you have regarding preliminary instructions on the law (check all that apply):

- [ ] I do not have any concerns.
- [ ] The giving of preliminary instructions is difficult unless counsel is adequately prepared at the outset of trial.
- [ ] The giving of preliminary instructions may improperly overemphasize particular facts or legal points over others.
- [ ] It is difficult to accurately describe/predict the evidence at the beginning of the trial.
- [ ] The giving of preliminary instructions may interfere with the jury's ability to objectively evaluate the evidence.
- [ ] Other (please specify)

10. Please check any of the following concerns that you have regarding time limits (check all that apply):

- [ ] I do not have any concerns.
- [ ] The time limits would not permit the full presentation of the case.
- [ ] Other (please specify)

Juror Notetaking

Judge Pretest Survey

11. Have you permitted jurors to take notes during trials?

- ◯ Yes (Please continue to question 12)
- ◯ No (Please skip to question 16)
- ◯ Other (please specify)

Juror Notetaking Practices

12. Were jurors permitted to take notes during:

	Yes	No
Opening statement	◯	◯
Witness testimony/Case-in-chief	◯	◯
Closing statement	◯	◯
Judge's charge	◯	◯

13. Were jurors permitted to bring their notes into deliberations?

- ◯ Yes.
- ◯ No.

Other (please specify)

14. Overall, do you agree that juror notetaking:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree
Resulted in more focused jurors	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of the trial	◯	◯	◯	◯	◯	◯	◯
Increased the efficiency of ths trial	◯	◯	◯	◯	◯	◯	◯
Don't know/No opinion	◯	◯	◯	◯	◯	◯	◯

Judge Pretest Survey

15. Please use this space to describe any logistical, implementation, or other problems you have encountered with allowing jurors to take notes.

Survey Complete

16. The pretest survey is now complete. Thank you for your input on this important subject.

UNIVERSITY of HOUSTON

CONSENT TO PARTICIPATE IN RESEARCH:
ATTORNEYS

PROJECT TITLE: Jury Innovations Project: An Effort to Enhance Jury Trials in Texas State and Federal Courts

You are being invited to participate in a research project conducted by Amanda K. Baumle from the Department of Sociology at the University of Houston, and Lonny Hoffman from the Law Center at the University of Houston.

NON-PARTICIPATION STATEMENT

Your participation is voluntary and you may refuse to participate or withdraw at any time without penalty or loss of benefits to which you are otherwise entitled. You may also refuse to answer any question.

PURPOSE OF THE STUDY

The purpose of this study is to test several jury practices in an effort to improve juror experience, and increase confidence in the jury system. These jury practices include things such as setting trial time limits and permitting jurors to ask questions of the witnesses. We anticipate the entire study, from collection of data through the analysis of data, will last approximately 2.5 years.

PROCEDURES

Attorneys located within Harris County will be asked to participate in this project.

Attorneys who agree to participate in this study will receive instructions from the judge regarding the particular innovation(s) to be tested in the trial. These instructions will guide the attorneys in preparing for the innovation, such as guidelines regarding interim arguments. Depending on the innovation tested, the attorneys might be asked to prepare an item for trial; this could include a preliminary statement, or response to juror questions of the witnesses. Preparation of these items should take approximately 30-60 minutes per trial. Further, attorneys will complete the pre-test survey at the beginning of involvement with the project, one trial survey at the completion of each trial in which an innovation is tested, and will receive a post-test survey when the project is completed (approximately one year later).

The surveys cover basic demographic information (sex, race, education, etc.) and information about experiences with the innovation prior to becoming a part of this project (pre-test survey), during the trial in which the innovation was tested (trial survey), and following completion of involvement in the project (post-test survey). The pre-test and post-test surveys will take approximately 5-10 minutes to complete, while the trial survey will take approximately 20-30 minutes to complete. After the completion of the post-test survey, your part in the study comes to an end.

Questions contained on the survey include items such as the following:

> "In your opinion, how complex was this case? Very Complex=1, Not complex at all=7"
>
> "How many interim statements did you (or attorneys working with you) make during the trial?"

CONFIDENTIALITY

Every effort will be made to maintain the confidentiality of your participation in this project. Each subject's name will be paired with a code number by the principal investigator. This code number will appear on all written materials and voice recordings. The list pairing the subject's name to the assigned code number will be kept separate from all research materials and will be available only to the principal investigator. Confidentiality will be maintained within legal limits.

RISKS/DISCOMFORTS

We believe there to be no risks associated with participation in this study. Your participation in this project is, however, anonymous; this means no names or other identifying information will be linked in any fashion with your participation in this project.

BENEFITS

While you will not directly benefit from participation, your participation may help investigators better understand how to improve the jury process for jurors, lawyers, and judges.

ALTERNATIVES

Participation in this project is voluntary and the only alternative to this project is non-participation.

PUBLICATION STATEMENT

The results of this study may be published in professional and/or scientific journals. The results may also be used for educational purposes or for professional presentations. However, no individual subject will be identified.

If you have any questions, you may contact Amanda K. Baumle at 713-743-3944. You may also contact Lonny Hoffman at 713-743-5206.

ANY QUESTIONS REGARDING YOUR RIGHTS AS A RESEARCH SUBJECT MAY BE ADDRESSED TO THE UNIVERSITY OF HOUSTON COMMITTEE FOR THE PROTECTION OF HUMAN SUBJECTS (713-743-9204). ALL RESEARCH PROJECTS THAT ARE CARRIED OUT BY INVESTIGATORS AT THE UNIVERSITY OF HOUSTON ARE GOVERNED BY REQUIREMENTS OF THE UNIVERSITY AND THE FEDERAL GOVERNMENT.

Attorney Pretest Survey

Demographic Background

1. What is your current age, in years?

Age

2. What is your sex?

- ◯ Male
- ◯ Female

Please answer both question 3 and 4.

3. Are you Hispanic/Spanish/Latino?

- ◯ Yes.
- ◯ No.

4. What is your race? Mark more than one box if necessary.

- ☐ White
- ☐ Black
- ☐ American Indian
- ☐ Asian Indian
- ☐ Asian
- ☐ Other (please specify)

Prior Experience with Jury Innovations

Attorney Pretest Survey

5. Prior to today, have you been a part of a trial where any of the following practices were used (please mark all that apply)?

- [ ] Jurors were permitted to submit questions for the witnesses.
- [ ] Attorneys were permitted to make interim statements.
- [ ] Judges provided preliminary instructions on the law.
- [ ] Judges implemented time limits.

Please enter any comments here.

6. How would you classify your overall opinion regarding the following practices:

	1 Disapprove	2	3	4 Neutral	5	6	7 Approve	Don't know/No opinion
Juror Questions to Witnesses	◯	◯	◯	◯	◯	◯	◯	◯
Interim Statements	◯	◯	◯	◯	◯	◯	◯	◯
Preliminary Instructions on Law	◯	◯	◯	◯	◯	◯	◯	◯
Time Limits	◯	◯	◯	◯	◯	◯	◯	◯

Concerns Regarding Jury Innovations

7. Please check any of the following concerns that you have regarding permitting jurors to submit written questions to the witnesses (check all that apply):

- [ ] I do not have any concerns.
- [ ] The questions would be irrelevant.
- [ ] The questions would take up too much time.
- [ ] The questions would not increase jurors' understanding of the trial.

Other (please specify)

Attorney Pretest Survey

8. Please check any of the following concerns that you have regarding interim statements (check all that apply):

- [ ] I do not have any concerns.
- [ ] The statements would take up too much time.
- [ ] The statements would be irrelevant.
- [ ] The statements would not increase jurors' understanding of the trial.
- [ ] Other (please specify)

9. Please check any of the following concerns that you have regarding preliminary instructions on the law (check all that apply):

- [ ] I do not have any concerns.
- [ ] The giving of preliminary instructions is difficult unless counsel is adequately prepared at the outset of trial.
- [ ] The giving of preliminary instructions may improperly overemphasize particular facts or legal points over others.
- [ ] It is difficult to accurately describe/predict the evidence at the beginning of the trial.
- [ ] The giving of preliminary instructions may interfere with the jury's ability to objectively evaluate the evidence.
- [ ] Other (please specify)

10. Please check any of the following concerns that you have regarding time limits (check all that apply):

- [ ] I do not have any concerns.
- [ ] The time limits would not permit the full presentation of the case.
- [ ] Other (please specify)

Survey Complete

This survey is now complete. Thank you for your participation!

JURY INSTRUCTION REGARDING THE SURVEYS

Members of the jury, thank you again for your service as jurors in this case. Your service in this case is now over, but I have one additional request of you. Before you say your goodbyes to one another and leave the jury room today, I would like you to fill out a brief questionnaire regarding your jury service in this case. The questionnaires I am asking you to complete are a part of a project in which state and federal courts in Texas are participating. Your answers in the questionnaires will assist us in finding ways to improve the jury system.

Your filling out the questionnaires is voluntary. However, we appreciate and thank those of you who do fill out the questionnaires as you will be providing us with valuable information regarding your jury service.

Thank you again.

UNIVERSITY of HOUSTON

CONSENT TO PARTICIPATE IN RESEARCH:
JURORS

PROJECT TITLE: Jury Innovations Project: An Effort to Enhance Jury Trials in Texas State and Federal Courts

You are being invited to participate in a research project conducted by Amanda K. Baumle from the Department of Sociology at the University of Houston, and Lonny Hoffman from the Law Center at the University of Houston.

NON-PARTICIPATION STATEMENT

Your participation is voluntary and you may refuse to participate or withdraw at any time without penalty or loss of benefits to which you are otherwise entitled. You may also refuse to answer any question.

PURPOSE OF THE STUDY

The purpose of this study is to test several jury practices in an effort to improve juror experience, and increase confidence in the jury system. These jury practices include things such as setting trial time limits and permitting jurors to ask questions of the witnesses. We anticipate the entire study, from collection of data through the analysis of data, will last approximately 2.5 years.

PROCEDURES

A total of approximately 600 jurors located within Harris County will be asked to participate in this project.

If you agree to participate in this study, you will complete the attached survey. The survey covers basic demographic information (sex, race, education, etc.) and information about your experiences during this trial.

Questions contained on the survey include items such as the following:

> "How many times have you sat on a jury before?"
>
> "In your opinion, how complex was this case? Very Complex=1, Not complex at all=7"
>
> "Did you submit any questions for any witness? Yes, No, Don't know/Can't recall"

The survey will take approximately 10 minutes to complete. After the completion of the survey, your part in the study comes to an end.

ANONYMITY

Your participation in this project is anonymous. Please do not write your name on any of the research materials.

RISKS/DISCOMFORTS

We believe there to be no risks associated with participation in this study. Your participation in this project is, however, anonymous; this means no names or other identifying information will be linked in any fashion with your participation in this project.

BENEFITS

While you will not directly benefit from participation, your participation may help investigators better understand how to improve the jury process for jurors, lawyers, and judges.

ALTERNATIVES

Participation in this project is voluntary and the only alternative to this project is non-participation.

PUBLICATION STATEMENT

The results of this study may be published in professional and/or scientific journals. The results may also be used for educational purposes or for professional presentations. However, no individual subject will be identified.

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Juror Survey: Background

Demographic Background

1. What is your current age, in years?

Age

2. What is your sex?

- ◯ Male
- ◯ Female

Please answer both questions 3 and 4.

3. Are you Hispanic/Spanish/Latino?

- ☐ Yes
- ☐ No

4. What is your race? Mark more than one box if necessary.

- ☐ White
- ☐ Black
- ☐ American Indian
- ☐ Asian Indian
- ☐ Asian
- ☐ Other (please specify)

5. What is the highest level of education that you have completed?

- ◯ Less than high school.
- ◯ Completed high school.
- ◯ Completed technical school/some college.
- ◯ Completed two year college.
- ◯ Completed four year college.
- ◯ Completed professional/graduate school.

Other (please specify)

Juror Survey: Background

6. Are you currently employed outside of the home?

- ◯ Yes
- ◯ No (If No, please skip to question 8.)

Other (please specify)

7. If you are currently employed, what is your occupation?

8. The total annual income, before tax, of all people living in my house is:

Household income

Jury Experience

9. Did you ever serve on a jury before?

- ◯ Yes
- ◯ No

10. How many times have you sat on a jury before?

Times on Jury

11. What type of juries have you sat on (check all that apply)?

- ☐ Civil
- ☐ Criminal
- ☐ Don't know/can't recall

Case Complexity

12. In your opinion, how complex was this case?

	1 Very complex	2	3	4	5	6	7 Not complex	Don't know/No opinion
Complexity	◯	◯	◯	◯	◯	◯	◯	◯

13. Overall, how clearly did you feel the evidence was presented in this trial?

	1 Not clearly	2	3	4	5	6	7 Very clearly	Don't know/No opinion
Clarity	◯	◯	◯	◯	◯	◯	◯	◯

Juror Survey: Background

14. How difficult was it for you to understand the evidence in this trial?

	1 Very difficult	2	3	4	5	6	7 Very easy	Don't know/No opinion
Evidence	◯	◯	◯	◯	◯	◯	◯	◯

15. How difficult was it for you to understand the law in this trial?

	1 Very difficult	2	3	4	5	6	7 Very easy	Don't know/No opinion
Law	◯	◯	◯	◯	◯	◯	◯	◯

Juror Survey: Juror Questions

Juror Questions to Witnesses

1. Were you permitted to submit questions to witnesses during the trial?

- ◯ Yes. (Please continue to question 2)
- ◯ No. (Please skip to question 15)
- ◯ Don't know/Can't remember (Please skip to question 15)

Juror Questions to Witnesses: Experience

2. How was the jury advised about the option of submitting questions to witnesses (select all that apply)?

- ☐ Jurors were encouraged to submit questions
- ☐ Jurors were told that they were permitted to submit questions
- ☐ Other (please specify)

3. To the best of your knowledge, about how many questions, in total, did jurors submit to be asked of the witnesses?

- ◯ 0*
- ◯ 1-5
- ◯ 6-10
- ◯ 11-15
- ◯ 16-20
- ◯ 21-25
- ◯ 26-30
- ◯ More than 30 (please specify)

* If you respond "0" to question 3, please skip to question 15. Otherwise, please continue to question 4.

Juror Questions to Witnesses: Experience

4. How were juror questions to witnesses submitted?

- ☐ Individual jurors submitted proposed questions in writing during the trial to the bailiff or other court employee.
- ☐ The judge allowed jurors to prepare and submit proposed questions in writing during a break in the trial to the bailiff or other court employee.
- ☐ Other (please specify)

Juror Survey: Juror Questions

5. Did you submit any questions for any witness?

- ◯ Yes (Please continue to question 6)
- ◯ No (Please skip to question 11)
- ◯ Don't know/Can't recall (Please skip to question 11)

Questions that you asked

6. How many questions for the witnesses did you submit?

◯ 1 ◯ 2 ◯ 3 ◯ 4 ◯ 5 ◯ 6 ◯ 7 ◯ 8 ◯ 9 ◯ 10

◯ More than 10 (please specify)

7. What were the primary purposes of your question(s) for the witnesses (select all that apply):

- ☐ To clarify information previously presented
- ☐ To obtain additional information not previously presented
- ☐ To cover something the lawyers had missed
- ☐ To examine possible inconsistencies in the evidence
- ☐ To test witness credibility
- ☐ To understand the law
- ☐ To help one side or the other

Other (please specify)

8. Were all of the questions that you submitted, or a similar question, asked of a witness?

- ◯ Yes, all of my questions were asked (Please skip to question 11)
- ◯ No, none of my questions were asked (Please continue to question 9)
- ◯ Some of my questions were asked, others were not (Please continue to question 9)
- ◯ Uncertain/Don't know (Please skip to question 11)

Other (please specify)

Unasked Questions

Juror Survey: Juror Questions

9. For any of your questions that were not asked of a witness, was the question later addressed in any of the following ways (select all that apply):

- [ ] Another witness answered the question
- [ ] One of the attorneys answered the question
- [ ] No one answered the question
- [ ] Other (please specify)

10. What reason(s) did the judge provide for not permitting your question(s) to be asked of a witness (select all that apply):

- [ ] The question was irrelevant.
- [ ] The question was likely to confuse the jurors rather than clarify an issue.
- [ ] The question was not legally permissible.
- [ ] No reason was given.
- [ ] Other (please specify)

Juror Questions Asked of Witnesses

11. What is your opinion of the number of questions submitted by jurors for the witnesses during the trial?

◯ Too many ◯ An appropriate number ◯ Too few

12. Overall, how relevant do you think the questions were that jurors asked the witnesses (please select one)?

- [ ] Most were relevant
- [ ] Some were relevant
- [ ] Most were irrelevant
- [ ] Don't know/No opinion

Juror Survey: Juror Questions

13. Whether or not you asked any questions personally, do you agree that questions submitted by the jurors:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Don't know/No opinion
Helped jurors pay attention	◯	◯	◯	◯	◯	◯	◯	◯
Helped jurors understand the evidence	◯	◯	◯	◯	◯	◯	◯	◯
Helped jurors reach a decision in this trial	◯	◯	◯	◯	◯	◯	◯	◯
Alerted the court or counsel to missing information desired by the jury	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial	◯	◯	◯	◯	◯	◯	◯	◯
Increased the efficiency of this trial	◯	◯	◯	◯	◯	◯	◯	◯

14. If you sit on a jury in the future, how important would it be to you that jury members be able to submit questions to witnesses?

	1 Not at all important	2	3	4 Neutral	5	6	7 Very important	Don't know/no opinion
Importance	◯	◯	◯	◯	◯	◯	◯	◯

15. You have completed the portion of the survey relating to juror questions. Please proceed to the questions on the next page. If there are no additional pages, your participation is complete. Thank you for your input on this important subject.

Juror Survey: Interim Statements

Interim Statements

1. Did the attorneys make any summary statements during trial, separate from the opening statements and closing statements?

- ◯ Yes. (Please continue to question 2)
- ◯ No. (Please skip to question 4)
- ◯ Don't know/Can't recall (Please skip to question 4)

Interim Statements: Experience

2. Do you agree that the short summaries provided by the attorneys:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Don't know/No opinion
Helped you to understand the evidence	◯	◯	◯	◯	◯	◯	◯	◯
Helped you to understand each side's case	◯	◯	◯	◯	◯	◯	◯	◯
Helped you to recall the evidence during deliberations	◯	◯	◯	◯	◯	◯	◯	◯
Helped keep you focus on the evidence	◯	◯	◯	◯	◯	◯	◯	◯
Helped make the evidence more interesting	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial	◯	◯	◯	◯	◯	◯	◯	◯
Increased the efficiency of this trial	◯	◯	◯	◯	◯	◯	◯	◯

3. If you sit on a jury in the future, how important would it be to you that attorneys make summary statements during the trial?

	1 Not at all important	2	3	4 Neutral	5	6	7 Very important	Don't know/no opinion
Importance	◯	◯	◯	◯	◯	◯	◯	◯

4. You have completed the portion of the survey relating to interim statements. Please proceed to the questions on the next page. If there are no additional pages, your participation is complete. Thank you for your input on this important subject.

Juror Survey: Preliminary Instructions

Preliminary Instructions: Process

1. Before you began hearing testimony from the witnesses, did the judge tell you anything about the law that would be applied in the case?

- ◯ Yes. (Please continue to question 2)
- ◯ No. (Please skip to question 3)
- ◯ Don't know/Can't recall (Please skip to question 3)

2. How helpful, if at all, was it for the judge to tell you about the law that would be applied in the case before you began to hear witness testimony?

	1 Very helpful	2	3	4 Somewhat helpful	5	6	7 Very unhelpful	Don't know/not applicable
Law	◯	◯	◯	◯	◯	◯	◯	◯

3. Before you began hearing testimony from the witnesses, did the judge give you a copy of the verdict form ?

- ◯ Yes. (Please continue to question 4)
- ◯ No. (Please skip to question 5)
- ◯ Don't know/Can't recall (Please skip to question 5)

4. How helpful, if at all, was it for the judge to provide you with a copy of the verdict form before you began to hear witness testimony?

	1 Very helpful	2	3	4 Somewhat helpful	5	6	7 Very unhelpful	Don't know/not applicable
Verdict form	◯	◯	◯	◯	◯	◯	◯	◯

Preliminary Instructions: Evaulation

5. Was there anything that the judge told you about the law at the end of the case (before you went to the jury room and began deliberating) that you would have liked to have known earlier?

- ◯ Yes.
- ◯ No.

If yes, please explain

Juror Survey: Preliminary Instructions

6. Do you agree that the judge providing you with information about the law before you heard any witness testimony:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Not applicable/The judge did not provide this information
Helped you to understand the evidence	◯	◯	◯	◯	◯	◯	◯	◯
Helped you to understand each side's case	◯	◯	◯	◯	◯	◯	◯	◯
Helped keep you focused on the evidence	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial	◯	◯	◯	◯	◯	◯	◯	◯
Increased the efficiency of this trial	◯	◯	◯	◯	◯	◯	◯	◯

7. If you sit on a jury in the future, how important would it be to you that the judge provided you with information about the law before you heard any witness testimony?

	1 Not at all important	2	3	4 Neutral	5	6	7 Very important	Don't know/no opinion
Importance	◯	◯	◯	◯	◯	◯	◯	◯

8. You have completed the portion of the survey relating to preliminary instructions. Please proceed to the questions on the next page. If there are no additional pages, your participation is complete. Thank you for your input on this important subject.

Juror Survey: Time Limits

Time Limits

1. Did the length of the trial seem:

- ◯ Too long.
- ◯ About right.
- ◯ Too short.
- ◯ Don't know/No opinion

2. Were you told at the beginning of the trial how long the trial would last or when the trial would be finished?

- ◯ Yes (Please continue to question 3)
- ◯ No (Please skip to question 4)
- ◯ Don't know/Can't recall (Please skip to question 4)

3. Did the trial end:

- ◯ Earlier than you were told by the judge.
- ◯ At about the time that the judge told you it would.
- ◯ Later than you were told by the judge.

4. How important, if at all, was it that you knew at the beginning of the trial how long the trial would last or the day that it would finish:

	1 Not at all important	2	3	4 Neutral	5	6	7 Very important	Don't know/No opinion
Importance	◯	◯	◯	◯	◯	◯	◯	◯

5. If you sit on a jury in the future, how important would it be to you to know at the beginning of the trial how long it would last?

	1 Not at all important	2	3	4 Neutral	5	6	7 Very important	Don't know/no opinion
Importance	◯	◯	◯	◯	◯	◯	◯	◯

6. You have completed the portion of the survey relating to time limits. Please proceed to the questions on the next page. If there are no additional pages, your participation is complete. Thank you for your input on this important subject.

Attorney Survey

Case Complexity

1. In your opinion, how complex was this case?

	1 Very complex	2	3	4	5	6	7 Not complex	Don't know/No opinion
Complexity	◯	◯	◯	◯	◯	◯	◯	◯

2. Overall, how clearly do you believe the evidence was presented in this trial?

	1 Not clearly	2	3	4	5	6	7 Very clearly	Don't know/No opinion
Clarity	◯	◯	◯	◯	◯	◯	◯	◯

3. In your opinion, how difficult was it for jurors to understand the evidence in this trial?

	1 Very difficult	2	3	4	5	6	7 Very easy	Don't know/No opinion
Evidence	◯	◯	◯	◯	◯	◯	◯	◯

4. In your opinion, how difficult was it for jurors to understand the law in this trial?

	1 Very difficult	2	3	4	5	6	7 Very easy	Don't know/No opinion
Law	◯	◯	◯	◯	◯	◯	◯	◯

Juror Questions to Witnesses

5. Were jurors permitted to submit questions to witnesses during the trial?

◯ Yes (Please continue to question 6)

◯ No (Please skip to question 14)

Juror Questions to Witnesses: Experience

6. Did the judge seek counsel's agreement before allowing jurors to submit questions?

◯ Yes

◯ No

◯ Other (please specify)

Attorney Survey

7. How many questions, in total, did jurors ask of the witnesses?

- ◯ 0*
- ◯ 1-5
- ◯ 6-10
- ◯ 11-15
- ◯ 16-20
- ◯ 21-25
- ◯ 26-30
- ◯ More than 30 (please specify)

* If "0", please skip to question 14.

Attorney Objections to Juror Questions to Witnesses

8. Did you object to any of the questions submitted by the jurors for the witnesses?

- ◯ Yes (Please continue to question 9)
- ◯ No (Please skip to question 11)

Attorney Objections to Juror Questions to Witnesses, cont.

9. What was the basis for your objection to one or more of the questions submitted by jurors for the witnesses (select all that apply)?

- ☐ The question was irrelevant.
- ☐ The question was likely to confuse the jurors rather than clarify an issue.
- ☐ The question was not legally permissible.
- ☐ Other (please specify)

10. Of the juror questions to which you objected, were any of them asked of the witnesses?

- ◯ All of them were asked
- ◯ Most of them were asked
- ◯ About half were asked and half were not asked
- ◯ Most of them were not asked
- ◯ All of them were not asked

Juror Questions Asked of Witnesses

Attorney Survey

11. What is your opinion of the number of questions submitted by jurors for the witnesses during the trial?

◯ Too many ◯ An appropriate number ◯ Too few

12. Overall, how relevant do you think the questions were that jurors submitted to be asked of the witnesses (please select one)?

☐ Most were relevant ☐ Some were relevant ☐ Most were irrelevant ☐ Don't know/No opinion

13. For the questions submitted by the jurors for the witnesses, do you agree that overall they:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Don't know/No opinion
Alerted the court or counsel to missing information desired by the jury	◯	◯	◯	◯	◯	◯	◯	◯
Provided information about one or more juror's comprehension of case issues or the evidence	◯	◯	◯	◯	◯	◯	◯	◯
Clarified witness testimony	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial	◯	◯	◯	◯	◯	◯	◯	◯
Increased the efficiency of this trial	◯	◯	◯	◯	◯	◯	◯	◯

Interim Statements

14. Were attorneys permitted to make interim statements during the trial?

◯ Yes (Please continue to question 15)

◯ No (Please skip to question 21)

Interim Statements: Process

15. Did attorneys on either side choose to make interim statements during the trial (check all that apply)?

☐ Yes, the plaintiff's attorney(s) did so. ☐ Yes, the defendant's attorneys did so. ☐ No interim statements were made.

Other (please specify)

Attorney Survey

16. Did you use interim arguments or statements to (check all that apply):

- [ ] Summarize the evidence previously presented
- [ ] Outline forthcoming evidence
- [ ] Argue the case
- [ ] I did not make an interim statement or argument.

Other (please specify)

Interim Statements: Process and Evaluation

17. At what point were interim statements made in the trial (check all that apply)?

- [ ] After the plaintiff's testimony.
- [ ] After the defendant's testimony.
- [ ] After expert testimony.

Other (please specify)

18. How many interim statements did you (or attorneys working with you) make during the trial

- ◯ 0
- ◯ 1
- ◯ 2
- ◯ 3
- ◯ 4
- ◯ 5 or more

Other (please specify)

Attorney Survey

19. Did you use interim arguments or statements to (check all that apply):

- ☐ Summarize the evidence previously presented
- ☐ Outline forthcoming evidence
- ☐ Argue the case
- ☐ I did not make an interim statement or argument.

Other (please specify)

20. For the interim statements made during this trial, do you agree that overall they:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Don't know/No opinion
Clarified the legal arguments for each side	◯	◯	◯	◯	◯	◯	◯	◯
Clarified witness testimony	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial	◯	◯	◯	◯	◯	◯	◯	◯
Increased the efficiency of this trial	◯	◯	◯	◯	◯	◯	◯	◯

Preliminary Instructions

21. Did the judge give preliminary instructions to the jury?

- ◯ Yes (Please continue to question 22)
- ◯ No (Please skip to question 26)

Preliminary Instructions: Process

22. Did the judge consult with you about the content of the preliminary instructions?

- ◯ Yes.
- ◯ No.

Other (please specify)

23. In this trial, what challenges were there, if any, in crafting effective preliminary instructions (check all that apply)?

- [ ] None.
- [ ] The judge needed to consult more with counsel in advance.
- [ ] Counsel needed to be more prepared at outset of trial.
- [ ] It was difficult to accurately describe/predict the evidence at the beginning of the trial.
- [ ] It was difficult to draft the preliminary instructions so as not to overemphasize particular facts or legal points over others.
- [ ] Other (please specify)

Preliminary Instructions: Evaluation

24. Was there anything that the judge told the jury about the law at the end of the case that you wish the jury knew earlier?

- ◯ Yes.
- ◯ No.

If yes, please explain.

25. For the preliminary instructions given in this trial, do you agree that overall they:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Don't know/No opinion
Interfered with the jury's ability to objectively evaluate the evidence.	◯	◯	◯	◯	◯	◯	◯	◯
Overemphasized particular facts or legal points over others.	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial.	◯	◯	◯	◯	◯	◯	◯	◯
Increased the efficiency of this trial.	◯	◯	◯	◯	◯	◯	◯	◯

Time Limits

Attorney Survey

26. Did the judge impose a time limit in this trial?

- ◯ Yes (Please continue to question 27)
- ◯ No (Please skip to end of survey)

Time Limits: Process

27. Did the judge consult with you about the length of the time limits?

- ◯ Yes.
- ◯ No.

Other (please specify)

28. How much time were you allotted by the judge?

In minutes

29. About how much time did you actually use out of your time limit?

In minutes

Time Limits: Evaluation

30. In retrospect, the time limit was:

- ◯ Too much time.
- ◯ The right amount of time.
- ◯ Too little time.

31. For the time limits used in this trial, do you agree that overall they:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Don't know/No opinion
Resulted in attorneys presenting more clear and concise arguments in this trial.	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial.	◯	◯	◯	◯	◯	◯	◯	◯
Increased the actual efficiency of this trial.	◯	◯	◯	◯	◯	◯	◯	◯
Increased the participants' perception of the efficiency of this trial.	◯	◯	◯	◯	◯	◯	◯	◯

Survey Completed

Judge Survey

Case Background

1. In your opinion, how complex was this case?

	1 Very complex	2	3	4	5	6	7 Not complex	Don't know/No opinion
Complexity	◯	◯	◯	◯	◯	◯	◯	◯

2. Overall, how clearly did you feel the evidence was presented in this trial?

	1 Not clearly	2	3	4	5	6	7 Very clearly	Don't know/No opinion
Clarity	◯	◯	◯	◯	◯	◯	◯	◯

3. How difficult do you believe it was for jurors to understand the evidence in this trial?

	1 Very difficult	2	3	4	5	6	7 Very easy	Don't know/No opinion
Evidence	◯	◯	◯	◯	◯	◯	◯	◯

4. How difficult do you believe it was for jurors to understand the law in this trial?

	1 Very difficult	2	3	4	5	6	7 Very easy	Don't know/No opinion
Law	◯	◯	◯	◯	◯	◯	◯	◯

5. Please indicate trial outcome:

- ◯ Settled before verdict
- ◯ Verdict for plaintiff on some or all claims
- ◯ Verdict for defense on some or all claims
- ◯ Post-verdict, you ruled as a matter of law for the plaintiff
- ◯ Post-verdict, you ruled as a matter of law for the defendant

Other (please specify)

6. Approximately how long did the jury deliberate in this case (in minutes):

Deliberations

Juror Questions to Witnesses

7. Were jurors permitted to submit questions to witnesses during the trial?

- ◯ Yes (If yes, please continue to question 8)
- ◯ No (If no, please skip to question 17)

Judge Survey

Juror Questions to Witnesses: Experience

8. Did you seek counsel's agreement before allowing jurors to submit questions?

- ◯ Yes
- ◯ No
- ◯ Other (please specify)

9. How many questions, in total, did jurors ask of the witnesses?

◯ 0* ◯ 1 ◯ 2 ◯ 3 ◯ 4 ◯ 5 ◯ 6 ◯ 7 ◯ 8 ◯ 9 ◯ 10

◯ More than 10 (please specify)

* If you answer 0, please skip to question 17.

Juror Questions to Witnesses: Process

10. How were juror questions to witnesses submitted?

☐ Individual jurors submitted proposed questions in writing during the trial to the bailiff or other court employee.

☐ The judge allowed jurors to prepare and submit proposed questions in writing during a break in the trial to the bailiff or other court employee.

☐ Other (please specify)

11. Did you allow all questions submitted from the jurors to be asked of the witness?

- ◯ Yes (Please skip to question 14)
- ◯ No (Please continue to question 12)

Juror Questions Not Asked of Witnesses

Judge Survey

12. How many juror questions did you NOT allow to be asked of the witnesses?

◯ 1 ◯ 2 ◯ 3 ◯ 4 ◯ 5 ◯ 6 ◯ 7 ◯ 8 ◯ 9 ◯ 10

◯ More than 10 (please specify)

13. What was the reason(s) that you did not permit one or more of the juror questions to be asked of a witness (check all that apply):

☐ The question was irrelevant.

☐ The question was likely to confuse the jurors rather than clarify an issue.

☐ The question was not legally permissible.

☐ Other (please specify)

Juror Questions Asked of Witnesses

14. What is your opinion of the number of questions submitted by jurors for the witnesses during the trial?

◯ Too many ◯ An appropriate number ◯ Too few

15. Overall, how relevant do you think the questions were that jurors submitted to be asked of the witnesses (please select one)?

☐ Most were relevant ☐ Some were relevant ☐ Most were irrelevant ☐ Don't know/No opinion

16. For the questions submitted by the jurors for the witnesses, do you agree that overall they:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Don't know/No opinion
Alerted the court or counsel to missing information desired by the jury	◯	◯	◯	◯	◯	◯	◯	◯
Provided information about one or more juror's comprehension of case issues or the evidence	◯	◯	◯	◯	◯	◯	◯	◯
Clarified witness testimony	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial	◯	◯	◯	◯	◯	◯	◯	◯
Increased the efficiency of this trial	◯	◯	◯	◯	◯	◯	◯	◯

Judge Survey

Interim Statements

17. Were attorneys permitted to make interim statements during the trial?

- ◯ Yes (Please continue to question 18)
- ◯ No (Please skip to question 24)

Interim Statements: Process

18. Did you allow attorneys to make interim statements/arguments in order to (check all that apply):

- ☐ Summarize the evidence previously presented
- ☐ Outline forthcoming evidence
- ☐ Argue the case

Other (please specify)

19. How much time did you allot for each side for interim statements?

(in minutes)

20. In retrospect, that was:

◯ Too much time. ◯ The right amount of time. ◯ Too little time.

Other (please specify)

21. How many interim statements were made by each side?

Plaintiff

Defendant

Interim Statements: Process and Experience

Judge Survey

22. At what point(s) in the trial were the interim statements made (please check all that apply)?

- ☐ After plaintiff's testimony.
- ☐ After defendant's testimony.
- ☐ After expert testimony.

Other (please specify)

23. For the interim statements, do you agree that overall they:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Don't know/No opinion
Clarified the legal arguments of each side	◯	◯	◯	◯	◯	◯	◯	◯
Clarified witness testimony	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial	◯	◯	◯	◯	◯	◯	◯	◯
Increased the efficiency of this trial	◯	◯	◯	◯	◯	◯	◯	◯

Preliminary Instructions

24. Did you give preliminary instructions to the jury?

- ◯ Yes (Please continue to question 25)
- ◯ No (Please skip to question 30)

Preliminary Instructions: Process

25. Did the preliminary instructions include (check all that apply):

- ☐ The elements of the claims.
- ☐ The elements of the defenses.
- ☐ Any explanatory or definitional instructions the jury needed to evaluate the claims and defenses.
- ☐ A copy of the verdict form.

Other (please specify)

26. Did you consult with the lawyers about the content of the preliminary instructions?

- ◯ Yes.
- ◯ No.

Other (please specify)

27. Was there anything you told the jury about the law at the end of the case that you would have liked to have told the jury earlier?

- ◯ Yes
- ◯ No

If yes, please explain.

28. In this trial, what challenges were there, if any, in crafting effective preliminary instructions (check all that apply)?

- ☐ None.
- ☐ I needed to consult more with counsel in advance.
- ☐ Counsel needed to be more prepared at outset of trial.
- ☐ It was difficult to accurately describe/predict the evidence at the beginning of the trial.
- ☐ It was difficult to draft the preliminary instructions so as not to overemphasize particular facts or legal points over others.
- ☐ Other (please specify)

29. For the preliminary instructions given in this trial, do you agree that overall they:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Don't know/No opinion
Interfered with the jury's ability to objectively evaluate the evidence.	◯	◯	◯	◯	◯	◯	◯	◯
Overemphasized particular facts or legal points over others.	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial.	◯	◯	◯	◯	◯	◯	◯	◯
Increased the efficiency of this trial.	◯	◯	◯	◯	◯	◯	◯	◯

Judge Survey

Time Limits

30. Did you use time limits in this trial?

- ◯ Yes (Please continue to question 31)
- ◯ No (Please skip to end of survey)

Time Limits: Process

31. How much time did you allot to each side for the trial (in minutes)?

Plaintiff

Defendant

32. In retrospect, that was:

- ◯ Too much time.
- ◯ The right amount of time.
- ◯ Too little time.

Other (please specify)

33. How much time was actually used by each side (in minutes)?

Plaintiff

Defendant

Time Limits: Evaluation

34. In retrospect, the time limits used in this trial were:

- ◯ Too much time.
- ◯ The right amount of time.
- ◯ Too little time.

Other (please specify)

Judge Survey

35. For the time limits used in this trial, do you agree that overall they:

	1 Disagree	2	3	4 Neutral	5	6	7 Agree	Don't know/No opinion
Resulted in attorneys presenting more clear and concise arguments in this trial.	◯	◯	◯	◯	◯	◯	◯	◯
Increased the fairness of this trial.	◯	◯	◯	◯	◯	◯	◯	◯
Increased the actual efficiency of this trial.	◯	◯	◯	◯	◯	◯	◯	◯
Increased the participants' perception of the efficiency of this trial.	◯	◯	◯	◯	◯	◯	◯	◯

Survey Completed

Thank you for your participation in this survey.

SECTION III: BENCH MEMORANDA ADDRESSING THE PROPOSED INNOVATIONS

Before selecting the four innovations for the pilot program, the Committee reviewed legal authority from Texas state appellate courts and the Fifth Circuit to confirm that trial courts in Texas have discretion to test the four jury innovations listed above. This section of the manual contains bench memoranda addressing the four proposed innovations. The memoranda conclude that it is within the trial court's sound discretion to implement the proposed innovations in civil trials.

A. MEMORANDUM ON JURY QUESTIONS AND JURY NOTETAKING

February 26, 2010

Here is a discussion of two issues in Fifth Circuit jury trials: jury questioning of witnesses and jury note taking.

I. JUROR QUESTIONS

A jury is given extraordinary responsibility. It must assume the important role of fact-finder, searching for the truth. To assist a jury in its quest for the truth, many jurisdictions allow a jury to present questions, in one form or another, to witnesses in both civil and criminal case. Others do not. Here is a summary of the state of play surrounding juror questions.

A. Federal Courts

The United States Supreme Court has not addressed the propriety of juror questioning of witnesses, to date. And the Federal Rules of Evidence do not comment on the practice of juror questioning of witnesses. This leaves considerable interpretation to the individual courts of each jurisdiction. Most jurisdictions refuse to prohibit the practice altogether; instead, they leave the decision whether to use the practice to the discretion of the trial court.

1. The Fifth Circuit

The Fifth Circuit addressed the issue of juror questioning witnesses in *United States v. Callahan*, 588 F.2d 1078 (5th Cir. 1979). In *Callahan*, before opening statements had begun, the court informed the jurors that they would have the opportunity to submit written questions to the judge if they had any particular questions that they would like asked of a witness. *Id*. at 1086. The trial judge informed the jurors that their questions would be asked so long as they were not legally improper. *Id*. The trial judge further explained that while he did not want to encourage numerous questions, jurors should not hesitate to ask something if they felt there was some necessary piece of information that had not been brought out by either the court or the attorneys. *Id*.

The Fifth Circuit stated that allowing jurors to present questions to witnesses was not improper:

> There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. 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. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop the truth.

Id. *Callahan* nonetheless declined to universally endorse the practice of juror questioning. *Id*. at 1086 n.2. Instead, the court noted that lower courts must individually balance the advantages of permitting jurors to ask questions against the potential abuses that could result if the practice was overly used. *Id*. ("District courts must in each case balance the positive value of allowing a troubled juror to ask a question against the possible abuses that might occur if juror questioning became extensive."). In short, the proper handling of juror questions is a matter within the discretion of the trial judge.

2. Other Federal Circuits

Every federal circuit that has addressed the issue of juror questioning of witnesses agrees that it is a practice that should be left entirely within the trial court's discretion. *See, e.g.*, *United States v. Brockman*, 183 F.3d 891, 898 (8th Cir. 1999); *United States v. Hernandez*, 176 F.3d 719, 723 (3d Cir. 1999); *United States v. Feinberg*, 89 F.3d 333, 337 (7th Cir. 1996); *United States v. Douglas*, 81 F.3d 324, 326 (2d Cir. 1996); *United States v. Cassiere*, 4 F.3d 1006, 1017–18 (1st Cir. 1993); *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986); *United States v. Gonzalez*, 424 F.2d 1055, 1055 (9th Cir. 1970).

B. Texas and State Courts

Likewise, most state courts permit the use of juror questioning. These jurisdictions include Arizona: *State v. LeMaster*, 669 P.2d 592, 598 (Ariz. Ct. App. 1983); Arkansas: *Nelson v. State*, 513 S.W.2d 496, 498 (Ark. 1974); California: *People v. McAlister*, 213 Cal. Rptr. 271, 276 (Ct. App. 1985); District of Columbia: *Yeager v. Greene*, 502 A.2d 980, 985 (D.C. 1985); Florida: *Ferrara v. State*, 101 So. 2d 797, 801 (Fla. 1958); Georgia: *Story v. State*, 278 S.E.2d 97, 98 (Ga. Ct. App. 1981); Indiana: *Carter v. State*, 234 N.E.2d 650, 652 (Ind. 1968); Iowa: *Rudolph v. Iowa Methodist Med. Ctr., Inc.*, 293 N.W.2d 550, 555–556 (Iowa 1980); Kentucky: *Stamp v. Commonwealth*, 253 S.W. 242, 246 (Ky. 1923); Michigan: *People v. Heard*, 200 N.W.2d 73, 75 (Mich. 1972); Missouri: *Sparks v. Daniels*, 343 S.W.2d 661, 667 (Mo. 1961); New Mexico: *State v. Rodriquez*, 762 P.2d 898, 901–902 (N.M. Ct. App. 1988); New York: *People v. Knapper*, 245 N.Y.S. 245, 251 (App. Div. 1930); North Carolina: *State v. Kendall*, 57 S.E. 340, 341 (N.C. 1907); Ohio: *State v. Sheppard*, 128 N.E.2d 471, 499 (Ohio Ct. App.); Oklahoma: *Krause v. State*, 132 P.2d 179, 182 (Okla. 1942); Pennsylvania: *Boggs v. Jewel Tea Co.*, 109 A. 666, 667 (Penn. 1920); South Carolina: *State v. Barrett*, 297 S.E.2d 794, 796 (S.C. 1982); Tennessee: *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978); Utah: *State v. Johnson*, 784 P.2d 1135, 1144–45 (Utah 1989).

In Texas, juror questioning is permitted in civil cases but not criminal cases. *See, e.g.*, *Hudson v. Markum*, 948 S.W.2d 1, 3 (Tex. App.—Dallas 1997, writ denied) (allowing the use of juror questions); *Fazzino v. Guido*, 836 S.W.2d 271, 276 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (same); *Morrison v. State*, 845 S.W.2d 882, 889 (Tex. Crim. App. 1992) (prohibiting juror questioning of witnesses in criminal trials).

C. Advantages and Disadvantages of Juror Questioning of Witnesses

Advocates generally cite six reasons for allowing jury questioning. First, such a system allows jurors to better understand evidence presented to them by permitting them to follow up or clarify evidence presented. Second, juror questioning of witnesses increases the jurors' attentiveness because they become more deeply involved in the trial. Third, it improves communications between the attorneys and the jury. Fourth, jury questioning alerts the parties as to what jurors are thinking and provides insight into which issues need clarification or further development. Fifth, allowing jury questioning enhances the jury's confidence in arriving at a verdict. Lastly, use of juror questioning procedures is also beneficial in that it increases the jurors' satisfaction with their own participation in the courtroom. *See, e.g.*, Emma Cano, *Speaking Out: Is Texas Inhibiting the Search for Truth by Prohibiting Juror Questioning of Witnesses in Criminal Cases*?, 32 TEX. TECH L. REV. 1013, 1034–38 (2001) (outlining the advantages of juror questioning).

Opponents of jury questioning contend that there are too many dangers in allowing the practice. These dangers include upsetting the adversarial system, distracting the jury from the trial or evidence presented, prejudicing the jury or the parties, permitting improper questions, and lengthening the trial. *Id*. at 1038–43.

D. Procedural Safeguards

To eliminate the potential disadvantages, courts should employ procedural safeguards. For example, in *Fazzino v. Guido*, 836 S.W.2d 271 (Tex. App.—Houston [1st Dist.] 1992, writ denied), the court determined that the following procedural safeguards were sufficient to protect the rights of the parties:

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

Id. at 275. Permitting a juror to spontaneously ask a direct, oral question of a witness could create substantial problems as follows:

1. It places counsel "in the intolerable condition of offending the juror by objecting or permitting improper or impossible prejudicial testimony to come in without objection";

2. It causes the juror involved to lessen his or her objectivity and causes a premature judgment on some issue in the case; and

3. It produces tension or actual antagonism between the juror and witness as a result of the interaction.

Allen v. State, 807 S.W.2d 639, 641–42 (Tex. App.—Houston [14th Dist.] 1991) (citing *People v. McAlister*, 213 Cal. Rptr. 271, 277 (Ct. App. 1985)), *rev'd*, 845 S.W.2d 907 (Tex. Crim. App. 1993)

In sum, procedural safeguards should include limiting questions only to those matters that have been attested to during direct and cross-examination; allowing juror questions only after the witness has finished testifying, but before the witness is dismissed; requiring all questions to be in writing and submitted to the judge directly; requiring the judge, and not the attorneys, to present the juror questions to the witness; and allowing the attorneys the opportunity to redirect and re-cross the witnesses after the juror questions are asked. *See* Cano, *supra*, at 1044–49.

II. JUROR NOTE TAKING

The law of juror note taking has evolved. Historically, courts disfavored juror note taking, but today, "the vast majority of states and most of the federal circuits hold that jurors may take notes subject to the trial judge's discretion." *Price v. State*, 887 S.W.2d 949, 952 & n.3 (Tex. Crim. App. 1994).

A. Federal Courts

In the Fifth Circuit, district judges retain the discretion to decide whether to allow jury note taking. "Allowing jurors to take notes and use them during deliberations is a matter within the discretion of the trial court; absent abuse of discretion, the action of the trial court will not be disturbed." *United States v. Rhodes*, 631 F.2d 43, 45–46 (5th Cir. 1980); *Fortenberry v. Maggio*, 664 F.2d 1288, 1292 (5th Cir. 1982) (quoting *Rhodes*); *accord United States v. Pollack*, 433 F.2d 967, 967–68 (5th Cir. 1970). The same rule predominates the circuits in both civil and criminal cases. 1 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS: JURY TRIAL § 5:11, at 432 (2006).

When district courts decide to permit note taking, they usually accompany the allowance with instructions: "Generally, there are certain safeguards in place and cautionary instructions are given to make sure that notes are used appropriately—most commonly, an admonition that jurors use their notes for their own personal edification and a requirement that jurors' notes remain in the room and not be taken home." O'MALLEY, GRENIG & LEE, *supra*, § 5:11, at 434. This is so in the Fifth Circuit as well:

> Jurors should be instructed that they should carefully listen to the evidence and not allow their note taking to distract them. The court should also explain that the notes taken by each juror are to be used only as a convenience in refreshing that juror's memory and that each juror should rely on his or her independent recollection of the evidence rather than be influenced by another juror's notes.

Rhodes, 631 F.2d at 46 (citation omitted). Here is an exemplary instruction:

> The court will permit jurors to take notes during the course of the trial. You of course are not obliged to take any notes, and some feel that the taking of notes is not helpful because it may distract you so that you do not hear and evaluate all of the evidence. If you do take notes, do not allow note taking to distract you from the ongoing proceedings.
>
> Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you do not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

Id. at 46 n.3.

B. State Courts

Most state courts permit juror note taking. *See Price*, 887 S.W.2d at 951–52. Texas follows the majority and permits juror note taking in both civil and criminal cases, with the same allowance for trial court discretion. *See id.* at 954–55; *Davis v. Huey*, 608 S.W.2d 944, 955 (Tex. App.—Austin 1980), *rev'd on other grounds*, 620 S.W.2d 561 (Tex. 1981). Like the federal courts, Texas courts use flexible guidelines for the trial court's note-taking decision and encourage specific admonishments and jury charges:

> First, determine if juror note-taking would be beneficial in light of the factual and legal issues to be presented at the trial. If the trial is to be relatively short and simple, the need for note-taking will be slight. On the other hand, if a long and complex trial is anticipated, note-taking could be extremely beneficial. Second, the trial judge should inform the parties, prior to voir dire, if the jurors will be permitted to take notes. If note-taking is to be allowed, the parties should be permitted to question the venire as to their ability to read, write or take notes.
>
> Third, the trial judge should admonish the jury, at the time it is impaneled, on note taking. Having reviewed the jury instructions used by many jurisdictions, we believe the following admonition, or one substantially similar, should be given:
>
> Ladies and Gentlemen of the Jury:

Because of the potential usefulness of taking notes, you may take notes during the presentation of evidence in this case. However, you may not take notes during the arguments of the lawyers, or when the jury charge is read to you.

Moreover, to ensure a completely fair and impartial trial, I will instruct you to observe the following limitations:

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

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

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

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

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

Fourth, the trial judge should provide the following instruction, or one substantially similar, in the jury charge at each phase of the trial:

You have been permitted to take notes during the testimony in this case. In the event any of you took notes, you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give no more and no less weight

> to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing or you might make a mistake in recording what you have seen or heard. Therefore, you are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.
>
> Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case.

Price, 887 S.W.2d at 954–55 (citations omitted).

C. Continued Disagreement

Despite relatively clear law, there remains significant disagreement about the utility of note taking:

> The principal argument in favor of permitting jurors to take notes is that the jurors' memories are fallible, and taking notes—especially in complex cases—will permit them to more accurately recall pertinent evidence and reach a just verdict. The attorneys and judge are allowed to take notes and the jurors also should be allowed to take notes.
>
> The principal arguments in opposition to note-taking by jurors is this, since most jurors are not accustomed to taking notes, doing so will distract them from hearing all of the testimony which they should recall and evaluate as a whole. Further, notes may overemphasize certain aspects of a trial, or give note-taking jurors greater persuasion over those who do not take notes.

O'MALLEY, GRENIG & LEE, *supra*, § 5:11, at 431–34. While opinions are trending in favor of note taking, some courts still hold strong reservations, *see, e.g.*, *Clemmons v. Sowders*, 34 F.3d 352, 357 (6th Cir. 1994) ("[I]t has been established that by allowing notes into deliberations, the court is permitting the best notetaker to dominate the deliberative process and thereby putting too much emphasis on the notes to the detriment of the independent recollections of all of the jurors."); *see also Price*, 887 S.W.2d at 952–53 ("Only Louisiana, Rhode Island, New Mexico and Pennsylvania do not allow some form of juror note-taking and, even in those states, the defendant must show harm before reversal will be warranted.").

B. MEMORANDUM ON TIME LIMITS AND INTERIM STATEMENTS

February 18, 2010

I. Introduction

Judge Nancy Atlas is directing a jury "innovations" project in an effort to identify and assess various techniques that might be implemented to increase juror comprehension during trial. As part of this effort, Baker Botts has been tasked with conducting research on two of the proposed innovations: (1) trial time limits and (2) interim argument. Trial time limits are, as the name suggests, prospective time limits set on the trial as a whole (or individual components thereof such as witness testimony). Interim argument refers to the procedure where counsel is allowed, at various times during the trial, to make brief statements in order to summarize the evidence that has been presented or to outline upcoming evidence.

II. Question Presented

Both trial time limits and interim arguments have been utilized by certain trial courts. How have these procedures been received by appellate courts and what can a trial judge do to ensure that her use of these procedures will not lead to reversible error?

III. Short Answer

Appellate courts have generally looked favorably on both these procedures in civil trials, especially in particularly long or complex cases. However, the trial judge should take care to make sure that the procedures are properly implemented—that time limits are appropriately flexible and interim argument is not abused by counsel. In criminal cases, trial judges should take particular care to respect the defendant's confrontation clause rights; interim argument should only be employed in particularly complex cases.

IV. Analysis

A. Trial time limits

The imposition of trial time limits has consistently been approved by appellate courts as an appropriate exercise of judicial discretion. The Fifth Circuit has long recognized that "[i]n the management of its docket, the court has an inherent right to place reasonable limitations on the time allotted to any given trial." *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir. 1994); *see also United States v. Warner*, 506 F.3d 517, 522 (7th Cir. 2007) (denying petition for reh'g in *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007) (Posner, J., dissenting)) ("All the legal authority a trial judge needs for streamlining a . . . trial is the judiciary's inherent authority to manage trials with due regard for eliciting intelligent consideration of the issues by the jurors."). In other words, the logistics of trial are soundly within the trial judge's discretion.

Perhaps it is this pragmatic understanding that has prevented trial time limits from being an oft-litigated issue on appeal. The practice is certainly common enough, especially in complex cases. *See, e.g.*, *Frazier v. Honeywell Inter'l. Inc.*, 518 F. Supp. 2d 831, 840 (E.D. Tex. 2007)

(approving time limit of 9 hours per side for presentation of evidence in products liability action); *Informatica Corp. v. Bus. Objects Data Integration, Inc.*, No. C 02-03378 EDL, 2007 WL 607792, at *1 (N.D. Cal. Feb 23, 2007) (setting time limit of 35 hours per side in complex patent infringement case). In fact, there seems to be a building consensus that, especially in complex cases, a trial judge may have an affirmative obligation to employ *some* procedure to "prevent unduly protracted trials." *Warner*, 498 F.3d at 523 (Posner, J., dissenting) (observing that it may be an abuse of discretion to allow a case to drag on unnecessarily); *see also* American Bar Association, Principles for Juries and Jury Trials (2005) ("Principle 12: Courts Should Limit the Length of Jury Trials Insofar As Justice Allows, and Jurors Should be Fully Informed of the Trial Schedule Established."). The rationale is simple—long trials lead to bad verdicts. *Warner*, 498 F.3d at 523 (Posner, J., dissenting).[1]

Similarly, despite the relative lack of explicit consideration of trial time limits in Texas state courts, there is a general acknowledgement that trial courts "[are] vested with great discretion over the conduct of the trial, and this discretion includes its intervention to 'maintain control in the courtroom, to expedite the trial, and to prevent what it considers to be a waste of time.'" *State v. Reina*, 218 S.W.3d 247, 254-55 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (quoting *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001)). In *Reina*, an eminent domain case, the State objected on appeal to the trial court's imposition of time limits mid-trial. *Id.* at 254. The appellate court found that the State had waived this argument—the parties had agreed to the time limit when it was set and failed to object during trial. *Id.* But the court noted that:

> [E]ven if the State had preserved this issue for review, we still would not conclude there was error. Although the State asserts the trial court limited the State to a six-minute closing argument, the record does not reflect such a limitation. The trial court did not impose a six-minute time limit for the State's closing arguments. Rather, the trial court imposed agreed-upon aggregate time limits based on the amount of time requested by the State. The trial court even reminded the State when it was cutting into its closing argument time, which had been projected at thirty minutes. The trial court repeatedly reminded the State of the time remaining, and it was the State's responsibility to allocate its time. Therefore, the trial court did not limit the State to six minutes for closing argument; the State voluntarily chose to give a six-minute closing argument by using the preceding minutes for examination of witnesses rather than for closing argument.

[1]As Judge Posner observed: "[T]he longer the trial, the less likely the jury is to be able to render an intelligent verdict. Jurors become overwhelmed by the volume of evidence and numbed by its repetitiousness. Their attention flags; their minds wander; the witnesses . . . get mixed up in the jurors' minds, or forgotten; the profusion of exhibits . . . makes the documentary record unintelligible. The impressions created by the closing arguments are likely to wipe out everything that went before." *Warner*, 498 F.3d at 523 (Posner, J., dissenting).

Id. at 256. This is consistent with the general consensus that trial time limits are soundly within the discretion of the trial judge.

Further, when the parties are involved in the process of determining agreed-upon time limits, appellate courts will be especially reluctant to find that holding the parties to their word constitutes error. *See Walton v. Canon, Short & Gaston*, 23 S.W.3d 143, 153-54 (Tex. App.—El Paso 2000, no pet.) (noting that even if the issue had been properly preserved on appeal "we would be hard-pressed to find error . . . where the parties were subject only to time limits they set themselves"). And in any event, if a party fails to object during trial, he will have no basis to complain on appeal. *Schwartz v. Forest Pharm., Inc.*, 127 S.W.3d 118, 127 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) ("Schwartz did not object to the time limit; therefore, error, if any, was waived.") Therefore, simply as a matter of best practices, a trial judge should involve the parties in formulating time limits based upon the anticipated complexity of the trial.

Appellate courts recognize that while time limits can be a very useful case management tool, they should not be arbitrarily imposed or stringently enforced. Time limits should be flexible, to allow for adjustment during trial if the need arises. *See Warner, 498 F.3d* at 521 (Posner, J., dissenting); *accord MCI Commc'n Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1171 (7th Cir. 1983). In enforcing time limits, judges should avoid exalting form over substance, keeping in mind their purpose: to maximize juror efficacy. Legalistic enforcement of time limits could lead to the perverse result of "prevent[ing] the jury from making a discriminating appraisal of the [evidence]." *United States v. Vest*, 116 F.3d 1179, 1187 (7th Cir. 1997).

At least one case notes that the need for flexibility is especially acute in criminal trials, where time limits "are best used as guideposts rather than deadlines." *Id.* Draconian enforcement of time limits could threaten a criminal defendant's Confrontation Clause rights by "an arbitrary cutoff of cross-examination." *Id.* But this is not to say that judges should not use them. Rather, "a trial judge must [simply] 'exercise judgment in deciding when the point of diminishing returns has been reached, or passed—a judgment that will depend on the particulars of each case, and on such unreviewable imponderables as the judge's assessment of the jury's comprehension and attention span.'" *Id.* (quoting *United States v. Pulido*, 69 F.3d 192, 204 (7th Cir. 1995)). In *Vest*, the court approved the use of time limits in a criminal trial noting that

> We think Vest had the "reasonable chance" to pursue matters covered on direct that the Confrontation Clause protects. The District Court's time limits were reasonably anchored to the defendant's own requests for time and to the amount of time the Government used on direct. The District Court's willingness to bend the time limits shows flexibility and its decision to end cross-examination only after concluding that Vest's counsel was wasting time with repetitive questions shows the particularized judgment necessary for limiting cross-examination.

Id. (internal citations omitted).

To sum up, appellate courts give trial courts substantial leeway in imposing trial time limits—especially in potentially lengthy cases. "A good deal of research shows that 20 days is about the longest trial any jury can comprehend fully." *SEC v. Koenig*, 557 F.3d 736, 739 (7th

Cir. 2009) (Easterbrook, J.). And appellate courts will look favorably upon judges who employ time limits to streamline difficult cases. But ultimately, they "are no substitute for involved trial judges who must always shepherd trials along, curtailing repetitive, irrelevant and immaterial questioning." *Vest*, 116 F.3d at 1187.

B. Interim argument

Interim arguments allow counsel to "summarize the evidence presented or outline forthcoming evidence." Federal Judiciary Center, Manual for Complex Litigation § 12.34 (4th ed. 2004). Despite commonly being referred to as "interim argument," the term "interim statement" is probably more accurate. *See id.* ("Although such procedures are often described as 'interim arguments,' it may be more accurate to consider them 'supplementary opening statements.'"). This is because "the purpose is to aid the trier of fact in understanding and remembering the evidence and *not* to argue the case." *Id.* (emphasis added). However, because of its potential for abuse, appellate courts have approached interim argument much more warily than trial time limits. Nevertheless, courts have recognized that, properly utilized, interim argument can be invaluable to juror comprehension, particularly in complex cases.

The most thorough examination of the use of interim argument in civil trials is found in *ACandS, Inc. v. Godwin*, 340 A.2d 116 (Md. 1994), a complex asbestos case that involved the consolidation of 8,555 individual actions. Multiple errors were alleged to have arisen as a result of interim argument, including that the parties were allowed "to present arguments that would otherwise only be permitted in closing arguments." *Id.* at 152. Specifically, the plaintiff was accused of using interim argument to continually focus the jury's attention on punitive damages issues, constantly highlighting the most inflammatory facts in an unfairly cumulative fashion. *See id.* at 152-54. The Maryland Court of Appeals—Maryland's highest court—found no reversible error, holding that "[the trial judge] did not abuse his discretion in determining that the benefits of interim argument would, and did, outweigh any problems associated with it." *Id.* at 154. In reaching its decision, the court approvingly noted that the trial judge "also gave interim instructions, frequently *sua sponte*, including reminders that evidence offered against one defendant was not evidence against other defendants, and that interim argument was argument only and not evidence." *Id.* at 148 n.22.

The use of interim argument in criminal cases, however, has been viewed much more warily by appellate courts. At least two courts have found the use of interim arguments in criminal cases to constitute reversible error. *See United States v. Yakobowicz*, 427 F.3d 144 (2d Cir. 2005); *Parker v. State*, 51 S.W.3d 719 (Tex. Ct. App.—Texarkana 2001, no pet.). In *Yakobowicz*, the Second Circuit held that "use of the interim summation procedure in [a criminal case,] . . . involv[ing] no length, no complexity, and no need, . . . was not only unjustified . . . but also violated appellant's constitutional right to a fair trial." 427 F.3d at 151, 153. While acknowledging the usefulness of the procedure in civil cases, the court noted that "[t]he effect of interim summations in most criminal cases is . . . to strengthen the government's theory cumulatively as well as repetitively." *Id.* at 152. While the court acknowledged that "the judge repeatedly told the jury not to form [premature] opinions," it found that "allowing interim summations was so inconsistent with those cautions that jury confusion was quite likely." *Id.* Further,

> There is limited discovery by defendants in criminal cases, whereas the prosecution has grand jury subpeonas at its disposal. The government generally has, therefore, a clearer vision of the entire case than does the defense and can unveil its evidence with interim summations in mind. Given this informational disadvantage, the defense may find it very risky to respond to particular interim summations by emphasizing evidentiary gaps that may be filled immediately thereafter or by promising or implying a defense that is ultimately not presented. A failure to respond to the government's interim summation, on the other hand, leaves the government with a growing advantage.

Id. Interim statements in criminal cases are viewed suspiciously by appellate courts because they provide the state with a procedural advantage.

Similarly, in *Parker* the Texarkana Court of Appeals found that allowing counsel to make argumentative statements during trial was error (although the court ultimately determined that such error was harmless due to the overwhelming evidence of defendant's guilt). 51 S.W.3d at 724-25. While the issue whether the use of interim statements in criminal trials was itself error was not properly preserved on appeal, the court noted that "we emphatically do not approve this procedure." *Id.* at 723. There are, unfortunately, no other Texas cases examining the interim argument procedure. But due to the concerns mentioned above it is unsurprising that the *Parker* court was skeptical of the procedure in criminal cases. As *Yakobowicz* demonstrates, however, the disapproval of interim arguments in criminal cases should not be construed as an implicit disapproval of their use in civil cases, where the procedure does not inherently favor one party over the other.

V. Conclusion

Appellate courts generally recognize that trial time limits and interim argument are helpful tools to increase juror understanding of the issues in a particular case and to stave off juror fatigue.

C. MEMORANDUM ON PRELIMINARY SUBSTANTIVE JURY INSTRUCTIONS

February 26, 2010

I. Introduction

Although some judges provide a brief introduction to the applicable law at the beginning of trial, detailed instructions on the law are generally given at the close of evidence or after closing arguments. In an effort to reform jury trials, some judges and commentators have recommended that courts also instruct the jury about the applicable law at the beginning of trial rather than exclusively at the close of evidence or after closing arguments.

This memorandum discusses the practice of giving preliminary jury instructions on the law at the beginning of trial. The practice of giving such instructions is well accepted in criminal cases in both the Fifth Circuit and Texas state courts. However, very few cases discuss the propriety of giving preliminary instructions on the law in civil cases.

II. Discussion

a. Fifth Circuit

i. Federal Criminal Cases

Federal Rule of Criminal Procedure 30 provides that "[t]he court may instruct the jury before or after the arguments are completed, or at both times." While this rule does not mention jury instructions at other stages of trial, the Fifth Circuit has specifically condoned the practice of providing substantive jury instructions at the beginning of criminal trials. *See United States v. Ruppel*, 666 F.2d 261, 274 (5th Cir. 1982).

In *Ruppel*, the Fifth Circuit approved the trial court's "decision to follow the better practice of instructing the jury on the fundamentals of a criminal trial prior to taking any evidence." *Id*. The Fifth Circuit stated, "Ideally, once the jury is sworn and the trial has begun, the trial judge should explain to the jurors their function as judges of the facts, the presumption of innocence, the burden of reasonable doubt, the roles of the judges and the lawyers, and other preliminary matters that are necessary to guide them through the trial." *Id*. The Fifth Circuit acknowledged that these preliminary instructions could include "definitions of criminal offenses and the rules of evidence." *Id.* However, the Fifth Circuit stressed that these substantive instructions on the law should also be repeated at the close of trial. *Id*.

The Fifth Circuit also approved the practice of providing preliminary jury instructions on the law in *United States v. Bynum*, 566 F.2d 914, 923-24 (5th Cir. 1978). The *Bynum* case involved the prosecution of multiple defendants for conspiracy and other charges arising from interstate auto theft rings. The Fifth Circuit held that the trial judge did not err by giving preliminary jury instructions explaining the order of the presentation of evidence, the attorneys' right to object, that an indictment is not evidence, that each defendant is entitled to be considered

separately on each charge against him, the elements of the conspiracy charge, the meaning of willful and intentional conduct, and how the jury should consider hearsay statements made during the course of the alleged conspiracy. The Fifth Circuit explained:

> We have found no previous Fifth Circuit decisions on this issue but certainly it is the obligation of the court to do all within its power to assist the jury in understanding the issues involved and the application of the law . . . . Although it is difficult for the courts to give preliminary jury instructions in all cases, it is not only not error to do so, *it is a well-reasoned modern trend to give instructions outlining the issues and the law involved prior to the taking of testimony.* We, therefore, find no merit in defendant's argument [opposing the practice].

Id. (emphasis added).

Consistent with these opinions, the Fifth Circuit's Pattern Jury Instructions for criminal cases support the practice of giving preliminary instructions about the law in criminal cases. Pattern Instruction 1.01 states in relevant part:

> The defendant has been charged by the government with a criminal violation of a federal law, [e.g., having intentionally sold heroin]. The charge against the defendant is contained in the indictment. The indictment is simply the description of the charge made by the government against the defendant, but it is not evidence that the defendant committed a crime. The defendant pleaded not guilty to the charge. A defendant is presumed innocent and may not be found guilty by you unless all twelve of you unanimously find that the government has proved defendant's guilt beyond a reasonable doubt. [Addition for multidefendant cases: The defendants are being tried together. But you will have to give separate consideration to the case against each defendant. Each is entitled to your separate consideration. Do not think of them as a group.]
>
> . . .
>
> The defendant is charged with _____. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence I will now give you a brief summary of the elements of the offense which the government must prove to make its case. [It is suggested that a discussion of the elements of the offense be inserted here.]
>
> . . .
>
> Finally, there are three basic rules about a criminal case which you should keep in mind. First, the defendant is presumed innocent until proven guilty. The indictment against the defendant brought by the government is only an accusation, nothing more. It is not proof of guilt or anything else. The defendant therefore starts out with a clean slate. Second, the burden of proof is on the government until the very end of the case. The defendant has no burden to prove his innocence, or to present any

> evidence, or to testify. Since the defendant has the right to remain silent, the law prohibits you in arriving at your verdict from considering that the defendant may not have testified. Third, the government must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that in this respect a criminal case is different from a civil case.

Fifth Circuit Pattern Jury Instructions—Criminal 1.01 (2006).

Thus, the practice of providing preliminary instructions about the law is well established in federal criminal cases within the Fifth Circuit.[2]

ii. Federal Civil Cases

The Fifth Circuit has not specifically addressed the propriety of preliminary instructions on the law in civil cases. Unlike the Fifth Circuit's Pattern Jury Instructions for criminal cases, the Fifth Circuit's Pattern Jury Instructions for civil cases do not provide for preliminary instructions on the law before the trial begins. Pattern Instruction 1.1, entitled "Preliminary Instructions," explains the duties of jurors and the order of trial but defers any explanation of the substantive law until trial has started. Jurors are told that the court will instruct them on the applicable law "from time to time during trial and at the end of trial." Fifth Circuit Pattern Jury Instructions—Civil 1.1 (2006).

While the Fifth Circuit has not specifically condoned preliminary instructions on the law in civil cases, Federal Rule of Civil Procedure 51(b)(3) provides courts with considerable

[2] This practice is consistent with other federal courts. *See United States v. Hernandez*, 176 F.3d 719, 727-35 (3d Cir. 1999) (holding trial judge erred by giving an incorrect definition of reasonable doubt in the preliminary instructions but explaining, "[o]ur holding today is not intended to discourage the very common practice of providing jurors with preliminary remarks to assist them during the course of the trial. We only hold that when such preliminary instructions are given, jurors must not be allowed to guess at which of two conflicting instructions control their deliberations."); *United States v. Hegwood*, 977 F.2d 492, 494–95 (9th Cir. 1992) ("[w]here the instruction challenged is given at the beginning of trial, reversal is unwarranted unless the defendant can prove prejudice or that the jury was materially misled"); *People of Territory of Guam v. Ignacio*, 852 F.2d 459, 461 (9th Cir. 1988) (finding trial judge did not commit reversible error by giving the jury an incorrect definition of reasonable doubt in the preliminary jury instructions because the judge cured the problem at the end of the trial by giving a correct definition to the jury); *United States v. Stein*, 429 F. Supp. 2d 648, 649–52 (S.D.N.Y. 2006) (overruling, in prosecution for tax fraud, defendant's objection to the trial judge giving preliminary substantive jury instructions on the elements of the offenses charged, observing that "[i]t is only common sense to think that it would be helpful to the jurors to know at the outset of a long trial what they are going to be asked to decide at the end"); *United States v. Tucker*, 1991 WL 33644 (N.D. Ill. 1991) (granting government's motion to read certain jury instructions before opening statements and stating "[t]he court finds that to read to the jury a non-argumentative, impartial issue instruction at the start of the trial would aid the jury in its comprehension of the evidence. If defendants wish to assist the jury by submitting a proposed non-argumentative theory-of-defense instruction, they may do so as well."); *United States v. Johnson*, 403 F. Supp. 2d 721, 835 (N.D. Iowa 2005) (rejecting challenge to preliminary instructions).

discretion in choosing when to instruct the jury. Rule 51(b)(3) states that the court "may instruct the jury at any time before the jury is discharged."

Although few federal courts have addressed preliminary instructions in civil cases, the Ninth Circuit has approved the practice of providing a preview of the issues at the start of a civil trial. In *Jerrold Electronics Corp. v. Westcoast Broadcasting Co.*, 341 F.2d 653, 665 (9th Cir. 1965), the Ninth Circuit affirmed a trial court's decision to read a statement at the outset of the trial advising the jury as to the nature of the case and of the issues that it anticipated would be present. *Id.* The Ninth Circuit stated that it was "unable to perceive in what manner the court's earlier outline of the case at the beginning of the trial could have been prejudicial to the defendants." *Id*. The Ninth Circuit reached this conclusion even though former Federal Rule of Civil Procedure 51, which provided that a court must instruct the jury after the arguments had been completed, was then in effect. As explained above, the current version of Rule 51 provides even more discretion to trial courts by allowing the court to instruct the jury "at any time before the jury is discharged." FED. R. CIV. P. 51(b)(3); *see also* 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS CIVIL ch. 101 (5th ed. 2009) (stating that preliminary instructions should provide a preliminary statement of legal principles and factual issues and explain briefly the basic elements of claims and defenses to be proved).

b. Texas State Courts

i. Criminal Cases

The Texas Court of Criminal Appeals has acknowledged that trial courts may provide preliminary instructions about the law even before voir dire begins. *See Williams v. State*, 719 S.W.2d 573, 576-577 (Tex. Crim. App. 1986). In considering whether a motion for a jury shuffle was timely made, the court explained the usual voir dire procedure as follows:

> When the jury panel for the case is brought to the courtroom from the central jury room, normally it is seated and a list of the jurors is distributed to the parties with juror information cards, if any. *Customarily the trial judge will then make introductory or preliminary remarks, identifying the court, the case, introducing the attorneys, giving general instructions as to jurors' duties, general information. Some judges, even in non-capital felony cases, will mention general principles of law, presumption of innocence, burden of proof, reasonable doubt, etc. Naturally these introductory remarks will vary from judge to judge as the instant cause reveals.* When they are concluded, the practice is to call upon the prosecutor to commence the voir dire examination of the jury panel for the case by the parties.

Id. (emphasis added).[3]

[3] Article 35.17 of the Texas Code of Criminal Procedure affirmatively provides that in a "capital felony case in which the State seeks the death penalty, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion. Then, on demand of

A number of other criminal cases similarly demonstrate that it is within the trial court's discretion to provide preliminary instructions or introductory remarks about the general principles of law applicable to the case. In *Flores v. State*, No. 04-04-00064-CR, 2005 WL 708430, at *1-2 (Tex. App.—San Antonio Mar. 30, 2005, no pet.), the court of appeals held that the trial court did not err in its preliminary instructions to the jury panel where the judge properly set forth the defendant's presumption of innocence, the State's burden of proof, and a defendant's constitutional right not to take the witness stand. In *Wilson v. State*, No. 11-02-00200-CR, 2003 WL 188884, at *1-2 (Tex. App.—Eastland Jan. 23, 2003, no pet.), the court of appeals held that the trial court's preliminary instructions to the jury during voir dire, which explained sentence enhancements based on prior felony convictions and then proposed a sentencing hypothetical for the panel, were proper. In *Salazar v. State*, No. 07-06-0350-CR, 2008 WL 424154 (Tex. App.—Amarillo 2008, no pet.), the court of appeals approved the preliminary instructions on general principles of law given by the trial court.

Courts in other states that have addressed the issue likewise concluded that giving preliminary instructions in criminal cases is within the discretion of the trial court. For example, the Connecticut Supreme Court approved preliminary instructions on the law in criminal cases in *State v. Woolcock*, 518 A.2d 1377, 1386-87 (Conn. 1986). The Supreme Court of South Dakota has noted that preliminary instructions serve to inform jurors of their function, the presumption of innocence, the burden of proof, and other preliminary matters aimed at making the trial more understandable. *See State v. Nelson*, 587 N.W.2d 439, 444 (S.D. 1998). An intermediate appellate court in New York has held that informing jurors of the elements of the crime at the outset of the trial is within the discretion of the trial court. *See People v. Harper*, 818 N.Y.S.2d 113 (App. Div. 2006).

ii. Civil Cases

While Texas state courts routinely provide some preliminary instructions in criminal cases, there is very little authority discussing the propriety of preliminary instructions in civil cases. Texas Rule of Civil Procedure 226a states that the trial court must give such admonitory instructions to the jury panel and to the jury as may be prescribed by the Texas Supreme Court in orders entered for that purpose. Pursuant to this provision, the Texas Supreme Court has prescribed approved instructions, including instructions to be given to the jurors after they have been sworn and before the voir dire examination and instructions to be given to the jury immediately after the jurors are selected for the case. The Texas Supreme Court's current preliminary instructions do not explicitly provide for any explanation of the applicable substantive law. These standard instructions can be given "with such modifications as the circumstances of particular case may require," leaving open the possibility of providing instructions on the law at the same time as the preliminary admonitory instructions. *See* TEX. R. CIV. P. 226a (approved instruction). That said, the lack of any caselaw acknowledging or

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the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court." Thus, under Texas law, jurors in capital cases receive some preliminary instructions about the law as a matter of course.

discussing the practice suggests that preliminary instructions on the law are rarely given in Texas civil cases.

c. Procedures for Implementing Preliminary Instructions

By adjusting certain trial procedures, courts can attempt to ensure that preliminary instructions are fair and accurate. Commentators have suggested that courts conduct a pretrial hearing for the purpose of finalizing the preliminary instructions. *See* Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 691-92 (2000). If the court has prepared proposed preliminary instructions, the court should provide the parties with a copy of the instructions and should provide counsel with an opportunity to argue the propriety of the proposed instructions. *Id.* Counsel can then request revisions to the proposed instructions or suggest wording for new instructions not included in the court's initial draft. *Id*. Alternatively, the court could require the parties to file proposed pretrial jury instructions and hold a hearing on the matter if necessary. *Id*.

If courts wish to give substantive preliminary instructions in federal civil cases, these procedures may not only be advisable, but required. Federal Rule of Civil Procedure 51(b) requires that the court "inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments" and "give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered."

In addition, giving preliminary instructions does not relieve courts of their duty to comprehensively instruct the jury at the close of evidence. Courts should repeat any preliminary instructions on the law when delivering the formal charge to the jury. *See Ruppel*, 666 F.2d at 274; *Nelson*, 587 N.W.2d at 444.

d. Policy Considerations

There are several challenges associated with providing preliminary instructions on the law. Some commentators have noted that preliminary instructions may be incomplete or even misleading because some issues that require jury instructions do not develop until late in the trial. *See* Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 691-92 (2000) (citing various commentators). This criticism seems particularly apt in the context of complex civil cases, where the parties may not know what issues or claims will ultimately be submitted to the jury until the close of evidence. Others have noted that providing jury instructions on the law may require more work for courts and litigants, may delay the proceedings as the litigants resolve issues related to the preliminary instructions, may cause jurors to decide the case before hearing the evidence, and may alter the verdict. *Id*. Others claim that the preliminary instructions may tend to "homogenize" the deliberative process by causing jurors to focus on the same issues, thus compromising some diversity in approach and analysis. *Id*.

Proponents of preliminary instructions counter that trial judges deprive jurors of important guidelines to use in observing and evaluating the evidence and demeanor presented throughout the trial when preliminary instructions are not given. *See* William H. Erickson, *Criminal Jury Instructions,* U. ILL. L. REV. 285, 291-92 (1993). These commentators argue that

providing some instructions at the start of the trial enables the jurors to evaluate the evidence with more focus and direction and look for the key elements of the issues before them. *Id*. Moreover, providing instructions at the start of the trial may steer jurors away from irrelevant issues. *Id.* Proponents of preliminary instructions also urge that such instructions improve jury recall of evidence and instructions, reduce juror bias and reliance on stereotypes, reduce juror confusion, encourage jurors not to form opinions too early in the case, and improve juror understanding of the jury instructions. *See* Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 691-92 (2000) (citing various commentators).

The majority of commentators to weigh in on the subject are in favor of providing some preliminary instructions on the law to jurors. *See id.*; *see also* Jay E. Grenig, *The Civil Jury in America: Improving the Jury's Understanding of a Case*, 24 AM. J. TRIAL ADVOC. 93, 94 (2000); *William W. Schwarzer, Reforming Jury Trials*, 132 F.R.D. 575, 583-84 (1990); Jurywork Systematic Techniques § 16:28, *Aiding Juror Comprehension of the Law—Substantive Preliminary Instructions* (2009).

III. Conclusion

The practice of providing some preliminary instructions on the law is well established in criminal cases in both the Fifth Circuit and Texas state courts. Few cases discuss whether preliminary instructions on the law are appropriate in civil cases, but there is no authority prohibiting the practice.

D. REPORT TO SCAC ON JURY INNOVATIONS

Report to SCAC on Jury Innovations
Judge Tracy Christopher, 295th District Court
Nov. 21-22, 2008

We have been asked to review several jury innovations for civil cases. Several other committees and task forces have also looked at these issues. I have done a short survey of trial judges[4] to get their feelings on the issues, reviewed the ABA and National Center for State Courts publications, made a review of some of the other states instructions[5] and included some cursory legal research too.

1. Note Taking

A. SB 1300[6]

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

B. Senate Jurisprudence Committee

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

C. PJC Oversight

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

D. SCAC discussions

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

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

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

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

E. State Bar Committee on Jury Service

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

F. State Bar Court Administration Task Force

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

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

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

H. Texas Judicial Council TJC

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

I. Trial Judges Survey

The vast[7] majority of trial judges surveyed already allow juror note taking in civil trials. The vast majority do not allow jurors to show their notes to others during deliberations. A few do not allow notes back into the jury room during deliberations. A solid[8] majority have the policy of note destruction at the end of trial.

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

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

The NCSC *Jury Trial Innovations* (Second Edition 2006) outlines the pros and cons of juror note taking and identifies as the only con that jurors who take notes may participate more effectively in jury deliberations that those who do not. The pros include: aids memory, encourages more active participation in deliberation, decreases deliberation time, keeps jurors alert in trial, increases juror confidence and reduces the number of requests for read back portions of testimony.

[7] A vast majority is in the 85% range. I am not giving the exact numbers as answers continue to come in.
[8] A solid majority is in the 60-65% range.

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

K. Texas case law on note taking

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

Here are the pre-trial instructions:

> "1. Note taking is permitted, but not required. Each of you may take notes. However, no one is required to take notes.
>
> 2. Take notes sparingly. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships.
>
> 3. Be brief. Overindulgence in note taking may be distracting. You, the jurors, must pass on the credibility of witnesses; hence, you must observe the demeanor and appearance of each person on the witness stand to assist you in passing on his or her credibility. Note taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made the observation itself. Keep in mind that when you ultimately make a decision in a case you will rely principally upon your eyes, your ears, and your mind, not upon your fingers.
>
> 4. Do not take your notes away from court. At the end of each day, please place your notes in the envelope which has been provided to you. A court officer will be directed to take the envelopes to a safe place and return them at the beginning of the next session on this case, unopened.
>
> 5. Your notes are for your own private use only. It is improper for you to share your notes with any other juror during any phase of the trial other than jury deliberations. You may, however, discuss the contents of your notes during your deliberations."

Id. at 954-955

Here are the pre-deliberation instructions:

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

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case." *Id*. at 955

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

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

L. Recommendation

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

2. Questions by Jurors During Trial

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

Silent on this issue.

B. Senate Jurisprudence Committee's Interim Report

The committee recommends allowing juror questions during civil trials by permitting anonymous written questions before deliberations. Counsel would object outside the presence of the jury and witnesses. After ruling on admissibility, judges could recall the jury and witnesses.

Questions would be read verbatim and counsel would have the opportunity to cross-examine each witness.

C. State Bar Court Administration Task Force

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

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

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

E. Texas Judicial Council TJC

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

F. Trial Judges Survey

A few[9] trial judges already allow juror questions with limitations (some only with consent of the parties.) The questions must be in writing, the lawyers and judge review them and objections are made at the bench. A solid majority of the trial judges (with an opinion) felt juror questions were a bad idea but many did not have an opinion.

For those who thought it was a good idea or that they might consider it with safeguards, all agreed that the questions should be written, not shown to other jurors, with the lawyers having a right to object and perhaps having the court re-phrase the questions. The judge then asks the question with ability to follow-up by the lawyers if they wanted to. Some variations included the idea of just showing the notes to the lawyers and letting them decide whether to incorporate the ideas into their own questions. Some thought the lawyers ought to agree to the process before it is done and some thought the judge should have the discretion to say no questions at all.

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

G. ABA, NCSC and other States

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

[9] Roughly 10%.

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

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

H. Federal case law

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

Other circuits have found no reversible error in juror questions with safeguards but all discourage the routine use of questions: *States v. Lewin*, 900 F.2d 145 (8th Cir. 1990); *DeBededetto v. Goodyear Tire &Rubber Co*., 754 F.2d 512 (4th Cir. 1985); *United States v. Callahan*, 588 F. 2d 1078 (5th Cir.) *cert denied*, 444 U.S. 826 (1979); *United States v. Collins*, 226 F. 3d 457(6th Cir. 2000)

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

extraordinary circumstances was an abuse of discretion." *Id*. at 15.

I. Texas case law

In *Morrison v State*, 845 S.W. 2d 882 (Tex. Crim. App.1992), the Court of Criminal Appeals held that it was per se harmful error to allow jurors to question witnesses.
The few civil cases on point have declined to follow the Court of Criminal Appeals. In *Fazzino v. Guido*, 836 S.W. 2d 271, 275 (Tex. App.-Houston [1st Dist.] 1991, writ denied), the Houston Court of Appeals concluded that juror questions, with appropriate safeguards, are permissible. Here were the steps:

1. After both lawyers had concluded their respective direct and cross-examination, the trial court asked the jurors for written questions.

2. The jury and witness left the courtroom while the admissibility of the question was determined.

3. The trial court read the question to both lawyers and they were given the opportunity to object to the questions.

4. The jury and witness were brought back into the courtroom and the admissible questions were read to the witness verbatim.

5. After the witness answered, both lawyers were allowed to ask follow-up questions limited to the subject matter of the juror's question.

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

J. Recommendation

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

3. Interim Summation/Argument

A. SB 1300

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

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

B. PJC Oversight and State Bar Committee on Jury Service

Silent on this issue.

C. State Bar Court Administration Task Force

The Task Force recommended that Supreme Court amend the rules of civil procedure to expressly allow in appropriate cases, interim statements by counsel.
Note the use of the word "statement" which is generally used in connection with opening statement-a preview of the evidence.

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

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

E. Trial Judges Survey

I may have skewed the survey process by asking the judges about interim "argument" rather than statements. Argument more closely tracks the "summation" language in SB 1300. The judges, who have actually done it, liken it more to a summary of the evidence.
A few judges have allowed interim statements of some sort in long trials or when there was a long break between days of trial. Most judges felt it might be appropriate only in very long trials, where a break in the days of trial occurred or where the trial was bifurcated in some manner but doubted they would ever try a case that needed it. Many judges thought it would never be appropriate. A couple of judges thought it might be more useful to have essentially a progressive opening statement, especially with experts, where a lawyer might get 5 minutes to explain what this expert was going to talk about and why his testimony was important, rather than a summation.

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

F. Other states

I did not survey other states on this issue. The Manuel for Complex Litigation, (Fourth) §12.34 (2004) recommends interim statements in complex cases as an aid to juries. "In a lengthy trial, it can be helpful if counsel can intermittently summarize the evidence that has been

presented or can outline forthcoming evidence. Such statements may be scheduled periodically (for example, at the start of each trial week) or as the judge and counsel think appropriate, with each side allotted a fixed amount of time. Some judges, in patent and other scientifically complex cases, have permitted counsel to explain to the jury how the testimony of an expert will assist them in deciding an issue. Although such procedures are often described as "interim arguments," it may be more accurate to consider them "supplementary opening statements," since the purpose is to aid the trier of fact in understanding and remembering the evidence and not to argue the case.″

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

G. Texas law

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

H. Recommendation

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

4. Juror Discussions about the evidence before deliberations

A. SB 1300

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

B. PJC Oversight

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

C. SCAC discussions

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

D. State Bar Committee on Jury Service and Task Force

No discussions about this.

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

Does not support interim deliberation.

F. Trial Judges

Not surveyed on this point.

G. ABA, NCSC and other States

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

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

Of the states I surveyed, only Indiana allowed early discussions. The rest followed Texas' procedure. Indiana's specific instruction is as follows:

> "When you are in the jury room, you may discuss the evidence with your fellow jurors only when all of you are present, so long as you reserve judgment about the outcome of the case until your final deliberations begin. Until you reach a verdict, do not communicate about this case or your deliberations with anyone else."

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

H. Texas law

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

I. Recommendation

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