

REPRESENTATIVE ASSEMBLY SPEAKS FOR MICHIGAN LAWYERS REGARDING PROPOSED JURY REFORMS

By Lori A. Buiteweg, Immediate Past Chairperson

The State Bar of Michigan's Representative Assembly, the final policy-making body of the State Bar, met all day in Ypsilanti, Michigan on September 14, 2006, to debate and vote on numerous jury reforms published by the Michigan Supreme Court on July 13, 2006. The period for comment expires on November 1, 2006, which required the Assembly to adjourn several other major policy issues in order to timely address these overwhelmingly significant proposals.

A panel of lawyers and judges from Michigan and Indiana were on hand to address a multitude of concerns raised by the 150-member body¹. Indiana has had many of the proposed reforms in place for several years.

Justice Stephen J. Markman opened the debate by introducing the proposals on behalf of the Michigan Supreme Court. He said the proposals are "intended to enhance the quality of the jury's deliberative process and thereby further the truth seeking function of the jury trial. Each is designed to strengthen the ability of the jury to undertake to make informed and intelligent decisions by making evidence more accessible. Each is designed to diminish opportunities for gamesmanship in the trial process and to facilitate the ability of the jury to assess the evidence before it, and each is designed to render somewhat less true Robert Frost's adage that a jury consists of 12 persons chosen to decide who has the better lawyer."

Justice Markman described the present rules as having worked well in enabling the jury to carry out its missions, "and those rules should not be altered lightly or without struggling to anticipate the unanticipated consequences of change." He was appreciative that the Assembly would be addressing the rules. "My court...will take your comments very, very seriously, as I believe we always do with respect to the Representative Assembly. We appreciate the expertise here, and it is unfathomable to me that your comments on this matter or on any other matter would not be given the most serious consideration by my court."

In the end, the Assembly decided that some of the proposed reforms should be adopted (e.g., allowing jurors to take notes and ask questions), others should be soundly rejected (e.g., allowing judges to comment upon the weight of the evidence, reading summaries of expert witness' *de bene esse* depositions

¹ Panelists were: James Bell, white collar criminal defense trial attorney from Indiana; Hon. William Caprathe, Bay City Circuit Court and member of the ABA's American Jury Project; James Dimos, intellectual property trial attorney from Indiana; Hon William Giovan, Wayne County Circuit Court and chair of the Michigan Supreme Court Advisory Committee on the Rules of Evidence and Committee on Model Civil Jury Instructions; Hon. Daniel Heath, Allen County Superior Court Judge from Indiana; Hon. Wallace Kent, Jr., Tuscola County Probate Court; Terrance Miglio, president of the Michigan Defense Trial Council; Douglas Shapiro, personal injury and medical malpractice trial attorney; Hon. Richard Hammer, Michigan District Judges Association.

into the record at trial rather than the entire transcript, and allowing the judge to craft a procedure for the presentation of expert testimony), and yet others should be adopted in a modified form (e.g., allowing the court the discretion to require attorneys to provide trial notebooks to each juror and the judge, and allowing jurors to request a view of the scene. Following is a summary of the proposals, some of the comments made by the panelists and assembly members, and the ultimate positions taken by the Assembly.

The proposals were addressed in clusters. The first cluster dealt with proposals affecting juror materials, namely, trial notebooks, and preliminary and final instructions.²

Regarding trial notebooks, Judge Daniel Heath, a Superior Court Judge from Allen County, Indiana, reported that trials in his courtroom have run much faster and smoother since he started requiring attorneys to provide trial notebooks for each juror and the judge, containing exhibits that have been admitted by stipulation into evidence. “Normally what happens is the attorneys make a record that they stipulate to the authenticity of those exhibits before they are actually handed to the jury, and then they are given to the jury, and frankly, it’s neater, it’s cleaner, and it’s more efficient. The old system was that the exhibits would be disseminated to the jury as they occurred during trial, and that was a slow, laborious process.”

² **2.513(E) Reference Documents.** The court ~~must encourage~~ may, in the court's discretion, allow counsel in civil and criminal cases to provide the jurors with a reference document or notebook, the contents of which ~~should~~ may include, but which is not limited to, witness lists, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the ~~preliminary~~ jury instructions and admitted exhibits, ~~and other appropriate information~~ to assist jurors in their deliberations.

PASSED AS EDITED 59-36

2.513(A) Preliminary Instructions. After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions.

PASSED

2.513(N)(2) Final Instructions to the Jury. Solicit Questions about Final Instructions. As part of the final jury instructions, the court ~~shall~~ may advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during the deliberations. Upon concluding the final instructions, the court ~~shall~~ may invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate. If questions arise, the court and the parties shall convene, in the courtroom or by other agreed-upon means. The question shall be read into the record, and the attorneys shall offer comments on an appropriate response. The court may, in its discretion, provide the jury with a specific response to the jury’s question, but the court shall respond to all questions asked, even if the response consists of a directive for the jury to continue its deliberations. The sealed envelope shall be made part of the record and preserved for appeal.

PASSED AS EDITED

2.513(N)(3) Copies of Final Instructions. The court ~~shall~~ may provide each juror with a written copy of the final jury instructions to take into the jury room for deliberation. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions.

PASSED AS EDITED

Attorney Jim Dimos, a trial lawyer from Indiana, addressed concerns that jurors will try to read ahead in the notebooks and have an unfair duration of exposure to inflammatory personal injury photographs. In that case, “we have done a sort of modified approach, and that is to pass certain exhibits out at a time but have them stored in a notebook. It doesn’t save the time, but it allows you to avoid these concerning situations. That’s something that the parties generally agree upon and it seems to work fine.”

Assembly member Daniel Loomis questioned the expense of providing notebooks to each juror. Criminal defense attorney James Bell from Indiana reported that he once tried a murder case involving 380 exhibits multiplied by 15 notebooks. Members Martin Krohner and Lisa Kirsch-Satawa expressed concern that attorneys appointed to represent indigent criminal defendants would be unable to afford the cost of creating trial notebooks for each juror. The Assembly resolved that leaving the decision to require a trial notebook to the court would address such cost concerns, and approved the proposal with some modifications.²

Judge Giovan of the Wayne County Circuit Court expressed concern over the propose rule to require that written instructions be disseminated to jurors. “I am in a busy urban trial court. In many cases, the jury instructions are practically irrelevant. For us to sit down and do all the instructions I think would (sometimes be) a waste of time. I object to being required to do it in 100 percent of the cases regardless of the complexity or simplicity of the case.” The Assembly passed the proposal on the condition that the court in each case has the discretion to provide written instructions to the jurors.

The second cluster dealt with proposals affecting juror participation.³ The first proposal in the cluster was to allow jurors to discuss the case prior to

³ **2.513(J) Jury View.** On motion of either party, on its own initiative, or at the request of the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. ~~During the view, no person, other than an officer designated by the court, may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion.~~

PASSED WITH A VERY STRONG YES VOTE, ALTHOUGH NOT UNANIMOUS

2.513(I) Juror Questions. The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

PASSED 60 YES VOTES TO 40 NO VOTES

2.513(H) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.

PASSED UNANIMOUSLY

deliberations. The assembly unanimously torpedoed the proposal after member Barry Poulson jokingly asking the chair to call for the vote after all the arguments in favor and before all the arguments opposed to the proposal were voiced.

Attorney James Bell from Indiana reported that, in one of his jury trials, he spoke with jurors post trial, and learned that during the course of discussing the case during breaks, cliques were formed that made it difficult for the state's case. Panelist Terry Miglio opined that the system we should be describing for jurors is to keep an open mind and to wait until all the evidence is in before you begin to deliberate. Judge Kent's response to the argument that jurors discuss the case before deliberations anyway, was: "There are holes in the dike. Rather than tearing down the dike and letting the flood in, we should continue to plug the holes as we can."

Judge Caprathe took a favorable position citing 45 Arizona Law Review 1, 2003: "Recent empirical studies of structured jurors' discussions on the evidence during actual trials of civil cases found that allowing discussion did not lead to premature judgments in cases by jurors, enhanced juror understanding of the evidence, and in more complex cases served to decrease the incidence of fugitive discussions of the trial by juries with family and co-workers, and met with high levels of acceptance by jurors, judges and trial counsel.."

Another proposal in the cluster was allowing the jury to request a view of the scene. Judge Giovan pointed out that, under the present system, there is nothing stopping a juror from writing a note or raising his hand and asking if the jury could go look at the scene, and if the judge decided that was a good idea, the juror's question would have been the impetus. "[The proposal] really doesn't change anything except to tell them that they may request a view," he said.

Allowing jurors to take notes and ask questions passed muster with the Assembly. Judge Heath from Indiana reported that it raises the jurors' attention to the trial. "No longer do I see jurors falling asleep. I have been pleasantly surprised at the insightful question and the increased participation on behalf of the jurors."

Panelist and trial lawyer Douglas Shapiro pointed out that cases that might otherwise be won can be lost if jurors have a question that goes unanswered. The opposite concern was expressed by Assembly member Cecil Cross, who noted that attorneys sometimes do not ask questions for strategic reasons. "We have an adversary system. The jury is to decide the case on the evidence presented, not on the evidence that they would like to have had presented." The

2.513(K) Juror Discussion. After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions and argument.

FAILED UNANIMOUSLY

proposal pertaining to jury questions passed 60-40, while the proposal pertaining to note taking passed unanimously.

The third cluster of proposals dealt with a proposal permitting the court to comment upon the evidence.⁴ Judge Giovan pointed out this is already permitted by MCR 2.516(B)(3), but that in the history of Michigan he does not think any judge has ever used that provision. He opined that it is an inherent contradiction to allow a judge to comment on the weight of the evidence in a fair and impartial way, because any commentary of this sort by a judge cannot by its very nature be fair and impartial.

Judges Heath and Wallace Kent, Jr. agreed. "I think it invades the province of the jury. I couldn't imagine doing it," said Judge Heath from Indiana, which does not have such a rule. "I don't want to be the 13th juror or the super juror," said Judge Kent. "I have never done it," said Judge Richard Hammer. The proposal failed unanimously.

The fourth cluster dealt with proposals affecting the role of the attorney.⁵ One proposal would allow attorneys in both criminal and civil cases to waive their opening statement and another would allow attorneys to make interim commentary on the evidence during the trial. Judge Kent expressed concern that the latter proposal would unduly delay the trial and possibly confuse, rather than enlighten, the jurors. The latter proposal failed while the former passed.

The fifth and final cluster dealt with proposals affecting the submission of evidence.⁶ One such proposal would encourage the reading of concise, written

⁴ **MCR 2.513(M) Comment on the Evidence.** After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence, if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation or comment. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury.

FAILED UNANIMOUSLY

⁵ **MCR 2.513(D) Interim Commentary.** Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial.

FAILED BY A SUBSTANTIAL MARGIN ALTHOUGH NOT UNANIMOUS

MCR 2.513(C) Opening Statements. Unless the parties and the court agree otherwise, the plaintiff or the prosecutor, before presenting evidence, must make a full and fair statement of the case and the facts the plaintiff or the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a similar statement. The court may impose reasonable time limits on the opening statements.

PASSED

⁶ **MCR 2.513(F) Deposition Summaries.** Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read.

FAILED UNANIMOUSLY

MCR 2.513(G) Scheduling Expert Testimony. The court may, in its discretion, craft a procedure for the presentation of expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to: (1)

deposition summaries at trial in lieu of the full deposition. Attorney Jim Dimos from Indiana pointed out that exchanging deposition summaries prior to trial has the effect of intensifying settlement discussions and settling cases. Mr. Shapiro pointed out that judging the credibility of witnesses is central to our system and it would be impossible for a jury to be able to determine how credible a witness is from a clean deposition summary. It is already a disadvantage to present *de bene esse* testimony, and an even further disadvantage for that testimony to be summarized. Moreover, argued Mr. Shapiro, there is no rule of evidence upon which a judge would decide any dispute between lawyers about what the summary should state or not state. “Judges are not at this time required to read depositions with this level of care and are not used to being arbiters of what is an accurate description of the testimony,” he said. The opportunity for appeals would be plentiful, he also argued. Assembly member Randall Miller asked the rhetorical question, “Has anybody in this room ever taken the deposition of an expert and wasted time asking irrelevant questions?” The rule failed unanimously.

Another proposed rule in the fifth cluster would allow the court to craft a procedure for the presentation of expert testimony. Mr. Shapiro explained that coordinating medical experts is an unbelievably difficult logistical headache. “Now, imagine, if on top of that I have to coordinate with the defense experts to make sure that they can come in right after my expert....” The rule also failed unanimously.

If you have comments or concerns about the proposed jury reforms, submit them to Corbin Davis, Clerk of the Michigan Supreme Court, Michigan Hall of Justice, P.O. Box 30052, Lansing, Michigan, 48909, by November 1, 2006.

Scheduling the presentation of the parties' expert witnesses sequentially; or (2) allowing the opposing experts to be present during the other's testimony and to aid counsel in formulating questions to be asked of the testifying expert on cross-examination; or (3) providing for a panel discussion by all experts on a subject after or in lieu of testifying. The panel discussion, moderated by a neutral expert or the trial judge, would allow the experts to question each other.

FAILED UNANIMOUSLY