AIRING OUT JURY TRIALS

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Jury trials, both civil and criminal, are seriously on the decline. Whether you consider this a positive or a negative development, it is a fact. I would like to think that, because you are here, you are not altogether thrilled about this development. Some of the commonly held explanations on the civil side are: 1) it is too expensive to go to trial; 2) it takes too long to get to trial; 3) arbitration clauses in consumer contracts foreclose the possibility of trials; 4) alternative dispute resolution is increasingly favored by businesses; and 5) the uncertainty of a trial outcome. To some extent, these factors are interrelated, yet all are also capable of remedy with some creative thinking and a willingness to try some different approaches.[2]

From my own perspective, most problems come down to one issue – trust among lawyers and their clients. The very finest lawyers I have encountered, both in practice and while on the bench, those lawyers who achieve exceptional results for their clients over the years, are those who are as ethical as the day is long, those whose word is their bond, those who recognize that they have a duty to their clients which does not include hiding evidence, burying opponents in requests and production, those who take the facts as they are and do not posture or take liberties with the truth. The scourge of our system are those who embrace the role as someone who is free to do anything in asserting a client's cause. That may work a few times, but it is at the expense of a system the lawyer has sworn to uphold. It is not the mark of a great lawyer to be disbarred for dishonesty with a court, opposing counsel, or a client.

But what about the courts? What role do judges have in this process? The Duke

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[1]Brian Wood, Michael Lahey, and Krystle Dalke contributed significantly to these materials, and I wish to acknowledge and thank them for their friendship and assistance.

[2]I have talked about the matters addressed in these materials from time-to-time, most recently at a conference in December 2017. I also have updated the materials over the years, but they have been available to lawyers attending various CLE programs for nearly fifteen years.

Conference in 2008 resulted in recommendations that judges assert themselves more aggressively in pretrial management of cases. I agree with that recommendation, but only to the extent it is absolutely necessary. Most judges know numerous lawyers who need little more than a trial date, and who will show up ready to try a tight case. We also know lawyers we could provide direction to every day who will still have difficulty getting a case ready for trial. Having actually tried dozens of cases, both civil and criminal, before taking the bench, I prefer lawyers who go about their business, who work out problems with the other side, and do not waste time and client money by using the courts as a cover for a lack of self-confidence or as an excuse for why excesses are curtailed. But that is a topic for another day.

The information set out in these materials is for the purpose of thinking through civil trials and what we can do to bring them back from the downward spiral of the past several decades. Steve Susman, a brilliant and hugely successful trial lawyer who founded and funded the Civil Jury Project at New York University Law School, and who many of you have heard over the past ten months in Kansas City and Wichita, is working tirelessly in an effort to bring back the civil jury trial.

He points out that judges (at least federal judges) have broad authority to implement procedures to make cases more accessible and understandable to juries. He also makes the point that it really is up to judges to put these procedures to the test, as with few exceptions, lawyers are reluctant to voluntarily agree to to changes to traditional trial order and practice. Virtually all of these changes have been put into practice somewhere, and some are mandatory in some jurisdictions. Those that use them are enthusiastic about the impact on jury comprehension, but they are not catching on of their own accord, so I'll push a bit today and encourage you to raise these matters with judges in your own cases.

These materials begin with an overview of the law governing trials, and then go into some changes I have made in my trial procedures over the years. I welcome your thoughts and principled feedback on any or all of these matters.

A GENERAL OVERVIEW OF THE LAW OF TRIALS

The General Rule

Conduct of the trial is generally left to the discretion of the trial court.

> The trial court has wide discretion in stating facts and commenting on the evidence. It is within the trial court's power to direct the trial in a manner reasonably thought to bring about a just result and in pursuit of that goal nonprejudicial comments may be made from time to time. Conduct of trial proceedings will not be disturbed on appeal unless it affirmatively appears

from the record that the trial court abused its discretion. *Oklahoma Federated Gold & Numismatics, Inc. v. Blodgett*, 24 F.3d 136, 140 (10th Cir.1994) (citations and quotations omitted).

A. Jury Selection

The Federal Rules of Criminal Procedure give no express guidance as to the manner in which peremptory challenges should be exercised in a criminal trial, leaving this and most other jury selection procedures to the discretion of the trial judge. *See United States v. Harris*, 542 F.2d 1283, 1295 (7th Cir.1976). "[P]reemptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial." i, 505 U.S. 42, 112 S.Ct. 2348, 2358 (1992); *see also Frazier v. United States*, 335 U.S. 497, 505 n. 11 (1948) ("right [to preemptory challenges] is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guaranties of an impartial jury and a fair trial") (internal quotations and citations omitted).

The Tenth Circuit has observed:

> The right to a specific number of peremptory challenges and the manner of their exercise is not constitutionally secured. *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965). Nevertheless, the peremptory challenge has been characterized as "one of the most important rights secured to the accused." *Id*. at 219, 85 S.Ct. at 835; quoting, *Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894). "Any system for the impanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer v. United States*, *supra*, at 408, 14 S.Ct. at 414. A "denial or impairment of the right is reversible error without a showing of prejudice." *Swain v. Alabama, supra*, 380 U.S. at 219, 85 S.Ct. at 835. Within the confines of these strictures, however, district courts have broad discretion in fashioning the method of exercising peremptory challenges, and the jury selection procedure in general.

United States v. Morris, 623 F.2d 145, 151 (10th Cir. 1980) (additional citations omitted).

Under Fed.R.Crim.Pr. 24(b)(2), in an ordinary felony case, the government has 6 preemptory challenges and the defendants "jointly have 10." The Rule provides that the court "may allow additional preemptory challenges to multiple defendants."

How these challenges are exercised is committed to the discretion of the court. *See United States v. Bryant*, 671 F.2d 450, 455 (11th Cir.1982). Under this standard, the Eleventh

Circuit upheld "a rotating method for the exercise of preemptory challenges," even though it effectively resulted in fewer than ten challenges for defendants, and gave the government the last strike. *United States v. Romero*, 780 F.2d 981, 983-84 (11th Cir. 1986) (explaining "novel procedure" of rotating challenges, and observing Rule 24 "does not mandate that a defendant be allowed to exercise the final peremptory challenge"). *See also United States v. Marcy*, 814 F.Supp. 673, 678 (N.D. Ill. 1982) (court may require defendants to pool their preemptory challenges).

With respect to voir dire, the procedure is again discretionary with the court. "The conduct of the voir dire is entrusted to the broad discretion of the trial judge ... and an appellate court will not interfere with the manner in which it has been conducted absent a clear abuse of discretion." *United States v. Barton*, 647 F.2d 224, 230 (2d Cir.1981). *See Rosales-Lopez v. United States*, 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) ("a trial judge has broad discretion whether to pose a defendant's requested voir dire questions"). "Because the obligation to empanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire." *Rosales-Lopez*, 451 U.S. at 189, 101 S.Ct. at 1634.

B. Opening Statements

There are numerous decisions holding, that, as a general matter, the trial court has broad discretion regarding the scope and manner of opening statements. For example, in *United States v. Rivera*, 778 F.2d 591, 593 (10th Cir.), the Tenth Circuit wrote:

> Regulation of the scope, extent and timing of defense counsel's opening statement rests within the district court's sound discretion. *United States v. Freeman*, 514 F.2d 1184, 1192 (10th Cir.1975). "The function of the defendant's opening statement is to enable him to inform the court and jury what he expects to prove, and the trial court may properly exclude irrelevant facts." *Id.* at 1192. The trial judge has an obligation to keep the trial on track and to prevent unfair appeals to sympathy or prejudice.

See also United States v. Salovitz, 701 F.2d 17, 21 (2d Cir. 1983) ("the making and timing of opening statements can be left constitutionally to the informed discretion of the trial judge," and indeed there is no constitutional right to give an opening statement); *United States v. Hershenow*, 680 F.2d 847, 858 (1st Cir.1982) (timing of defendant's opening statement within discretion of trial court).

"[A] defendant's unfettered right to make an opening statement, unlike his right to make a closing argument, is not one of the 'traditions of the adversary factfinding process that has been constitutionalized by the Sixth and Fourteenth Amendments.'" *United States*

v. Salovitz, 701 F.2d 17, 19 (2d Cir. 1983)(quoting *Herring v. New York* (1975) 422 U.S. 853, 857).

Most cases discussing the "timing" of opening statements mean whether the defendant's statement is given before the government's evidence or afterwards, rather than prior to voir dire. One of the few cases directly addressing the issue is *United States v. Goode*, 814 F.2d 1353 (9th Cir. 1987), where the Ninth Circuit rejected defendant's argument that, by permitting the government to give an opening statement before voir dire, the trial court had effectively forced his counsel to do the same.

Goode contended that counsel's statement would have been more effective if given after the information obtained by voir dire. The Ninth Circuit held that defendant failed to show that the procedure actually resulted in any prejudice. It also observed that, "[i]n fact, familiarizing prospective jurors with a case before voir dire could benefit a defendant by enabling prospective jurors to assess knowledgeably whether they are fit to sit as fair and impartial jurors in the case at hand." 814 F.2d at 1355. The court also observed that "If a district court wished to achieve this purpose and also to accord the opening statement its usual role in the trial, the court could require preliminary opening statements before voir dire and then supplementary opening statements once the jury has been impaneled." *Id.* at 1355 n. 1. *See also In re Yagman*, 796 F.2d 1165, 1171 (9th Cir. 1986)(holding that district court in a civil action did not abuse its discretion when it ordered the parties to make their opening statements to all of the prospective jurors before trial).

There is favorable comment on the practice in legal commentary. *See* Susan McPherson & Elissa Krauss, "Tools to Keep Jurors Engaged," 44 TRIAL, Mar. 2008, at 32, 33 (noting the benefits of allowing lawyers to orient prospective jurors through mini-opening statements before voir dire); Fred H. Cate, "Improving Communications in the Courtroom Communicating with Juries," 68 IND. L.J. 1101 (Fall, 1993) (reporting results of seminar panel in which participants recommend the practice).

Some states have adopted such an approach. Arizona has been at the forefront of many changes in trial practice, and it recognizes modifications to the way opening statements are approached are part of that process. However, Arizona does not appear to contemplate having *full* opening statements before voir dire.

16 A.R.S. Rule 47(B)(2) provides:

> The court shall conduct a thorough oral examination of prospective jurors. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to

> the purpose of such examination. In addition, the court may terminate or limit voir dire on grounds of abuse. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination. **The parties may, with the court's consent, present brief opening statements to the entire jury panel, prior to voir dire. On its own motion the court may require counsel to do so. Following such statements, if any, the court shall conduct a thorough examination of prospective jurors.**

(Emphasis added).

That the "brief opening statements" are not full openings is further suggested by 16 A.R.S. Rule 39(b), which provides a chance for the parties to make their "statement of the case" after voir dire. The rule provides:

> The trial by a jury shall proceed in the following order, unless the court for good cause stated in the record, otherwise directs:
>
> (1) Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions of witnesses or of the court as set forth in Rule 39(b)(10), and the elementary legal principles that will govern the proceeding.
>
> (2) The plaintiff or the plaintiff's counsel may read the complaint to the jury and make a statement of the case.
>
> (3) The defendant or the defendant's counsel may read the answer and may make a statement of the case to the jury, but may defer making such statement until after the close of the evidence on behalf of the plaintiff.

The Arizona Rules of Criminal Procedure follow a similar approach. *Cf.* 17 A.R.S. Rules Crim.Proc., Rule 18.5(c) (permitting "brief opening statements" prior to voir dire) *and* 17 A.R.S. Rule 19.1 (providing for the order of trial following voir dire as including the opportunity for the prosecution and the defendant to each make an "opening statement").

California offers a similar approach. In order to assist in efficient voir dire, the civil procedure code provides 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." C.C.P. § 222.5. See Cal. Prac. Guide–Civil Trials and Evid., Ch. 6A (contrasting provision for standard opening statements under C.C.P. § 607, and emphasizing that statements in aid of voir dire under § 222.5 should be brief).

C. Preinstructions

Preinstructing consists essentially of giving the jury instructions on the law and how it should be applied at a point early in the case. For my purposes, it is giving elements instructions for claims and defenses, as well as other instructions regarding what evidence is and how it should be weighed, burden of proof, etc. immediately following jury selection and immediately before the parties begin presenting evidence. A number of decisions hold that issuing instructions prior to the submission of evidence is not error. *See United States v. Ruppel*, 666 F.2d 261, 274 (5th Cir. Unit A 1982) (approving trial judge's decision to follow the "better practice of instructing the jury on the fundamentals of a criminal trial prior to taking any evidence"); *Jerrold Elecs. Corp. v. Wescoast Broad. Co.*, 341 F.2d 653, 665 (9th Cir. 1965) (holding that preinstructions were not prejudicial when given both before and after argument).

The federal rules provide for the procedure — Federal Rule of Criminal Procedure 30 and Federal Rule of Civil Procedure 51 authorize preinstruction of the jury. Federal Rule of Criminal Procedure 30 provides:

> At 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 court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties.... The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Similarly, in civil trials, Federal Rule of Civil Procedure 51 provides:

> At 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 court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection

out of the hearing of the jury.

D. Juror Predeliberation Discussions

While federal caselaw directly supporting the proposition that pre-deliberation discussions of the evidence is a matter within the discretion of the trial court is limited, there are some discussions of the subject in other materials. For example, *see* William W. Schwarzer, "Reforming Jury Trials," 1990 U. CHI. LEGAL F. 119, 142-43:

> Discussion among jurors may reveal areas of misunderstanding or confusion that jurors could then clarify by questioning the witnesses or the judge. It may also help ease the tension that jurors experience sitting on a long and complicated case. That such discussions may influence the views of some jurors before the trial is over is not objectionable, since any tentative opinion so formed must still stand the test of full debate among the entire jury during the deliberations. In any event, the lonely juror who, unable to talk to the others, remains confused during the trial is not likely to be an effective participant in the verdict deliberations.
>
> Permitting jurors to talk to each other about the case during the trial may have other positive effects. There is evidence that the opinions jurors form early in the trial often become their decisions later. It is possible that a juror may be less prone to form and hold to an early opinion if he or she hears that others view the evidence differently. Discussions with other jurors may suggest to a juror different perspectives and interpretations that will lead to more thoughtful and open-minded consideration of the case. Although the benefits of relaxing the traditional rule are not provable, the rule's disadvantages seem sufficiently clear to justify jettisoning this unnatural and burdensome restriction.

Id. at 142-43 (citation omitted). *See also* David A. Anderson, Let Jurors Talk: Authorizing Pre–Deliberation Discussion of the Evidence During Trial, 174 MIL. L.REV. 92 (2002)); Hon. B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated & Democratic Juries, 68 IND. L.J. 1229, 1264–67 (1993).

A Hofstra Law Review has recommended the practice, while admitting that the case law on the subject is "divided." The article cites two federal cases referencing the use of pre-deliberation juror discussions: *United States v. Lemus*, 542 F.2d 222 (4th Cir. 1976) and *Meggs v. Fair*, 621 F.2d 460 (1st Cir. 1980).

In *Lemus*, the trial court, over the defendant's objection, instructed the jury that discussion among its members was entirely proper. After acknowledging that such an instruction "if given in the abstract" would clearly jeopardize the defendant's right to a fair trial, the Fourth Circuit found that the context within which this instruction was given rendered the error harmless. According to the court, the instruction was accompanied by a lengthy admonition to the jury, in which the trial judge advanced all of the reasons why jurors should not discuss the evidence and instructed them to refrain from reaching any conclusions until all the evidence was submitted and an appropriate charge given. The court concluded that this admonition as to open-mindedness minimized any danger to the defendant. 542 F.2d at 224.

In *Meggs v. Fair*, 621 F.2d 460 (1st Cir. 1980), the court noted that any danger to the defendant was minimized by an admonition that the jurors "not to commit themselves until 'you hear all the evidence and hear arguments.'" *Id.* at 463-64. However, the court ultimately refused to decide the question. The court stated that, because the defendant failed to raised a timely objection at trial, "we decline to take a definitive stand on this delicate issue." *Id.*

Some courts have expressed support for the practice. In *Richards v. Berghuis*, No. 4:13-CV-13763, 2014 WL 3708844, at *5 (E.D. Mich. May 6, 2014), *report and recommendation adopted*, No. 13-13763, 2014 WL 3708978 (E.D. Mich. July 28, 2014), the court concluded that with careful instruction "that such discussions could only occur in the jury room with all jurors present, and with the clear understanding that such discussions were only preliminary—there is nothing inherently unfair or prejudicial in allowing predeliberation discussions of the evidence"). *See also People v. Richards*, 491 Mich. 855, 858, 809 N.W.2d 148, 150 (2012) (Young, C.J., concurring) (observing that "there is evidence that predeliberation discussions enhance a jury's ability to reach a fairer and just result"). *Cf.* 5 ABA BUS. & COM. LITIG. FED. CTS. § 46:19 n. 4 (4th ed.) (noting adoption of rules permitting predeliberation discussions in Arizona, Indiana, Michigan and North Dakota, and observing that "[t]he proverbial jury is still out on whether this reform will have a positive influence on juror comprehension"); Dennis J. Devine et al., Jury Decision Making, 7 PSYCHOL. PUB. POL'Y & L. 622, 668-669 (2001) (observing that in Arizona "jurors as well as judges generally felt that predeliberation discussion produced beneficial results" while "attorneys and litigants were somewhat less enthusiastic," and "its impact on jury verdicts is still unclear").

"What is crucial is not that jurors keep silent with each other about the case but that each juror keep an open mind until the case has been submitted to the jury." *Davis v. Woodford*, 384 F.3d 628, 653 (9th Cir.2004). As a result, a party complaining of predeliberation discussions must show how the practice deprived them of a fair trial. *Mahoney v. Diaz*, No. SACV 13-1082-GW JPR, 2014 WL 2985720, at *8–9 (C.D. Cal. July 1, 2014).

Some courts have expressed blanket opposition to the practice. The leading case, *Winebrenner v. United States*, 147 F.2d 322, 328 (8th Cir. 1945), observes:

> The jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by them, and neither have they heard the arguments of counsel. The crime here charged was not a common one with which the layman is more or less familiar, such as larceny or other well known common law crime, but it was a statutory crime more or less technical and intricate in its nature, with which the ordinary layman was wholly unfamiliar. For this additional reason the jury could not give intelligent consideration to the evidence without the assistance of the court's instructions.

E. Concurrent Presentation of Expert Testimony.

There is a widespread perception that using retained experts hampers the search for truth in jury trials as often as it helps. Critics refer to such experts as "hired guns" or worse. Lawyers acknowledge the fact of bias but may be reluctant to do anything about it. As trial lawyer Melvin Belli once reportedly said, "If I got myself an impartial witness, I'd think I was wasting my money." Adam Liptak, *Experts Hired to Shed Light Can Leave U.S. Courts in the Dark*, N.Y. Times, Aug. 12, 2008.

Bias is not the only perceived problem. The use of experts under current trial procedures can cause inordinate delay and expense, as well as produce confusion rather than making difficult topics easier for a jury to understand.

The perception that expert testimony is too influenced by bias has led some courts to experiment with different procedures. One method, known technically as "concurrent evidence" but better known as "hot-tubbing," was developed in Australia, where the practice was first put to widespread use. The hot-tubbing name (thankfully) is used only because the method seeks to present expert testimony in a more conversational and less adversarial manner. Australian courts have been experimenting with the practice for over a decade, with courts in England and elsewhere joining in. Megan A. Yarnall, *Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?*, 88 Or. L. Rev. 311, 312 (2009). It bears noting that federal courts in Australia and England have largely done away with civil juries, so the procedure has largely been confined to bench trials. As we might say, the jury is still out on how well the method would work in the American system.

Concurrent evidence or hot tubbing basically means that multiple experts jointly

present their testimony and field questions from the judge and attorneys in a single session. Procedures vary among courts and are still being developed. One method has opposing experts meet prior to trial. The experts confer and develop a list of matters upon which they agree and upon which they disagree. At trial, after the factual evidence has been presented, the experts are sworn in and sit together to testify. Each expert may be allowed to give a short summary of his or her position, followed by questions asked by the other expert(s) without the intervention of the court or counsel. The experts then summarize their positions in light of the questions. After that, the court may permit counsel to examine and cross-examine the experts in a more conventional manner, but with multiple experts present and answering questions. Yarnall, *supra*, 88 OR. L. REV. at 324 (citation omitted). *See also* Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72-WTR LAW & CONTEMP. PROBS. 159, 162-63 (2009); Steven Rares, *Using the 'Hot Tub': How Concurrent Expert Evidence Aids Understanding*, 12 Oct. 2013, http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20131012.

Advocates of hot-tubbing claim it has several benefits. They say it allows the issues to be narrowly focused by sifting out areas of agreement. They argue that presenting opinions contemporaneously helps a jury better compare them, as opposed to having the jury recall and evaluate opposing viewpoints that may occur separately over a span of days. The physical placement of two (or more) experts together may downplay their adversarial role and promote a more professional discussion. A give-and-take session between professionals in a given field, of the sort that academics or other experts may be accustomed to, may help reduce partisanship. Feedback from some experts involved in the method indicate that it allows them to better present and explain their opinions. Advocates of the method also claim that it increases judicial economy by reducing extraneous matters and focusing on points of disagreement. Yarnall, *supra*, 88 OR. L. REV. at 325-29.

The method has critics as well. Some say it does nothing to reduce bias and that it may increase the tendency of fact-finders to credit one expert over another based on comparative smoothness of presentation rather than for substantive reasons. Critics also say that without a skilled and prepared judge, the method may degrade into unproductive squabbling. One solicitor dubbed it "a bit like communism, good in theory but it doesn't work in practice." Edmond, *supra*, 72-WTR LAW & CONTEMP. PROBS. At 183. Another barrister said that "to the extent they do talk to each other in the witness box it's usually, 'Have you got a pencil' rather than, ' I think you've got that wrong.'" *Id*.

The general view of the procedure in Australia seems to be positive. Rares, *supra*, at 12. Whether the procedure can be effectively used in the American jury system, and whether it can produce the intended benefits, remains to be seen. Edmond, 72-WTR LAW

& CONTEMP. PROBS. at 187-88.[3]

TRADITIONAL TRIAL

A trial as we traditionally view it consists of the following sequence of events:

1) Jury selection
2) Opening statements
3) Presentation of evidence
4) Closing arguments
5) Instructions
6) Jury deliberations

Recognizing that many states (and their federal counterparts) instruct the jury before closing arguments, including most, if not all courts in Kansas, this "traditional" trial sequence may seem a bit dated. However, lawyers and judges on the east coast advise me that it is still the more frequently followed practice in those areas to have closing arguments before instructing the jury. Within the Tenth Circuit itself there is a difference in practice. At a 10th Circuit Conference within the past few years, one judge indicated he instructs the jury after closing argument because he wants his voice to be the last the jury hears before deliberating, and further justifies the practice on the basis of "recency." Most judges (and lawyers) in those jurisdictions which instruct after closings have indicated they do not want the jury rushing into deliberations riding a wave of emotion generated by counsel during closings.

THE MODIFIED TRIAL:

My current practice in civil cases is to use this modified sequence of events:

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[3] *See also* Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 LAW & CONTEMP. PROB. 159 (2009) (discussing pros and cons of concurrent evidence); Michael R. Devitt, *A Dip in the Hot Tub: Concurrent Evidence Techniques for Expert Witnesses in Tax Court Cases*, 117 J. TAX. 213 (2012); Elizabeth Reifert, *Getting into the Hot Tub: How the United States Could Benefit from Australia's Concept of 'Hot Tubbing' Expert Witnesses*, 89 U. DET. MERCY L. REV. 103, 113 (2011); Stephen E. Snyder, *Adversarial Collaboration: Court-Mandated Collaboration Between Opposing Scientific Experts in Colorado's Water Courts*, 28 NAT. RES. & ENV. 8 (Summer 2013); David Sonenshein & Charles Fitzpatrick, *The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence*, 32 REV. LITIG. 1, 60 (2013); Scott Welch, *From Witness Box to the Hot Tub: How the 'Hot Tub' Approach to Expert Witnesses Might Relax an American Finder of Fact*, 5 J. INT'L COMMERCIAL L. & TECH. 154 (2010).

1) Opening statements
2) Jury selection
3) Instructions
4) Presentation of evidence
5) Jury discussions during trial
6) Closing arguments
7) Jury deliberations

WHAT ARE THE BENEFITS AND DRAWBACKS OF THE MODIFIED APPROACH?:

If a judge is going to tinker with a tried and true sequence of events in trial, he or she should have some justification beyond doing something different. With respect to the modified sequence I have used in whole or in part for the past few years, I offer the following thoughts.

Opening Statements Before Jury Selection. While I do a reasonably extensive voir dire, I also allow lawyers to question prospective jurors. It did not take long to become concerned that the lawyers were spending more time trying to sell their cases to prospective jurors than in asking questions designed to elicit information helpful in selecting a jury. I first heard about parties making opening statements to the entire venire panel at a 10th Circuit Conference in 1996. One of the speakers was Judge Richard Bilby (deceased at much too young an age) from the District of Arizona, who had tried it and had found it useful in shortening voir dire. It largely eliminated questions that began with phrases like, "We anticipate there will be testimony concerning . . . ." and counsel's other efforts to tell the jury what the case was about indirectly. After opening statements, the prospective jurors already know what the case is about.

While my experience with voir dire has tracked Judge Bilby's since adopting this approach twenty0one years ago, I have found other benefits to opening to the entire venire panel equally valuable. First, everyone on the venire panel is immediately involved in the case — not just those prospective jurors called to the box. Second, hearing the openings seems to place voir dire questions in perspective — prospective jurors not only respond more frequently to questions, but the quality of information offered is better. Another benefit is that those persons not called to the box are significantly more attentive to the voir dire process, which cuts down on the time spent going over prior questions when a cause challenge is sustained. Finally, and perhaps most significantly, in visiting with persons who sat through the process but were not called to the box, they feel that their time was not wasted — they actually participated in part of a trial.

A major concern about this approach is that prospective jurors are in the courtroom an hour or two more than they would have to be if they had not had to sit through opening

statements. However, with shortened voir dire and the sense of personal involvement in the trial, these fears have simply not been borne out by experience. Another concern is whether a fair and impartial jury can be picked following opening statements. After some thought, I determined that if a person would be persuaded to the point of partiality by an opening statement, I would prefer to know during jury selection when the parties have the chance to identify that influence and deal with it legitimately rather than to learn about it after the jury is sworn.

Instructions. As a practicing lawyer, it never made much sense to me to wait until all of the evidence had been presented before telling the jury what is evidence and what is not, and what they should have been listening for throughout the trial. By preinstructing the jury, the jurors know at the outset what is and what is not evidence. They already know what kind of dispute they will be deciding from the opening statements, and they learn from the preliminary instructions about who bears the burden of proof and what each party needs to prove to prevail. At the end of the case, if any changes are necessary, we provide those changes to the jury. Jurors are also able to take notes on their instructions, so keeping track of the elements and the proof supporting it becomes easier.

I have not seen a down side to this approach yet. When I grant a defendant's motion for judgment on one or more claims at the close of the plaintiff's case-in-chief, I advise the jury that they will not be deciding that issue at the conclusion of the case. I also indicate that I will let them know about any changes to the instructions.

Jury Discussions During Trial. In three civil trials years ago, I allowed jurors 15-20 minutes at the end of each trial day to discuss the evidence they have heard in the case to date. The jury was carefully instructed that it is not to reach any conclusions, as additional evidence is still to be presented which may impact a juror's thinking about the case. I recently changed that procedure to allow the jury to discuss the evidence any time all of the jurors are together.

The concerns I hear about this practice today are precisely those set out more than 50 years ago by the 8th Circuit in *Winebrenner*. Typically, the defense is more concerned about these discussions than the plaintiff, and the concern is that the jury is discussing only the plaintiff's case when the defendant's case will not be presented for several days or weeks.

I believe this fear is largely unfounded for three reasons. First, the defense frequently is presenting part of its case through cross-examination of the plaintiff's witnesses. If the cross-examination is effective, the jurors will be discussing the weaknesses in plaintiff's case right along with the strengths. Second, since becoming a judge, I have learned in my discussions with jurors that the greatest consistent mistakes I made as a trial lawyer were: 1) to seriously underestimate the ability of jurors to only need to hear

something once or twice (as opposed to three or more times), 2) respect jurors have for following instructions, and 3) the lengths to which jurors go to carefully evaluate all of the evidence presented to them.

Since I began allowing jury discussions during the trial, the comments from jurors have enthusiastically supported the practice. Coming out of breaks, the jurors have given us a note identifying disputes among themselves about what a witness has said. This procedure allows the lawyers to clarify the testimony with the witness or in some other part of its case. It has cut down significantly on questions druing deliberations about what the testimony was.

Each of the three cases from years ago in which the jurors discussed the evidence during the trial were flat-out defense verdicts. In a case we recently tried, plaintiffs prevailed. The recent cases have gone in all directions. There is nothing about these experiences that would lead me back to my prior rules against juror discussions during trial.

Juror Questions. There have been a number of articles written about other techniques judges are using in trials to assist jurors in better understanding cases and, thus, doing better justice. One of the more common ones is allowing jurors to ask questions.

To an objection that allowing jurors to ask questions during trial is error, the Seventh Circuit has responded: "There is no such statute or rule," "[n]or has any court of appeals forbidden the judge to ask questions submitted by the jurors." *S.E.C. v. Koenig*, 557 F.3d 736, 742 (7th Cir. 2009). "Like other issues of trial management—may jurors take notes? should written jury instructions and copies of exhibits be sent to the jury room during deliberations?—whether to allow the jurors to pose questions is a topic committed to the sound discretion of the judge." *Id.*

Similarly, the Sixth Circuit has observed that "allowing jurors to ask questions during criminal trials is permissible and best left to the discretion of the trial judge." *United States v. Collins*, 226 F.3d 457, 461, 464 (6th Cir. 2000) (suggesting precautions such as notifying the jurors and parties about the practice, requiring the jurors to submit their questions in writing, and instructing the jurors that some questions may not be asked or could be rephrased as required by evidentiary rules). *See also United States v. Rawlings*, 522 F.3d 403, 407 (D.C. Cir. 2008) (noting unanimity among ten circuits). Juror questioning "should be a rare practice," but "the balance of risks to benefits is more likely to weigh in favor of juror questions in complex cases." *Collins*, 226 F.3d at 463. Recently, the same circuit has stated that if questions are asked,

> (1) counsel should be alerted as early as practicable; (2) the jury should be instructed that questions should be reserved for important points, that the

> rules of evidence may prevent certain questions from being asked, and that jurors should not draw any inferences from the court's choice not to ask a question; (3) the court should give a prophylactic instruction in its final charge to the jury; and (4) "a screening mechanism should be set in place, such as having the jurors write down their questions and pass them to a judge, followed by a sidebar at which the judge would rule on attorneys' objections.

United States v. Brown, 857 F.3d 334, 340-41 (6th Cir. 2017). See also United States v. Richardson, 233 F.3d 1285, 1289 (11th Cir.2000) (finding written juror questions to witnesses during trial did not cause premature deliberations); Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, Juror Questions During Trial: A Window into Juror Thinking, 59 Vand. L.Rev.1927 (2006); Nicole L. Mott, The Current Debate on Juror Questions, 78 Chi.-Kent L.Rev. 1099 (2003).

For years, I advised jurors to hold up a hand if the juror did not hear a question or answer, or if the juror did not understand a question or answer. This would allow the lawyer to immediately address the matter with the witness, while allowing the lawyer to maintain control over her case and the evidence. Very few jurors raised hands, but it was apparent from questions the jurors sent out during deliberations that there were questions which might have been better addressed while submitting evidence. So I now allow jurors to submit questions at the end of a witness's testimony. I review the questions with the lawyers and ask those which are appropriate. If, in the view of counsel, further follow-up is needed, I allow that.

CONCLUSION:

When I went on the bench nearly twenty-two years ago, I had tried enough cases that I thought I knew how I would conduct trials as a judge. I was going to do them just the way the judges I had appeared before did them, because it was what I knew. Since that time, as I have begun to make some of the changes I've noted above, I have asked other judges why we are not changing some of these things, and the response has generally been, "Because this is the way we've always done them." Which, translated means something like, "Leave well enough alone" or "If it ain't broke, don't fix it."

But sometimes it's not a matter of fixing it -- it's a matter of believing it is worth trying to make something fine just a little better. While we all may recognize that perfect justice is an impossible goal, that is no justification for failing to give justice every chance to be discovered in every case. And most people would agree that justice has its best chance when the jury understands its responsibility, when from the outset of a trial the jury is given every opportunity possible to not only hear the evidence, but to understand it and

process it, guided by legal principles in clear instructions. When the jury can seek immediate clarification of complex matters.

In nearly every case, there is a moment when I feel our system is fulfilled. It does not occur when the case is over and the verdict returned. Rather, it is the point where a trial is transformed from the legal equivalent of a football game to life. When the jury begins to see the parties as something other than litigants and the proceeding as much more than a contest. At the outset, every trial is a proceeding characterized by a particular kind of adversarial dynamic, where the parties appear to be trying two separate cases. As the trial progresses, it becomes less one side against another in a dispute and more a very different adversarial system where the parties have clearly staked out their positions but are viewed as seeking the same thing -- the truth. And at that point, the jurors have achieved the same level of respect for the system that we true believers preach.

Anything the court and the parties can do to assist the jury in reaching this level of understanding and clarity of purpose is worth trying. None of these ideas are revolutionary – we are using them in one form or another in most aspects of our lives already. Why not bring them into the most obvious place to give them effect – the courtroom?