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Toward Better Treatment of Jurors by Judges

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Toward Better Treatment of Jurors By Judges

*"I sniff and guess. . . . I pick things out of the wind and air."*¹

I. INTRODUCTION

Old judicial customs die hard. When the bones that hold a custom upright collapse, judges build artificial ones and put them in place. When the lungs rattle and the breathing labors, judges do the breathing themselves, as though the custom's life were sacred. The tenacity of judges in their heroic measures is a source of wonder.

The origins of jury treatment are obscure, but customs that grew up early persist, propped up by old or new assumptions about human behavior. Three of these customs and their assumptions are the subjects of this Article.

Jurors stand in a place of significance in our system of justice. Their judgment of the truthfulness of witnesses, of the comparative strength of competing evidence, and of the validity of the subtleties of arguments by counsel is generally given immunity from attack. Yet, customs rationalized by distrust of jurors to do simple and natural tasks remain alive in many courts. Taking notes, asking questions, and receiving written instructions are said to be beyond the capacity of the people who must walk through the intricacies of fact and law to decide on the guilt and liability of other people. This Article suggests that jurors can ably handle all three of these often-forbidden acts, because the reasons for distrust are based on "sniff and guess."

II. JURY NOTE-TAKING DURING TRIAL

A. Existing Legal Authority

The American jury system calls upon jurors to be the triers of fact. Fulfillment of this duty requires jurors to recollect countless

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1. Carl Sandburg, *Wilderness*.

details of evidence they have heard during the trial on subjects with which they have had little or no familiarity before the trial. It should come as no surprise that even the shortest of trials may tax a juror's memory of specific details. The problem reaches astonishing proportions in trials which last weeks or months and encompass voluminous amounts of evidence.

A sensible method to assist jurors in remembering details for use in deliberations is to permit them to take written notes while evidence is presented. As sensible as this solution may seem, it has met with mixed reactions by the judiciary. The extremes in appellate case law run from outright prohibition to affording the trial judge complete discretion.

The Indiana Supreme Court dealt with the matter as early as 1871, reversing a criminal conviction because a juror disobeyed the trial judge's order to cease taking notes.² The court stated that jurors should record evidence "on the tablets of [their] memory and, not otherwise."³ However, Indiana courts thereafter exhibited a lessening resistance to the practice, culminating in the approval of note-taking in 1970.⁴ Pennsylvania has retained a prohibition on juror note-taking, which is set out in a rule of criminal procedure.⁵

Other jurisdictions give jurors a legal right to take notes. Some states grant this right by statute⁶ or court rules.⁷ The Georgia Supreme Court has held that jurors have the right to take notes, even though the right is not declared by statute or rule.⁸

Most jurisdictions have steered a middle course by leaving the

2. *Cheek v. State*, 35 Ind. 492 (1871).

3. *Id.* at 495. The Indiana court may have overstated its case somewhat in *Cheek* because in a case decided one year later, *Cluck v. State*, 40 Ind. 263 (1872), the court refused to reverse a decision where there had been no instruction by the trial court for jurors not to take notes and the defendant had not objected to jurors taking notes. *Cluck* thus seems to constitute an early retreat from an absolute per se prohibition of note-taking to requiring an objection. See Comment, *Taking Note of Note-Taking*, 10 COLUM. J.L. & Soc. PROBS. 565, 584 (1974).

4. See *Dudley v. State*, 255 Ind. 176, 181-82, 263 N.E.2d 161, 164 (1970); see also Comment, *supra* note 3, at 584-85.

5. PA. R. CRIM. P. 1113. See also LA. CODE CIV. PROC. ANN. art. 1794 (West 1961).

6. See, e.g., CAL. PENAL CODE § 167 (West 1970); MINN. STAT. ANN. § 546.15 (1947); MONT. REV. CODES ANN. § 25-7-404 (1981); NEV. REV. STAT. § 175.131 (1981); N.D. CENT. CODE § 29-22-04(3) (1974); UTAH CODE ANN. § 77-32-2 (1978).

7. See, e.g., ARIZ. R. CRIM. P. 18.6; COLO. R. CIV. P. 47(m); IOWA R. CRIM. P. 18(7)(e); MINN. R. CRIM. P. 26.03 subd. 12; MD. R.P. 558, 757; UTAH R. CIV. P. 47(m).

8. *Tift v. Towns*, 63 Ga. 237, 242 (1879). See *Lilly v. Griffin*, 71 Ga. 535, 540 (1883) (jurors allowed to take notes as of right as long as no substantial delay results). See also Petroff, *The Practice of Jury Note Taking, Misconduct, Right, or Privilege?*, 18 OKLA. L. REV. 125, 139 (1965).

matter to the discretion of the trial judge.⁹ That is true in the federal system, where the "sound discretion of trial judges"¹⁰ governs. Judges have discretion in most jurisdictions to prohibit note-taking,¹¹ to permit it on a limited basis,¹² or to encourage it.¹³

Allowing note-taking has been encouraged by the Judicial Conference of the United States¹⁴ and the American Bar Association.¹⁵ The Commissioners on Uniform State Law have adopted a rule permitting the practice at the discretion of the trial judge.¹⁶ The American Bar Association's position is the strongest, allowing jurors to take notes as a matter of right in Standard 15-3.2 of the Standards for Trial by Jury.¹⁷ Its position is based on the conclusion that the advantages from note-taking outweigh the disadvantages.¹⁸

Uniform Rule of Criminal Procedure 513(e) and Recommendation XX of the Judicial Conference Committee on the Operation of the Jury System¹⁹ vest the trial judge with discretion to allow note-taking but do not permit it as a matter of right to the jurors. Both the Uniform Rule and the Recommendation were drafted to represent existing law in the majority of jurisdictions.²⁰

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9. See, e.g., *United States v. MacLean*, 578 F.2d 64 (3d Cir. 1978); *Howard v. State*, 583 P.2d 827, 835 n.19 (Alaska 1978); *Travis v. Commonwealth*, 457 S.W.2d 481, 482 (Ky. 1970); *State v. Shedd*, 274 N.C. 95, 104-05, 161 S.E.2d 477, 484 (1968); *State ex. rel. Dept. of Highways v. Lehman*, 462 P.2d 649, 650-51 (Okla. 1969); *Watkins v. State*, 216 Tenn. 545, 562-63, 393 S.W.2d 141, 145 (1965); *Manges v. Willoughby*, 505 S.W.2d 379, 383 (Tex. Civ. App. 1974).
 10. *United States v. MacLean*, 578 F.2d 64, 65 (3d Cir. 1978).
 11. See, e.g., *United States v. Bassler*, 651 F.2d 600, 601-02 (8th Cir. 1981); *Martin v. Bell Helicopter Co.*, 85 F.R.D. 654 (D. Colo. 1980) (in lieu of notes the judge provided jurors with a weekly listing of the witnesses who had testified at trial).
 12. See, e.g., *In re Appropriation of Easements of Hulbert*, 16 Ohio Ops. 2d 465, 469-70, 176 N.E.2d 881, 883 (1961) (notes allowed during expert testimony only); *Maclin v. Horner*, 357 S.W.2d 325, 328 (Ky. 1962) (jury allowed to take down damages figures on a chart).
 13. See, e.g., *United States v. Standard Oil Co.*, 316 F.2d 884, 896-97 (7th Cir. 1963); *People v. Graves*, 263 Cal. App. 2d 719, 739-40, 70 Cal. Rptr. 509, 523 (1968); *State v. Goldberg*, 261 N.C. 181, 208-09, 134 S.E.2d 334, 353, *cert. denied*, 377 U.S. 978 (1964).
 14. See Judicial Conference of the United States, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 424, 457-59 (1960) (Recommendation XX) [hereinafter cited as Recommendation].
 15. STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY, Standard 15-3.2 (1980) [hereinafter cited as STANDARD].
 16. UNIF. R. CRIM. P. 513(e) (1974).
 17. STANDARD, *supra* note 15, Commentary, at 15-84.
 18. *Id.* at 15-85.
 19. Recommendation, *supra* note 14, at 424.
 20. UNIF. R. CRIM. P. 513(e), Comment, at 244; Recommendation, *supra* note 14, at 458.

B. Should Jurors Be Allowed to Take Notes?

As discussed above, the majority of jurisdictions vest trial judges with discretion on the matter of juror note-taking. Such a grant of discretion is best used by permitting note-taking in almost all trial situations. An approach used successfully by the author as a standard practice since 1970 is to furnish jurors with pencils and note pads immediately after opening statements for use during the trial. The jurors are instructed that they may make notes as they choose during the trial and use them for their deliberations. The note pads are kept locked in the jury room overnight and during recesses. At the conclusion of the trial, the jurors are free to dispose of their notes as they choose. If the notes are left with the court, they are destroyed.

1. *Advantages of the Practice*

Allowing jurors to take notes and properly regulating the practice holds a number of advantages. A judge who has tried a complex case cannot doubt the impossibility of anyone remembering the evidence without help. A recent jury trial presided over by the author entailed over 3500 exhibits and 10½ months of testimony from 285 witnesses, involving dozens of different transactions.²¹ Neither the lawyers nor the judge nor the jurors could store that amount of information for useful recall, and note-taking was an unchallenged necessity.

Shorter, less complicated trials will also be served by the jurors' taking notes. Memories are assisted, especially as to dates, statistics, damage figures, and witnesses' interrelationships. Given the nature of the memory process,²² it is logical to conclude that retention is enhanced by the dual process of hearing and writing. Also, a juror's role may be transformed from that of a passive to an active listener, thereby increasing his or her attentiveness.

Perhaps the author's view, born of a dozen years' experience, can be summed up this way: if there are reasons for note-taking by lawyers and judges during a trial, there are at least the same reasons for note-taking by jurors.

21. *United States v. Phillips*, No. 78-03382-01/22-CR-S-W-2 (W.D. Mo. 1980).

22. "Ordinarily, without rehearsal, short-term memory cannot retain anything for more than a half minute or so. . . . New information held in short-term memory can be kept alive if repeated or rehearsed." E. LOFTUS, *MEMORY*, 19-20 (1980). Writing what one has heard or one's understanding of what one has heard may well be at least a repetition or rehearsal, helping to lengthen the time the matter is likely to be kept in the memory and available for use.

2. Problems and Precautions

a. Procedural Concerns

Juror note-taking is not without its potential problems, and precautions need to be taken to ensure avoidance of prejudice or impropriety. Some reported cases have involved the problem of whether counsel or the court should take the leading role in permitting jurors to take notes, if notes are to be allowed. As discussed above, the author instructs jurors at the outset of the evidence in every case that they may take notes and provides pencils and note pads. This practice ensures that jurors have note pads with no extraneous material and eliminates the potential for jurors to favor one side or the other because that side provided or failed to provide writing materials. It is true, however, that some courts have found that counsel's furnishing of materials does not constitute reversible error.²³

If the judge takes the initiative in providing note-taking materials, it is wise to refrain from insisting that the jurors take notes at any time. It has been hinted that the trial court's insistence that jurors take notes, either on the entire case or on a certain portion, constitutes reversible error.²⁴ Some jurisdictions prefer that counsel or the jurors request that the jurors be allowed to take notes before the court provides materials,²⁵ although that is not the case in the federal system.²⁶

In every case where jurors are allowed to take notes, a preliminary instruction cautioning them as to the use of notes is advisable. At a minimum the cautionary instruction should recite that notes are only to assist jurors in remembering details of evidence.²⁷ Some jurists prefer to add cautionary remarks to the ef-

23. See, e.g., *Commercial Music Co. v. Klag*, 288 S.W.2d 168, 172 (Tex. Civ. App. 1955). It is likely, however, that counsel's dictating to the jury rather than merely furnishing them with writing materials may cross the bounds of propriety and constitute reversible error if not corrected by the trial judge. See Comment, *supra* note 3, at 572.

24. See, e.g., *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (7th Cir. 1963).

25. See, e.g., *Corbin v. Cleveland*, 144 Ohio St. 32, 34, 56 N.E.2d 214, 215 (1944).

26. See, e.g., *United States v. Anthony*, 565 F.2d 533, 536 (8th Cir. 1977); *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (7th Cir. 1963); *Waldrip v. Liberty Mut. Ins. Co.*, 11 F.R.D. 426, 430 (W.D. La. 1951).

27. The author uses the following instruction in preliminary instructions given to the jury before opening statements:

You may take notes during the trial to assist you in remembering details of evidence. When you retire at the end of a court day, leave in the jury room the notes you have taken, the note pads, and the pencils furnished to you. When you have reached a verdict at the end of the trial, leave the note pads and pencils in the jury room and dispose of your notes as you choose.

Listen carefully to everything that is said during the trial, be-

fect that jurors do not need to feel obligated to take notes or that notes are not entitled to any greater weight than recollections of details by other jurors and do not constitute a verbatim transcript of the testimony.²⁸

b. Other Potential Problems

Other possible problems are perceived by some appellate courts or trial judges. The seriousness of them is subject to grave doubt.

In earlier times when a larger portion of the population was illiterate, there may have been some valid concern that literate ju-

cause, although you will have the exhibits that will be received in evidence, there will be no written transcript of the testimony for your use. You may make notes, but you must rely primarily upon your memory and your notes for recalling the testimony. In some instances it may be possible, if necessary, during your deliberations, for the court reporter to read back a part of the testimony of a particular witness, but that will be done only in rare circumstances.

Devitt and Blackmar suggest the following instruction:

The court will permit jurors to take notes during the course of this trial, since there may be complicated issues in which the notes may be helpful. 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 please keep them in confidence between yourself and your fellow jurors.

1 E. DEVITT & C. BLACKMAR, *FED. JURY PRACTICE AND INSTRUCTIONS* § 10.06 (3d ed. 1977).

28. Judge Sorg used a more cautious instruction in the trial in *United States v. MacLean*, 578 F.2d 64 (3d Cir. 1978):

A second matter that I think we can process is a request that was made by one of the jurors having to do with taking notes. The taking of notes by jurors has been frowned upon by many courts because of the danger that in the course of the jury's deliberations such notes may be given more significance than they may deserve. Also, it's feared that while a juror may be taking notes on a particular point, some very important items of testimony that follow may be overlooked, the juror being preoccupied in recording impressions on a particular point. It's my view, however, that if a juror wishes to take notes which may help to refresh his or her own memory, particularly when an indictment contains a number of counts and the testimony of the witnesses is prolonged and it takes over an unusual period of time, that the juror should be permitted to take such notes. I emphasize, however, that such notes are not entitled to any greater weight than the recollection or the impression of any other juror as to what the testimony may have been or what the conclusions should be arrived at and with that understanding the taking of notes by jurors will be permitted. It is hoped that you will fully understand that they are not official transcripts and may not cover points that are significant to another juror, but if a juror wishes to keep his or her mind refreshed as to the testimony in the case as it goes along, the Court will not prohibit the taking of notes.

Id. at 67.

rors would use notes to an unfair advantage over illiterate jurors.²⁹ The problem is not of concern in the federal system, where an ability to read and understand the English language is a prerequisite to jury service.³⁰ In some jurisdictions, however, juries may contain illiterate persons. This possibility should not automatically ban juror note-taking, but should be a factor to be considered by the trial judge in the particular case.

A modern offshoot of the literate/illiterate juror concern is the attitude of some courts that good note-takers will dominate the rest.³¹ Most courts have realized, when confronted with this issue, that many factors affect a juror's ability to persuade others.³² Since such a fear of juror dominance is merely based upon assumption, reason hardly presses for banning note-taking. Aggressiveness, speaking ability, confidence, and interpretive ability affect the impact of one juror upon another. By what rationale is a judge to decide that those characteristics are acceptable weapons of persuasion but that note-taking ability is not? Why is it better, as a matter of *law*, for a jury to be dominated by good speakers than by good note-takers?

Another expressed concern is that jurors may miss part of the evidence while they are taking notes on another part.³³ By missing parts of the evidence, the jurors are viewed as having an incomplete picture of the case and thus are deemed unable to consider the evidence as a whole.³⁴ No doubt that is possible, but it is also possible that lawyers and judges will miss part of the testimony by writing notes about other parts. Should we then refuse to allow lawyers and judges to take notes? Should a judge, therefore, take no notes during a nonjury trial? It is as logical to answer yes to those questions as to say that jurors cannot take notes because they may miss something. No evidence has been found that hints that lawyers or judges are better note-takers than jurors, and none is likely to be found. It is also probably true that jurors are better judges of their own note-taking skills than is the presiding judge. Jurors today for the most part are people with enough education and native intelligence to decide not only whether a litigant's freedom or property should be taken away but also what some judges seem to view as a tougher issue—whether the jurors' taking notes will help or hinder them.

29. See *infra* note 57.

30. See 28 U.S.C. § 1865(b)(2)-(3) (1976).

31. See, e.g., *United States v. Davis*, 103 F. 457, 470 (W.D. Tenn. 1900), *aff'd*, 107 F. 753 (6th Cir. 1901); *Fischer v. Fischer*, 31 Wis. 2d 293, 304, 142 N.W.2d 857, 863 (1966).

32. See Comment, *supra* note 3, at 578-79 and authorities cited therein.

33. See, e.g., *Thornton v. Weaver*, 380 Pa. 590, 597-98, 112 A.2d 344, 347-48 (1955).

34. *Id.*

A related pair of problems is safeguarding the integrity of the jurors' notes and disposing of the notes after trial. Several judges have gone to considerable lengths to ensure that jurors' notes are not tampered with from day-to-day during the trial. Some judges require court personnel to collect writing materials at the conclusion of each day.³⁵ At least one has gone further by giving the jurors separate envelopes containing note paper and instructing them to seal the notes in the envelopes each night.³⁶ A practice that has worked well for the author is simply to require that the jurors leave their notes and note pads in the jury room during all recesses and overnight. Access to the jury room is limited to court personnel, and the court is locked at night.

After safeguarding the integrity of the notes during trial, one must ask whether the notes need to be retained after trial. At least one court of appeals has recommended that trial judges retain jurors' notes and include them with the record on appeal.³⁷ If jurors are allowed to talk freely to anyone about the trial after the verdict has been received,³⁸ it is difficult to understand why their notes should be kept by the court, instead of allowing the jurors to dispose of them or keep them. In a similar vein, some courts require that notes be destroyed in the jurors' presence at the conclusion of the trial.³⁹ If jurors' written recollections of a trial are to be kept secret, why then ever allow them to talk to anyone about the case?

C. Summary

Although historically there has been some uneasiness about jurors taking notes during trial, the practice may be suitably allowed in nearly every case. It is preferable that the trial judge provide the jury with materials and instruct them that they may take notes. The jury should be cautioned about the proper use of the notes, and safeguards should be employed by the court to ensure that the notes are not disturbed during trial.

For the most part, problems with note-taking perceived by appellate courts do not in reality present significant impediments. No residue of distrust from a former time, when illiteracy was common, should control the modern trial. Jurors today are quite capable of finetuning their memories by note-taking when allowed to exercise their own judgment in when to take notes. If in a particu-

35. See *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (7th Cir. 1963).

36. *Corbin v. Cleveland*, 144 Ohio St. 32, 34, 56 N.E.2d 214, 214 (1944).

37. *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (7th Cir. 1963).

38. See E. DEVITT & C. BLACKMAR, *supra* note 27, § 5.25 and authorities cited therein.

39. See, e.g., *Corbin v. Cleveland*, 144 Ohio St. 32, 56 N.E.2d 214 (1944).

lar case genuine deficiencies of jurors are observable, the trial judge's discretion should be available for control.

Safeguarding the integrity of jurors' notes during trials can be accomplished with easy procedures in securing the materials. If more stringent measures are necessary in a given setting, the trial judge should be able to implement them without scuttling the note-taking practice. The judge's aim should be to provide assistance to the jurors, not to handcuff them.

III. QUESTIONING OF WITNESSES BY JURORS

A. Existing Legal Authority

Although jurors are called upon to decide issues of fact, the information upon which they are to base a decision comes in the main from answers to questions posed by others. Counsel, while questioning witnesses, may not ask, for whatever reason, questions that call for all the information deemed important by the jurors for making a decision. As a result, jurors may become frustrated, and that frustration may manifest itself in a verdict permeated with irritation toward one or more counsel or skewed by what is perceived as a factual void.

Jurors may be allowed to ask questions to be answered by witnesses. The existing legal authority dealing with the subject generally permits the practice.⁴⁰ Most jurisdictions leave the matter to the trial judge's discretion.⁴¹ Jurisdictions which discourage the practice generally do so upon the basis of fears that prejudicial and inadmissible evidence will come into the trial⁴² or that counsel who object to a juror's question may be disadvantaged by the juror's resentment at the objection.⁴³ In most cases where reversal rests upon jurors' asking of questions, the grounds are improper control over the procedure, not the procedure itself. As discussed below, proper management by the judge will alleviate evidentiary and other problems that accompany the allowing of questions by jurors.

B. Should Jurors Be Allowed to Question Witnesses?

The preferable approach to questions by jurors is to permit

40. See Annot., 31 A.L.R.3d 872 (1970) and authorities cited therein.

41. See, e.g., *Nelson v. State*, 257 Ark. 1, 513 S.W.2d 496, 498 (1974); *Scheel v. State*, 350 So. 2d 1120, 1121 (Fla. App. 1977); *People v. Heard*, 388 Mich. 182, 187-88, 200 N.W.2d 73, 76 (1972).

42. See, e.g., *State v. Taylor*, 25 Ariz. App. 497, 499-500, 544 P.2d 714, 716-17 (1976); *Stinson v. State*, 151 Ga. App. 533, 536, 260 S.E.2d 407, 410 (1979); *Raynor v. State*, 1 Tenn. Crim. App. 556, 447 S.W.2d 391, 393 (1969).

43. See, e.g., *Raynor v. State*, 1 Tenn. Crim. App. 556, 447 S.W.2d 391, 393 (1969).

questioning, while the judge maintains careful control over the practice. A lack of adequate control can, as pointed out by Judge Templar, "present some difficulty for the reason that the juror is not an attorney and not familiar with the rules of evidence, and might intentionally or inadvertently ask some question which is hopelessly improper and which should not in any event be answered."⁴⁴

An approach followed by the author with success and suggested by other authorities⁴⁵ does not allow jurors to ask questions directly of the witnesses.⁴⁶ Instead, jurors must direct the questions to the judge. In turn, the judge decides whether the question meets the legal rules and, if so, the judge puts the question to the witness. If the question is not to be put to the witness, the judge gives the jury a brief explanation of why the judge has ruled it out. If there is any doubt as to the propriety of the question, the judge calls counsel to the bench for a conference or hears from counsel outside the presence of the jury. If questions by jurors are relayed to and answered by a witness, counsel are then afforded opportunity to examine and cross-examine the witness on the subject of those questions.

1. *Advantages of the Practice*

A properly handled procedure for allowing jurors' questions accrues obvious advantages. Basically, exploration of the facts is improved. Counsel may have been insensitive to nuances or details seemingly unimportant to them but of great interest to the jurors, or counsel may have inadvertently left a subject untouched.

In a recent trial,⁴⁷ counsel arranged with the judge's approval for an examination of a railroad crane at a railroad site. During the examination jurors studied what they had gathered from photographs in evidence to be the critical parts of the crane involved in the plaintiff's fall from the crane. When given an opportunity to ask questions, a juror asked whether the boom was then in the same position as when the fall occurred. The author put the question to the plaintiff, whose testimony had been interrupted by the

44. Proceedings of the Annual Judicial Conference, Tenth Judicial Circuit, *Jury Management During the Trial and Sequestration*, 44 F.R.D. 245, 305 (1967) [hereinafter cited as *Jury Management*].

45. See, e.g., *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir.), cert. denied, 444 U.S. 826 (1979).

46. The practice of allowing jurors to ask questions as employed by the author may be viewed as the judge, not the jurors, posing questions to the witness. The judge has long been empowered to question witnesses and that power is now explicitly set forth in the Federal Rules of Evidence. See FED. R. EVID. 614(b).

47. *Hogan v. Burlington N. R.R. Co.*, No. CV 80-0-447 (D. Neb. Apr. 9, 1982).

viewing of the crane, and the answer was that it had been pointed in the opposite direction. The boom then was rotated 180° and the jurors viewed the actual areas of the crane—different from those they had been studying—from which the plaintiff had fallen. A simple oversight of counsel was thus easily corrected by a juror's question. Such an occurrence is not usual in the author's experience, but neither is it surprising or unique.

Furthermore, what may seem obvious to counsel, who have been gaining familiarity with a case's factual matters for weeks or months or years, may be obscure or incomprehensible to the jurors without an explanation. Familiarity may lull counsel into not inquiring of a witness as to such matters, and the jurors may get the explanation or clarification through a question prompted by them.

Allaying a juror's misdirected concern is also an advantage of the practice. A question about an inappropriate subject affords the judge an opportunity to deal squarely with the fact of inappropriateness. In contrast, the juror's raising the matter during deliberations in the jury room for the first time means the jury may speculate on it or rail about the lawyers or one of them for failing to provide information about it. The judge's stating that the subject is not to be taken into account has the prospect, at least, of persuading the jurors not to speculate about it or blame counsel for omitting facts about it. In short, allowing questions by jurors tends to open the trial, whereby forbidden subjects can be declared forbidden and can be treated, rather than be left to fester in the jury room.

Fear that a juror will impregnate the trial with unwanted and prejudicial material is unwarranted. The juror merely asks a question; a question, however violative of the rules of evidence, has scant potential in itself for mischief. The question may be readily intercepted by the judge, and no answer will be heard. The same is true whether the question is asked orally in open court or orally at the bench or in writing. Permitting oral questions in open court has not led to a single instance in the author's seven years of constant use of the practice of prejudicial material being inserted into the trial. To forbid the practice on the basis of frightful imaginings is not to be commended.

One more advantage appears: when a question is asked, it may well be a clue to counsel of a line of inquiry that needs to be made. By giving counsel an opportunity to question the witness further after the jurors' questions, counsel may be able to flesh out the factual subject, as well as to rebut any misleading inferences arising from the answers to the jurors' questions.

If a worthy goal of a trial is to develop the truth through fair

procedures, it is difficult to fault increased factual input from carefully monitored questions by the jurors.

2. *Problems and Precautions*

a. *Procedural Concerns*

Most—probably all—of the potential problems presented by allowing jurors' questions to witnesses arise from procedural difficulties. Some courts have noted that juror questioning could interrupt the examinations of witnesses by counsel.⁴⁸ Of course it could, if permitted to, but it will not, if the jurors' questions are allowed only after counsel have completed examination of a particular witness. Allowing follow-up inquiry by counsel after jurors' questions rounds out the process to give counsel the last encounter with the witness.

A related issue is whether jurors should be able to question a witness directly or only through the judge. Many of the cases displaying uneasiness about juror questioning have done so in situations where jurors may question the witness directly.⁴⁹ By interposing the judge between the juror and the witness, a check of the questions is installed and improper questions may be intercepted.

The judge may intervene in a variety of ways. The author allows jurors to ask questions in open court, but instructs that the question be directed to the judge and that the witness not answer the question until the judge has indicated approval. Ordinarily, the question is restated by the judge, sometimes in a modified form. A more restrictive approach is used by Judge Bruce Thompson of the Superior Court in Ventura, California. Judge Thompson requires jurors to write the questions and submit them to the judge.⁵⁰ The juror's identity is not disclosed to the witness or counsel. After conferring with counsel and deciding whether the question should be asked, Judge Thompson himself presents the question to the witness.

An intermediate approach might be to take juror questions orally but out of the presence of counsel and the witness. The judge could then consult with counsel, if necessary, and submit the question to the witness when the jury is reassembled.

Another concern sometimes present is whether the court on its own motion may invite jurors to ask questions or whether counsel's consent or request should be a prerequisite to the practice.

48. See, e.g., *Pacific Improvement Co. v. Weidenfeld*, 277 F. 224, 227 (2d Cir. 1921).

49. See, e.g., *Raynor v. State*, 1 Tenn. Crim. App. 556, 447 S.W.2d 391, 393 (1969).

50. Letter from the Honorable Bruce A. Thompson to the Center for Jury Studies (Mar. 11, 1981).

As most cases rely upon the discretion of the trial judge, it would appear that the courts of those jurisdictions have the power on their own motion to initiate the practice. As with questioning of witnesses by the judge, the judge should not become an advocate by encouraging jurors to question any particular witness or about any particular subject.⁵¹

Although generally the consent of counsel is not required for the court to initiate juror questioning, it is helpful to inform counsel that the judge intends to allow the jurors to ask questions. It is also helpful to explain the acceptable procedure to counsel and the jurors.

b. Other Potential Problems

One potential problem alluded to by Judge Thompson is that of counsel's playing favorites with jurors who ask questions.⁵² By concealing the identity of the questioner, Judge Thompson eliminates that problem. Although the author's procedure does not conceal the identity of the questioner, no instance has been experienced in which any counsel has played favorites with jurors who ask questions of a witness. Even if it were to become a problem, a warning to counsel—as gentle or stern as circumstances suggested—should suffice to prevent a recurrence. This practice would preserve the advantage of efficiency inherent in the use of oral questions.

Some authorities voice a worry of counsel that objections to a juror's question might prejudice the juror against the objecting counsel.⁵³ Once again, the apprehension should dissolve by careful judicial management. If there is doubt about the propriety of a question, the judge may call for a conference at the bench or outside the presence of the jury. Because the judge initiates the conference and the jurors do not know who, if anybody, has objected, none of the counsel is cast in the role of an obstructionist. If the judge does not recognize a possible frailty in a question and therefore, does not summon counsel for a conference, counsel may simply request to confer with the judge at the bench. This discreet manner of raising the issue lessens the risk of alienating a juror. Additionally, a direct explanation by the judge to the jury of the judge's decision not to require a witness to answer should draw the juror's ire, if there is any, away from counsel, especially if the explanation is not phrased in terms of a response to an objection.

51. See *State v. Martinez*, 7 Utah 2d 387, 389, 326 P.2d 102, 103-04 (1958).

52. Letter from the Honorable Bruce A. Thompson to the Center for Jury Studies, *supra* note 50, at 1.

53. See, e.g., *White v. Little*, 131 Okla. 132, 133-34, 268 P. 221, 222-23 (1928); see also *Jury Management*, *supra* note 44, at 305.

The author's experience is that jurors do not ask many questions but they usually ask good ones.

C. Summary

Whether jurors should be afforded a chance to ask questions of witnesses during a trial has been left to the trial judge's discretion in most cases. Usually, that discretion should be used to permit the questions. The advantages are real, and the shortcomings are either imaginary or easily avoidable. The key is careful control by the judge. Counsel and jurors should be told of the acceptable procedure before the first witness testifies. Questions may be oral or written, should be permitted only after counsel have finished with a witness, should be directed to the judge, should be put to a witness only after the judge has tested them against the rules of evidence and has conferred with counsel if any uncertainty of the question's propriety exists, and should be followed by such additional queries by counsel as the jurors' questions make appropriate.

IV. WRITTEN COPIES OF JURY INSTRUCTIONS FOR JURORS

A. Existing Legal Authority

Traditionally, at some time shortly after the conclusion of the evidence in a case, instructions of law are orally given to the jury by the court. Many judges provide only this oral guidance, and jurors are left to their unaided memories about the law to be applied.

Some courts have sought to combat this problem by providing the jury with some aid in the form of written instructions. Most often, the written instructions are a typewritten form of the instructions orally read from the bench. Other courts have stopped slightly short of written instructions and have required the court reporter to read instructions back upon request⁵⁴ or have sent a tape recording of the instructions into the jury room for playing back as the jury desired.⁵⁵

Giving the jury written aid has not always met with the approval of the appellate courts. In 1862 the Indiana Supreme Court prohibited sending written copies into the jury room with the following language:

The principle is, that the jury shall take the law from the Court. The mode in which the Court communicates with the jury is by addressing them in open Court. The jury take the law from the Court through the ear.

54. See, e.g., *Gregory v. United States*, 365 F.2d 203, 206 (8th Cir. 1966), cert. denied, 385 U.S. 1029 (1967).

55. See, e.g., *Wagner v. State*, 76 Wis. 2d 30, 49-50, 250 N.W.2d 331, 341-42 (1977).

By so doing, they generally stand upon equality, because none but men with hearing ears are competent jurors. In the juryroom, then, each depends upon his own recollection of the instructions, and upon the impression they made upon him for their meaning, their construction; and, this standing upon an equality, if they differ, they should come into Court, and, in presence of the parties, let the Court be interpreter of its own instructions. But if, instead of this being done, the court sends the written instructions to the jury, inasmuch as jurors are not upon equality in their ability to read and interpret writing, it puts it in the power of the sharp ones on the jury to read, and become the interpreters for the Court, and mislead their less skillful fellow-jurors. We think instructions should not be sent to the juryroom, without consent of both parties.⁵⁶

While the apprehension as to literacy or "equality in . . . ability to read and interpret writing" is not the problem today that it was in 1862,⁵⁷ courts more recently have found other grounds for resisting the practice of submitting written instructions to the jury. Some courts have discouraged the practice out of fear that jurors will place undue emphasis on one portion of the instructions and not read the jury charge as a whole.⁵⁸ Other courts have taken a similar tack and have discouraged the practice because they fear that jurors will argue over points of law contained in the instructions.⁵⁹

Many jurisdictions, recognizing the usefulness of sending written instructions into the jury room, have left the matter to the discretion of the trial judge.⁶⁰ The federal courts' general policy—leaving the matter to the discretion of the trial judge, unless a party is prejudiced by the action—typifies this approach.⁶¹ Some jurisdictions have gone somewhat further and have given the jury the right to have written copies of the jury instructions sent into

56. *Smith v. McMillen*, 19 Ind. 391 (1862).

57. In 1970 the illiteracy rate in the United States was only about one percent of the population. *See* 1981 STATISTICAL YEARBOOK I-22 (1981). In addition, the educational attainment of individuals in the United States indicates that reading and comprehending plainly drafted instructions should not present a problem. By 1969, 52.4% of the population over 25 years of age had completed high school and the median number of years of school completed was 12.1. U.S. DEP'T OF COMMERCE, 1970 CENSUS OF THE POPULATION, EDUCATIONAL ATTAINMENT 1-2 (1973). Among persons of ages 20 to 24, nearly 80% had completed high school. *Id.* If concerns about inability of jurors to understand written instructions have any validity at the present time, it would thus seem that their validity is declining.

58. *See, e.g., United States v. Schilleci*, 545 F.2d 519, 526 (5th Cir. 1977); *Commonwealth v. Baker*, 466 Pa. 382, 396, 353 A.2d 406, 413-14 (1976).

59. *See, e.g., United States v. Schilleci*, 545 F.2d 514, 526 (5th Cir. 1977), *Commonwealth v. Baker*, 466 Pa. 382, 396, 353 A.2d 406, 413-14 (1976).

60. *See* authorities cited in Annot., 91 A.L.R.3d 382, 391 (1979); Annot., 91 A.L.R.3d 336, 344 (1979).

61. *See, e.g., United States v. Hicks*, 619 F.2d 752, 758 (8th Cir. 1980); *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101, 1107-08 (7th Cir. 1979).

the jury room.⁶² When the right is provided by statute, it is not always clear whether all or only part of the jury charge should be sent into the jury room in written form.⁶³

B. Should Written Copies of Jury Instructions Be Sent into the Jury Room?

While there is disagreement, as noted above, the modern and preferable view is that jurors should receive written copies of the jury instructions for use during deliberations. Even the simplest of cases factually can be complicated with respect to the law to be applied. For example, most ordinary products liability cases are probably brought on theories of strict liability, breach of warranty, and negligence. Defenses of contributory negligence (complicated, perhaps, by comparative negligence), assumption of risk, and misuse of the product are typical. If a third-party action for contribution or indemnity against a supplier of parts of the product is joined, a seemingly simple injury case becomes mind-boggling from the profusion of rules to be applied. The very simple solution of providing written instructions is the common sense way of giving a jury guidance through the thicket.

Few lawyers would attempt to quote from memory the law applicable to a pending case. How then can lay jurors, untrained in the law, be expected to remember the intricacies of the jury charge without the aid of written copies? Lawyers and appellate courts examine with a searching eye the precise wording of each instruction, but strangely suffer jurors either to apply the law by feel or to ignore the fine points they cannot recall.

Just as lawyers and judges turn unhesitatingly to written sources to understand the law, so jurors should be given a similar courtesy. To give less is punishing to the jurors and a loss to the cause of justice.

1. *Advantages of the Practice*

Studies indicate that persons receiving information orally—or any other way—retain little of it for very long without some aid.⁶⁴ If written jury instructions are available for the jurors to review, they are a logical help⁶⁵ because they supply the repetition that

62. See, e.g., *Curtis v. Kansas City Pub. Serv. Co.*, 74 S.W.2d 255, 262 (Mo. App. 1934); *Hollis v. Ferguson*, 244 Or. 415, 422-23, 417 P.2d 989, 993 (1966); *McElhane v. State*, 220 Tenn. 532, 534-35, 420 S.W.2d 643, 645 (1967).

63. See, e.g., *Curtis v. Kansas City Pub. Serv. Co.*, 74 S.W.2d 255 (Mo. App. 1934).

64. See *supra* note 22; B. SALES, *PERSPECTIVES IN LAW & PSYCHOLOGY*, VOL. 1, 67-68 (1977).

65. See Strawn & Munsterman, *Helping Juries Handle Complex Cases*, *JUDICATURE* 444 (Mar.-Apr. 1982).

memory needs. Particularly in complex cases presenting multiple alternatives under the law, jurors cannot possibly remember the details of the law contained in the charge.

Jurors are rarely brilliant and rarely stupid, but they are treated as both at once. They are thought by some to be able to stick on their minds, from a single reading, a clear version of law so complicated that lawyers strain to grasp it; yet, they are deemed too incompetent to be trusted with a written version of the same law.

Jurors are human beings, like the rest of us. They are our friends and neighbors. They need what all of us need. They get their understanding as we all get it. If an oral presentation is superior to a written one and is sufficient in itself, why does not every judge listen only to an oral recitation of each side's version of the law, read none, and then make a decision or render an opinion or make a charge to a jury? Why read briefs at all? Who honestly supposes that jurors without written instructions understand the location of the subtle lines they must draw? Has any literate juror ever told a judge that the juror would rather have no written instruction?

It is apparent that in most instances the choice is between decision by understanding and decision by hunch. The latter should be unacceptable by any modern standard.

2. *Problems and Precautions*

a. *Procedural Concerns*

Once a court has decided to submit written copies of the jury instructions to the jury for deliberations, a number of procedural choices confront the court. One matter which often occurs in case law is to decide when written copies will be given to the jury. The matter meets with a diversity of response, as described above.⁶⁶

Although courts may send only a portion of the instructions into the jury room in written form,⁶⁷ the author prefers to send a complete set. Selectivity would seem to be counter to the usual urging that instructions be considered as a whole.

Some courts have used written summaries instead of the verbatim instructions.⁶⁸ The author sends photocopies of the instructions actually read to the jury from the bench. If instructions are written in plain language, it is difficult to understand a need for summaries. In addition, summaries may amount to unnecessary

66. See *supra* notes 54-63 and accompanying text.

67. See, e.g., *People v. Medrano*, 101 Mich. App. 577, 583-84, 300 N.W.2d 636, 638 (1980); *People v. Maye*, 58 A.D.2d 782, 783, 396 N.Y.S.2d 381, 382 (1977).

68. See, e.g., *State v. Frank*, 284 N.C. 137, 146-47, 200 S.E.2d 169, 176 (1973).

additional effort, when a plainly drafted instruction would accomplish the same objective. Summaries also introduce the risk of not being true reflections of the full instructions.

The author prefers to provide one photocopy for each juror. Although this may present some difficulty for a court with a limited staff,⁶⁹ the extra effort places the jurors on equal footing. No sign is evident and none has been produced from many posttrial conferences with jurors by the author that this practice tends to lengthen or complicate deliberations.

b. Other Potential Problems

Although in some systems, such as the federal court, literacy in English is a prerequisite to jury service, the problem of illiterate jurors may not be a simple one in other systems. Should the trial judge detect that one or more of the jurors in a case are not literate, that fact should be weighed with other factors. Of course, when copies of instructions are sent in with the jury, they should be clean, unmarked, and legible.⁷⁰

C. Summary

It is both helpful and advisable to send written copies of the jury charge to the jury room with the jury. Understandability will be markedly increased in most cases. It is also a good practice to provide each juror with a copy of the instructions to follow when the instructions are being read aloud by the judge and for use in deliberations, if adequacy of staff and equipment make it feasible.

V. CONCLUSION

When a judge supposes that he or she knows that jurors are incapable of taking notes—though jurors themselves do not know it and students from high school forward do it daily—honest inquiry prompts asking why. When a judge decides that jurors are incompetent to put questions to fill factual voids they perceive—though jurors alone must decide the factual issues in face of the voids—one is pushed to ask why. When a judge denies to jurors a

69. See STANDARDS RELATING TO TRIAL BY JURY § 4.6(d), Commentary 120 (Tent. Draft 1968).

70. Although it would seem reasonable to suppose that written copies of instructions always would be clean and unmarked, many courts have sent copies containing partially obliterated words, underlined or italicized words, or unintelligible writing. Such practices are undesirable and pose problems on appeal. See Annot., 91 A.L.R.3d 382, 402-12 (1979); Annot., 91 A.L.R.3d 336, 354-64 (1979); Annot., 10 A.L.R.3d 501 (1966) and authorities cited therein.

means to remember rules of law they cannot otherwise recall—but are sworn to follow—a fair question asks why.

A realistic approach to trial improvement, designed to reduce distrust of juries by the legal community and enhance the jury's factfinding product, is to allow greater juror participation in the trial process. This Article has advocated, therefore, permitting jurors to take notes, allowing jurors to ask questions to be put to witnesses, and furnishing jurors with copies of written instructions. The practices proposed are both safe, once it is realized that the risks associated with them are easily avoidable by the trial judge, and sensible, once it is seen that assumptions of juror inadequacy have been "pick[ed] . . . out of the wind and air."⁷¹

71. Carl Sandburg, *Wilderness*.