**(JURY REFORM PROPOSAL)**
**MCR 2.513(J)—JURY VIEW**

## Issue

Should jurors be allowed to request a view the property or the place where a material event occurred?

## Synopsis

Currently, judges and parties, but not juries, may request to view a property or a place where a material event took place. The Staff Comment explains that this subrule incorporates the jury view provisions presently contained in MCR 2.513(A) and MCR 6.414(F). This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

Allowing jurors to request to view a property or a place where a material event took place may undermine the discretion of judges and parties. Jurors may be under a false impression that viewing a property or place where a material event occurred would be helpful in their decision-making, thereby unnecessarily wasting resources. Judges and parties are in the best position to determine whether this is necessary for the fair administration of justice.

## Fiscal Impact on State Bar of Michigan

None known.

## STATE BAR OF MICHIGAN POSITION
**By vote of the Representative Assembly on September 14, 2006**

Jurors should be allowed to request a view of the property or the place where a material event occurred.

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(K)—JUROR DISCUSSION**

## Issue

Should jurors be permitted to discuss the evidence of the case among themselves in the jury room during trial recesses?

## Synopsis

Currently, jurors are not permitted to discuss the evidence of the case among themselves until they are in deliberations. The subrule provides that, after informing the jury that it is not to decide the case until it has 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." Such instructions, however, may only take place "when all jurors are present" and such discussions "must be clearly understood as tentative pending final presentation of all evidence, instruction, and argument." The Staff Comment explains that this subrule would allow the jurors to discuss evidence as it is admitted and that such discussions "may promote timely questions to be propounded to the witnesses by the court." The Staff Comment also explains that the discussions are intended only to promote a better understanding of the evidence as it is introduced. This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

Strongly opinionated juror(s) would have an increased opportunity to compromise the neutrality of other jurors if permitted to discuss the evidence during trial recesses.

Jurors may become prematurely entrenched in a position and not be open-minded to arguments and instructions at the close of proofs.

The jury is very likely to have made up its mind in advance of having heard any of the instructions or arguments if this rule is adopted, thereby resulting in uninformed decision making. The purpose of arguments and instruction is to focus the jury and the deliberations on the law as it applies to the facts which have been presented to them during the course of the trial. Without advice concerning the law to be applied to the facts, the jury may very well have reached a conclusion based on a total misunderstanding of what the law is as it applies to the case submitted to them for decision.

## Fiscal Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION**
**By vote of the Representative Assembly on September 14, 2006**

Jurors should be permitted to discuss the evidence of the case among themselves in the jury room during trial recesses.

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(I)—JUROR QUESTIONS**

## Issue

Should jurors be allowed, with the court's permission, to submit questions to witnesses through the court?

## Synopsis

Currently, criminal procedure rules provide for jurors to ask questions of witnesses. This subrule provides that if a court allows the jurors to ask questions of witnesses, the court must ensure that 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 on the jury to object to the questions." The Staff Comment explains that this subrule is substantially similar to MCR 6.414(E), and that it ensures that the parties' objections will be heard outside the jury's presence. This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

The proposal may undermine the advocacy skills of the trial attorneys, delay the release of witnesses, and prolong the duration of the trial.

Currently, jurors are not shy about submitting their questions to the court on their own initiative if they need further clarification.

## Fiscal Impact on State Bar of Michigan

None known.

## STATE BAR OF MICHIGAN POSITION
**By vote of the Representative Assembly on September 14, 2006**

Jurors should be allowed, with the court's permission, to submit questions to witnesses through the court.

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(G)—SCHEDULING EXPERT TESTIMONY**

## Issue

Should the court be permitted to schedule expert testimony in a way that is designed to assist the jurors' understanding of the issues, such as scheduling the presentation of expert witnesses sequentially, allowing the opposing experts to be present during the other's testimony and assist counsel with formulating cross-examination questions, and providing a panel discussion by all experts in lieu of testifying?

## Synopsis

The Staff Comment explains that this subrule would allow the court to craft a procedure designed to allow the jurors to better understand the expert testimony. For example, "the court could allow the experts to testify out of order so that the testimony of opposing experts in a given field would be heard sequentially." This subrule would also allow the court to convene a panel discussion at which counsel would ask questions of the experts to educate the jurors, followed by specific questions related to the experts' opinions on the relevant topic. This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

The financial burden of this proposal upon litigants is potentially significant.

The proposal would impose upon or eviscerate certain skills of trial counsel.

The applicability of the Michigan Rules of Evidence to expert panel discussions is unclear.

The judge as moderator is at risk of inadvertently allowing his or her own personal biases and prejudices intrude upon the moderation process.

Debates are often uninformative, misleading and disingenuous. Truth and justice would be much better served by continuing the present practice of letting the advocates examine and cross-examine each of the experts in turn in order to must fully and accurately enlighten the jury as to the questions upon which they offer their expert opinions.

## Fiscal Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION**
**By vote of the Representative Assembly on September 14, 2006**

The court should be permitted to schedule expert testimony in a way that is designed to assist the jurors' understanding of the issues, such as scheduling the presentation of expert witnesses sequentially, allowing the opposing experts to be present during the other's testimony and assist counsel with formulating cross-examination questions, and providing a panel discussion by all experts in lieu of testifying.

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(M)—COMMENT ON THE EVIDENCE**

## Issue

Should judges, in both civil and criminal trials, be permitted to "fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence?"

## Synopsis

Currently, judges do not have the discretion to fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence. The Supreme Court issued this Jury Reform Proposal subrule to allow a court to do so, on the condition that the court instruct the jury that the jury is to determine for itself the weight of the evidence and witness credibility, and that the jurors are not bound by the court's summation or summary. The Staff Comment provides that this subrule expands on MCR 2.516(B)(3), and that it would allow the court to "summarize the evidence and to comment on the weight of the evidence, much like the attorneys do in closing arguments." This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

Commenting upon the weight of the evidence is the province of the advocate. It is human nature to let one's opinion show through, no matter how subtly. No matter how well intentioned, judges are at risk of inadvertently letting their own personal opinions become apparent in their commentary on the evidence, even if only by intonation and emphasis. The power of the bench is awesome, and should not be taken lightly. Comments by the Judge are likely to be given undue weight because they came from the Judge, and this would not be fair to counsel or their clients.

The proposal may result in a new basis for appeals, thereby increasing the number of appeals filed and a delay in the final resolution of cases for the litigants.

## Fiscal Impact on State Bar of Michigan

None known.

## STATE BAR OF MICHIGAN POSITION
**By vote of the Representative Assembly on September 14, 2006**

Judges, in both civil and criminal trials, should be permitted to "fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence."

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(D)—INTERIM COMMENTARY**

## Issue

Should parties be permitted to present "interim commentary" during trial?

## Synopsis

The Staff Comment explains that this subrule gives the court the discretion to allow the parties to present interim commentary during the trial. Interim commentary, particularly useful in long or complex trials, are statements made by counsel, "to assist the jurors in comprehending or putting testimony or other evidence in context of the theory of the case." The Staff Comment states that the court may limit or bar interim commentary by a party if it appears that the opposing party will not be making such comment. This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

Interim commentary is likely to result in "mini closing arguments" after the testimony of each witness, during which inadmissible comments by counsel may be made. Counsel would have the opportunity to grandstand, distract the jury from the issues, and delay the progress of the trial with unnecessary arguments at inappropriate times.

Interim commentary during the course of the trial is inappropriate since arguments should be made only after the jury has had the opportunity to hear all of the evidence. Otherwise, they might be too easily misled and distracted.

## Fiscal Impact on State Bar of Michigan

None known.

## STATE BAR OF MICHIGAN POSITION
**By vote of the Representative Assembly on September 14, 2006**

Parties should be permitted to present "interim commentary" during trial.

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(E)—REFERENCE DOCUMENTS**

## Issue

Should the courts be required to encourage attorneys in civil and criminal cases to provide jurors with a reference document or notebook, the contents of which should include, but not limited to, witness lists, relevant statutory provisions, and copies of the relevant document if with witness lists, relevant statutory provisions, admitted exhibits, and in cases where the interpretation of a document is at issue, copies of the relevant document?

## Synopsis

Currently, courts are not required to encourage attorneys to provide a reference document or notebook with witness lists, relevant statutory provisions, admitted exhibits and other appropriate information to assist jurors in their deliberations. The Staff Comment explains that the use of reference documents or notebooks "may reduce the jurors' need to take notes and would provide documents and other materials for the jurors' reference throughout the trial." This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

Reference notebooks are an invitation to counsel to submit inappropriate or inadmissible evidence which properly should be excluded by the rules of evidence. They would invite attorneys to editorialize and misrepresent facts not in evidence. Their content may create disputes between lawyers, thereby consuming precious judicial resources and time.

Because such notebooks would be encouraged rather than required, such a notebook may place one party at a disadvantage relative to another party who does not produce such a notebook (perhaps due to limited financial resources to pay an attorney for this work). In simple cases, justifying the cost of such a notebook would be difficult. Failing to provide one, however, may raise inappropriate suspicions by jurors.

If the goal is to provide the jury with copies of relevant statutes and documents, provision should be made instead to have them admitted as some form of trial exhibit upon which the court can rule as to both admissibility and relevance.

Reference notebooks may also confuse jurors because jurors would identify witnesses who were listed on a witness list but not called to testify, and identify witnesses who were not listed on a witness list, but called to testify as rebuttal witnesses.

A trial is an evolutionary process, and in some cases, it is impossible to anticipate precisely how a case will develop. Counsel may decide mid-trial not to call a witness or argue a particular statute. Explaining this to the jury would be difficult and time consuming.

**Fiscal Impact on State Bar of Michigan**

None known.

**STATE BAR OF MICHIGAN POSITION**
**By vote of the Representative Assembly on September 14, 2006**

Courts should be required to encourage attorneys in civil and criminal cases to provide jurors with a reference document or notebook, the contents of which should include, but not limited to, witness lists, relevant statutory provisions, and copies of the relevant document if with witness lists, relevant statutory provisions, admitted exhibits, and in cases where the interpretation of a document is at issue, copies of the relevant document.

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(F)—DEPOSITION SUMMARIES**

## Issue

Should parties be encouraged to provide concise, written summaries of *de bene esse* depositions to be read at trial instead of the full deposition transcript?

## Synopsis

This proposal would permit parties to give copies of the summaries to jurors before they are read and would allow the summaries to be read in lieu of the full transcript. The Staff Comment provides that this subrule "anticipates that the party proffering the testimony first would prepare the summary and the opposing party would then add a narrative to the summary based on that party's perspective of the deposition." The Staff Comment also provides that if either party believes a summary is wrong or misleading, objections would be resolved by the trial court. This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

It should be for the jury, not the attorneys, to decide what is said in deposition that is persuasive to the jury. This proposal is akin to trying a case outside the presence of the jury and then submitting a summary of the testimony received in open trial to a jury for decision.

Insuring the accuracy and neutrality of such summaries and resolving disputes regarding their accuracy and neutrality would unnecessarily consume judicial resources and increase the cost to litigants.

Summaries would deprive jurors of the opportunity to weigh the evidentiary value of testimony, abdicating that responsibility to the judge and lawyers instead. The shortcomings of reading a full deposition transcript into the record (e.g., not being able to observe the demeanor of the witness and hear the intonation of the witness' voices) would be exacerbated by summaries that would deprive jurors of the ability to perceive the level of cooperation of a witness and the truthfulness and preparedness of a witness as evidenced by, for example, pauses and "uh"s noted on the record.

## Fiscal Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION**
**By vote of the Representative Assembly on September 14, 2006**

Parties should be encouraged to provide concise, written summaries of *de bene esse* depositions to be read at trial instead of the full deposition transcript.

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(H)—NOTE TAKING BY JURORS**

## Issue

Should jurors be permitted to take notes and to take their notes with them into deliberations?

## Synopsis

Currently, jurors in criminal cases are permitted to take notes, but judges have the right to prevent them from taking their notes with them into deliberations. The proposal states that jurors in both criminal and civil trials may take notes and may take them with them into deliberations. The proposal states that jurors must keep their notes confidential, except as to other jurors, and that the court must ensure that notes are collected and destroyed after the trial. The Staff Comment explains that this proposed subrule is substantially the same as MCR 6.414(D), but that it eliminates language that allows a court to bar jurors from taking their notes into the jury room during deliberations. This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

Jurors are at risk of not hearing all the evidence if they are preoccupied taking notes. Knowing that they can use their notes in deliberations may encourage them to take notes and not listen to all the evidence. However, if note-taking is permitted, it only makes sense to uniformly allow jurors to take the notes into the jury room for deliberations in order to refresh their minds about the testimony.

## Fiscal Impact on State Bar of Michigan

None known.

## STATE BAR OF MICHIGAN POSITION
**By vote of the Representative Assembly on September 14, 2006**

Jurors should be permitted to take notes and to take their notes with them into deliberations.

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(A)—PRELIMINARY INSTRUCTIONS**

## Issue

Should judges be required to provide each juror a written copy of pretrial instructions, including the duties of the jury, trial procedure, and the law applicable to the case in addition to the elements of the civil claims or criminal charges in the case?

## Synopsis

The Staff Comment provides that after the jury is sworn but before evidence is taken, the court "shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case." The Staff Comment states that the court "shall provide each juror with a copy of such instructions." At a minimum, the preliminary instructions should include the elements of all civil claims or all charged offenses, the legal presumptions and burdens of proof, and should explain the duties of the jury, trial procedure, and the applicable law that are reasonably necessary to help the jury understand the proceedings and the evidence. This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

Jurors may be reading the pre-trial instructions during trial when they should be listening to witnesses, counsel, or the court. Any rule that is adopted should address this concern.

## Fiscal Impact on State Bar of Michigan

None known.

## STATE BAR OF MICHIGAN POSITION
**By vote of the Representative Assembly on September 14, 2006**

Judges should be required to provide each juror a written copy of pretrial instructions, including the duties of the jury, trial procedure, and the law applicable to the case in addition to the elements of the civil claims or criminal charges in the case.

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(N)(2) AND (3)—FINAL INSTRUCTIONS TO THE JURY**

## Issue

Should judges be required to provide each juror with a copy of the final jury instructions, ask the jury is it needs immediate clarification on the final instructions, and inform jurors that they may ask for clarification of jury instructions at a later time?

## Synopsis

The Staff Comment provides that proposed subrule (N)(2) "would allow a trial court to ask the jury if it needs immediate clarification on the final instructions that it received," and that a court should notify the jury that the jury may later ask for clarification on an instruction. Meanwhile, proposed subrule (N)(3) would require the trial court to provide jurors with a copy of the final jury instructions. These two subrules are designed to reduce the frustration of jurors and practices that hamper their decision-making ability. They are also intended to help jurors seek the truth. See Exhibit B for the exact wording of these two subrules.

## Background

See Exhibit A.

## Opposition to the Proposal

Many cases are routine and a mandated submission of written requests for jury instructions would be unnecessarily burdensome to the attorneys and to the court. It may be appropriate to provide that the court may submit the written instructions to the jury in printed form, but the mandate may be unnecessary.

## Fiscal Impact on State Bar of Michigan

None known.

## STATE BAR OF MICHIGAN POSITION
**By vote of the Representative Assembly on September 14, 2006**

Judges should be required to provide each juror with a copy of the final jury instructions, ask the jury is it needs immediate clarification on the final instructions, and inform jurors that they may ask for clarification of jury instructions at a later time.

(a) Yes

or

(b) No

**(JURY REFORM PROPOSAL)**
**MCR 2.513(C)—OPENING STATEMENTS**

## Issue

Should opening statements be governed by the following rule:

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, defendant may make a similar statement.

## Synopsis

Currently, attorneys in civil cases do not have the option of not making or reserving opening statements. The Staff Comment explains that this subrule is substantially the same as MCR 6.414(C). This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

## Background

See Exhibit A.

## Opposition to the Proposal

To the extent the proposal mandates opening statements, it should be opposed. All counsel in both civil and criminal cases should have the right to waive opening statements. Defense counsel in both criminal and civil cases should also have the right to reserve opening statements for tactical purposes.

## Fiscal Impact on State Bar of Michigan

None known.

## STATE BAR OF MICHIGAN POSITION
**By vote of the Representative Assembly on September 14, 2006**

The plaintiff or the prosecutor must be required in opening statements to "make a full and fair statement of the case and the facts the plaintiff or the prosecutor intends to prove," and the defendant "may make a similar statement."

(a) Yes

or

(b) No