

# Tools to keep jurors engaged

*The era of the passive juror is over. Research has shown that allowing jurors to actively participate in the trial process yields a more engaged and motivated panel—and promotes justice for all.*

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The juror is slouched in his seat and looking at the ceiling, out the window, at the floor. He's looking at everything but the witness stand. Another juror stares at the witness stand appearing attentive, but she's actually making mental lists of errands to run during the lunch break and groceries to pick up on her way home. Jurors are required to attend the trial, but they can't be required to focus their attention once they get there.

Why do jurors mentally wander in and out of the courtroom? In post-trial interviews, jurors have said:

■ “They used so many technical terms that I couldn't follow what they were saying, so after a while I kind of gave up.”

■ “Nobody gave a real explanation of what they were trying to prove until the end, so it was hard to sort out what was important.”

■ “I had trouble remembering who said what, and there was no way to sort it out. When you're confused, it's hard to stay focused.”

When jurors become confused or overwhelmed and don't know how to evaluate the information provided, they lose the motivation to stay focused

on the trial—and they may not be mentally “present” for your key testimony or crucial cross-examination.

Tools that can help jurors start out and remain fully engaged in their task are sometimes called jury trial innovations. They include a “mini-opening” at the beginning of voir dire; preliminary instructions on the law that include a definition of the claims and relevant legal concepts before jurors hear evidence; the opportunity to take notes and use trial notebooks; interim summations; and—most controversial—the chance to ask questions.

The first two tools give jurors a framework for the questions they are asked in voir dire and for what they will see and hear once the trial begins. The remaining tools help jurors understand, organize, and retain more of the information they receive during trial.

Calling these tools “innovations” is a partial misnomer. They are still new in many courtrooms, but they have been studied and practiced for more than 20 years. In 1985, Second Circuit judges experimented with several innovations, including allowing jurors to take notes and ask questions, giving jury instructions before the trial, and providing ju-

rors with a written copy of the judge's final charge.<sup>1</sup> Note-taking and juror questions received their first systematic academic study in the late 1980s.<sup>2</sup>

Since then, courts in California, Colorado, Hawaii, New Jersey, New York, Ohio, and Tennessee have begun jury innovation pilot programs;<sup>3</sup> Arizona mandated that these and other tools be provided to jurors in 1995;<sup>4</sup> and leading scholars continue to examine the impact of these practices.<sup>5</sup> A 2007 nationwide survey of jury-improvement efforts in the states by the National Center for State Courts (NCSC) provides a comprehensive snapshot of jury operations and practices in state courts.<sup>6</sup>

Although there is ample authority for using these tools, they are not used uniformly. In many jurisdictions, judges decide what will be permitted on a case-by-case basis, and unless an attorney specifically requests that the tools be given to jurors, they may not be made available. An attorney making such a request may encounter resistance from the judge and from other attorneys.

Some fear that giving jurors a more active role in the trial will undermine

the adversary system. These skeptics ask, “If it’s not broken, why fix it?” The system isn’t broken, but enhancing comprehension and reducing confusion will improve jurors’ motivation and performance.

Some may protest using these tools for “routine” trials. But what seems routine to an experienced attorney or judge may seem complex to a juror. Several studies asking judges, attorneys, and jurors to rate a case’s complexity have documented differences in perceptions among trial participants. For example, in a New York state court study involving 921 jurors, only 27 percent of judges thought the trials were “very complex,” while 41 percent of jurors thought they were.<sup>7</sup>

Judges and attorneys may characterize cases as routine, but jurors find that the rules for resolving disputes in court differ from those in the outside world, the language is foreign, and the testimony addresses issues and events that may be outside their experience.

## The toolbox

Implementing jury trial innovations requires changing old habits or challenging assumptions about complexity, but overcoming resistance is worth the effort, particularly for plaintiff attorneys. It is far more difficult to meet your burden of proof with jurors who are confused, overwhelmed, and not fully engaged in their task.

**Mini-openings.** Motivating jurors begins at the outset of voir dire with a mini-opening or “voir dire opening.” Each counsel presents an overview of the case from his or her client’s perspective and previews the issues jurors will have to decide—in a brief statement usually no more than five minutes long. Mini-openings identify the controversies and sensitive issues that will arise during trial and help jurors understand why specific questions are being asked during voir dire.

Having information about the case enables prospective jurors to better evaluate the impact of their own experiences and beliefs on their ability to be impartial. When they are asked, “Can you be fair?” it is in the context of a case,

and those with experiences that mirror the case facts frequently volunteer that information right away. They can be questioned at the bench and quickly excused if necessary.

When the key elements of the dispute are outlined before questioning, counsel has a proper backdrop for voir dire—eliminating the need to use questions based on hypotheticals (a tactic frowned on in many courts) or convoluted examples to avoid being accused of “arguing the case” or “getting into the evidence.”

Wherever this practice has been tried, it has been endorsed by judges and attorneys and applauded by jurors.<sup>8</sup> In New York, 186 jurors who heard voir dire openings in 22 trials were more likely than their peers—who heard only standard introductions—to say that the introduction was very helpful to them in understanding what the trial would be about.<sup>9</sup>

**Preliminary instructions.** Presenting preliminary instructions on the substantive law that applies to the case—before opening statements—will enhance jurors’ ability to assign legal relevance to facts and interpret evidence within the confines of unfamiliar legal rules. Giving jurors the proper legal framework to evaluate evidence reduces their need to rely on subjective or idiosyncratic ideas about the legal standards.

For example, if jurors begin a medical negligence trial with an accurate understanding of the health care provider’s duty, they won’t look for evidence of intent. In a products liability case, learning what the plaintiff is legally entitled to expect from a defendant manufacturer can help jurors put their ideas about assumption of risk in proper perspective.

The benefits of preliminary instructions were demonstrated in a 1989 study of 67 criminal and civil trials involving 550 jurors.<sup>10</sup> That study showed the procedure can enhance jurors’ ability to remember information and assimilate evidence by linking it to relevant legal issues. Jurors’ performance can be improved if they are able to apply the correct criteria while receiving evidence,

rather than applying it retroactively during deliberations.

A study of alternate jurors who heard actual trials in court also found that preliminary substantive instructions alert jurors to relevant facts and focus their attention on the evidence rather than on extraneous information.<sup>11</sup>

**Note-taking.** While most attorneys and judges would never walk into a courtroom without a pad for note-taking, jurors were long denied this common tool for focusing attention, learning, and increasing retention of new information. In the 1980s, some courts began allowing jurors to take notes, and the practice was studied in real trials.

Early studies led to several conclusions rebutting the most common concerns that attorneys have about juror note-taking:<sup>12</sup>

- Note-takers do not emphasize evidence they have written down over other evidence.

- Note-takers do not have an undue influence on those who do not take notes.

- The presence of note-takers does not consume extra time during trial or deliberations.

- Note-taking does not favor either side.

Academic mock jury research suggests that for some note-takers, the act of taking notes may be as important as, or more important than, the notes themselves in aiding recall, and that note-takers recall more case facts than those who do not take notes.<sup>13</sup> Every state court evaluation of juror note-taking has recommended that it be permitted or at least considered by trial judges in every trial.<sup>14</sup> In the New York study, jurors in 91 criminal and civil trials were permitted to take notes, and 68

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percent in criminal trials and 75 percent in civil trials chose to do so; the note-takers reported their notes were helpful in understanding the law and in reaching a decision.<sup>15</sup>

In the NCSC survey of state jury operations, over 11,000 judges and lawyers reported that jurors were permitted to take notes in 69 percent of cases.<sup>16</sup> Although every state court now permits note-taking—except courts in Pennsylvania, which prohibits note-taking in criminal trials—attorneys may still need

overinclusive is less helpful to jurors than paring down the documents to those at the core of each party's claims or defenses.

**Interim summations.** In a trial that lasts several months, interim summations—sometimes called “interim commentary”—can help jurors organize and retain information. With this procedure, counsel for each side is permitted to make brief summary arguments about evidence during the course of the trial. Interim summa-

will undermine their control of the trial. Judges fear that a juror's question that oversteps legal bounds might result in a mistrial. Everyone worries that a juror's question will tip off a party that it failed to prove a required element of proof.

None of these things happen where questioning is allowed, primarily because rigorous procedures ensure that judge and counsel maintain full control of the process.

Jurors always submit questions in writing. When they are given note-taking materials, jurors are told that they may also use them to submit written questions for witnesses. The judge explains that questions are aimed at clarification, not at exploration; that he or she alone will decide whether to ask a juror's question; and that juror and attorney questions are evaluated the same way. Some judges allow jurors to submit questions as they arise, but most tell jurors to hold their questions until a witness has finished testifying.

Once questions are submitted, the judge consults counsel out of the jurors' hearing, rules on the questions' propriety, and makes any agreed-on wording changes. Typically, the judge presents juror questions to the witness and allows counsel to ask limited follow-up questions.<sup>20</sup>

For more than 30 years, the National Jury Project and other trial consultants for plaintiff attorneys have encouraged jurors to ask questions in trial-preparation research. Questions are usually submitted in writing and answered only if the information would be admissible in court.

Juror questions

- give counsel clues to any major stumbling blocks that could easily be removed or reduced by providing more information.

- indicate when jurors are “going down the wrong path” by revealing basic misconceptions about facts or law that can be corrected.

- highlight holes in either attorney's case presentation.

Allowing juror questions during trial preparation will show the attorney what may confuse jurors and alert him

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to request that judges use this procedure.<sup>17</sup> In many federal courts, note-taking is the standard practice.

**Trial notebooks.** Notepads provided for note-taking and trial notebooks are not the same thing. Typical trial notebooks are three-ring binders containing basic documents and tools to understand the evidence. Each juror gets a copy.<sup>18</sup>

For long, complex trials, the notebook might include the preliminary instructions, a glossary of terms, a time line, key documents, a list of witnesses with photos, the curricula vitae of experts, seating charts identifying attorneys and their respective clients, and indexes of exhibits (enabling jurors to find and use the exhibits during their deliberations). Notebooks for shorter trials might be limited to stipulations, key documents, and the judge's final charge.

One caveat: In some lengthy and complex trials, jurors have complained that the notebooks eventually became unmanageable. With notebooks containing several hundred pages of documents, jurors did not know how best to use them, much less hold them in their laps. By the end of the trial, the notebook was more likely to be a footrest than a reference tool. Being

tions could be made at the end of each week of trial, at the conclusion of a series of expert witnesses addressing a similar issue, or at the close of one party's case-in-chief.

Each party is generally allowed to present a 20- to 30-minute oral summary of the key points developed in testimony and, in some cases, points anticipated in upcoming testimony. This process of summing up and previewing keeps jurors on track.

**Question-asking.** Allowing jurors to ask questions is the most controversial tool. The practice is within the discretion of the trial court in at least 32 states and every federal circuit but is not yet widespread.<sup>19</sup> Jurors were permitted to ask questions in only 15 percent of the trials reported in the NCSC state courts survey. In several states—including Arizona, Colorado, and Indiana—judges are required to permit jurors to submit written questions. The practice is prohibited only in Georgia, Minnesota, Mississippi, Nebraska, and Texas.

Judges and attorneys balk at the thought of jurors playing such an active role in the trial, imagining a free-for-all in which jurors yell out their questions during testimony. Attorneys fear that their trial preparation will be for naught because jurors' questions

or her to clarify that point at trial.

Jurors often ask questions about undisputed facts that the attorneys on both sides take for granted and simply forget to mention. For example, one judge reported a trial where a plaintiff was suing for damages over a crippling injury to his hand. Counsel and the judge were surprised when a juror asked if the plaintiff was left-handed or right-handed. This important fact had inadvertently been omitted from the testimony.

Anecdotal reports show how juror questions also can serve as a signal. A question referring to information or opinions not in evidence may indicate that a juror has conducted private Internet research. A question in a civil trial that begins, “Is there proof beyond a doubt . . .” clearly calls for the judge to issue supplemental instruction or for counsel to explain the correct burden of proof in closing. If a juror in a medical negligence case asks for clarification of an expert’s opinion on causation that the expert has ruled out, this may signal that jurors were not satisfied with the expert’s brief explanation on that point, and the plaintiff attorney can ask the expert to elaborate and provide the information the jurors need to accept that certain causes should be ruled out.

Not allowing jurors to ask questions is more likely to result in the loss of control that attorneys fear. Jurors who can’t ask questions are likely to fill in any holes they see with speculation and rely on their own assumptions or experiences outside the courtroom to clarify confusing witness testimony.

Instructions to rely only on the evidence presented do not cure this problem because jurors are often unaware of how their assumptions influence their decisions. Moreover, research shows that telling jurors what *not* to do is often ineffective.<sup>21</sup>

Academic research studying jurors asking questions in real trials goes back more than two decades. Researchers found that jurors who were permitted to submit questions did not become advocates, react negatively when their questions were declined, draw inap-

propriate inferences from unanswered questions, or overemphasize their own questions and answers at the expense of other evidence.<sup>22</sup>

More recently, researchers studied videotapes of juror discussions before and during deliberations in 50 Arizona civil cases involving driver negligence, medical malpractice, and 17 other torts.<sup>23</sup> The jurors submitted 829 questions, and 632 of them were asked—at least one question was asked in 48 of the 50 trials studied. The authors found that jurors used

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questions to fill in gaps, eliminate extraneous issues, clarify ambiguities, and understand apparent omissions and inconsistencies.<sup>24</sup>

As with note-taking, not every juror permitted to ask questions will do so. In the New York research, jurors asked an average of only 2.5 questions in civil trials. Overall, about one-third of jurors permitted to submit questions actually did so.<sup>25</sup> This research also found that jurors whose questions were rejected, those whose questions were asked, and those who did not submit questions were all equally satisfied with the procedure. More than 80 percent in each group found the procedure very helpful in providing relevant information, understanding the evidence, and clarifying witness testimony.

### **New ground rules**

A film entitled *Order in the Classroom* made by the International Association of Defense Counsel has been widely distributed at conferences on jury innovations and shown in CLE programs to illustrate the challenges in courtroom communication. The film draws an analogy between the classroom and the courtroom. The film shows a professor laying out the classroom ground rules

to a new group of students, just as a judge gives procedural instructions to jurors at the outset of a trial.

The absurdity of the traditional ground rules for jurors immediately becomes clear when the professor tells his students he will be presenting extensive new material but they will not be allowed to take notes or ask questions, they will not be told what the most important points are until after the material is presented, and at the end of the class they must make a decision that someone’s life will depend on—even

though they will not get any of the traditional tools used for learning.

Fortunately, the traditional ground rules for jurors have changed—or now can be changed—so you can ensure that your jurors have the tools they need for their task. Those tools will improve both their performance and their motivation to be active participants in the trial. ■

#### Notes

1. Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. Rev. 423 (1985).

2. Larry Heuer & Steven Penrod, *Increasing Jurors’ Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 L. & Hum. Behav. 231 (1988).

3. B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research in Jury Trial Innovations*, 41 Ct. Rev. 12 (Spring 2004).

4. See e.g. 16 Ariz. Rev. Stat. R. Civ. P. 39(b) (10) (mandating that jurors in civil trials be permitted to submit questions to witnesses).

5. See e.g. B. Michael Dann et al., *Can Jury Trial Innovations Improve Juror Understanding of DNA Evidence?*, 255 Natl. Inst. Justice J. 2 (2006); Shari Seidman Diamond et al., *Juror Questions during Trial: A Window into Juror Thinking*, 59 Vand. L. Rev. 1927 (2006).

6. Gregory E. Mize et al., *The State-of-the-State Survey of Jury Improvement Efforts: A Compendium Report 6-7* (Apr. 2007), [www.ncsc-ctc.org/D\\_Research/cjs/state-survey.html](http://www.ncsc-ctc.org/D_Research/cjs/state-survey.html) (describing state

and local jury improvement efforts for 1,396 state court jurisdictions and in-court jury trial practices in 11,752 state and federal trials between 2002 and 2006). For more on the study, see Gregory E. Mize & Paula Hannaford-Agor, *Toward a Better Voir Dire Process*, on page 50.

7. Jury Trial Project, *Final Report of the Committees of the Jury Trial Project 2* (2005), [www.nyjuryinnovations.org/materials/Final\\_Report\\_of\\_the\\_Committees\\_of\\_the\\_Jury\\_Trial\\_Project.pdf](http://www.nyjuryinnovations.org/materials/Final_Report_of_the_Committees_of_the_Jury_Trial_Project.pdf) (hereinafter *Final Report*).

8. Court-based studies in California, Massachusetts, New York, Ohio, and Tennessee have collected data about mini-openings.

9. *Final Report*, *supra* n. 7, at 22.

10. Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 L. & Hum. Behav. 409 (1989).

11. Special Committee of the ABA Litigation Section, *Jury Comprehension in Complex Cases* 49 (1989). Principle 6, Subdivision C.1 of the ABA's *Principles for Juries and Jury Trials* endorses using preliminary instructions. See [www.abanet.org/juryprojectstandards/principles.pdf](http://www.abanet.org/juryprojectstandards/principles.pdf).

12. Heuer & Penrod, *supra* n. 2.

13. Lynne Forster-Lee & Irwin Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 *Judicature* 184, 188 (2003).

14. See e.g. Paula L. Hannaford & G. Thomas Munsterman, *Final Report of the Massachusetts Project on Innovative Jury Trial Practices* (2002); *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service* 14 (Feb. 2004), [www.sconet.state.oh.us/publications/juryTF/jurytf\\_proposal.pdf](http://www.sconet.state.oh.us/publications/juryTF/jurytf_proposal.pdf); Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 *Memphis L. Rev.* 1 (2003); *Final Report*, *supra* n. 7, at 73.

15. *Final Report*, *supra* n. 7, at 80.

16. Mize et al., *supra* n. 6, at 32.

17. The American Judicature Society provides summaries and direct citations for law, statutes, and rules on note-taking at [www.ajs.org/jc/juries/jc\\_improvements\\_notetaking\\_laws.asp](http://www.ajs.org/jc/juries/jc_improvements_notetaking_laws.asp).

18. Principle 13(B) of the ABA's *Principles for Juries and Jury Trials* recommends that in appropriate cases jurors be supplied with identical trial notebooks. See [www.abanet.org/juryprojectstandards/principles.pdf](http://www.abanet.org/juryprojectstandards/principles.pdf).

19. See *State v. Fisher*, 789 N.E.2d 222, 226-27 (Ohio 2003) (includes national summary of case law).

20. This procedure is outlined in New Jersey's rule permitting jurors to submit questions in civil cases. N.J. R. of Gen. App. 1:8-8 (c), *Juror Questions*. A comparable approach is used elsewhere.

21. Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 *Va. L. Rev.* 1857 (2001), [www.law.northwestern.edu/faculty/fulltime/diamond/papers/JuryRoom.pdf](http://www.law.northwestern.edu/faculty/fulltime/diamond/papers/JuryRoom.pdf).

22. Larry Heuer & Steven D. Penrod, *Juror Note-Taking and Question-Asking During Trials: A National Field Experiment*, 18 L. & Hum. Behav. 121 (1994).

23. Arizona Rules of Civil Procedure 39(f) requires that jurors in civil cases be instructed that they are permitted to discuss the case before deliberations only in the jury room and only when all members of the jury are present.

24. Diamond et al., *supra* n. 5.

25. See *Final Report*, *supra* n. 7, at 61.