

AN EMPIRICAL STUDY ON JURY TRIAL INNOVATIONS

Stephen D. Susman and Richard L. Jolly *

Juries today decide fewer civil disputes than at any point in the country's history. While judges, practitioners, and scholars offer many explanations for this trend, this Article takes a different tact. It analyses a number of jury innovations, including: limiting the length of trials; preliminary substantive instructions; Juror-posed questions; pre-voir dire questionnaires; opening statements before voir dire; interim counsel arguments; back-to-back expert testimony; and juror discussion of evidence before deliberation. It reviews the legal basis of these practices as well as empirical data on their use and popularity among attorneys. It concludes that these techniques may help halt the disappearing jury trial.

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INTRODUCTION

Civil jury trials are disappearing all over the country. And while no one can deny this phenomenon, fingers point in every direction as to what is causing the disappearance. Many point to the Supreme Court's summary judgment trilogy and love affair with arbitration; others to the critical new role of modern discovery, managerial judges, and mediation; and still others suggest that today's lawyers are inexperienced and simply afraid to try a jury case. Some argue that jury trials are too long, too expensive, and too unpredictable, but how do you explain that bench trials are disappearing faster than jury trials?

Regardless of the reasons, there are certain courtroom innovations that judges and practitioners can implement to rejuvenate civil jury trials. Outlined below are eight such innovations. These practices have been proposed by academics and practitioners, implemented by state and federal judges, and are not prohibited by most jurisdictions. The proposals include: (1) Limiting the Length of Trials; (2) Preliminary Substantive Instructions; (3) Juror-Posed Questions; (4) Pre-Voir Dire Questionnaires; (5) Opening Statements Before Voir Dire; (6) Interim Arguments by Counsel; (7) Back-to-Back Expert Testimony; and (8) Juror Discussion of Evidence Before Deliberation.

Our review of these innovations includes a brief summary of how each practice works, the legal support for their use throughout the country, and empirical studies on their use and popularity among attorneys. Empirical data is drawn from an assortment of studies including the American Bar Association's 2008 Seventh Circuit Project, Houston's 2009 Jury Innovation Project, and an ongoing questionnaire circulated by the New York University Civil Jury Project. It also offers the first review of an attorney survey conducted by the American Society of Trial Consultants in conjunction with the Civil Jury Project. This study collected responses from 936 attorneys between May 3, 2016 and August 1, 2016. Respondents answered questions on their personal use of the aforementioned trial innovations, and noted whether they would recommend others implement them. If they did not recommend their use, the attorneys offered brief rationales for their aversion.

Based on our findings, we are confident that these innovations can help to stem the tide of America's disappearing civil jury trials. Indeed, these innovations respond to a number of common criticisms heard about public dispute resolution. Implementing these innovations can make civil jury trials quicker, less costly, and more accurate. They can also improve the experience of those serving on juries, making citizens more likely to report to the courthouse and serve on cases to completion. In this way, implementation of these innovations can help make public dispute resolution better for everyone.

I. LIMITING THE LENGTH OF TRIALS

The most significant and obvious innovation is limiting the length of trials by setting a maximum number of trial hours per party. Principle 12 of the American Bar Association's American Jury Project Principles and Standards provides that "[c]ourts should limit the length of jury trials insofar as justice allows," and that "jurors should be fully informed of the trial schedule established."¹ The expense of trial corresponds directly with how long it takes. The most frequently voiced complaint by jurors who have returned verdicts is that there was too much repetition of evidence and arguments during the trial. And the quality of jurors who are willing or able to serve increases as the length of the anticipated trial decreases—jurors are able to restructure their other personal and professional obligations so that they may be fully committed judicial actors.

Judges establish time limits at a pretrial conference based on a number of factors. These factors include the complexity of the issues, the burden of proof on each party, the nature of proof offered, and input from the parties.² A judge may also choose to limit the time counsel has to conduct specific parts of the trial.³ The sooner a judge sets time limits, the more likely the limits are to have a beneficial effect on the amount of pretrial discovery sought. A lawyer facing a time limit of several days is going to have a hard time justifying to his client or partners why he needs multiple depositions that will never be read or shown to the jury. In this way, trial time limits can "trickle down" and affect the entire dispute resolution process. Importantly, the judge should instruct the jury of the time limits and inform them should any schedule changes become necessary.

A. Legal Foundations

There is overwhelming legal support for trial judges imposing reasonable time limits. To be sure, the Federal Rules of Civil Procedure and Evidence support the usage of trial time limits. Indeed, the Federal Rules of Civil Procedure specifically state: "At any [pretrial] conference under this rule consideration may be given, and the judge may take appropriate action, with respect to ... (4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence; ... (15) an

¹ Am. Bar Ass'n, Principles for Juries & Jury Trials § IV (Aug. 2005).

² Seventh Circuit Bar Ass'n American Jury Project Comm'n, *Seventh Circuit American Jury Project Final Report* 44–47 (Sept. 2008), <http://www.uscourts.gov/file/3467/download> (hereinafter "Seventh Circuit Jury Project Report").

³ *Id.*

order establishing a reasonable limit on the time allowed for presenting evidence; and (16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.”⁴ Similarly, the Federal Rules Evidence require that “[t]he judge ... exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”⁵

Furthermore, a large number of federal courts have explicitly supported limiting trial times. In *Wantanabe Realty Corp. v. City of New York*, the Southern District of New York emphasized that “[t]rial courts have discretion to impose reasonable time limits on the presentation of evidence at trial. This is essential if they are to manage their dockets, as many cases compete for trials and for the attention of judges, and no party has an unlimited call on their time.”⁶ The Seventh Circuit has been more forceful, stating not merely that federal district judges have discretion to set time limits, but that “[they] must exercise strict control over the length of trials, and are therefore entirely within their rights in setting reasonable deadlines in advance and holding the parties to them.”⁷ The Eighth Circuit, too, noted in *Life Plus International v. Brown*, “Trial courts are permitted to impose reasonable time limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence.”⁸

So essential is the district court’s ability to structure the trial and manage dockets, that time limits are reviewable only for abuse of discretion.⁹ The Ninth Circuit explained: “Where a district court has set reasonable time limits and has shown flexibility in applying them, that court does not abuse its discretion. Moreover, to overturn a jury verdict based on a party’s failure to use its limited time for witness cross-

⁴ FED. R. CIV. P. 16(c).

⁵ FED. R. EVID. 611(a).

⁶ *Wantanabe Realty Corp. v. City of New York*, No. 01 CIV. 10137, 2004 WL 2112566, at *2 (S.D.N.Y. Sept. 23, 1004); *see also* *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 442–43 (1st Cir. 1991) (“District courts may impose reasonable time limits on the presentation of evidence.”).

⁷ *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 473 (7th Cir. 1984).

⁸ *Hicks v. Kentucky*, 317 F.3d 799, 807 (8th Cir. 2003); *see also* *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir. 1994) (“In the management of its docket, the court has an inherent right to place reasonable limitations on the time allotted to any given trial.”).

⁹ *Sparshott v. Feld Entm't, Inc.*, 311 F.3d 425, 433 (D.C.Cir. 2002) (“The district court’s decisions on how to structure time limits are reviewable only for abuse of discretion.”).

examination would be to invite parties to exhaust their time limits without completing cross-examination, then appeal on due process grounds.”¹⁰

State courts likewise recognize limiting trial time as part of a trial court’s core managerial power.¹¹ For instance, in *Hicks v. Kentucky*, the Kentucky state court approved of trial time limits, explaining that “[a] trial court clearly has the power to impose reasonable time limits on the trial of both civil and criminal cases in the exercise of its reasonable discretion.”¹² Courts all over the country echo this result and reasoning.¹³ In fact, our review reveals no jurisdiction in which rules or laws prohibit trial courts from setting and enforcing reasonable trial time limits in civil cases.

B. Empirical Data

An ongoing questionnaire circulated by the New York University Civil Jury Project noted that about sixty-seven percent (67%) of federal judges have set trial time limits at some point.¹⁴ And the Civil Jury Project/American Society of Trial Consultants (ASTC) 2016 survey showed that just over forty-seven percent (47.7%) of respondents had used trial time limits.¹⁵ Of those who had experience with this innovation, forty-seven percent (47%) recommended their use while just over thirty-one

¹⁰ *Amarel v. Connell*, 102 F.3d 1494, 1513–15 (9th Cir. 1996).

¹¹ *See e.g.*, *Sneberger v. Morrison*, 776 S.E.2d 156, 164 (W. Va. 2015) (holding that the Federal Rules of Procedure inform West Virginia Rules of Procedure and therefore permit judges to set time limits on trials); *Varnum v. Varnum*, 586 A.2d 1107, 1115 (Vt. 1990) (“We think that the power granted by [Vermont Rule of Evidence 611(a)] includes the authority to set reasonable limits on the consumption of time in examining witnesses.”).

¹² *Hicks v. Kentucky*, 805 S.W.2d 144, 151 (Ky. 1990).

¹³ *Brown v. Brown*, 488 P.2d 689 (Ariz. 1971) (holding that it was reasonable for the trial judge to place a time limit on the presentation of the case); *Messinger v. Mount Sinai Med. Ctr.*, 15 A.D.3d 189, 189 (N.Y. App. Div. 2005) (“The trial court has broad discretion to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary.”); *California Crane Sch., Inc. v. Nat’l Comm’n for Certification of Crane Operators*, 171 Cal. Rptr. 3d 752, 760 (Cal. Ct. App. 2014) (“[I]t is clearly within the power of the court to impose time limits before the trial commences.”).

¹⁴ The questionnaire, circulated to twenty-one (21) judicial advisors to the project, found that six (6) judges regularly use the innovation, eight (8) judges have used it, and seven (7) judges have never used it. *Questionnaire for Judges on Use of Jury Innovations* (on file with the NYU Civil Jury Project), data current as of April 2016 (hereinafter “CJP Questionnaire”).

¹⁵ Civil Jury Project at NYU Law School/American Society of Trial Consultants: Attorney Survey Results Report 28 (2016) (hereinafter “CJP/ASTC Attorney Survey”).

percent (31.2%) did not recommend it.¹⁶ Common reasons given for why attorneys did not recommend time limits is that artificial constraints hamstring good lawyers without regard for the realities of the case. Furthermore, they were skeptical of any time limits placed on voir-dire questioning, fearing that this could potentially compromise selecting an impartial jury.¹⁷

The empirical data betrays these fears. The American Bar Association's 2008 Seventh Circuit Project tested the use of trial time limits, but only in seven (7) trials, which was too small a sample size from which to draw meaningful conclusions.¹⁸ However, of those seven (7) trials, five (5) responses reported that those time limits did not at all alter the fairness, efficiency, or overall satisfaction with the trial process.¹⁹ Some studies further argue that time limits can actually increase satisfaction with the trial process—at least for jurors. In the 2009 Houston Project, eighty-six percent (86%) of jurors in twelve (12) trials reported that they very strongly or strongly believed in the importance of knowing how long a trial would take at the outset.²⁰

Other academics have further bolstered these projects' conclusions. Professor Mark Lemley and his colleagues at Stanford Law School recently updated his comprehensive empirical analysis of patent trials around the country.²¹ His data shows that while jury trials typically take longer than bench trials, the overall length of trial does not affect outcomes in favor of one party over the other.²² Patent trials tend to involve some of the most

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Seventh Circuit Jury Project Report, *supra* note 2, at 58–59.

¹⁹ Courts implemented time limits in seven trials, but the data was reported in the number of responses rather than the unique number of judges involved.

²⁰ Data compiled from results submitted to the Committee of the Jury Innovations Project, *Jury Innovations Project: An Effort to Enhance Jury Trials in Texas State and Federal Courts* (2009), <https://www.justex.net/JustexDocuments/0/CourtsAndLaw/Jury%20Innovation%20Project%20Manual%20101411.pdf> (hereinafter “Houston Project”).

²¹ Mark Lemley, *et al.*, *Update on Rush to Judgment? Trial Length & Outcomes in Patent Cases*, delivered to Patent Jury Trial Roundtable Sept. 30, 2016, http://www.law.nyu.edu/sites/default/files/upload_documents/Lemley%20Update%20on%20Rush%20to%20Judgment%20-%202016%20NYU%20Roundtable%20-%20v.3%20SPM%20edits.pdf; *see also* Mark Lemley, *et al.*, *Rush to Judgment? Trial Length and Outcomes in Patent Cases*, *AIPLA Quart. J.*, Vol. 41, No. 2, Spring 2013.

²² Note that there is one curious caveat to this conclusion. In the Northern District of California, longer trials may benefit patentees. Everywhere else, however, the study concluded that there was trial time limits had no effect on the outcome of the case. *See* Mark Lemley, *et al.*, *Update on Rush to Judgment? Trial Length & Outcomes in Patent Cases*, delivered to Patent Jury Trial Roundtable on Sept. 30,

technically difficult issues litigated, with extra time usually spent trying to teach jurors about the complex technology. That time limits do not affect outcomes in this most complicated of area strongly suggests that courts may broadly employ reasonable time limits without implicating due process concerns.

Finally, a number of lawyers who have participated in time-limited trials report that it does not “hamstring” them, but actually improves the quality of their presentation because they have to streamline their case. Though it is true that such streamlining may force attorneys to abandon weaker alternative arguments, “trimming the fat” often results in stronger overall argument. Therefore, trial time limits may not only save money but also help lawyers put their best case forward.

II. PRELIMINARY SUBSTANTIVE INSTRUCTIONS

This innovation is providing jurors instructions on the substantive law at the start of the case rather than waiting until the end of the case. In all other teaching environments, the instructor provides directions before the recipient undertakes the task—not when the task is already completed. Accordingly, preliminary substantive jury instructions are instructions provided to jurors at the start of a trial—before the presentation of evidence by the parties—on the elements of a claim or defense.

These preliminary instructions resemble the final instructions and are not limited to things such as burden of proof, how to judge a witnesses’ credibility, or taking notes. Substantive instructions aim to facilitate, first, better decision making by jurors, and, second, greater understanding by jurors of their duty in the decision-making process by providing them with a legal framework for the parties’ argument.²³ Such instructions address Principle 6 of the American Bar Association’s Principles for Juries and Jury Trials, which suggests that “[c]ourts should educate jurors regarding the essential aspects of a jury trial.”²⁴ The relevant law is undoubtedly an essential aspect of the trial.

The justification stated by some judges for not giving these substantive preliminary instructions is that it requires unnecessary preparation of instructions on claims and defenses that may be dropped during the course of the trial. It is not until the court hears the evidence, the critics claim, that it becomes aware of the nuances upon which the jury must be instructed. Interestingly, however, no court that gives preliminary substantive

2016,

http://www.law.nyu.edu/sites/default/files/upload_documents/Lemley%20Update%20on%20Rush%20to%20Judgment%20-%202016%20NYU%20Roundtable%20-%20v.3%20SPM%20edits.pdf.

²³ Seventh Circuit Jury Project Report, *supra* note 2, at 25.

²⁴ Am. Bar Ass’n, Principles for Juries & Jury Trials § IV (Aug. 2005).

instructions uses that as an excuse to forego final instructions. Regardless, instruction on the law is one phase of trial that bears repetition. We suspect that the main reason that substantive instructions are absent at the start of the case is that counsel and the court just get too busy with handling other things. There is so much to schedule in trial preparation that the relevant actors likely have little time to draft and debate even preliminary substantive instructions.

A. *Legal Foundations*

Preliminary substantive instructions find firm foundation in federal and state law. Federal Rule of Civil Procedure 51(b)(3) provides federal courts with considerable leeway in determining when to instruct a jury, stating that instruction may take place “at any time before the jury is discharged.”²⁵ But while preliminary substantive instructions have been discussed with regard to criminal cases by many courts, only the Ninth Circuit has explicitly addressed substantive preliminary instructions in civil trials.²⁶ In *Jerrold Electronics Corp. v. Westcoast Broad. Co.*, the appellate court concluded that the trial court's conduct in advising the jury at the outset of trial on the nature of the case and anticipated issues was not prejudicial to defendants as a violation of the rule that the jury should be instructed after argument.²⁷ The Fifth Circuit's model instructions do not specifically include preliminary instructions on the law before the trial begins; however, jurors are told that the court will instruct them on the applicable law “from time to time during the trial and at the end of the trial.”²⁸

Some state rules of civil procedure explicitly permit the administration of preliminary substantive jury instructions. For instance, the Minnesota Rules of Civil Procedure instruct: “After the jury has been impaneled and sworn, and before opening statements of counsel, the court may instruct the jury as to the respective claims of the parties and as to such other matters as will aid the jury in comprehending the trial procedure and sequence to be followed.”²⁹ Similarly, the Massachusetts Rules of Civil Procedure state that “[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the

²⁵ 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).

²⁶ *Jerrold Elecs. Corp. v. Westcoast Broad. Co.*, 341 F.2d 653, 665 (9th Cir. 1965).

²⁷ *Id.*

²⁸ Fifth Circuit Pattern Jury Instruction—Civil 1.1 (2006).

²⁹ MINN. R. CIV. P. 39.03 (2016).

court instruct the jury on the law as set forth in the requests.”³⁰ Furthermore, although a criminal case, in *People v. Harper* the New York Appellate division cited the American Bar Association’s Principles for Juries and Jury Trials alongside the 2005 New York State study as demonstrating the usefulness of a trial court providing preliminary substantive instructions to juries.³¹

Similarly, a number of States have rules supporting the use of preliminary substantive instructions. Seven States currently employ procedural rules requiring judges to pre-instruct jurors on the substantive law before the evidentiary portion of the trial in civil or criminal cases, including: Colorado, Indiana, Missouri, New York, Oregon, Tennessee, and Wyoming.³² And only Nevada and Texas prohibit pre-instructions.³³ This means, like most procedural modifications, parties are free to adopt the use of preliminary substantive instructions in most jurisdictions.

B. Empirical Studies

Preliminary substantive instructions are commonly practiced, widely supported, and effective in assisting jurors in understanding and resolving civil disputes. In 2015, a National Center of State Courts survey of participants in state and federal civil trials noted that nineteen percent (19%) included preliminary instructions on the legal elements of the claims involved in the case.³⁴ An ongoing questionnaire circulated by the NYU Civil Jury Project noted that eighty-one percent (81%) of judges had employed preliminary substantive instructions at some point.³⁵

³⁰ MASS. R. CIV. P. 51.

³¹ *People v. Harper*, 818 N.Y.S.2d 113, 115 (N.Y. App. Div. 2006).

³² See Hon. Gregore Mize, Paula Hannaford-Agor, Nicole Waters, *The State-of-the-State Survey of Jury Improvement Efforts: A Compendium Report* 36 (April 2007), www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx (hereinafter “NCSC Report”).

³³ *Id.*

³⁴ This study collected data from 1,673 state and federal court trials. Other types of preliminary jury instructions are more prevalent. For example, 87% of cases included preliminary instructions on jury conduct; 70% included preliminary instructions on Internet use by jurors; and 49% included preliminary instructions on the burden of proof. See generally Paula Hannaford-Agor, *But have we made any progress? An update on the status of jury improvement efforts in state and federal courts*, Nat’l Ctr. for State Courts Ctr. for Jury Studies (2015), http://www.law.nyu.edu/sites/default/files/upload_documents/But-have-we-made.pdf.

³⁵ See CJP Questionnaire, *supra* note 14.

The 2016 Civil Jury Project/ASTC survey showed that of the nearly forty-four percent (43.8%) of respondents that had experience with preliminary substantive instructions, less than three percent (2.2%) did not recommend employing this innovation.³⁶ Those opposed did not provide reasoning. Similarly, the New York State Jury Trial Project in 2005 tested the use of preliminary substantive jury instructions in twenty-six (26) civil trials. Ninety-two percent (92%) of judges and seventy-nine percent (79%) of attorneys thought that preliminary substantive instructions were helpful to jurors' understanding of the law.³⁷ And the 2008 American Bar Association Seventh Circuit Project found that in thirty-four (34) trials, more than eighty percent (80%) of the jurors, eighty-five percent (85%) of the judges and seventy percent (70%) of the attorneys who participated stated they believed that the intended goal of enhancing juror understanding was accomplished.³⁸

Finally, though the 2009 Houston Project did not formally collect data on this issue, it offered some conclusions on the benefits substantive preliminary questions offer for jurors. Based on outside data, the project concluded that more than seventy-five percent (75%) of jurors in nine (9) trials found that preliminary substantive instructions were helpful in keeping jurors focused on the evidence, increased the fairness of the trial, increased the efficacy of the trial, and should be used in future trials.³⁹

III. JUROR-POSED QUESTIONS

Discharged jurors almost unanimously agree that it would have helped them had they been able to ask questions of witnesses. Typically, it works as follows: Before a witness takes the stand, the court provides each juror a piece of paper on which she may write a question. When a witness finishes testifying but before being excused from the stand, the jurors are told they may submit a written question anonymously to the witness.⁴⁰ The bailiff gathers the sheets from every juror and passes them to the judge who scans them to see if any juror has submitted a written question. Every juror submits paper to prevent the parties from knowing which jurors are submitting which questions. The judge shows the questions to the lawyers at the bench. If there is no objection, the lawyer who called the witness is

³⁶ CJP/ASTC Attorney Survey, *supra* note 15, at 32.

³⁷ New York State Unified Court System, Final Report of the Committees of the Jury Trial Project 31–40 (2005), https://www.nycourts.gov/publications/jury-materials/Final_Report_of_the_Committees_of_the_Jury_Trial_Project.pdf (hereinafter “New York State Jury Trial Project”).

³⁸ Seventh Circuit Jury Project Report, *supra* note 2, at 25.

³⁹ Houston Project, *supra* note 20.

⁴⁰ See Judge Ken Curry & M. Beth Krugler, *The Sound of Silence: Are Silent Juries the Best Juries?*, 62 Tex. B.J. 441, 441 (1999).

allowed to ask the question to the witness and the other lawyer then gets an opportunity to cross.

Allowing jurors to ask questions helps jurors better understand the facts and evidence presented in the case and to stay engaged with the trial proceedings. This includes complex expert testimony, as juror questions may quickly bring clarity to confusing aspects of the expert's testimony.⁴¹ Most jurors report that being able to ask questions keeps them awake and engaged, though a few of them object that the process of developing questions is distracting. Still, there is no evidence that it dramatically increases the costs or length of trial. It does give counsel some idea of how they are doing and whether something needs clarifying.

A. Legal Foundation

No evidentiary or court rule prohibits juror from questioning witnesses, and in fact there is much legal support for allowing jurors to ask questions. The Eighth Circuit, for instance, has supported the practice, explaining:

Questioning may tend to transform jurors from neutral fact finders into advocates, that the process of formulating questions may precipitate prematurely the deliberation phase of trial, that jurors may weigh more heavily the answers to questions from each other than the answers to questions from counsel, that jurors may ask questions about legally irrelevant and legally inadmissible evidence, and that an objecting party risks alienating the jury. . . . [But] if juror questions are allowed, the trial court should carefully weigh using a procedure that requires those questions to be submitted in writing or out of the hearing of (and without discussion with) other jurors.⁴²

The Eighth Circuit's reasoning is in line with every other federal circuit that has addressed the issue: Whether or not jurors may question witnesses should be left up to the trial judge's discretion and efforts to maintain juror neutrality.⁴³ And while the questions allowed cannot compromise the

⁴¹ Shari Seidman Diamond, *How Jurors Deal with Expert Testimony and How Judges Can Help*, 16 J.L. & POL'Y 47, 64–65 (2007).

⁴² *United States v. Brockman*, 183 F.3d 891, 898 (8th Cir. 1999).

⁴³ *See, e.g.*, *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. Callahan*, 588 F.2d 1078 (5th Cir. 1979); *United States v. Gonzalez*, 424 F.2d 1055, 1055 (9th Cir. 1970).

integrity of the proceedings, judges are likely to consider the parties preferences in deciding whether or not to allow questioning.

Many states have adopted the same type of approach, leaving it up to the individual judge whether to allow or disallow questions from jurors.⁴⁴ Several states have gone further, including Arizona, Colorado, Indiana, and Wyoming, and mandate that jurors be allowed to ask questions during civil trials.⁴⁵ Conversely, a few states including Georgia, Minnesota, Mississippi, and Nebraska, outright prohibit jurors from asking questions of witnesses at trial.⁴⁶ Finally, some states do not permit questions during criminal trials but allow them in civil trials.

B. Empirical Data

Allowing jurors to ask questions of witnesses is one of the more common innovations. Juror questions were permitted in twenty-five percent (25%) of civil jury trials in a 2015 survey of 1,673 state and federal court trials nationwide.⁴⁷ This is up from sixteen percent (16%) in a 2005 survey also by the National Center for State Courts.⁴⁸ A questionnaire circulated by the NYU Civil Jury Project to forty-two (42) judicial advisors suggests that 71% have at some point permitted jurors to ask questions of witnesses.⁴⁹

Allowing jurors to question witnesses is incredibly popular among jurors. The 2008 American Bar Association's Seventh Circuit Project found that in thirty-eight (38) trials, eighty-three percent (83%) of jurors reported that the ability to submit written questions helped jurors understand the facts.⁵⁰ The timing of when judges inform jurors of their opportunity to ask questions may also matter: Post-trial questionnaires revealed that only thirty-eight percent (38%) of jurors knew that they could submit questions when judges mentioned the option only in opening remarks, while ninety-nine percent (99%) of jurors understood that they could ask questions when judges mentioned this during trial.⁵¹

⁴⁴ The states that have specifically approved of juror questioning are: Arizona, Arkansas, California, District of Columbia, Georgia, Indiana, Iowa, Kentucky, Michigan, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah. See Houston Project, *supra* note 20, at 69.

⁴⁵ NCSC Report, *supra* note 32.

⁴⁶ See Paula Hannaford-Agor, *Juror Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts*, 28 N. ILL. L. REV., 407, 414 (2002).

⁴⁷ Hannaford-Agor, *supra* note 34, at 7 (2015).

⁴⁸ *Id.*

⁴⁹ See CJP Questionnaire, *supra* note 14.

⁵⁰ Seventh Circuit Jury Project Report, *supra* note 2, at 13.

⁵¹ Shari Seidman Diamond, *Juror Questions at Trial: In Principle and In Fact*, 78 NEW YORK STATE BAR ASSOC. J. 23 (2006). Unfortunately, the sample size of the

Most judges and attorneys also believe that jurors are benefiting from asking questions. The 2005 New York State Jury Trial Project found that in twenty-seven (27) civil trials,⁵² seventy-four percent (74%) of judges and fifty percent (50%) of attorneys in civil trials believed that juror questions helped jurors to better understand evidence presented.⁵³ Likewise, the Civil Jury Project/ASTC Survey found that over sixty percent (61.7%) of those attorneys who had experience with allowing jurors to ask questions would recommend the practice, and roughly seventeen percent (16.5%) opposed such questioning.⁵⁴ Common reasons for their aversion were that jurors asking questions presented challenges with respect to objections, time, and usefulness; they also worried that juror-posed questions were inadmissible and thus not asked or answered, leaving jurors frustrated.⁵⁵ When properly conducted by an attentive judge, however, these concerns appear to be easily managed. For instance, the judge might explain why a given question is objectionable. Similarly, the practice may be halted if at the parties feel that it is undermining the proceedings.

IV. PRE-VOIR DIRE JURY QUESTIONNAIRES

The next innovation involves jurors completing made-to-order questionnaires in advance of voir dire. Virtually every court provides counsel with some basic personal information about each juror before voir dire begins, but often the standard juror information form provides only the level of education, the current occupation and employer of the juror and spouse, and whether the juror has served before. Also, this bare bones information is only provided as the venire files into the courtroom. But today, in the interest of allowing counsel to better identify juror bias with a shorter oral voir dire, courts are starting to require potential jurors to provide answers to a more comprehensive questionnaire, tailored to the particular case and often agreed to by both sides in advance. The issues are how long may the questionnaire be, how intrusive are the questions, and when are the completed questionnaires furnished to counsel.

On the question of length, most courts will allow a questionnaire if it can be printed on one piece of paper, so that each juror can complete it on a clipboard and so it can be quickly copied for counsel. On the question of the substance of the questions, most courts will agree to ask whatever counsel for both sides (and their jury consultants) can agree to. Some courts however are more protective of a juror's privacy and reject questions that

number of jurors who submitted questionnaires with answers to each of these questions is not available.

⁵² New York State Jury Trial Project, *supra* note 37, at 59–60.

⁵³ *Id.*

⁵⁴ CJP/ASTC Attorney Survey, *supra* note 15, at 38.

⁵⁵ *Id.*

they think are too personal, irrelevant, or designed to waste the court's time.⁵⁶ The hot question today is the timing of asking the potential jurors to complete the questionnaires, and when the answers are provided to counsel. If this occurs before the jurors report to the courthouse, jurors who need to be excused for cause or hardship can be identified and notified that they need not report to the jury assembly room. But this also allows the lawyers to do extensive Internet research on the venire—using social media and simple Google searches—and it potentially allows the jurors to reciprocate by doing research on the judges, lawyers, and parties.

Because getting the questionnaires in ample time to do Internet research is more useful to lawyers aimed at selecting unbiased or even sympathetic jurors, most lawyers would prefer getting them before the jurors come into the courtroom—or better yet, the courthouse. Ethics rules uniformly ban ex parte communication with potential jurors, but local bar rules or opinions vary as to whether this ban includes social media research that asks the potential juror for access to a social media site or research that notifies a potential juror that someone is accessing his or her site.⁵⁷ There is disagreement whether judges can or should bar or limit online social media research of the jurors.⁵⁸ On the one side are concerns about preserving a citizen's privacy, but on the other are concerns about eliminating the biggest objection to jury duty: The time wasted in reporting for voir dire

⁵⁶ See *Oracle America, Inc. v. Google Inc.*, Case 3:10-cv-03561-WHA (N.D.CA. March 1, 2016) (rejecting a questionnaire that the court deemed was designed specifically to waste the court's time).

⁵⁷ The New York City Bar Association, for example, decided in 2012 that viewing a jurors' social media profile might constitute "communication" when the juror receives notification of the viewing. Conversely, the ABA's Committee on Ethics and Professional Responsibility decided in 2014 that it is not communication when the social media service sends an automated notice to the juror indicating that the lawyer has viewed his or her page—even when the lawyer knows the website will send such a notice.

⁵⁸ Compare *Carino v. Muenzen*, No. A-5491-08T1, 2010 WL 3448071, at *1 (N.J. Super. App. Div. Aug. 30, 2010) (prohibiting plaintiff's counsel from using the Internet to investigate the jurors because they had failed to notify opposing counsel that they would be conducting such searches) and *Oracle America, Inc. v. Google Inc.*, No. 3:10-cv-03561-WHA, 2016 WL 1252794 (N.D. CA March 25, 2016) (forbidding parties from conducting Internet history searches of the jury, noting that it could facilitate improper personal appeals to particular jurors) with *Sluss v. Commonwealth*, 381 S.W.3d 215, 226–227 (KY. 2012) (arguing that counsel's lack of access to social media "effectively precluded full voir dire"); see also Miss. R. Civ. P. 69.025 (requiring counsel to search a prospective juror's litigation history in the court's database and raise nondisclosure issues prior to empanelling the juror, with failure to do so waiving the right to seek relief based upon nondisclosure).

and not being selected. Data shows that jurors who report to the courthouse but are summarily dismissed harbor negative emotions about the process.⁵⁹

A. *Legal Foundation*

There is much legal support for both general and specific jury questionnaires. For example, Missouri local rules require that prospective jurors complete questionnaires through the mail, and furthermore, that attorneys have access to the answers well before voir dire.⁶⁰ Similarly, in the U.S. District Court for the Northern District of Ohio, attorneys are provided jurors' questionnaires explicitly "for the limited purpose of assisting their preparation for voir dire."⁶¹ A number of districts within states similarly provide rules governing the use of juror questionnaires, including districts in Kentucky, Indiana, and Wisconsin.⁶²

In all of the above courts, the lawyers have access to the names of jurors and are free to conduct extensive Internet research on them in advance of voir dire. The only restriction—common among all jurisdictions sharing juror questionnaires with attorneys—is that the parties keep the jurors' answers confidential. That is, the jurors' answers may not be used, copied, or otherwise disclosed without the written consent of a specified judicial actor.⁶³ Yet, with that said, a number of state courts are beginning to conclude that questionnaires are presumptively public documents, releasing them after balancing the public's interests in judicial transparency with the jurors' interest in privacy.⁶⁴

One recent order in the Northern District to California reviewed in depth the issue of jury questionnaires. There, Judge William Aslup recited the typical reasons for questionnaires: They save time, allow for more accurate answers, allow venire members to disclose embarrassing information in writing rather than open court, and to avoid comments prejudicial to one party or another from being blurted out during voir dire. But in rejecting the parties' request, he noted his suspicion that the party's questionnaire was actually designed to lengthen the jury selection process, thereby

⁵⁹ See, e.g., Shari Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in Robert E. Litan, VERDICT: ASSESSING THE CIVIL JURY SYSTEM 286 (1993).

⁶⁰ See MO. R. 43, CIR R. 52.

⁶¹ See OH. R. USDC ND LR 47.2.

⁶² KY. R. CHRISTIAN CIR. CT. R. 15; IN. ST. WAYNE CR. R. 011; WIS. R. APP. P. L. WALWORTH 16.

⁶³ See e.g., CA. ST. CIVIL R. 3.1548; IN ST. WAYNE CR. R. 011; KS. R. 11 DIST, R. 6; KY. R. CHRISTIAN CIR. CT. R. 15; MO. R. 43, CIR R. 52; WIS. R. APP. P. L. WALWORTH 16.

⁶⁴ See Reporters Committee for Freedom of the Press, *Secret Justice: Access to Juror Questionnaires* 3–5 (Spring 2011).

allowing jury consultants extra time to conduct extended Internet investigations on the venire prior to the oral voir dire procedure. He also noted that assuming such Internet searches are permitted, they create an above average risk that the loser in the case will seek to impeach the verdict by claiming a jury member answered falsely during the voir dire.⁶⁵ Accordingly, the case law is developing in ways that might demonstrate a shift away from long complex forms and toward more basic questionnaires.

B. Empirical Data

The American Bar Association's 2008 Seventh Circuit Project found that seventy-eight percent (78%) of judges and forty-seven percent (47%) of attorneys believed the use of juror selection questionnaires did not affect the fairness of the trial process. A majority of the judges and attorneys believed using jury selection questionnaires increased the efficiency of the trial process.⁶⁶ In most cases, the court provided questionnaires to prospective jurors on the day of jury selection; however, in lengthy, complex, or high-publicity cases, a more detailed questionnaire was mailed to prospective jurors in advance of trial to permit review of the answers before the day of jury selection.⁶⁷ Unfortunately, the study fails to address the concerns regarding research of jurors' online and social media presence before exercising their strikes.

According to a 2015 survey of state and federal courts, federal courts used general questionnaires in thirty-two percent (32%) of cases that went to trial, and state courts used questionnaires in twenty-six percent (26%) of such cases. Case-specific questionnaires were used in nineteen percent (19%) of federal court cases and nine percent (9%) of state court cases.⁶⁸

Many jurisdictions, administer general juror questionnaires over the Internet using what is known as the "eJuror" system. Other courts use a similar platform known as "I-Jury Online." These electronic systems allow jurors to respond to their summons as well as complete preliminary qualification questionnaires. The questionnaires focus on demographic data pertaining to reasons a person might be unqualified to serve on a jury, such as age, citizenship, medical issues, or financial hardship. This keeps clearly unqualified jurors from needing to report to the courthouse. In the U.S. District Court of Nevada, for example, it works as follows: Potential jurors are required to complete and submit the questionnaire within ten days of

⁶⁵ See *Oracle America, Inc. v. Google Inc.*, Case 3:10-cv-03561-WHA (N.D.CA. March 1, 2016).

⁶⁶ Seventh Circuit Jury Project Report, *supra* note 2, at 37–38.

⁶⁷ *Id.*

⁶⁸ Hannaford-Agor, *supra* note at 4–5 (2015).

receiving their original summons.⁶⁹ The district court then reviews the answers and dismisses those unqualified persons, before summoning randomly from the remaining group of qualified persons. The district court never provides attorneys access to this demographic information. However, in other jurisdictions, such as Missouri, the generic questionnaires are administered through the mail and the answers must be “available for inspection by the attorneys no later than 48 hours in advance of the scheduled commencement of the trial.”⁷⁰ This provides plenty of time for attorneys to conduct online research of the jurors.

Following these preliminary questions, judges on a case-by-case basis may decide to administer supplemental questionnaires related to the specifics of the case like the ones we recommend. These questionnaires are designed to elicit information regarding the jurors’ background characteristics, experiences, activities, opinions, and evaluations. This information can—and is in fact anticipated to—help attorneys better employ peremptory challenges. Specific questionnaires are usually used in high profile or complex cases, as they are largely unfeasible in routine cases.⁷¹ Indeed, our review identifies no jurisdiction that employs supplemental questionnaires as a matter of course in all cases. This does not mean, however, that the benefits are nonexistent.

V. OPENING STATEMENTS BEFORE VOIR DIRE

The next proposed innovation is the use of opening statements, most often mini-openings, before voir dire begins. In courts that leave voir dire entirely up to the judge, or limit the lawyers to posing open-ended questions, mini-openings allow counsel to present the key aspects of the case to potential jurors before the voir dire process starts. The goal is to help potential jurors understand the relevance of questioning and provide more complete answers to voir dire questions. It may also spark jurors’ interest in the case, such that a juror reluctant to serve may be open about the prospect. Moreover, studies show that those jurors who are dismissed without any explanation feel as if their time has been wasted.⁷² By providing these jurors with a small taste of what the dispute concerns, they may not harbor such negative emotions toward the judicial process following dismissal. A few judges require lawyers to give complete

⁶⁹ *Juror Information*, United States District Court for the District of Nevada, <http://www.nvd.uscourts.gov/JuryInformationVegas.aspx>.

⁷⁰ See MO R. 43, CIR R. 52 (“Selection of Juries-Questionnaires”).

⁷¹ Council for Court Excellence, *Jury Service Revisited: Upgrades for the 21st Century*, 49 (2014), http://www.courtexcellence.org/uploads/publications/CCE_Jury_Report_Web_Final.pdf.

⁷² See Diamond, *supra* note 55, at 298.

opening statements before voir dire, in lieu of openings after the jury is sworn and seated.

A. Legal Foundation

Some states have civil procedure laws that already provide for mini-openings before voir dire. For example, California Code of Civil Procedure §222.5 states that the “trial judge should allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process.” Arizona provides for something similar.⁷³ The Federal Rules do not discuss the practice and some states are similarly silent.⁷⁴ In these jurisdictions, it falls on the attorneys to propose, and for the judge to accept, the use of mini-openings. Conversely, some states have civil procedure laws that suggest mini-openings are not allowed. Oklahoma, for example, provides that “Counsel shall scrupulously guard against injecting any argument in their voir dire examination.”⁷⁵

B. Empirical Data

The New York State Jury Trial Project in 2005 tested mini-openings in six (6) civil trials and sixteen (16) criminal trials. Seventy-seven percent (77%) of judges⁷⁶ and attorneys in civil trials believed mini-openings aided juror understanding of why they were being questioned. Of the twenty-one (21) attorneys who participated in trials where mini-openings were used, eighty-one percent (81%) approved of the use of these openings.⁷⁷ If the 186 jurors who heard mini-openings before voir dire, ninety-one percent (91%) said that they were very helpful for understanding what the case was about, while only eighty-two percent (82%) of jurors in typical introductions thought those introductions were helpful.⁷⁸

The Civil Jury Project/ASTC 2016 Attorney Survey found that only about a quarter of respondents (25.7%) had experience with mini-opening statements. Of those with experience, over sixty-six percent (66.5%) recommended them, while only just over twelve percent (12.6%) did not.⁷⁹ Those against the innovations claimed that mini-openings pre-disposed the jury and encouraged jurors to self-select.⁸⁰ It is difficult to believe, however, that short openings providing jurors but a taste of what is to come

⁷³ See ARIZ. R. CIV. P. 18.5(c), 18.6(c), 47(b), and 51(a)

⁷⁴ FED. R. CIV. P. 47.

⁷⁵ OKLA. DIST. CT. R. 6.

⁷⁶ New York State Jury Trial Project, *supra* note 37, at 23.

⁷⁷ *Id.* at 24.

⁷⁸ *Id.* at 25.

⁷⁹ CJP/ASTC Attorney Survey, *supra* note 15, at 36.

⁸⁰ *Id.*

could so entrench the venire as to affect the outcome of the case. Moreover, it may in fact allow jurors to better explain why they may have difficulty being impartial in a given case.

VI. INTERIM ARGUMENTS BY COUNSEL

Interim arguments are arguments that counsel make to the jury between opening statements and closing arguments. Counsel are generally given an overall time limit for interim arguments and can choose how to allocate that time. Interim arguments are encouraged by Standard 13(G) of the American Bar Association's American Jury Project Principles and Standards, which provides that "[p]arties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues including: Alteration of the sequencing of expert witness testimony, minor interim openings and closings, and the use of computer simulations, deposition summaries and other aids."⁸¹

Allowing counsel to make statements or arguments to the jury during the course of a trial would allow the court to rein in counsel who use their questions of witnesses to make arguments to the jury. The only possible objection is that it might increase the time of the trial. But, in fact, if the lawyers could explain to the jury why they are calling a witness or what the witness has just demonstrated, the lawyers may also feel less need to repeat things—which remains the most common objection that jurors have to the way lawyers try cases.

A. Legal Foundation

The advisory notes to Rule 51(b)(1) of the Federal Rules of Civil Procedure reference the use of interim arguments: "The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments."⁸² And interim arguments, or "summations," in some form have been permitted in lengthy and/or complex civil trials. The Second Circuit has "noted repeatedly that a district court can greatly assist a jury in comprehending complex evidence through the use of intelligent management devices," and that "such management devices include ... interim explanations by the judge on issues of law and fact and on the limited use of evidence, [and] interim addresses to the jury by counsel."⁸³ Other districts have also recognized the value of

⁸¹ Am. Bar Ass'n, Principles for Juries & Jury Trials § IV (Aug. 2005).

⁸² Fed. R. Civ. P. 51(b)(1).

⁸³ See *Consorti v. Armstrong World Industries, Inc.*, 72 F.3d 1003, 1008 (2d Cir. 1995), judgment vacated on other grounds, 518 U.S. 1031 (1996); *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 836 (2d Cir. 1992) (as part of

summations when the case involves complex subject matter, multiple parties, or lengthy presentation of evidence—such as asbestos litigation.⁸⁴

Numerous legal scholars have noted, too, the helpfulness of interim statements in complex and lengthy civil trials.⁸⁵ And the Federal Judicial Center’s Manual for Complex Litigation recognizes the technique of having “counsel from time to time ... summarize the evidence that has been presented or outline forthcoming evidence.”⁸⁶ The manual clarifies interim arguments should not be used to argue the case per se; rather, their purpose is to facilitate the jury’s understanding and recollection of evidence presented.⁸⁷

B. Empirical Data

Interim arguments are uncommon. Only one percent (1%) of civil trials included interim summaries of evidence.⁸⁸ An ongoing questionnaire circulated by the NYU Civil Jury Project, however, noted that nineteen percent (19%) of judges have permitted counsel to make interim arguments during trial.⁸⁹ It was one of the least commonly practice jury trial

handling the consolidated trial of 79 asbestos-related personal injury and wrongful death actions “to ensure that the jurors could assimilate the vast amounts of information necessary to assess the claims,” the district court employed an interim summation procedure).

⁸⁴ See e.g., *In re New York Asbestos Litigation*, 149 F.R.D. 490, 499 (S.D.N.Y. 1993) (interim summations “considered and adopted where appropriate during the consolidated trial” of tort actions based on asbestos exposure); cf. *Baez-Cruz v. Municipality of Dorado*, 780 F. Supp. 2d 149, 151 (D.P.R. 2011) (stating that in a Title VII discrimination action where there was to be a month-long hiatus in the presentation of evidence and the jury requested some mechanism to refresh their recollection of the testimony upon their return to court, “[i]nterim summations would have been considered but the case [was] not lengthy and complex, and only plaintiffs [had] presented witnesses.”).

⁸⁵ See, e.g., Tom M. Dees, III, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 S.M.U. L. REV. 1755, 1778–80 (2001) (summarizing arguments for and against interim summations and citing state task forces advocating use of said); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 537 (1997) (noting that interim summations are particularly desirable in lengthy or complex cases); Robert M. Parker, *Streamlining Complex Cases*, 10 REV. LITIG. 547, 553–54 (1991) (discussing the many advantages of interim argument in many week or month-long trials).

⁸⁶ Federal Judicial Center, *MANUAL FOR COMPLEX LITIGATION* § 22.34 (3d ed. 1995).

⁸⁷ *Id.*

⁸⁸ See Hannaford-Agor, *supra* note 34, at 7.

⁸⁹ See CJP Questionnaire, *supra* note 14.

innovation identified by the Civil Jury Project/ASTC, with just over nine percent (9.1%) of respondents having any experience with them.⁹⁰

Despite their scarcity, some empirical data has shown that interim arguments can be very effective litigation tools. The American Bar Association's Seventh Circuit Project in 2008 found that in seventeen (17) trials, over eighty percent (80%) of the jurors reported that interim arguments of counsel were helpful to aid juror comprehension of the case.⁹¹ Over eighty-five percent (85%) of participating judges thought the use of interim arguments increased the jurors' understanding and said they would permit such arguments during trials in the future. And over ninety percent (90%) of jurors thought that interim arguments were helpful when used to introduce or summarize evidence.

VII. BACK-TO-BACK EXPERTS

One objection to jury trials is that lay jurors are incapable of understanding expert testimony on complex issues, and that they are often persuaded by style more than substance. This innovation allows experts to testify sequentially based on the subjects covered by their testimony. Alternatively, it allows concurrent expert testimony, wherein both experts testify and answer questions at the same time thereby engaging in a dialogue. The goal is to aid juror comprehension by allowing jurors to more easily compare the testimonies of "battling" experts, as compared with the current practice wherein experts may testify days or even weeks apart. It may also be helpful for the judge to explain why the experts are testifying back-to-back, in part to alert jurors that the subject of the experts' testimony is likely to be sharply contested by the parties.⁹²

A. Legal Foundation

The discussion of this technique is relatively new, and thus there is not a robust body of court decisions or rules of procedure that specifically mention back-to-back expert testimony. However, allowing experts to testify concurrently is one of the methods suggested in Wigmore's Treatise on Evidence to improve the use of expert testimony.⁹³ Further, Federal Rule of Evidence Rule 611 gives trial courts "control over the mode and order of examining witnesses and presenting evidence," which suggests

⁹⁰ CJP/ASTC Attorney Survey, *supra* note 15, at 47.

⁹¹ Seventh Circuit Jury Project Report, *supra* note 2, at 37–38.

⁹² Shari Seidman Diamond, *How Jurors Deal with Expert Testimony and How Judges Can Help*, 16 J.L. & POL'Y 47, 65 (2007).

⁹³ 3 THE NEW WIGMORE: A TREATISE ON EVIDENCE: Expert Evidence § 11.5 (Aspen Publishers 2012).

that this technique is not precluded in federal courts.⁹⁴ The alternative, which undermines the adversary system, is for the court to appoint a neutral expert. And nothing in our review suggests laws or rules in any jurisdiction that would prohibit some form of this practice.

B. Empirical Data

Empirical studies of the use of these forms of expert testimony in the United States are not available. Concurrent expert testimony is common in Australia, however. There, experts both testify and answer questions at the same time—known as Australian Hot Tubbing. This is not used during jury trials.⁹⁵ The United States experience is limited and there is no nationwide survey data available about using back-to-back or concurrent expert testimony. There are, however, limited examples of concurrent expert testimony, including a 2004 case in the District of Massachusetts and a 2005 Court of Federal Claims case.⁹⁶

The Civil Jury Project/ASTC Attorney Survey found that just over twenty-one percent (21.7%) of respondents had experience with back-to-back experts.⁹⁷ Because this practice is so rare in front of juries, and is comparatively common in bench trials, it is unclear whether these attorneys ever used this in front of a jury. Nevertheless, of those with experience, just under forty percent (39.3%) recommended the practice, whereas eleven percent (11%) opposed it.⁹⁸ Those who responded negatively opposed the practice on grounds that it was unfair to plaintiffs because it allowed the defense to present their case throughout the proceedings. More empirical data is necessary to know whether this is true, as well as to know whether the benefits to juror comprehension outweigh any such detriments.

VIII. JUROR DISCUSSION OF EVIDENCE BEFORE DELIBERATION

While jurors are traditionally instructed not to discuss evidence before deliberation, some courts have begun to permit juror discussion of evidence before deliberation in order to motivate juror involvement in the trial and

⁹⁴ Fed. R. Evid. 611.

⁹⁵ See e.g., Megan A. Yarnall, Comment, *Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary*, 88 OR. L. REV. 311, 312 (2009); *Room in American Courts for an Australian Hot Tub?*, Jones Day Publications (Apr. 2013), http://www.jonesday.com/room_in_american_courts/#_edn1.

⁹⁶ *Black Political Task Force v. Galvin*, 300 F.Supp.2d 291 (D. Mass. 2004); Transcript of Record, *Anchor v. United States*, No. 95-39C (July 18–19, 2005) (cited in Lisa C. Wood, *Experts in the Tube*, 21 Antitrust 95, 95 (2006)).

⁹⁷ CJP/ASTC Survey Report, *supra* note 15, at 53.

⁹⁸ *Id.*

ensure more accurate fact-finding.⁹⁹ Jurors who discuss evidence during the trial may recall the evidence more easily when deliberations begin.¹⁰⁰ Allowing jurors to discuss the evidence when they are together in the jury room also makes for a more rewarding juror experience: Jurors do not view time spent meaningfully in the jury room as wasted.

A. Legal Foundation

A few state rules explicitly permit juror discussion of evidence before deliberation. Arizona has been at the forefront of this development, with a rule requiring that “jurors shall be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.”¹⁰¹ Colorado, too, allows jurors to “discuss the evidence among themselves in the jury room when all jurors are present.”¹⁰² And North Dakota grants courts discretion in civil cases to “allow the jury to engage in predeliberation discussion.”¹⁰³ Some states that have not approved predeliberation discussion have also not explicitly prohibited the practice.¹⁰⁴

B. Empirical Data

The prevalence of this practice depends heavily on jurisdiction. An ongoing questionnaire circulated by the NYU Civil Jury Project noted that fourteen percent (14%) of judges have permitted jurors to discuss evidence before final deliberations.¹⁰⁵ In Arizona, however, where the practice is specifically sanctioned, it occurs often. The Arizona Jury Project found that eighty-nine percent (89%) of juries that were instructed that they could discuss evidence in the case before deliberation chose to do so.¹⁰⁶ The Civil

⁹⁹ B. Michael Dann, “Learning Lessons” and “Speaking Rights”: Creating Educated and Democratic Juries, 68 IND. L.J. 1229, 1240 (1993).

¹⁰⁰ *Id.*

¹⁰¹ See ARIZ. R. CIV. P. 39(f).

¹⁰² COLO. R. CIV. P. 47(a)(5).

¹⁰³ N.D. R. CT. 6.11.

¹⁰⁴ See *Steele v. Atlanta Maternal–Fetal Medicine*, 610 S.E.2d 546, 552 (2005) (“Although Georgia is not one of the states that have codified the prohibition of pre-deliberation discussions, the Supreme Court of Georgia has found it ‘clearly erroneous’ for jurors to violate the trial court’s instructions not to discuss the case before final deliberations.”).

¹⁰⁵ See CJP Questionnaire, *supra* note 14.

¹⁰⁶ See Shari Diamond et. al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003); Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges and Jurors*, 32 U. MICH. J.L. REFORM 349 (1999).

Jury Project/ASTC Attorney Survey were familiar with the practice, with just over eight percent (8.6%) using the practice.¹⁰⁷ It was relatively unpopular when compared to the other innovations that were tested, with over ten percent (10.4%) of respondents against the practice.¹⁰⁸

Their opposition was based on a fear that early deliberation would result in camp formation and prevent the jury from fully considering all of the evidence. Empirical studies undermine these concerns. Data shows that jurors who have been allowed to engage in interim discussions, but have also been instructed not to make any final decisions until final deliberations, in fact follow this instruction.¹⁰⁹ And there appears to be no difference between those jurors allowed to discuss and those prohibited from discussing evidence as to when during the course of the trial they started to solidify their decision of who should win the case.¹¹⁰

CONCLUSION

The trial innovations discussed above can help make civil jury trials better for everyone. They can help to keep trials moving, and therefore allow for a quicker and cheaper public dispute resolution for the litigants. Judges, too, will be happy with the efficiency increases, which may allow them to better manage their dockets. The innovations allow jurors to be more engaged in the trial and, therefore, more accurate in their deliberation. They can also make sure that jurors' time is not wasted, making the experience less painful and hopefully making high-qualified citizens more willing to participate. To be sure, if our judicial system is to continue to develop and better itself, it is imperative that the Texas bench and bar experiment with these types of proposals. More empirical data can help us figure out what works and what does not work. Together, we can make civil jury trials work.

¹⁰⁷ CJP/ASTC Survey Report, *supra* note 15, at 43.

¹⁰⁸ *Id.*

¹⁰⁹ Thomas G. Munsterman, *et al.*, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 *LAW & HUMAN BEHAV.* 359, 370 (2000).

¹¹⁰ *Id.* at 378.