IMPROVING THE SEARCH FOR TRUTH

By Richard Apkarian

Do the amendments foster juror interest and attention?

Do the amendments create juror distraction?

Do the amendments lead to better verdicts?

The Michigan Supreme Court recently modified the way jury trials are conducted in state courts. It did so by adopting a series of amendments to the Michigan Court Rules which took effect September 1, 2011.[1] The amendments, among other things, permit jurors—at the trial court's discretion—to take notes, submit questions to witnesses, and, in civil cases, conduct interim discussions. The amendments also authorize attorneys—once again, at the trial court's discretion—to summarize depositions, offer interim commentary, and provide jurors with reference documents or notebooks with key information. The amendments also permit trial courts to schedule expert testimony in a nontraditional fashion and even summarize the evidence. These amendments, which are intended to improve jurors' ability to perform their civic duty, are described below. Some of them are brand-new trial procedures, while others have

been used by courts for years. Additionally, some of the amendments have been welcomed with open arms by attorneys, courts, and court staff, while others cause headaches or offer little practical utility.

Juror Note Taking

Under MCR 2.513(H), courts may permit jurors to take notes. If note taking is permitted, the court must instruct jurors that taking notes is optional and must not interfere with jurors' attentiveness. The court must also inform jurors that their notes are confidential, but may be shared with other jurors during deliberations. Lastly, the court must collect and destroy all juror notes at the conclusion of the case.[2]

Juror note taking is not new. It has been allowed by certain courts for years and was expressly permitted in criminal cases under former MCR 6.414(D). Note taking always presents a risk of distraction, but for most jurors that risk is outweighed by the ability to record and better recall key facts.

Jurors Submitting Questions to Witnesses

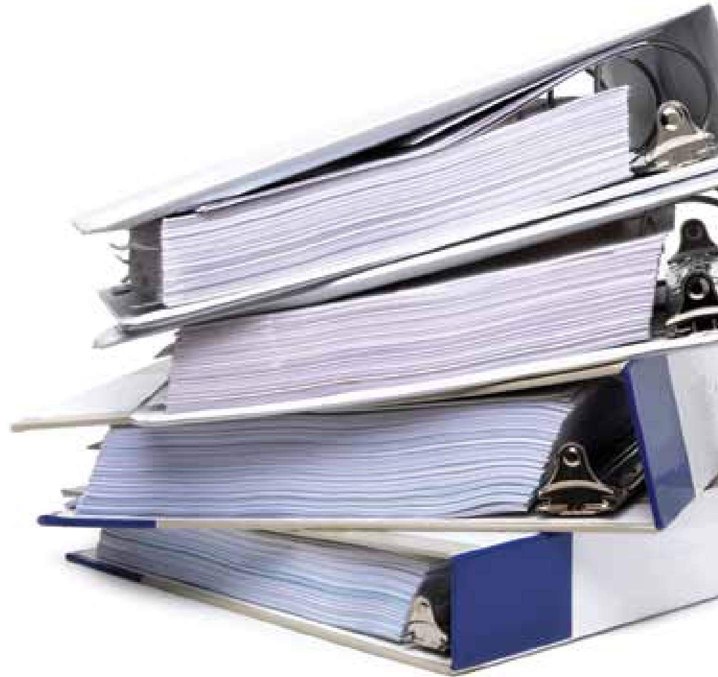
Under MCR 2.513(I), courts may permit jurors to submit questions to witnesses. If questions are allowed, the court must ask the questions and reject any "inappropriate" ones, and the parties must have an opportunity to object to any question outside the jury's presence.[3]

Like note taking, the opportunity for jurors to submit questions to witnesses is not new. Several courts have permitted it for years, and former MCR 6.414(E) expressly authorized it in criminal cases. However, this opportunity is probably the most worrisome for trial lawyers, who may fear that a juror will ask a question that was intentionally not asked. On the other hand, the types of questions raised should give trial lawyers a glimpse into the thought processes of the jurors while also helping jurors feel more engaged and involved in the truth-seeking function.

Interim Jury Discussions

Under MCR 2.513(K), courts may authorize jurors in civil cases to "discuss the evidence among themselves in the jury room during trial recesses." If interim discussions are allowed, the court must instruct the jurors that they are not to decide the case until all evidence, arguments, and instructions are heard. Further, such discussions may take place only if all jurors are present.[4]

This amendment, which applies only in civil cases, is brand new. The fear, particularly for defendants and defense counsel, is that the jury may decide the case too early, perhaps before the defense is even heard. But, like juror questions for witnesses, interim jury discussions should promote further interest and attentiveness by jurors as the trial proceeds.



Reference Documents

Under MCR 2.513(E), courts may allow (or even require) attorneys to provide jurors with a "reference document or notebook" that "should include, but which is not limited to, a list of witnesses, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document." During the trial, the court and the parties may supplement the reference document or notebook with "copies of the preliminary jury instructions, admitted exhibits, and other admissible information to assist jurors in their deliberations."[5]

Trial lawyers may worry that reference documents, like note taking, could be a distraction. But perhaps the biggest concern is an administrative one: who will compile the reference documents and when? Trial lawyers typically spend every waking minute leading up to opening statements in preparation for trial, and compiling a reference document is an additional burden. But the benefit of having all key information at the jury's fingertips should outweigh any administrative drawbacks.

Deposition Summaries

When witness testimony is offered by deposition rather than in person, MCR 2.513(F) allows attorneys to prepare a written deposition summary instead of reading the transcript to the jury. The rule also provides a safeguard by allowing an opposing party "the opportunity to object to its contents."[6]

While the benefit of avoiding the mundane reading of deposition questions and answers is apparent, the extra time needed to prepare the summary and deal with objections may outweigh the benefit and prevent any practical usefulness.

According to the Supreme Court, the purpose of these amendments is to "assist those citizens who are performing their civic duty as jurors."

Interim Commentary

Under MCR 2.513(D), attorneys (or in pro per parties) "may, in the court's discretion, present interim commentary at appropriate junctures of the trial."[7]

The word "commentary" is not described in the court rule, but the apparent intent behind the amendment is to allow a mini-opening or mini-closing argument, perhaps to preview upcoming evidence, summarize evidence already presented, or simply provide an opportunity for interim argument. Most attorneys would jump at the chance to address the jury in the middle of trial, but trial courts may be reluctant to allow it in a typical case. Perhaps the only practical advantage for interim commentary is in a very lengthy or overly complicated trial.

Alternative Scheduling of Expert Testimony

Under MCR 2.513(G), courts may "craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties," such as allowing experts to testify sequentially, remain in the courtroom during other experts' testimony, and aid attorneys in the formulation of questions for cross-examination.[8]

For jurors, the benefit of this amendment is the sequential presentation of experts, which allows them to compare and contrast opposing opinions. However, there clearly exists a risk of boredom with several hours, or even days, of expert testimony.

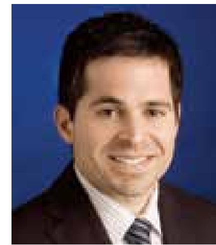
Summing Up the Evidence

Under MCR 2.513(M), trial judges "may fairly and impartially sum up the evidence" after closing arguments. If a court employs this procedure, it must instruct the jury to determine the weight of the evidence and credibility of the witnesses, and specify that the jury is not bound by the court's summary.[9]

While the rule allows a court to simplify or clarify the evidence presented, it is unlikely that this procedure will be used in light of the difficulty of presenting an unbiased summary of the evidence and the associated risk for appeal.

Do the New Rules Accomplish Their Purpose?

According to the Supreme Court, the purpose of these amendments is not to make trial practice harder or easier for attorneys, courts, or court staff. Instead, the purpose is to "assist those citizens who are performing their civic duty as jurors" and, ultimately, "to further the rule of law, and necessarily the search for truth...."[10] Interestingly, the Supreme Court will review the efficacy of the amendments in the fall of 2014. However, no one will know for sure whether the new rules actually accomplish their purpose, as there is no objective test for whether a jury reached the correct verdict. At a minimum, the amendments should better equip a jury with additional tools to more effectively, efficiently, and properly perform its critical duty. ■



Richard Apkarian is a member of Dickinson Wright PLLC in its Ann Arbor and Troy offices. He practices general business litigation with a specialty in contract and business tort disputes, automotive supplier conflicts, real estate disputes, intellectual property cases, and personal injury defense matters. He also negotiates and drafts various agreements and contract-related documents, including residential and commercial leases, standard terms and conditions of supply and purchase, noncompetes, and confidentiality agreements.

FOOTNOTES

1. The amendments were adopted after the two-year pilot project, the results of which were described in detail by Hon. Timothy G. Hicks in a previous *Michigan Bar Journal* article. See Hicks, *The jury reform pilot project—The envelope, please,* 90 Mich B J 40 (June 2011), available at <http://www.michbar.org/journal/pdf/pdf4article1864.pdf> (accessed December 11, 2012).
2. MCR 2.513(H).
3. MCR 2.513(I).
4. MCR 2.513(K).
5. MCR 2.513(E).
6. MCR 2.513(F).
7. MCR 2.513(D).
8. MCR 2.513(G).
9. MCR 2.513(M).
10. Administrative Order No. 2005-19.