TEXAS LAWYER
September 17, 2012
An ALM Publication

OUT of ORDER
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Four Jury Innovations to Use in Civil Trials

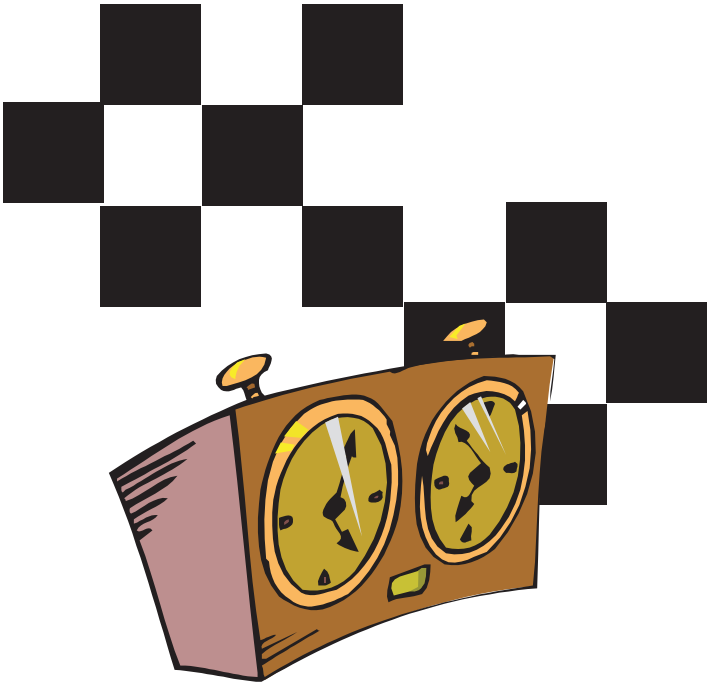
by DAVID BISSINGER

Courts around the country are experimenting with innovations in jury trials. Smart trial lawyers will take advantage of these developments to benefit their clients.

Texas courts have been implementing some of these changes. In 2009, U.S. District Judge Nancy Atlas of the Southern District of Texas formed a committee to devise a pilot program for courts, if they chose, to test jury innovations in civil trials. Courts have some discretion regarding whether to use these innovations, and lawyers can request implementation in their clients' trials. To learn more, lawyers can read the Jury Innovations Project's "Pilot Program Manual," which is available online.

Trial lawyers should consider asking courts to use the four procedures discussed in the manual: preliminary jury instructions on the law (attorneys should ask for these most of the time), juror questions of witnesses (sometimes), interim summations (only in long and complex cases) and time limits (these are likely even in the absence of a request). I'll discuss each of these in turn.

LETTER TO A YOUNG TRIAL LAWYER



1. Preliminary jury instructions on substantive law: The manual recommends that courts give jurors preliminary instructions about the law before opening statements, instead of waiting until the close of evidence.

This makes sense. Good lawyer preparation includes preparing a jury charge before filing a pleading. By the time most cases reach trial, the parties long since have defined the legal issues. Standard pattern jury charges reflecting well-settled law apply in most cases. Courts require counsel to submit preliminary jury charges before trial.

Why not give jurors, who know far less than the lawyers about the law, similar early guidance? Jurors have the least understanding of the law. They have little knowledge about the elements of claims or defenses to causes of action. Yet under current practice, jurors must wait until the close of evidence before anyone tells them the law.

Educating jurors early regarding the framework within which they will decide the case helps them fulfill their obligations. In their book "Judging the Jury" (1986), law professors Valerie P. Hans and Neil Vidmar cite studies from the early 1980s that support this innovation. As they note, "when instructions were presented at both the beginning and end of a trial, simulated jurors were better able to distinguish relevant evidence and remember it." Likewise, as Chief Judge Mark W. Bennett of the U.S. District Court for the Northern District of Iowa observed in *Mercer v. City of Cedar Rapids* (2001) (reversed on other grounds), preliminary instructions give the jurors a "roadmap" or

"flow chart" that helps the jury interpret the evidence before the witnesses testify, not after. Indeed, the Federal Judicial Center's "Manual for Complex Litigation Third" specifically recommends this procedure.

Good reasons exist for lawyers to ask courts to adopt the innovation of preliminary jury instructions. As Yogi Berra puts it, "If you don't know where you're going, you might not get there."

2. Juror questions for witnesses: The manual suggests that courts allow jurors to submit questions to the witnesses. Like issuing preliminary jury instructions, the idea of a jury asking questions dates back decades, if not more. The famous eighth juror in "12 Angry Men," played in the 1957 film version by Henry Fonda, told his fellow jurors that "I had questions I would have liked to ask." In *Ratton v. Busby* (1959), the Arkansas Supreme Court affirmed a judgment from a trial court that allowed jurors to submit questions about expert witness terminology. Hans and Vidmar cite cases in which courts allowed the practice. They conclude that juror questions gave jurors more satisfaction "that the witnesses had been questioned thoroughly, and that the jury had sufficient information to reach a responsible verdict."

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Texas lawyers can turn to the manual for sample forms they can ask courts to give jurors. With the relative decrease in ordinary tort cases and the relative increase in trials involving complex commercial deals, technology and the like, this procedure likely will enhance juror satisfaction and may help lawyers better understand jurors' views and concerns.

3. Interim summations: This is an innovation that needs to be handled with care, lest attorneys further frustrate jurors who grow weary of hearing lawyers talk.

As early as 1987, in an article titled "Juries and the Complex Case" published in "The American Civil Jury," 5th U.S. Circuit Court of Appeals Judge Patrick Higginbotham recommended interim summations from trial lawyers in lengthy jury trials.

But the key here is "lengthy." Lawyers should ask for interim summations only in large-scale civil cases involving many dozens of witnesses. For example, in *United States v. Yakobowicz*, the 2nd U.S. Circuit Court of Appeals reversed a criminal conviction in which the district court allowed interim summations. Among other reasons, the court noted, the case before it "involved no length, no complexity, and no need."

Jurors may find interim summations unnecessary or even offensive. In his book "Examining Witnesses," Michael E. Tigar raises the concern of lawyers abusing cross-examination by "trying to squeeze more meaning from the performance than the witness's answers were giving." Jurors may have an equally negative reaction to interim summations. As Tigar notes, jurors want to hear from the witnesses and see the exhibits; they don't want more talk from the lawyers.

4. Trial time limits: The manual states, "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."

I would offer a minor qualification: By definition, jurors have normal attention spans. In the words of Don Henley in his song "The End of the Innocence," it is lawyers who "dwell on small details."

In any event, I advocate time limits. They improve attorneys' presentations, help control costs and increase the likelihood of victory. [*See "Working on the Clock: The Advantages of Timed Trials,"* Texas Lawyer*, April 2, 2012, page 22.*]

Despite the benefits, some lawyers still struggle to restrict themselves. But help is available. As the manual notes, "Chess clocks can come in handy in implementing time limits."

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