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## Foreword

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JURIES AND LAY PARTICIPATION:  
AMERICAN PERSPECTIVES  
AND GLOBAL TRENDS

NANCY S. MARDER AND VALERIE P. HANS  
Symposium Editors



## FOREWORD

JAMES F. HOLDERMAN\*

When Professor Nancy S. Marder asked me to deliver the keynote address at the IIT Chicago-Kent College of Law's 2014 Jury Conference presented by the Justice John Paul Stevens Jury Center and the *Chicago-Kent Law Review*, I felt highly honored. The conference featured some of the best and brightest individuals on the subject of the American jury system. I feel equally honored to have been asked by Professor Marder to write the Foreword for this symposium containing the articles prepared and presented at the 2014 Jury Conference.

As a federal trial judge, I have presided over numerous federal jury trials, both civil and criminal, during my thirty years on the bench. Before joining the bench, I served as trial counsel in dozens of jury trials. During my more than four decades of jury trial experience, which has included talking to jurors after a good number of those trials, I developed three general opinions of jurors. First, jurors as a group want to be fair and do the right thing when they are asked to decide a case. Second, jurors in their quest to be fair and do the right thing will call upon their own experiences in evaluating the credibility of the witness testimony and other evidence. In fact, most federal court jury instructions tell them to do that.<sup>1</sup> Third, jurors strive to understand the facts based on the evidence presented at trial, but sometimes they desire more information than the evidence provides.

Because less than five percent of the cases filed in U.S. courts are ultimately decided by a jury,<sup>2</sup> each individual jury trial is important to America's system of justice and the delivery of justice by that system. Consequently, I am a firm believer that we judges, and the lawyers who conduct jury trials in our courtrooms, should seek in every way, consistent with the rules of evidence, to maximize jurors' understanding of

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1. See, e.g., COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 1.13, available at [www.ca7.uscourts.gov/7thcivinstruc2005.pdf](http://www.ca7.uscourts.gov/7thcivinstruc2005.pdf) (last visited Mar. 16, 2015).

2. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 *passim* (2004).

the facts (based on the evidence) and the law (based on the jury instructions), so that jurors are in the best position to return a fair and just verdict. We should also do what we can to motivate jurors to eliminate from their consideration any information that was not presented as evidence. We should do this not only so justice is done in every case, but also so the jury trial right our country's founders envisioned and made a part of the United States Constitution is preserved.

My keynote remarks at the IIT Chicago-Kent College of Law Jury Conference were titled "Maximizing Jurors' Understanding," and were designed to raise awareness of procedures currently available to help twenty-first century jurors maximize their understanding of the evidence and minimize their potential use of information outside of the presented evidence. The procedures I discussed in my keynote remarks are based on my first-hand experience as a federal trial judge, as chair of the American Bar Association (ABA) Commission on the American Jury Project, and as chair of the Seventh Circuit Bar Association's American Jury Project (Project).<sup>3</sup>

In 2005, I began using several jury trial procedures recommended by the ABA in civil jury trials as part of the Seventh Circuit's Project. Based on my experience, and that of my fellow federal judges who likewise implemented several of the ABA's recommended procedures on an experimental basis, three procedures emerged as the most valuable for maximizing jurors' understanding:

1. Allowing jurors to submit written questions for witnesses during the evidentiary phase of the trial;
2. Allowing the lawyers to make interim statements to the jury between witnesses during the evidentiary phase of the trial; and
3. Giving the jury preliminary substantive jury instructions before the trial begins.

During the Project, after the completion of each of the fifty experimental jury trials in federal civil cases that my judicial colleagues and I conducted in our respective federal district courtrooms, the jurors, lawyers and judges were asked to answer written questions seeking their opinion on whether the experimental procedures increased jurors' understanding. Responses were collected from 434 jurors, 86

3. SEVENTH CIRCUIT AM. JURY PROJECT COMM., SEVENTH CIRCUIT AMERICAN JURY PROJECT FINAL REPORT (Sept. 2008), <http://c.ymcdn.com/sites/www.7thcircuitbar.org/resource/resmgr/imported/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf>.

trial attorneys, and 22 federal district judges who participated in the trials.<sup>4</sup>

On the question whether allowing jurors to submit written questions for witnesses increased the jurors' understanding, 83% of the jurors, 65% of the lawyers and 77% of the judges said "Yes."<sup>5</sup> On the question whether the lawyers' interim statements increased jurors' understanding, 80% of the jurors, 70% of the lawyers, and 85% of the judges said "Yes."<sup>6</sup> On the question whether providing preliminary substantive jury instructions before opening statements increased the jurors' understanding, 80% of the jurors, 70% of the lawyers, and 85% of the judges said "Yes."<sup>7</sup>

Consequently, I have continued to employ these three procedures during the federal civil jury trials in which I have served as the trial judge over the past decade. No party has ever raised an issue about these procedures on appeal. In addition, the United States Court of Appeals for the Seventh Circuit approved the procedure of jurors submitting written questions for witnesses.<sup>8</sup>

From my experience, I found that several benefits flow from using these procedures in jury trials. Allowing written questions for witnesses from the jurors during the trial: (1) keeps jurors engaged and attentive during trial; (2) keeps jurors from seeking answers elsewhere; (3) provides insight into jurors' thinking and areas of interest; (4) allows the lawyers and judges to dispel confusion jurors may have about evidence presented; (5) allows the judge to explain to the jury why certain information is not relevant to its decision and why certain questions cannot be asked; and (6) allows the lawyers and judge to bring jurors' focus back to the pertinent evidence. I also found that permitting lawyers to give interim statements: (1) allows the lawyers to focus jurors' attention when the evidence is fresh in their minds; (2) helps jurors to understand immediately the purpose of the evidence presented; (3) allows jurors to evaluate the evidence in light of lawyers' stated positions; and (4) helps everyone stay on track. I further found that providing jurors with preliminary substantive instructions before opening statements: (1) places the dispute between the parties

4. *Id.* at 13.

5. *Id.* at 24.

6. *Id.* at 35.

7. *Id.* at 28.

8. See *SEC v. Koenig*, 557 F.3d 736, 741–43 (7th Cir. 2009). This opinion decided an appeal from a trial in which I was not the trial judge.

in the legal context for the jurors; (2) provides the jurors an early legal framework for the evidence that is presented at trial; (3) helps the jurors focus on the legal elements to be proven at trial; and (4) lets the jurors know what they have to decide.

As I mentioned, an added benefit of allowing jurors to submit written questions for witnesses is that jurors are motivated not to go outside the evidentiary and judicial process (i.e., using the Internet) to gain information jurors may feel they need in order to decide the case. I tell the jurors in each case that to be fair, which I know they each want to be, they cannot seek or consider anything other than the evidence presented at the trial to decide the case. I also tell them that if they feel they need more information than what has been provided in the evidence, they should submit a written question for a witness. If any juror submits a question, I talk to the lawyers about the submitted question and hear any objections the lawyers desire to make outside the presence of the jurors. If a question seeks evidence that is admissible, I will allow evidence to be presented. If a question seeks evidence that is inadmissible, I will sustain counsel's objection outside the jurors' presence, and then explain to the jurors on the record in open court why that evidence is not admissible. I have never had a situation brought to my attention where a juror has obtained information or tried to obtain information outside the evidence presented at the trial. It is my practice to remind the jurors at the beginning of every trial day and again at the end of every trial day about the need for them to comply with their individual responsibilities—to be fair jurors and not to seek or obtain outside information to help them reach their verdict. No juror, to my knowledge, has ever let me down.

I recommend these procedures to all who are participants in the jury trial process. I also commend all the valuable information provided by the authors of the outstanding, scholarly articles contained in this symposium. We who are a part of American jury trials and we who care about American jury trials must do what we can to help each jury in each jury trial reach a fair and just verdict. That is the goal that we Americans, collectively, aspire to achieve in every jury trial conducted daily in courtrooms across our country.