The Jury Reform Pilot Project—The Envelope, Please

By Hon. Timothy G. Hicks

From mid-2008 through 2010, the Michigan Supreme Court has engaged in a pilot project to test innovations in the way we conduct jury trials. Those results are now in, revealing sharp differences in the way in which attorneys and jurors view a jury trial. The innovation most liked by the jurors—and most disliked by the attorneys—was allowing the jurors to discuss the evidence before deliberation.

It's Monday morning and you get the call. Dad is being taken to ER. You better come now. By mid-afternoon, you and your sisters have arrived. Mom lays out the rules.

"Dad is going to be tested and evaluated for a few days. We want to get it right, so don't write anything down. Don't talk about it to each other or with anyone else. Don't ask any questions. We'll just gather all the information and talk about it Friday afternoon."

None of us would make important decisions this way. But we ask jurors to do it every day.

Welcome to the world of jury reform.

History of Jury Trial Innovations

First, some history. Scholars have been exploring jury trial innovations since the early 1990s. Arizona began working on changes to its system in 1993; Massachusetts followed suit in 1997. As of 2004, at least 30 states were exploring changes.[1] Not Michigan.

In 2005, though, the Michigan Supreme Court published for comment proposed amendments[2] that would have adopted many of these innovations. Those commenting were unanimous in their opposition. The Court then decided in 2008 to conduct a pilot project.[3]

Participating Courts

Through its regional administrators, the Court identified six circuit and six district judges (including me) who volunteered to participate. From mid-2008 through the end of 2010, this group conducted jury trials using some of the Court-authorized innovations. At the end of the project, jurors, attorneys, and judges each completed a survey—most did, anyway. One prosecutor's office ordered its assistants not to complete any questionnaires.

The results are in, and it's official. Call Dr. Phil. Attorneys and jurors need relationship counseling.

The scope of this article is limited to three of the most widely used innovations: (1) jurors submitting questions[4] for witnesses, (2) jurors discussing evidence before deliberations, and (3) jurors using notebooks containing relevant information.

Note-taking was also included on the list of "innovations," even though MCR 6.414(D) has long permitted it. Even so, it appears that attorneys do not much like it. A slim majority (53 percent) thought it increased jurors' understanding of the case; only 43 percent thought it increased the fairness of the trial. Meanwhile, twice as many jurors, 86 percent, said it helped them reach the correct verdict.

Five other innovations—judicial comment on the evidence, use of deposition summaries, alternative presentation of expert witnesses, use of video or audio recordings, and judicial assistance during impasse—were rarely used or tested.

Innovation 1: Jurors Asking Questions During the Trial

Jurors could submit only written questions for the witnesses. At the start of the trial, I usually told jurors that I probably could not ask every question submitted because of the Rules of Evidence; I compared it to sustaining or overruling attorneys' objections. The jurors' deadline was usually the end of the first cross-examination, so the attorneys' subsequent questions to the witness would be the last word.

The attorneys and I collected and examined the written questions. While there were a few we agreed we could *not* ask, I cannot remember the last time we disagreed about a question. More than one-third (37 percent) of the jurors submitted questions; the most common purpose for questions was to obtain additional information.

The results: 98 percent of the jurors thought questions should be allowed, 64 percent thought allowing questions increased the fairness of the trial, and 72 percent said it increased their understanding of the case.

Attorneys see little use for the juror questions. Approximately one-third (35 percent) thought juror questions increased the fairness of the trial, while fewer than one-half (49 percent) thought the questions increased jurors' understanding.

Jurors' questions were sometimes better than ours. They asked about things the attorneys were afraid to touch, such as, "Have you changed your diet or explored other ways to lose weight?" to a personal-injury plaintiff.

My favorite juror question has attained some local fame. The defendant testified that he and his young victim went to Taco Bell before he later allegedly molested her at his home. His testimony was that he had expected his daughter, traveling separately,

Questions During the Trial[1]		
Juror Percentage *n*=270[2]	Question	Attorney Percentage *n*=54
64[3]	Did it increase the fairness of the trial process?	35
53	Did it increase the efficiency of the trial process?	28
72	Did it increase the jurors' understanding of the case?	49
71	Did it increase your satisfaction with the trial?	35
Jury Discussion of Evidence Before Deliberations		
Juror Percentage	Question	Attorney Percentage
91	Did it help[4] the jurors reach a correct verdict (jurors) or increase the fairness of the trial (attorneys)?	10
91	Did it help the jurors recall the evidence (jurors) or increase the efficiency of the trial (attorneys)?	17
91	Did it increase jurors' understanding of the case? (Same question for both groups)	21
91	Did it help the jurors stay focused on the evidence (jurors) or increase attorney satisfaction (attorneys)?	17
Notebooks During the Trial		
Juror Percentage	Question	Attorney Percentage
85	Did it help the jurors reach a correct verdict (jurors) or increase the fairness of the trial (attorneys)?	43
70	Did it help the jurors recall the evidence (jurors) or increase the efficiency of the trial (attorneys)?	51
73	Did it increase jurors' understanding of the case? (Same question for both groups)	47
73	Did it help the jurors stay focused on the evidence (jurors) or increase attorney satisfaction (attorneys)?	37

FOOTNOTES

1. In this item, the jurors were asked the same questions as the attorneys, so we can compare "apples to apples." For the other two, they were generally asked different questions, as noted. We have tried to match the questions that seemed most analogous.
2. The sample included 30 trials from these cities: Pontiac, Bay City, Centreville, Hillsdale, Ludington/Baldwin, Mason, and Muskegon. There were 19 circuit courts and 11 district courts. Twenty-five were criminal cases, three torts, and one contract. For each group of surveys, there were some "missing" responses.
3. The respondents were allowed four options: "increased, decreased, don't know, and no effect." For simplicity, I have included only those who responded "increased." However, one should *not* assume that the remaining 36 percent felt that the innovation decreased fairness. In fact, no one did. Most of the other responses were either "no effect" or "don't know."
4. The jurors scored this on a 7-point continuum ranging from 1—"not at all helpful"—to 7—"very helpful." Rankings of 5, 6, and 7 were combined in determining whether the innovation simply "helped" to some degree.

to join them there for a sleepover. The juror wanted to know what the defendant ordered at the restaurant. I asked the question, prompting laughter in the courtroom, but the juror was smarter than all of us—he wanted to know how many meals (two or three?) the defendant had ordered.

Innovation 2: Jury Discussion of Evidence Before Deliberations

This innovation may be the most controversial. The Court of Appeals has considered constitutional and due-process arguments but affirmed the conviction in a case conducted under the pilot project in *People v Richards*.[5] This case is pending in the Supreme Court, so I will defer further discussion on that point.

The jurors and attorneys seem to have the biggest differences of opinion here; however, that conclusion must be tempered somewhat because the two groups were asked different questions.

The jurors overwhelmingly approved: 91 percent thought discussion of evidence before deliberations helped them reach the correct verdict, and 91 percent said it helped them understand the evidence. The attorneys were exactly the opposite: only 10 percent thought it increased the fairness of the process, and 21 percent said it increased jurors' understanding.

My post-trial conversations with jurors indicated they were not closing their minds early in the trial. In fact, they said they immediately identified differences in opinion and *paid more attention* when subsequent witnesses testified. I had a big-money, business-loss case in which some jurors told me they changed their minds during closing arguments, just like in the good old days. One of the district judges said there was no difference in the percentage of acquittals when he compared criminal cases under the traditional and pilot project systems.

The concern is that a strong-willed juror might steer the other jurors toward his or her preferred outcome even before formal deliberations begin. I suggest the opposite. Juror relationships will be forged through *discussions of the case* rather than through discussion of irrelevant matters. The bossy juror's opinions will be discussed and tested almost immediately.

Also, the jurors can tell us right away if problems arise during the trial. Most judges would prefer to deal with them then rather than in the murky world of post-trial evaluation of jury deliberations.

Innovation 3: Use of Notebooks During the Trial

Proposed amendment MCR 2.513(E) authorized the court to require counsel to prepare reference books (one for each juror) containing things like witness lists, relevant statutes, preliminary jury instructions, key exhibits, and "other appropriate information" to assist them.

This was a challenge. It was more work for counsel and court staff. In one case, the attorneys did not collaborate, and *each* showed up with huge notebooks with duplicate materials that provided the jurors with no help. One seasoned attorney got so frazzled by this requirement that we gave up. Many of the criminal cases were shorter and simpler, so there was less need for the notebooks.

But it was worth it. The jurors loved them. Approximately 70 percent said the notebooks helped them understand, recall, and

stay focused on the evidence. A staggering 85 percent said the notebooks helped them reach the correct verdict.

The attorneys—you know where this is going by now—were less enthusiastic. Fewer than half (43 percent) said the notebooks increased the fairness of the trial, and only 47 percent said the notebooks increased jurors' understanding.

Frankly, much of this is simply asking us to do something that should be done anyway. Forcing attorneys to collaborate in preparing notebooks has huge benefits for trial organization. It minimizes those unflattering time-wasters when one attorney walks around the courtroom and says, "Have you seen this?" or we wait for jurors to pass the exhibit through the jury box.

Conclusions

When this article was written, the Supreme Court was still considering the reforms and the *Richards* case. By the time you read this, one of two bad things may have happened to my career: either the Supreme Court approves the reforms and the Bar thinks I am a flack, or the Court does not approve them and starts peremptorily reversing me as an insurrectionist.

I will walk the plank.

The inherent problem with this type of study is that there is no outcome we can objectively measure—there is no definition of the "correct" verdict. In a health study, we can measure blood pressure at the conclusion and then evaluate which of the two methods is better at reducing it. Not here. This study is entirely subjective.

But we have heard from the persons most integral to our jury system—the jurors. We know what they want and what they think works. We say we value them, but we ignore or disregard what 91 percent of them want.

Here are the reasons to oppose change:

"We have always done it this way."

You do not need me to list the entities, from the animal kingdom to the business world, that have vanished or nearly did because they could not or would not adapt to a changing world.

Lawyers, including (maybe even especially?) judges, can be an arrogant bunch. We expect to make two-hour closing arguments without any visual aids, but we have trouble staying with a 20-minute message at our houses of worship. Most of us have never been trained in education or learning theory, but we think we know more than those who have.

"Why fix it if it ain't broke?"

Define "broke." That D+ in geometry earned you a credit, but probably did not reflect subject mastery.

And maybe it is broke. I spoke with three lawyers—two plaintiff and one defense—who used mock juries for settlement purposes. Two used the word "scary," and one of those said "very scary." The third was more diplomatic, but said it was amazing how jurors went off on odd tangents. All three agreed that jurors focused on things the attorneys thought were either given or unimportant. Jurors' questions during trial might alert you to this. Increasing their involvement in the trial might avoid that.

The original jury-innovation movement was a response, in part, to perceived problems—aberrant verdicts, juror no-shows—in the system. Current efforts could limit jury trials to some extent. Michigan's cyber court[6] has a presumptive jury waiver. Discussions regarding health care[7] and business courts[8] generally include elimination of, or limitations on, jury trials. Reasonable folks can disagree about the merits of these proposals, but those who favor resolution by jury trial may not want to assume that this option is inviolate. If nothing else, increasing juror satisfaction with trials brings more support for and confidence in our jury system.

Maybe We Really Do Not Respect Jurors Like We Say We Do

We were remodeling the Hall of Justice here in Muskegon a few years ago. Several early proposals contained no jury assembly room anywhere in the remodeled building. One of the committee members told me, "They were just jurors—they can meet in some room somewhere." And she was an attorney. That hurt.

Maybe some *do not want* jurors to be engaged. There are cases in which attorneys want confusion and doubt, where they want the jurors to nullify or render a verdict on the basis of passion unconnected to any facts. If so, then let's at least admit it.

Final Thoughts

"Use your common sense and everyday experience." I hear this in virtually every closing argument. Yet the traditional jury trial essentially deprives jurors of the tools to do this. They cannot take notes, ask questions, or discuss the case while the testimony is fresh—all the things you'd do during the week Dad is being evaluated.

We were recently talking about using written deposition summaries in lieu of live testimony. I was one of the few who had done that. I explained that I never barred attorneys from bringing in witnesses live or on video. However, I did force them to do summaries instead of reading in the witness's testimony. One person asked, "Don't you think the attorneys sometimes just want the jurors to hear the witness's words?"

Therein lies the problem. We do it because it is good *for us*. I doubt that any juror much appreciates hearing my law clerk pretending to be Dr. McDreamy.

Like bad partners, we do not listen when our loved ones tell us what they want or need. We tell them what *we* think they want or need. Never a good idea. We bring our laptops into court but deny jurors the right to take notes.

We have heard from the persons most integral to our jury system—the jurors. We know what they want and what they think works. We say we value them, but we ignore or disregard what 91 percent of them want.

The traditional jury trial is a top-down system based on tradition, assumptions, bromides, and beliefs that we are somehow exempt from the forces of a changing world. If we refuse to adapt to that world, we should not expect to avoid the fate of others who have trod that path. ■

Judge Timothy G. Hicks taught, counseled, and coached at two rural schools before starting his law career in 1983. He practiced law for 13 years before his appointment to the 14th Circuit Court in 1996. He was chief judge from 1998 to 2003. He is currently president-elect of the Michigan Judges Association. His interest in this project stems from his training and experience in education and learning theory.

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FOOTNOTES

1. Mize & Connelly, *Jury Trial Innovations: Charting a Rising Tide,* 41 Court Review 4, 4–5 (Spring 2004), available at <http://aja.ncsc.dni.us/courtrv/cr-41-1/CR41-1Mize.pdf>. All websites cited in this article were accessed May 5, 2011.
2. Order Proposing the Amendments to 2.512, 2.513, 2.514, 2.515, 2.516, and 6.414 of the Michigan Court Rules, ADM File No. 2005-19 (July 11, 2006), available at <http://www.courts.michigan.gov/supremecourt/Resources/Administrative/2005-19.pdf>.
3. Order Adopting a Pilot Project to Study the Effects of the Jury Reform Proposal, ADM File No. 2005-19 (August 5, 2008), available at <http://www.icle.org/contentfiles/milawnews/Rules/Ao/2005-19_08-05-08_unformatted-order_AO-No.:2008-2_Pilot_Project_Jury_Proposal.pdf>.
4. This is already permitted. See, for example, CJI2d 2.9 and M Civ JI 2.11 and their accompanying comments. However, it appears not to be commonly allowed, so this article treats it as one of the innovations.
5. *People v Richards,* unpublished opinion per curiam of the Court of Appeals, issued October 19, 2010 (Docket No. 293285).
6. MCL 600.8013 presumes a waiver unless the case is removed to circuit court.
7. Michigan Chamber of Commerce, *Specialized Health & Business Courts* <http://www.michamber.com/specialized-health-business-courts>.
8. Akers, *A Business Court in Michigan,* 45 Mich Bus L J 9, 9 (Fall 2005); Chamber of Commerce, *supra.*