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THE JUDGE-JURY RELATIONSHIP

by

Jack Pope*

ONE of the most hallowed traditions in Anglo-American jurisprudence is the jury system. The machinery of this great system starts to turn each Monday morning as the clerk calls the roll of jurors for the week. For many jurors, it is their first courthouse experience. Some are eager to serve; others fret over the disruption of business plans or the disturbance to their routine. For most of them, the week's experience will be a financial sacrifice. One thing, however, is common to all of those present: they are a captive audience—they are present in response to the command of the law.

The judge is the one person present to whom the scene is familiar. Continuously, he is confronted with one of the greatest opportunities in all government to educate citizens to the gravity and the importance of administering justice. Under no other system do so many citizens have the opportunity to become actual participants in the judicial process, and this important fact should be communicated to the citizens in the courtroom. The scene in the courtroom which the judge views, however familiar and tiresome to him, should never be taken for granted. The jurors want instructions; it is the judge to whom they primarily look for guidance, and this is no time for perfunctory indifferent lectures. To the contrary, the judge should orient the jurors with their physical environment and explain to them the nature and gravity of their week's service. Moreover, he must strive to stimulate them to the spirit of justice according to rules and standards of the law. To assist the judge in enlightening jurors to their responsibilities, the State Bar of Texas authorized the distribution of jury booklets among all County Commissioners with the request that they in turn authorize the printing of a sufficient number for distribution among all jurors summoned in the county.¹ Many counties have adopted this practice, and the distribution of such booklets has been approved by the courts.²

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¹ The State Bar of Texas published such a handbook in 1952. The information contained therein makes a trial more understandable to jurors. The handbook provides a summary account of the historical background of the jury and designates the manner in which jurors are chosen, the importance of government under the law, the steps in the conduct of a trial, and the proper conduct of jurors.

² *City of Dallas v. Shuford*, 186 S.W.2d 708 (Tex. Civ. App.), *aff'd*, 144 Tex. 342, 190 S.W.2d 721 (1945).

I. STEPS IN JURY EDUCATION

There are five logical stages of the trial when the judge may instruct the jurors. Brief, well-prepared instructions at each of these stages will better educate citizens concerning a juror's duty and, hopefully, will improve the quality of verdicts. These periods include the instructions (1) to the panel for the week; (2) before the voir dire; (3) after a jury is sworn for a case; (4) when the case is submitted to the jury; and (5) at the time of discharge. Each stage calls for instructions of a different nature. If instructions are omitted at any stage, an opportunity to comment on subjects which are then pertinent and essential is lost. In the absence of a clear statement of rules of conduct, jurors, innocently and with good intentions, may violate the standards of jury conduct. It is for this reason that the judge should instruct jurors at each stage about those matters most likely to occur at that time. It does little good to instruct jurors after they have acted improperly. Often, the element of repetition in the statement of some of the standards will impress the jurors with their importance.

A. Lecture To Jury Panel For The Week

The first opportunity to orient the jurors with the courthouse and their expected service is presented when the jurors initially assemble. This lecture should not be unduly long, but greater harm can come from its being too short. It should be prepared carefully and include comments and explanations about these subjects: (1) the nature of their service, the cases to be heard (criminal or civil), the physical arrangement of the courthouse, the hours of work, the time and place to which they should report each day, and the probable length of their service; (2) an explanation of the history and significance of trial by jury in free nations; (3) the importance and gravity of the jury in analyzing and deciding the facts as distinguished from the law; and (4) a statement that all jurors—as well as judges, attorneys, court officials, and the public—must abide by certain standards of conduct which will be stated from time to time. The judge should explain that jurors must possess certain qualifications.³ He should ask jurors to advise the court of any reasons which they may have for disqualification or excuse. Furthermore, jurors should be apprised of the legal exemptions from jury duty⁴ and that emergencies may justify postponed service.

³ Tex. Rev. Civ. Stat. Ann. art. 2133 (Supp. 1962).

⁴ Tex. Rev. Civ. Stat. Ann. art. 2135 (Supp. 1962).

B. *Lecture Before Voir Dire*

After jurors have been excused by exemption, disqualification, or other reasons, the district court clerk prepares a list of at least twenty-four jurors (twelve in the county court) and delivers copies to the attorneys.⁵ After the swearing of the jurors,⁶ the judge should give additional instructions covering the following subjects: (1) a brief statement of the suit on trial, *e.g.*, the names of the plaintiff and defendant, the meaning of these terms, and the general nature of the case; (2) an introduction to the jury of the attorneys for the parties; (3) a statement that twelve jurors (or six) must be chosen and that each party has the right to exercise six (or three) peremptory challenges;⁷ (4) an explanation that the additional questions by the lawyers concerning the jurors' background, experience, and attitudes are proper⁸ and that each juror should give complete answers even though the questions are addressed to the panel collectively; (5) an estimate of the time required to try the case; and (6) certain rules of proper conduct and that the jurors are free to separate at recess, for meals, and at night provided they obey the standards of proper jury conduct.

C. *Lecture After The Jurors Are Sworn For The Case*

After each party has exercised his peremptory challenges and the clerk has called the names of the remaining jurors, the judge must swear the jurors.⁹ At this point, the most complete instructions should be given the jurors concerning their own conduct. Since the true object of the trial is to try a case properly at first rather than to remedy an error at a subsequent time, it is better to give thorough instructions early in the trial in order to prevent possible jury misconduct. The better practice is to give each juror a printed sheet which contains the general rules of proper conduct. While the juror examines the sheet, the judge should orally explain these rules.

D. *Written Admonitory Charges*

In many courts, the only admonitions given the jury are those which are contained in the written charge. The last attempt to improve upon this practice was made in 1941. At that time, Mr. Justice Alexander distributed sample admonitory charges. Those charges

⁵ Tex. R. Civ. P. 224.

⁶ Tex. R. Civ. P. 226.

⁷ Tex. R. Civ. P. 233.

⁸ *Houston & T.C. Ry. v. Terrell*, 69 Tex. 650, 7 S.W. 670 (1888); *Robinson v. Lovell*, 238 S.W.2d 294 (Tex. Civ. App. 1951) *error ref. n.r.e.*

⁹ Tex. R. Civ. P. 236. The judge should ask the jurors to be seated in the order called and to use the same seats during the course of the trial.

have fallen into disuse in many districts, probably because there was no official sanction, although most admonitory charges have been tested and approved. Consequently, the admonitory charges, in general, have gradually deteriorated, and many current charges are mere skeletons of models in use twenty years ago.

E. Lecture When Discharged

Jurors should be discharged after the judge has thanked them for serving an important role in the judicial system. Judge Williams of the Dallas Court of Civil Appeals suggests that comments, if appropriate to the case, may well be made which point out the date the case was filed, how quickly it was tried, and the reasons for certain delays and recesses necessary to the progress of the trial. Jurors should be told that rule 327¹⁰ releases them from their secrecy and that they are free to discuss the case, but are under no compulsion to do so. They should also be told that Texas permits investigations concerning jury misconduct.¹¹ Such instructions should be worded carefully and should not encourage the suppression of misconduct proof or other error.¹² It is better that these instructions concerning the Texas law come from the judge instead of the attorneys. The Ethics Committee of the State Bar has had occasion to state that certain post-trial letters from attorneys to jurors may violate Canons 19, 22, 36, and 39 of the Canons of Ethics.¹³ However, other more carefully worded letters have escaped this criticism.¹⁴ In any event, the judge should assume this responsibility of further instructing the jury. Without instructions about this law, a juror may become indignant if one of the attorneys subsequently contacts him.

II. ORAL ADMONITORY CHARGES

In the course of a trial, certain oral instructions of an admonitory or cautionary nature are acceptable. These admonitory charges are usually left to the discretion of the trial judge.¹⁵ "A judge," it has been said, "is not required to be a speechless, mechanical robot who can speak

¹⁰ Tex. R. Civ. P. 327.

¹¹ *Tumlinson v. San Antonio Brewing Ass'n*, 170 S.W.2d 620 (Tex. Civ. App. 1943) *error ref. w.o.m.*; Tex. R. Civ. P. 327.

¹² *O'Neil v. Quilter*, 236 S.W. 116 (Tex. Civ. App. 1917).

¹³ 13 Texas B.J. at 466 (1950).

¹⁴ *St. Louis Southwestern Ry. v. Duffy*, 308 S.W.2d 202 (Tex. Civ. App. 1957) *error ref. n.r.e.*

¹⁵ *J.H. Robinson Truck Lines v. Ragan*, 204 S.W.2d 662 (Tex. Civ. App. 1947); *Quannah, Acme & Pac. Ry. v. Eblen*, 55 S.W.2d 1060 (Tex. Civ. App. 1932) *error ref.*

and function only if and when someone pulls the right lever."¹⁶ However, he may not assume the role of an advocate,¹⁷ nor may he comment on the evidence.¹⁸ Moreover, the judge should neither do nor say anything that would indicate approval or disapproval of a plea or position taken by any of the parties, or that he agrees or disagrees with the evidence.¹⁹ However, the judge may orally explain the alignment of the parties.²⁰ He may also give oral admonitions against arriving at a verdict by chance.²¹ The judge may orally admonish the jurors to consider only the questions of law submitted to them²² and not to separate.²³ During the trial, the court may instruct jurors orally to disregard improper evidence,²⁴ side-bar remarks,²⁵ extraneous matters or occurrences,²⁶ and improper questions or arguments.²⁷ The judge may rule orally on objections during the argument, and in the absence of a request for a written charge, he may instruct jurors orally that evidence is admitted for a limited purpose only.²⁸ He may order jurors to return to the jury room for further deliberations and comment on their duty to deliberate.²⁹ If jurors seek additional instructions, he may instruct them orally to follow the instructions and the charge previously given.³⁰ Furthermore, he may instruct the jury orally as to the form of the verdict³¹ and to answer as many questions as they can agree upon.³² On the other hand, the court may refuse to answer a question propounded by the jury.³³ After the deliberations begin, lectures and advice to jurors³⁴ or additional instruc-

¹⁶ Chavarria v. Macias, 252 S.W.2d 262, 264 (Tex. Civ. App. 1952).

¹⁷ Hudson v. Hudson, 308 S.W.2d 140 (Tex. Civ. App. 1957).

¹⁸ Tex. R. Civ. P. 272; 20 Texas L. Rev. 83 (1941).

¹⁹ For an excellent discussion of the role of the judge, see Texas & Pac. Ry. v. Murphy, 46 Tex. 356 (1876).

²⁰ Farmers' Nat'l Bank v. Wallace & Co., 263 S.W. 1105 (Tex. Civ. App. 1924).

²¹ Houston Belt & Terminal Ry. v. Davis, 19 S.W.2d 77 (Tex. Civ. App. 1929) *error ref.*

²² Luse v. Beard, 252 S.W. 243 (Tex. Civ. App. 1923) *error disp.*

²³ Mahaney v. State, 95 Tex. Crim. 443, 254 S.W. 946 (1923).

²⁴ Dallas Ry. & Terminal Co. v. Whitcomb, 139 Tex. 467, 163 S.W.2d 616 (1942).

²⁵ Dallas Ry. & Terminal Co. v. Helton, 145 S.W.2d 655 (Tex. Civ. App. 1940) *error disp., judgm. cor.*

²⁶ Bell v. New Jersey Ins. Co., 120 S.W.2d 610 (Tex. Civ. App. 1930).

²⁷ Browning v. Nesting, 219 S.W.2d 712 (Tex. Civ. App. 1949) *error ref. n.r.e.*

²⁸ Anderson v. Barnwell, 52 S.W.2d 96 (Tex. Civ. App. 1932), *aff'd*, 86 S.W.2d 41 (Tex. Comm. App. 1935).

²⁹ Hunt v. Johnson, 141 S.W. 1060 (Tex. Civ. App. 1911) *error disp. w.o.j.*, 106 Tex. 509, 171 S.W. 1125 (1914).

³⁰ Kuykendall v. Johnson Funeral Parlor, 38 S.W.2d 601 (Tex. Civ. App. 1931); Gillham v. St. Louis Southwestern Ry., 241 S.W. 512 (Tex. Civ. App. 1922) *error disp.*

³¹ Tyler v. Timpson Handle Co., 135 S.W. 250 (Tex. Civ. App. 1911).

³² Varn v. Gonzales, 193 S.W. 1132 (Tex. Civ. App. 1917), *rev'd on other grounds*, 222 S.W. 543 (Tex. Comm. App. 1920).

³³ F. H. Vahlsing v. Hartford Fire Ins. Co., 108 S.W.2d 947 (Tex. Civ. App. 1937) *error disp.*; Compton v. Jennings Lumber Co., 295 S.W. 308 (Tex. Civ. App. 1927) *error disp.*; Moore v. Thomas, 258 S.W. 1087 (Tex. Civ. App. 1924).

³⁴ *Ibid.*

tions on the law which should be in writing³⁵ may be coercive unless the statements are carefully limited. Instructions about the burden of proof should not be oral.³⁶ Jurors should not be admonished to make concessions during their deliberations.³⁷ During the trial and even after deliberations commence, the judge may recess the jurors orally. At such time, he may instruct them, in fact he should, concerning their conduct during periods of separation.³⁸ The judge may receive the verdict from the jury orally,³⁹ and he may poll them orally.⁴⁰

III. APPROVED WRITTEN ADMONITORY CHARGES

Except for matters of admonition and administration, instructions should be in writing.⁴¹ This also applies to definitions and instructions about legal terms, although a few clear and simple oral instructions have been permitted.⁴² As a part of the court's formal written charge, it is the standard Texas procedure to give certain written admonitions. Some of these instructions are very old and have been approved in decided cases, but the experience of many years shows the need to add additional instructions. The following are suggested instructions that have been tested and approved:

(1) Matters of fact: You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matters of law, you must be governed by the instructions in this charge.⁴³

(2) Special issues: This case is submitted to you upon the following special issues which you will answer, without regard to the effect your answers may have upon the judgment in this case or the parties to the suit.⁴⁴

(3) Disinterest: Do not let bias, prejudice, sympathy, resentment, or any such emotion play any part in your deliberations.⁴⁵

(4) No communication: Hold yourselves completely aloof from the lawyers, witnesses, parties, and all other persons concerned with

³⁵ *Ibid.*

³⁶ *Reed v. Bates*, 32 S.W.2d 216 (Tex. Civ. App. 1930).

³⁷ *Gulf, C. & S.F. Ry. v. Johnson*, 99 Tex. 337, 90 S.W. 164 (1905).

³⁸ Tex. R. Civ. P. 284.

³⁹ Tex. R. Civ. P. 293.

⁴⁰ Tex. R. Civ. P. 294.

⁴¹ Tex. R. Civ. P. 271, 272.

⁴² See note 76 *infra* and accompanying text.

⁴³ *Dickinson v. Sanders*, 39 S.W.2d 102 (Tex. Civ. App. 1931); *International & G.N. R.R. v. Muschamp*, 90 S.W. 706 (Tex. Civ. App. 1905) *error ref.*; *Ft. Worth & D.C. Ry. v. Bunrock*, 46 S.W. 70 (Tex. Civ. App. 1898) *error ref.*; *Galveston H. & S.A. Ry. v. Davis*, 23 S.W. 301 (Tex. Civ. App. 1893).

⁴⁴ *Imperial Underwriters v. Dillard*, 146 S.W.2d 1105 (Tex. Civ. App. 1940) *error ref.*; 9 *Stayton, Texas Forms* § 5091 (Rev. ed. 1961).

⁴⁵ *Throckmorton v. Missouri, K. & T. Ry.*, 39 S.W. 174 (Tex. Civ. App. 1896) *error ref.*

this suit.⁴⁶ Do not discuss this case with anyone or even mention it to other persons, and do not permit anyone to mention it in your hearing while this case is on trial. That means that you will not discuss the case even with your wife or husband.⁴⁷

(5) No speculation: Do not speculate on matters not shown by the evidence and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.⁴⁸

(6) Do not visit scene: Do not go out to the scene of any occurrence to make personal inspections, observations, or investigations. If you conduct a personal view of the premises or of things and articles which are not produced in open court, you will violate your oath and your duty as jurors.⁴⁹

(7) Personal knowledge: Be very careful not to consider or mention any personal knowledge or information you may have about any fact or person which is not shown by the evidence you have heard in this trial. Do not try to gather any evidence for yourselves. Your duty is to answer these questions from the evidence you have heard here and from that alone.⁵⁰

(8) Verdict by lot or chance: Do not try to reach a verdict by lot or chance and do not return a quotient verdict by adding together figures, dividing by the number of jurors, and agreeing to be bound by the result. Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way. All questions must be answered by a unanimous vote and not by a majority vote.⁵¹

(9) Effect of answers to special issues: Do not decide who you think should win, and then try to answer the questions accordingly. If you do that, your verdict will be worthless and all of our time will

⁴⁶ Tex. R. Civ. P. 284.

⁴⁷ *Ibid.*

⁴⁸ *Ford Motor Co. v. Whitt*, 81 S.W.2d 1032 (Tex. Civ. App. 1935) *error ref.*; *Taylor v. General Exchange Ins. Corp.*, 67 S.W.2d 1061 (Tex. Civ. App. 1933), *rev'd on other grounds*, 128 Tex. 118, 96 S.W.2d 70 (1936); *American Nat'l Ins. Co. v. Callahan*, 51 S.W.2d 1083 (Tex. Civ. App. 1932), *aff'd*, 125 Tex. 222, 81 S.W.2d 504 (1935); *Dickinson v. Sanders*, 39 S.W.2d 102 (Tex. Civ. App. 1931); *St. Louis, S.F. & T. Ry. v. Allen*, 296 S.W. 950 (Tex. Civ. App. 1927) *error disp.* Such a charge was not objectionable on the grounds that it deprived a jury of the right to consider matters of common knowledge. *Petroleum Producers Co. v. Stolley*, 137 S.W.2d 207, 212 (Tex. Civ. App. 1939) *error disp., judgm. cor.*

⁴⁹ *Southern Traction Co. v. Wilson*, 254 S.W. 1104 (Tex. Comm. App. 1923); see also *Houston Belt & Terminal Ry. v. Davis*, 19 S.W.2d 77 (Tex. Civ. App. 1929) *error ref.*

⁵⁰ *Taylor v. General Exchange Ins. Corp.*, 67 S.W.2d 1061 (Tex. Civ. App. 1933), *rev'd on other grounds*, 128 Tex. 118, 96 S.W.2d 70 (1936); *International Harvester Co. v. Campbell*, 96 S.W. 93 (Tex. Civ. App. 1906).

⁵¹ *Texas Employers' Ins. Ass'n v. Roys*, 281 S.W.2d 753 (Tex. Civ. App. 1955) *error ref. n.r.e.*; *Texas & Pac. Ry. v. Dickey*, 70 S.W.2d 614 (Tex. Civ. App. 1934) *error ref.*; *Reed v. Bates*, 32 S.W.2d 216 (Tex. Civ. App. 1930).

have been wasted. Simply answer the questions as you find the facts from the evidence without concerning yourselves about the effect of your answers.⁵²

(10) Attorney's fees and cost of litigation: You must not consider, discuss, or refer in your deliberations to attorney fees. You will not allow any recovery therefor or for costs of litigation, and you will not take these matters into consideration.⁵³

IV. DISAPPROVED ADMONITORY CHARGES

Although the courts have been liberal in permitting admonitions about conduct, they have neither encouraged nor often permitted instructions that tell jurors what they may consider in arriving at their verdict. Instructions that jurors may consider common knowledge are discouraged.⁵⁴ The same may be said about instructions that jurors may consider circumstantial evidence.⁵⁵ Ordinarily, courts do not instruct jurors that they should not consider whether any party does or does not have insurance coverage.⁵⁶

⁵² *Turner v. Texas Elec. Serv. Co.*, 77 S.W.2d 728 (Tex. Civ. App. 1934) *error disp.*

⁵³ *Texas & Pac. Ry. v. Dickey*, 70 S.W.2d 614 (Tex. Civ. App. 1934) *error ref.*; *Reed v. Bates*, 32 S.W.2d 216 (Tex. Civ. App. 1930); *Houston Belt & Terminal Ry. v. Davis*, 19 S.W.2d 77 (Tex. Civ. App. 1929) *error ref.*; *St. Louis, S.F. & T. Ry. v. Allen*, 296 S.W. 950 (Tex. Civ. App. 1927) *error disp.*; *Northern Tex. Traction Co. v. Woodall*, 294 S.W. 873 (Tex. Civ. App. 1927), *rev'd on other grounds*, 299 S.W. 220 (Tex. Comm. App. 1927).

⁵⁴ *Phoenix Ref. Co. v. Tips*, 125 Tex. 69, 81 S.W.2d 60 (1935); *Becker v. Mollenauer*, 234 S.W.2d 690 (Tex. Civ. App. 1950) *error ref. n.r.e.*; *Kiel v. Mahan*, 214 S.W.2d 865 (Tex. Civ. App. 1948) *error ref. n.r.e.*; *Gillette Motor Transport Co. v. Whitfield*, 197 S.W.2d 157 (Tex. Civ. App. 1946), *aff'd*, 145 Tex. 571, 200 S.W.2d 624 (1947), noted in 26 Texas L. Rev. 89 (1947); *Petroleum Producers Co. v. Stolley*, 137 S.W.2d 207 (Tex. Civ. App. 1939) *error disp., judgm. cor.*; *St. Louis, B & M. Ry. v. Zamora*, 110 S.W.2d 1242 (Tex. Civ. App. 1937).

⁵⁵ *Johnson v. Zurich Gen. Acc. & Liab. Ins. Co.*, 146 Tex. 232, 205 S.W.2d 353 (1947), noted in 26 Texas L. Rev. 814 (1948); *Nass v. Nass*, 224 S.W.2d 280 (Tex. Civ. App. 1949), *aff'd*, 149 Tex. 41, 228 S.W.2d 130 (1950).

⁵⁶ In *Lucas v. Alsmeyer*, 322 S.W.2d 19 (Tex. Civ. App. 1959), a juror approached the judge in course of a trial and asked: "Judge, can't this boy's liability insurance company help him out of this some way or other?" The court then gave this instruction to the whole jury:

I especially remind and instruct you that this suit is between the individual parties before you, to-wit, Benjamin D. Lucas and wife, Valita Lucas, as Plaintiffs, and Charles R. Alsmeyer, as the Defendant, and none other than said above-named parties. There is no evidence before you as to whether either party to this suit has or had liability or any other kind of insurance; nor is this a matter within your province as jurors to consider one way or the other, and on this you must not guess or speculate, nor discuss, mention or consider. It is, therefore, imperative that all times during this trial and during your deliberations on your verdict that you bear in mind that the above named Plaintiffs and Defendant are the only parties to this suit, and you must not mention, discuss, or consider, by mental reservation or otherwise, whether either party to this suit is covered by insurance of any kind whatsoever, and in awarding damages, if any, you must not consider that any amount, if any,

An admonition which has been criticized is one that induces jurors to conceal their misconduct. Suppression of misconduct by the court or attorneys is misconduct.⁵⁷ In *O'Neil v. Quilter*,⁵⁸ the judge instructed the jury:

Gentlemen of the panel for the week, the court instructs you that in all cases which have or may be submitted to you during the week, that after a verdict has been rendered by you in such case, you shall not converse with or make any statements to any of the parties, or their attorneys, or any one else, as to how, or in what manner, or by what means, you arrived at a verdict, or state anything that transpired among the jury while deliberating on your verdict therein.

The reason for the above instruction is that, if any such information is given by any of you, it is possible that, based upon such information, this court will be compelled to set aside your verdict on a motion for new trial urged by the losing party.⁵⁹

The instructions were condemned severely, but there was no reversal since the aggrieved party made no effort to investigate any acts of misconduct. Counsel's explanation that he feared he would be fined for contempt if he undertook an investigation did not excuse his failure to prove suppression in fact. Justice would have been better served if the judge had explained that the jury was released from secrecy and that they were free to discuss the case if they so desired.

V. COMMUNICATIONS BETWEEN JUDGE AND JURY

A. In General

The proper rule is for a judge to refuse to communicate with jurors, either individually or collectively, except in open court and strictly in the manner stated by the rules. Rules 285 and 286 generally set forth the procedure to be followed in communications between judge and jury in civil cases:

Rule 285. Jury May Communicate with Court:

The jury may communicate with the court by making their wish known to the officer in charge, who shall inform the court, and they may then in open court, and through their foreman, communicate with the court, either verbally or in writing. If the communication is to request further instructions, Rule 286 shall be followed.⁶⁰

so awarded will be adjudged against anyone except the defendant, Charles Alsmeyer. *Id.* at 20-21.

Although there was a waiver of the point because there was no motion for mistrial, the court said the charge was proper and timely given, since one of the jurors had already raised the question of insurance.

⁵⁷ *Goldstein Hat Mfg. Co. v. Cowen*, 136 S.W.2d 867 (Tex. Civ. App. 1940) *error dismissed*; *Traders & Gen. Ins. Co. v. Watkins*, 94 S.W.2d 843 (Tex. Civ. App. 1936) *rev'd mem.*

⁵⁸ *O'Neil v. Quilter*, 236 S.W. 116 (Tex. Civ. App. 1917).

⁵⁹ *Id.* at 119.

⁶⁰ Tex. R. Civ. P. 285.

Rule 286. Jury May Receive Further Instructions:

After having retired, the jury may receive further instructions of the court touching any matter of law, either at their request or upon the court's own motion. For this purpose they shall appear before the judge in open court in a body, and if the instruction is being given at their request, they shall through their foreman state to the court, in writing, the particular question of law upon which they desire further instruction. The court shall give such instruction in writing, but no instruction shall be given except in conformity with the rules relating to the charge. Additional argument may be allowed in the discretion of the court.⁶¹

Prior to the adoption of the Rules of Civil Procedure in 1941, the statutes⁶² were construed strictly, and almost any communication between the judge and jury which was not in open court or which was otherwise in violation of the rules resulted in a reversal.⁶³ In this area of communications between judge and jury, perhaps the greatest changes have been affected by the harmless error rules.⁶⁴ The rule of presumed harm, which was often construed to mean conclusive harm, was changed⁶⁵ to a rule that the complainant must, as in other cases, prove harm.⁶⁶ However, conduct which is harmless may nevertheless be improper, and the careful judge will avoid every charge of im-

⁶¹ Tex. R. Civ. P. 286.

⁶² Tex. Rev. Civ. Stat. Ann. art. 2197 (1925) is the source of Rule 285, and Tex. Rev. Civ. Stat. Ann. art. 2198 (1925) is the source of Rule 286.

⁶³ Houston Elec. Co. v. Lee, 139 Tex. 166, 162 S.W.2d 692 (1942); see also Houston Elec. Co. v. McLeroy, 139 Tex. 170, 163 S.W.2d 1062 (1942); Scroggs v. Morgan, 133 Tex. 581, 130 S.W.2d 282 (1939); Texas Midland R.R. v. Byrd, 102 Tex. 263, 115 S.W. 1163 (1909); Gerneth v. Galbraith Foxworth Lumber Co., 38 S.W.2d 775 (Tex. Comm. App. 1931); Corn v. Crosby County Cattle Co., 25 S.W.2d 290 (Tex. Comm. App. 1930); Parker v. Bailey, 15 S.W.2d 1033 (Tex. Comm. App. 1929); Kuhn v. Palo Duro Corp., 151 S.W.2d 894 (Tex. Civ. App. 1941), *rev'd and dism.*, 139 Tex. 125, 161 S.W.2d 778 (1942); Neely v. Woolley, 143 S.W.2d 1015 (Tex. Civ. App. 1940); Reynolds v. Sandel, 142 S.W.2d 527 (Tex. Civ. App. 1940); Belser v. Achley, 57 S.W.2d 278 (Tex. Civ. App. 1933); City of Waco v. Craven, 54 S.W.2d 883 (Tex. Civ. App. 1932); Millerman v. Houston & T.C.R.R., 27 S.W.2d 897 (Tex. Civ. App. 1930) *error ref.*; Lorenzen v. Keenan, 266 S.W. 839 (Tex. Civ. App. 1924); Smith v. Harris, 252 S.W. 836 (Tex. Civ. App. 1923). At least one case decided under the former statute (article 2198) did require a showing of prejudice (Whitaker v. Browning, 155 S.W. 1197 (Tex. Civ. App. 1913) *error ref.*), but this case, in effect, was overruled by Parker v. Bailey, *supra*.

⁶⁴ Tex. R. Civ. P. 434, 503.

⁶⁵ This new interpretation emerged in 1945. Denbow v. Standard Acc. Ins. Co., 143 Tex. 455, 186 S.W.2d 236 (1945); Onion, *Judge & Jury in the State Courts*, in Personal Injury Litigation in Texas 417, 428 (1961).

⁶⁶ Ross v. Texas Employers' Ins. Ass'n, 153 Tex. 276, 267 S.W.2d 541 (1954); Foreman v. Texas Employers' Ins. Ass'n, 150 Tex. 468, 241 S.W.2d 977 (1951); Denbow v. Standard Acc. Ins. Co., *supra* note 65; Travis-Williamson County Water Control & Improvement Dist. No. 1 v. Page, 358 S.W.2d 158 (Tex. Civ. App. 1962), *modified*, ___ Tex. ___, 367 S.W.2d 307 (1963); Brown v. Panhandle & S.F. Ry., 294 S.W.2d 223 (Tex. Civ. App. 1956) *error ref. n.r.e.*; Whelan v. State, 271 S.W.2d 108 (Tex. Civ. App. 1954), *rev'd on other grounds*, 155 Tex. 14, 282 S.W.2d 378 (1955); see also Annot., 41 A.L.R.2d 288, 306-07 (1955).

proper communications by avoiding contacts and conversations with jurors.

B. *Additional Instructions*

After the original charge is read⁶⁷ and the jurors begin their deliberation, it is not unusual that additional instructions are requested. Rules 286⁶⁸ and 295⁶⁹ contemplate and authorize additional instructions. If the judge independently determines that an additional instruction should be given, he may either give an additional charge or withdraw one that he deems in error.⁷⁰ Less frequently, attorneys originate the request for an amended or altered charge.⁷¹ Moreover, it is not uncommon for jurors to request the court to give them additional instructions or information.⁷² The request from the jurors, if it pertains to matters of additional instruction, should be in writing in conformity with rule 286.⁷³ Additional instructions are generally left to the discretion of the judge.⁷⁴ However, not every communication between judge and jury is termed a giving of further instructions. Reading a part of the charge which has previously been submitted⁷⁵ or advising the jury to answer such issues as they can agree upon is not an additional instruction.⁷⁶

Many situations may arise during trial that will justify additional admonitory charges.⁷⁷ Matters concerning the health and comfort of

⁶⁷ Tex. R. Civ. P. 272 requires that the original charge be in writing.

⁶⁸ Tex. R. Civ. P. 286.

⁶⁹ Tex. R. Civ. P. 295.

⁷⁰ *Traders & Gen. Ins. Co. v. Carlisle*, 138 Tex. 523, 161 S.W.2d 484 (1942); *Jas. A. Dick Co. v. Yanez*, 55 S.W.2d 600 (Tex. Civ. App. 1932) *error ref.*; *Goode v. Ramey*, 48 S.W.2d 719 (Tex. Civ. App. 1932) *error ref.*; *Mulligan v. McConnell Bros.*, 242 S.W. 512 (Tex. Civ. App. 1922); *Cheek v. W.H. Nicholson & Co.*, 146 S.W. 594 (Tex. Civ. App. 1912) *error ref.* This was the law prior to the adoption of the Rules. Now, Tex. R. Civ. P. 286 specifically provides: "[T]he jury may receive further instructions of the court . . . upon the court's own motion."

⁷¹ *Gotoskey v. Grawunder*, 158 S.W. 249 (Tex. Civ. App. 1913).

⁷² *Ross v. Texas Employers' Ins. Ass'n*, 153 Tex. 276, 267 S.W.2d 541 (1954); *Dallas Ry. & Terminal Co. v. Starling*, 130 Tex. 379, 110 S.W.2d 557 (1937); *Miller v. Jones*, 270 S.W.2d 303 (Tex. Civ. App. 1954) *error ref. n.r.e.*; *Neely v. Wooley*, 143 S.W.2d 1015 (Tex. Civ. App. 1940); *F.H. Vahlsing, Inc. v. Hartford Fire Ins. Co.*, 108 S.W.2d 947 (Tex. Civ. App. 1937) *error dism.*; *Gillham v. St. Louis Southwestern Ry.*, 241 S.W. 512 (Tex. Civ. App. 1922) *error dism.*; *Hermann v. Schroeder*, 175 S.W. 788 (Tex. Civ. App. 1915).

⁷³ Tex. R. Civ. P. 286.

⁷⁴ Compare *Mulligan v. McConnell Bros.*, 242 S.W. 512 (Tex. Civ. App. 1922), *with* *Oates v. Maxcy*, 206 S.W. 535 (Tex. Civ. App. 1918).

⁷⁵ *Kuykendall v. Johnson Funeral Parlor*, 38 S.W.2d 601 (Tex. Civ. App. 1931).

⁷⁶ *Varn v. Gonzales*, 193 S.W. 1132 (Tex. Civ. App. 1917), *rev'd on other grounds*, 222 S.W. 543 (Tex. Comm. App. 1920).

⁷⁷ In *Bell v. New Jersey Ins. Co.*, 120 S.W.2d 610 (Tex. Civ. App. 1938), it was proper for the judge to give an oral instruction to the jury that they may disregard statements made to them by one who had intruded in the jury room. A juror who, during recess, asked the judge about insurance coverage gave rise to an excellent charge to the jury. See note 56 *supra*.

the jury are common matters of oral advice from the court.⁷⁸ Furthermore, the court may need to withdraw or correct an erroneous charge, to make an additional charge,⁷⁹ to instruct the jury to disregard an issue,⁸⁰ or to correct clerical and typographical errors.⁸¹ Conflicts in the answers to special issues often require further instructions.⁸² Before the verdict is returned, a jury may inquire about possible conflicts.⁸³ The court should check the verdict with possible conflicts in mind prior to discharging the jury. If conflicts are indicated, the judge should point out the conflicts and return the jury for further deliberation.⁸⁴

C. Proper Procedure For Communications Between Judge And Jury

1. *In Open Court* Rules 285⁸⁵ and 286⁸⁶ state that communications between the judge and jury should be in open court.⁸⁷ Problems may arise if there are private conferences between separated jurors and the judge,⁸⁸ if the judge enters the jury room,⁸⁹ or if the judge and jury communicate by messages.⁹⁰ Especially is this true if any of the aforementioned communications are not in open court or outside the presence of counsel. Although these practices may not constitute

⁷⁸ Prescott v. Metropolitan Life Ins. Co., 129 S.W.2d 821 (Tex. Civ. App. 1939) *error disp.*

⁷⁹ Boler v. Coughran, 304 S.W.2d 290 (Tex. Civ. App. 1956) *error ref.*; Goode v. Ramey, 48 S.W.2d 719 (Tex. Civ. App. 1932) *error ref.*; Cheek v. W.H. Nicholson & Co., 146 S.W. 594 (Tex. Civ. App. 1912) *error ref.*; Martin, Moodie & Co. v. Petty, 79 S.W. 878 (Tex. Civ. App. 1904); Yoakum v. Mettasch, 26 S.W. 129 (Tex. Civ. App. 1894) *error ref.*

⁸⁰ Consolidated Cas. Ins. Co. v. Perkins, 269 S.W.2d 683 (Tex. Civ. App. 1954), *rev'd on other grounds*, 154 Tex. 424, 279 S.W.2d 299 (1955).

⁸¹ Boler v. Coughran, 304 S.W.2d 290 (Tex. Civ. App. 1956) *error ref.*

⁸² Tex. R. Civ. P. 295.

⁸³ Dallas Ry. & Terminal Co. v. Starling, 130 Tex. 379, 110 S.W.2d 557 (1937).

⁸⁴ Denbow v. Standard Acc. Ins. Co., 143 Tex. 455, 186 S.W.2d 236 (1945); Traders & Gen. Ins. Co. v. Carlisle, 138 Tex. 523, 161 S.W.2d 484 (1942); City of Dallas v. Riddle, 325 S.W.2d 955 (Tex. Civ. App. 1959) *error ref. n.r.e.*; Burnett v. Rutledge, 284 S.W.2d 944 (Tex. Civ. App. 1955) *error ref. n.r.e.*; Texas Employers' Ins. Ass'n v. Johnson, 275 S.W.2d 211 (Tex. Civ. App. 1955) *error ref. n.r.e.*; Pantazis v. Dallas Ry. & Terminal Co., 162 S.W.2d 1018 (Tex. Civ. App. 1942) *error disp.*; Traders & Gen. Ins. Co. v. Boyd, 146 S.W.2d 488 (Tex. Civ. App. 1940) *error disp.*; Tex. R. Civ. P. 295; 41-B Tex. Jur. Trial - Civil Cases §§ 363-68, 573-79 (1953).

⁸⁵ Tex. R. Civ. P. 285.

⁸⁶ Tex. R. Civ. P. 286.

⁸⁷ The judge standing in the court room with a door opened to the jurors in the jury room was "open court." Texas & Pac. Ry. v. Short, 62 S.W.2d 995 (Tex. Civ. App. 1933) *error ref.*; Compton v. Jennings Lumber Co., 295 S.W. 308 (Tex. Civ. App. 1927) *error disp.*; Wichita Falls Compress Co. v. W.L. Moody & Co., 154 S.W. 1032 (Tex. Civ. App. 1913) *error disp. Contra*, Scroggs v. Morgan, 133 Tex. 581, 130 S.W.2d 283 (1939); Lorenzen v. Keenan, 266 S.W. 839 (Tex. Civ. App. 1924). See also Gillham v. St. Louis Southwestern Ry., 241 S.W. 512 (Tex. Civ. App. 1922) *error disp.*

⁸⁸ Parker v. Bailey, 15 S.W.2d 1033 (Tex. Comm. App. 1929).

⁸⁹ Houston Elec. Co. v. Lee, 139 Tex. 166, 162 S.W.2d 692 (1942).

⁹⁰ Ross v. Texas Employers' Ins. Ass'n, 153 Tex. 276, 267 S.W.2d 541 (1954).

the harmful error,⁹¹ they are irregular. All judicial comments, however short and harmless, should be made in open court.

2. *In a Body* Rule 286⁹² also contemplates that instructions shall be given directly to *all* jurors. Although private conferences are discouraged,⁹³ harmful error must be proven for reversal.⁹⁴ There are good reasons why all instructions should be given collectively to the jurors. Privately communicated instructions may be misunderstood; they may be reported erroneously; or they may not be reported at all.⁹⁵ Furthermore, the judge should require that all private inquiries from jurors be put in writing.⁹⁶ In the *Ross* case,⁹⁷ a lone juror's misconduct gave impetus to the harmless error rule in an area which theretofore had required strict adherence to principles of propriety. The instruction in that case was admonitory in nature and should not have been disclosed to other jurors. It was, in fact, a matter which properly should have been handled privately, so that one juror's impending misconduct would not affect the other jurors. Although proof of harm must now be shown, nevertheless, it is improper to give instructions about applicable law to separated jurors.⁹⁸ However, the error may be waived if counsel knows of the private communication and does not take action.⁹⁹

3. *In Conformity With The Rules* Jurors often initiate an inquiry to the court by oral communications to the bailiff or judge.¹⁰⁰ The court should require, however, that any requests for instructions be

⁹¹ *Ibid.* Prior to the 1941 Rules, it would have been prejudicial. *Texas Midland Ry. v. Byrd*, 102 Tex. 263, 115 S.W. 1163 (1909); *Corn v. Crosby County Cattle Co.*, 25 S.W.2d 290 (Tex. Comm. App. 1930); *Parker v. Bailey*, 15 S.W.2d 1033 (Tex. Comm. App. 1929); *Kuhn v. Palo Duro Corp.*, 151 S.W.2d 894 (Tex. Civ. App. 1941), *rev'd and dism.*, 139 Tex. 125, 161 S.W.2d 778 (1942); *Belser v. Achley*, 57 S.W.2d 278 (Tex. Civ. App. 1933); *Millerman v. Houston & T.C.R.R.*, 27 S.W.2d 897 (Tex. Civ. App. 1930) *error ref.*; The error was waived in *White v. Haynes*, 60 S.W.2d 275 (Tex. Civ. App. 1933) *error dism.* Undisclosed discussions between judge and jury should not occur. *Smith v. Harris*, 252 S.W. 836 (Tex. Civ. App. 1923).

⁹² Tex. R. Civ. P. 286.

⁹³ *Parker v. Bailey*, 15 S.W.2d 1033 (Tex. Comm. App. 1929).

⁹⁴ *Ross v. Texas Employers' Ins. Ass'n*, 153 Tex. 276, 267 S.W.2d 541 (1954).

⁹⁵ *Millerman v. Houston & T.C.R.R.*, 27 S.W.2d 897 (Tex. Civ. App. 1930) *error ref.*

⁹⁶ *Brown v. Panhandle & Santa Fe Ry.*, 294 S.W.2d 223 (Tex. Civ. App. 1956) *error ref. n.r.e., cert. denied*, 355 U.S. 818 (1957).

⁹⁷ *Ross v. Texas Employers' Ins. Ass'n*, 153 Tex. 276, 267 S.W.2d 541 (1954).

⁹⁸ *Belser v. Achley*, 57 S.W.2d 782 (Tex. Civ. App. 1933); *Humble Pipe Line Co. v. Kincaid*, 19 S.W.2d 144 (Tex. Civ. App. 1929) *error ref.*; *Holman Bros. v. Cusenbary*, 225 S.W. 65 (Tex. Civ. App. 1920) *error dism.*; *Corpus Christi St. & Interurban Ry. v. Kjellberg*, 185 S.W. 430 (Tex. Civ. App. 1916).

⁹⁹ *Lucas v. Alsmeyer*, 322 S.W.2d 19 (Tex. Civ. App. 1959); *White v. Haynes*, 60 S.W.2d 275 (Tex. Civ. App. 1933) *error dism.*; *Ineeda Laundry v. Newton*, 33 S.W.2d 208 (Tex. Civ. App. 1930) *error dism.*; *Carter v. Guaranty State Bank*, 262 S.W. 108 (Tex. Civ. App. 1924); *Gillham v. St. Louis Southwestern Ry.*, 241 S.W. 512 (Tex. Civ. App. 1922) *error dism.*

¹⁰⁰ Tex. R. Civ. P. 285.

put in writing.¹⁰¹ The parties have the right to demand that additions and deletions from the original charge also be made in writing. The irregularity of giving oral instead of written instructions, like other improper communications, may be waived by inaction.¹⁰²

Rule 286,¹⁰³ which states that additional instruction will be in conformity with the rules relating to the charge, accords counsel the right to object to additional instructions concerning the charge.¹⁰⁴ In order to constitute reversible error, counsel must prove probable harm.¹⁰⁵ Counsel may waive the error by joining therein or by knowingly remaining silent.¹⁰⁶ Therefore, counsel who wishes to preserve any error would be well advised to remain accessible to the court while the jury is deliberating.¹⁰⁷

D. Coercion

Jurors should render a verdict in accordance with what their respective judgments lead them to believe is the truth. What convictions a juror may surrender consistent with an intelligent and conscientious discharge of his duty is for him alone to determine. It is his judgment that the law seeks to obtain, and he should be left to form it uninfluenced by coercive advice from the court or any other person.¹⁰⁸ Most coercion results from judicial lectures or from re-

¹⁰¹ Tex. R. Civ. P. 286. See also note 72 *supra* and accompanying text.

¹⁰² *Peters v. Gilland*, 186 S.W.2d 1019 (Tex. Civ. App. 1945) *error ref.*; *Vahlsing, Inc. v. Hartford Fire Ins. Co.*, 108 S.W.2d 947 (Tex. Civ. App. 1937) *error disp.*; *Carter v. Guaranty State Bank*, 262 S.W. 108 (Tex. Civ. App. 1924).

¹⁰³ Tex. R. Civ. P. 286.

¹⁰⁴ *Scroggs v. Morgan*, 133 Tex. 581, 130 S.W.2d 282 (1939); *Ft. Worth Structural Steel Co. v. Griffin*, 63 S.W.2d 887 (Tex. Civ. App. 1933); *Meinecke v. Fidelity Inv. Co.*, 62 S.W.2d 623 (Tex. Civ. App. 1933) *error ref.*; *Stolz v. Wells*, 43 S.W.2d 163 (Tex. Civ. App. 1931); *Thompson v. Caldwell*, 22 S.W.2d 720 (Tex. Civ. App. 1929), *aff'd*, 36 S.W.2d 999 (Tex. Comm. App. 1931); *Texas & Pac. Ry. v. Bryan*, 15 S.W.2d 1098 (Tex. Civ. App. 1929); *Hickman v. Talley*, 8 S.W.2d 267 (Tex. Civ. App. 1928); *Corpus Christi St. & Interurban Ry. v. Kjellberg*, 185 S.W. 430 (Tex. Civ. App. 1916). See also *Texas Indem. Ins. Co. v. Hubbard*, 138 S.W.2d 626 (Tex. Civ. App. 1940) *error disp.*

¹⁰⁵ *Ross v. Texas Employers' Ins. Ass'n*, 153 Tex. 276, 267 S.W.2d 541 (1954).

¹⁰⁶ *White v. Haynes*, 60 S.W.2d 275 (Tex. Civ. App. 1933) *error disp.*; *Ineeda Laundry v. Newton*, 33 S.W.2d 208 (Tex. Civ. App. 1930) *error disp.*; *Carter v. Guaranty State Bank*, 262 S.W. 108 (Tex. Civ. App. 1924); *Gillham v. St. Louis Southwestern Ry.*, 241 S.W. 512 (Tex. Civ. App. 1922) *error disp.*; *Oates v. Maxcy*, 206 S.W. 535 (Tex. Civ. App. 1918).

¹⁰⁷ *Moore v. Jordan*, 328 S.W.2d 343 (Tex. Civ. App. 1959) *error ref. n.r.e.*; *Maryland Cas. Co. v. Gideon*, 213 S.W.2d 848 (Tex. Civ. App. 1948); *Pantazis v. Dallas Ry. & Terminal Co.*, 162 S.W.2d 1018 (Tex. Civ. App. 1942) *error disp.*; *Kuykendall v. Johnson Funeral Parlor*, 38 S.W.2d 601 (Tex. Civ. App. 1931); *Texas & N.O. Ry. v. Martin*, 32 S.W.2d 363 (Tex. Civ. App. 1930) *error ref.*; *Cheek v. W.H. Nicholson & Co.*, 146 S.W. 594 (Tex. Civ. App. 1912) *error ref.*; *cf. Hickman v. Talley*, 8 S.W.2d 267 (Tex. Civ. App. 1928).

¹⁰⁸ *Gulf C. & S.F. Ry. v. Johnson*, 99 Tex. 337, 90 S.W. 164 (1905); *Reed v. Bates*, 32 S.W.2d 216 (Tex. Civ. App. 1930); *Annot.*, 41 A.L.R.2d 229, 250 (1955); *Annot.*, 19 A.L.R.2d 1257 (1951); *Annot.*, 109 A.L.R. 72 (1937); *Annot.*, 85 A.L.R. 1420 (1933); 53 *Am. Jur. Trial* §§ 150-64, 905 (1945); 41-B *Tex. Jur. Trial - Civil Cases* § 328 (1953); 3 *McDonald, Texas Civil Practice* § 14.03, at 1227 (1950).

marks made by others on behalf of the judge. Jurors should never be advised to compromise their convictions,¹⁰⁹ and coercion has resulted from statements by judges that a minority should yield to a strong majority¹¹⁰ or that the case would probably be appealed in any event.¹¹¹ The judge should never minimize the significance of the case by stating that the case is only a civil suit which involves dollars and cents.¹¹² Comments about the cost, expense, or waste incident to a new trial are also coercive.¹¹³ To force a verdict either by threats to hold jurors together for extended periods of time under difficult circumstances or by actually holding them together for an unreasonably long time may result in coercion.¹¹⁴ It was so held when a judge advised the jurors that he would hold them "until next Saturday night,"¹¹⁵ which was a week away. It was coercion for a judge to tell the jury that it was his practice not to discharge a jury until a verdict was received¹¹⁶ and also for a judge to tell the jurors that he would hold them to the end of the term.¹¹⁷

A judge does not have to discharge a jury if they request it. Moreover, the jury may be held together for extended periods of time if coercion is not present. Some cases—by reason of their complexity, the number of witnesses and issues, and the length of the trial—justify extended deliberation. It is not coercive to send jurors back several times for further deliberations; this is so although they report that they are hopelessly deadlocked.¹¹⁸ A jocular remark to a jury that

¹⁰⁹ *Gulf C. & S.F. Ry. v. Johnson*, *supra* note 108; *Reed v. Bates*, *supra* note 108; *Pecos & N.T. Ry. v. Finklea*, 155 S.W. 612 (Tex. Civ. App. 1913); *Cornelison v. Ft. Worth & R.G. Ry.*, 103 S.W. 1186 (Tex. Civ. App. 1907); *Texas Midland Ry. v. Byrd*, 90 S.W. 185 (Tex. Civ. App. 1905); 30 *Texas L. Rev.* 642 (1952).

¹¹⁰ *Sargent v. Lawrence*, 40 S.W. 1075 (Tex. Civ. App. 1897).

¹¹¹ *Sunshine Oil Corp. v. Randals*, 226 S.W. 1090 (Tex. Civ. App. 1921) *error disp.* *But see* *Renn v. Samos*, 42 Tex. 104 (1875).

¹¹² *Texas Cent. Ry. v. Driver*, 187 S.W. 981 (Tex. Civ. App. 1916).

¹¹³ *Texas Midland Ry. v. Brown*, 228 S.W. 915 (Tex. Comm. App. 1921); *Missouri, K. & T. Ry. v. Barber*, 209 S.W. 394 (Tex. Comm. App. 1919); *Cloudt v. Hutcherson*, 175 S.W.2d 643 (Tex. Civ. App. 1943) *error ref.*; *Baldwin v. Morton*, 19 S.W.2d 948 (Tex. Civ. App. 1929); *Sunshine Oil Corp. v. Randals*, 226 S.W. 1090 (Tex. Civ. App. 1921); *Cornelison v. Ft. Worth & R.G. Ry.*, 103 S.W. 1186 (Tex. Civ. App. 1907); *Wootan v. Partridge*, 87 S.W. 356 (Tex. Civ. App. 1905); *cf.* *Fleck v. Missouri, K. & T. Ry.*, 191 S.W. 386 (Tex. Civ. App. 1916).

¹¹⁴ *Hunter v. Hunter*, 187 S.W. 1049 (Tex. Civ. App. 1916) *error disp.*; *Pecos & N.T. Ry. v. Finklea*, 155 S.W. 612 (Tex. Civ. App. 1913); *North Dallas Circuit Ry. v. McCue*, 35 S.W. 1080 (Tex. Civ. App. 1896). For an example of coercion from one other than a judge, see *State v. Black*, 14 S.W.2d 72 (Tex. Civ. App. 1929).

¹¹⁵ *Hunter v. Hunter*, *supra* note 114, at 1050.

¹¹⁶ *Texas Midland Ry. v. Brown*, 228 S.W. 915, 916 (Tex. Civ. App. 1921).

¹¹⁷ *North Dallas Circuit Ry. v. McCue*, 35 S.W. 1080 (Tex. Civ. App. 1896). *Contra*, *Burgess v. Singer Mfg. Co.*, 30 S.W. 1110 (Tex. Civ. App. 1895).

¹¹⁸ *Youngblood v. Wilson & Cureton*, 321 S.W.2d 887 (Tex. Civ. App. 1959) *error ref. n.r.e.*; *Kimbriel Produce Co. v. Webster*, 185 S.W.2d 198 (Tex. Civ. App. 1944) *error ref.*; *Pantazis v. Dallas Ry. & Terminal Co.*, 162 S.W.2d 1018 (Tex. Civ. App. 1942) *error disp.*; *Dallas Ry. & Terminal Co. v. Horton*, 119 S.W.2d 122 (Tex. Civ. App. 1938)

they had "the whole world to agree on and the whole week before [them]" was regarded as harmless.¹¹⁹ The judge may inquire in open court about the progress of the jurors.¹²⁰ However, to avoid the charge of coercion, it is better for the judge to make his inquiries through the foreman.¹²¹ If the verdict is incomplete or conflicting, the judge should return the jury for further deliberation, and to do so is not coercion.¹²² Coercion by the judge may be waived if counsel does not preserve the error.¹²³

E. Reproduction Of Evidence

A request for reproduction of evidence, in proper circumstances, is a legitimate communication between judge and jury.¹²⁴ Rule 287¹²⁵ provides as follows:

If the jury disagree as to the statement of any witness, they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness' testimony on the point in dispute; but if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial; and on their notifying the court that they disagree as to any portion of a deposition or other paper not permitted to be carried with them in their retirement, the court may, in like manner, permit such portion of said deposition or paper to be again read to the jury.

This rule is said to be a "safeguard" against jury misconduct.¹²⁶ However, elicitation of new evidence is outside the purpose of the rule. The reproduction of evidence is said to be within the discretion of the trial court.¹²⁷ Even though a jury may be in disagreement about the evidence, the court may in the exercise of a sound judicial discretion decline a request that the evidence be reproduced for them.¹²⁸

error dism.; Northern Tex. Traction Co. v. Brigance, 128 S.W. 919 (Tex. Civ. App. 1910); Houston & T.C. Ry. v. Darwin, 105 S.W. 825 (Tex. Civ. App. 1907) *error ref.*

¹¹⁹ Western Union Tel. Co. v. Oakley, 181 S.W. 506, 510 (Tex. Civ. App. 1916).

¹²⁰ Foreman v. Texas Employers' Ins. Ass'n, 150 Tex. 468, 241 S.W.2d 977 (1951).

¹²¹ *Ibid.*

¹²² Texas Employers' Ins. Ass'n v. Haywood, 266 S.W.2d 499 (Tex. Civ. App. 1953), *rev'd on other grounds*, 153 Tex. 242, 266 S.W.2d 856 (1954); Pantazis v. Dallas Ry. & Terminal Co., 162 S.W.2d 1018 (Tex. Civ. App. 1942) *error dism.*

¹²³ Renn v. Samos, 42 Tex. 104 (1875); Cloudt v. Hutcherson, 175 S.W.2d 643 (Tex. Civ. App. 1943) *error ref.*; Hunter v. Hunter, 187 S.W. 1049 (Tex. Civ. App. 1916) *error. dism.*

¹²⁴ Tex. R. Civ. P. 287.

¹²⁵ *Ibid.*

¹²⁶ Burkett v. Slauson, 150 Tex. 69, 237 S.W.2d 253, 255 (1951).

¹²⁷ J.H. Robinson Truck Lines v. Ragan, 204 S.W.2d 662 (Tex. Civ. App. 1947); Standard Supply & Hardware Co. v. Christian-Carpenter Drilling Co., 183 S.W.2d 657 (Tex. Civ. App. 1944) *error ref.*

¹²⁸ *Ibid.*

F. *Disclosing The State Of Deliberations*

Jurors should not disclose the state of their deliberations before they return their verdict.¹²⁹ Rule 283 states that the officer in charge should not, prior to rendition of the verdict, communicate to anyone the state of the deliberations or the verdict agreed upon.¹³⁰ The rule also applies to judges.¹³¹ The judge should not ask each juror individually if he believes that the jury will be able to reach a verdict, nor should he send for the charge or the jury's worksheet for personal examination.¹³² Moreover, the judge may not ask the individual jurors what they think about the verdict itself.¹³³

There are limited inquiries which may be made of a jury, however. Rule 283 permits the officer attending the jury to inquire if they have agreed upon a verdict.¹³⁴ The judge or the bailiff acting for the judge may also determine that fact.¹³⁵ The correct procedure is for the judge to call the jury into open court and to ask the foreman if they have reached a verdict.¹³⁶ The judge may also inquire if the jury is making any progress, if it appears that they will be able to reach a verdict, and if the jury can estimate how much more time will be required.¹³⁷ A judge who proceeds cautiously and carefully may take still a further step. It is better, however, to take the step only with consent of all counsel and after cautioning the jury that they must neither state how they stand on specific issues nor state how many are for the plaintiff and defendant. Having so advised the jury, the judge may then ask how they stand numerically.

Situations sometimes develop by which the judge, parties, and attorneys may discover how a jury stands on the issues. Notes from jurors may indicate the state of their deliberations; this is usually considered harmless.¹³⁸ Often, jurors will return a partial verdict, and

¹²⁹ Tex. R. Civ. P. 283.

¹³⁰ *Ibid.*

¹³¹ *Houston Elec. Co. v. McLeroy*, 139 Tex. 170, 163 S.W.2d 1062 (1942); *Houston Elec. Co. v. Lee*, 139 Tex. 166, 162 S.W.2d 692 (1942); *Burnett v. Rutledge*, 284 S.W.2d 944 (Tex. Civ. App. 1955) *error ref. n.r.e.*; *Currie v. Smith*, 184 S.W.2d 656 (Tex. Civ. App. 1945) *error ref. w.o.m.*; *Bailiff's misconduct: Willis v. Goodrum*, 360 S.W.2d 182 (Tex. Civ. App. 1962) *error ref. n.r.e. Party's misconduct: Aetna Cas. & Sur. Co. v. Perez*, 360 S.W.2d 157 (Tex. Civ. App. 1962).

¹³² *Currie v. Smith*, 184 S.W.2d 656 (Tex. Civ. App. 1945) *error ref. w.o.m.*; *Houston Elec. Co. v. McLeroy*, *supra* note 131; *Houston Elec. Co. v. Lee*, *supra* note 131.

¹³³ Tex. R. Civ. P. 286.

¹³⁴ Tex. R. Civ. P. 283.

¹³⁵ *Union City Transfer v. Adams*, 248 S.W.2d 256 (Tex. Civ. App. 1952) *error ref. n.r.e., cert. denied*, 344 U.S. 912 (1953); 41-B Tex. Jur. *Trial - Civil Cases* § 315 (1953).

¹³⁶ *Foreman v. Texas Employers' Ins. Ass'n*, 150 Tex. 468, 473, 241 S.W.2d 977, 979 (1951).

¹³⁷ See *Foreman v. Texas Employers' Ins. Ass'n*, *supra* note 136; *Callahan v. Hester*, 181 S.W.2d 294 (Tex. Civ. App. 1944) *error ref. w.o.m.*

¹³⁸ *Burnett v. Rutledge*, 284 S.W.2d 944 (Tex. Civ. App. 1955) *error ref. n.r.e.*; *Colls v. Price's Creameries, Inc.*, 244 S.W.2d 900 (Tex. Civ. App. 1951) *error ref. n.r.e.*

the judge may direct them to resume deliberations.¹³⁹ The rule against disclosing the state of deliberations must also be read in connection with rules 286¹⁴⁰ and 295¹⁴¹ because situations may arise which require additional instructions after the jury has returned—the verdict may be defective or may contain conflicting answers. The problem of disclosure is apparent. The judge should point out the defects or conflicts and return the jury for further deliberations.¹⁴² The same rule applies if the foreman fails to sign the verdict.¹⁴³

G. Separation Of Jurors

Rule 282 provides that the jury should be kept together:

The jury may either decide a case in court or retire for deliberation. If they retire, they shall be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court; but the court in its discretion may permit them to separate temporarily for the night and at their meals, and for other proper purposes.¹⁴⁴

“If permitted to separate, either during the trial or after the case is submitted to them, the jury shall be admonished by the court that it is their duty not to converse with, or permit themselves to be addressed by any other person, on any subject, connected with the trial.”¹⁴⁵ In civil cases, jurors are usually permitted to separate during recesses, for meals, and at night.¹⁴⁶ The trial judge has considerable discretion concerning the separation of jurors both during the trial and after a cause is submitted to them.¹⁴⁷ A separation of a jury for a period of five days was held to be a proper exercise of discretion.¹⁴⁸ Even though there is an objection to the separation, the court may permit it.¹⁴⁹ A separation without permission is harmless in itself,

¹³⁹ *Traders & Gen. Ins. Co. v. Davis*, 209 S.W.2d 963 (Tex. Civ. App. 1948) *error ref. n.r.e.*

¹⁴⁰ Tex. R. Civ. P. 286.

¹⁴¹ Tex. R. Civ. P. 295.

¹⁴² *Traders & Gen. Ins. Co. v. Carlisle*, 138 Tex. 523, 161 S.W.2d 484 (1942).

¹⁴³ *Burnett v. Rutledge*, 284 S.W.2d 944 (Tex. Civ. App. 1955) *error ref. n.r.e.*

¹⁴⁴ Tex. R. Civ. P. 282; *Union City Transfer v. Adams*, 248 S.W.2d 256 (Tex. Civ. App. 1952) *error ref. n.r.e., cert. denied*, 344 U.S. 912 (1953).

¹⁴⁵ Tex. R. Civ. P. 284. This procedure was cited as a safeguard against jury misconduct in *Burkett v. Slauson*, 150 Tex. 69, 237 S.W.2d 253 (1951).

¹⁴⁶ *Traders & Gen. Ins. Co. v. Carlisle*, 138 Tex. 523, 161 S.W.2d 484 (1942).

¹⁴⁷ *San Antonio & A.P. Ry. v. Bennett*, 76 Tex. 151, 13 S.W. 319 (1890); *Noel v. Denman*, 76 Tex. 306, 13 S.W. 318 (1890); *International & G.N.R.R. v. McVey*, 102 S.W. 172 (Tex. Civ. App. 1907) *error ref.*; 53 Am. Jur. *Trial* §§ 861-65 (1945); 41-B Tex. Jur. *Trial - Civil Cases* § 303 (1953). By amendment of Tex. Rev. Civ. Stat. Ann. arts. 2133, 2135 (Supp. 1962), women serve as jurors in Texas. Of necessity, there must be periods of separation of the men and women. See Annot., 71 A.L.R. 68 (1931).

¹⁴⁸ *Kothman v. Faselner*, 84 S.W. 390 (Tex. Civ. App. 1904).

¹⁴⁹ *San Antonio & A.P. Ry. v. Bennett*, 76 Tex. 151, 13 S.W. 319 (1890); *Noel v. Denman*, 76 Tex. 306, 13 S.W. 318 (1890); *International & G.N.R.R. v. McVey*, 102 S.W. 172 (Tex. Civ. App. 1907) *error ref.*

provided other misconduct does not vitiate the verdict.¹⁵⁰ An unauthorized separation may subject a juror to contempt action, however.¹⁵¹ Although the authorized release of the jurors by the bailiff was ruled to be harmless,¹⁵² the judge should direct the separation.

Jurors should always deliberate as a body. It is error for the members of the jury to discuss the case, even with other jurors, outside the presence of the entire panel.¹⁵³ Although separation itself is seldom grounds for reversal, many prejudicial forms of misconduct may occur during the separation period.¹⁵⁴ It was reversible error for a foreman to separate himself from the jury for the purpose of reading a deposition and reporting its content to the remainder of the jury.¹⁵⁵ As previously indicated, a juror should not be allowed to separate himself from the other jurors to engage in a private conference with the judge.¹⁵⁶ It was once necessary to obtain the parties' consent in order to permit jury separation prior to the return of the verdict;¹⁵⁷ however, it is now a matter of judicial discretion.

H. Signing The Verdict

All jury verdicts should be signed by the foreman.¹⁵⁸ The signature requirement, however, is directory only and is not essential to the

¹⁵⁰ *Burns v. Paine*, 8 Tex. 159 (1852); *Edrington v. Kiger*, 4 Tex. 89 (1849); *Gulf C. & S.F. Ry. v. Lockhart*, 18 S.W. 649 (Tex. Civ. App. 1892).

¹⁵¹ *Burns v. Paine*, *supra* note 150; *Edrington v. Kiger*, *supra* note 150.

¹⁵² *Prescott v. Metropolitan Life Ins. Co.*, 129 S.W.2d 821 (Tex. Civ. App. 1938) *error dismissed*.

¹⁵³ *Texas & Pac. Ry. v. Gillette*, 125 Tex. 563, 83 S.W.2d 307 (1935); *Cloudt v. Hutcherson*, 175 S.W.2d 643 (Tex. Civ. App. 1943) *error ref.*; 53 Am. Jur. *Trial* §§ 899, 906, 907 (1945). Several jurors' unauthorized presence in another room for about twenty-five minutes during deliberation, though present during discussion and at the time the issues were voted upon, was ruled not to be harmful. *Clark v. Levingston Shipbuilding Co.*, 226 S.W.2d 212 (Tex. Civ. App. 1949) *error ref. n.r.e.*

¹⁵⁴ *Hines v. Parry*, 238 S.W. 886 (Tex. Civ. App. 1922).

¹⁵⁵ *Tian v. Warren*, 271 S.W.2d 453 (Tex. Civ. App. 1954) *error ref. n.r.e.*

¹⁵⁶ See notes 92-102 *supra* and accompanying text.

¹⁵⁷ For a statement of the old rule, see *Hancock v. Winans*, 20 Tex. 320 (1857); *Annot.*, 66 A.L.R. 536, 560 (1930); 53 Am. Jur. *Trial* § 865 (1945); 41-B Tex. Jur. *Trial - Civil Cases* § 337 (1953). Today, the jury may separate without the express consent of the parties (Tex. R. Civ. P. 282); in fact, the exercise of the court's discretion in permitting a jury to separate will not be reversed on appeal unless it is clearly shown that the party complaining has been injured thereby. *Railway Co. v. Bennett*, 76 Tex. 151, 13 S.W. 319 (1890); *Noel v. Denman*, 76 Tex. 306, 13 S.W. 318 (1890).

¹⁵⁸ Tex. R. Civ. P. 290:

A verdict is a written declaration by a jury of its decision, comprehending the whole or all the issues submitted to the jury, and shall be either a general or special verdict, as directed, which shall be signed by the foreman of the jury.

A general verdict is one whereby the jury pronounces generally in favor of one or more parties to the suit upon all of the issues submitted to it. A special verdict is one wherein the jury finds the facts only on issues made up and submitted to them under the direction of the court.

A special verdict shall, as between the parties, be conclusive as to the facts found.

validity of the verdict.¹⁵⁹ The absence of the signature may require the production of evidence that the verdict was in fact received as a verdict.¹⁶⁰ In the case of an incomplete verdict, the signature is some evidence that the jury intended the answers as their verdict.¹⁶¹ During a trial of a civil case in the district court, should one or more jurors die or become disabled, those remaining may render and return a verdict provided at least nine jurors join therein.¹⁶² In such a case, the verdict should be signed by all the jurors.¹⁶³

I. *Receiving The Verdict*

When the jury agree upon the verdict, they shall be brought into court by the proper officer, and they shall deliver their verdict to the clerk; and if they state that they have agreed, the verdict shall be read aloud by the clerk. If in proper form, and no juror dissent therefrom, and neither party requests a poll of the jury, the verdict shall be entered upon the minutes of the court.¹⁶⁴

The verdict must be returned in open court in the presence of the entire jury.¹⁶⁵ The reception of the verdict requires clarity and strict adherence to the law. Particularly is this important if the verdict does not completely answer the charge. These steps are suggested:

(1) When the bailiff informs the court that the jury is ready to report, all the lawyers should be notified. Although a verdict may be received in their absence,¹⁶⁶ it is not good practice to do so.

(2) With all jurors present and in the box, the court should say

¹⁵⁹ *Barker v. Weingarten Riverside Co.*, 232 S.W.2d 692 (Tex. Civ. App. 1950) *error ref. n.r.e.*; *Patterson v. Gulf, C. & S.F. Ry.*, 77 S.W.2d 1073 (Tex. Civ. App. 1934) *error disp.*; *Schlofman v. Bear Canon Coal Co.*, 77 S.W.2d 337 (Tex. Civ. App. 1934); *Laybourn v. Bray & Shifflet*, 214 S.W. 630 (Tex. Civ. App. 1919) *error ref.*; *Aycock v. Paraffine Oil Co.*, 210 S.W. 851 (Tex. Civ. App. 1919); *City of Henderson v. Fields*, 194 S.W. 1003 (Tex. Civ. App. 1917) *error ref.*; *Barker v. Ash*, 194 S.W. 465 (Tex. Civ. App. 1917) *error ref.*; *Calvin v. Neel*, 191 S.W. 791 (Tex. Civ. App. 1916) *error disp.*; *Crosby v. Stevens*, 184 S.W. 705 (Tex. Civ. App. 1916) *error disp.*; *Quanah, A. & P. Ry. v. R.D. Jones Lumber Co.*, 178 S.W. 858 (Tex. Civ. App. 1915) *error ref.*; 53 Am. Jur. *Trial* § 1034 (1945).

¹⁶⁰ *Houston Fire & Cas. Ins. Co. v. Gerhardt*, 281 S.W.2d 176 (Tex. Civ. App. 1955); *Barker v. Weingarten Riverside Co.*, *supra* note 159; 41-B Tex. Jur. *Trial - Civil Cases* § 343 (1953).

¹⁶¹ *Ibid.*

¹⁶² Tex. Const. art. V, § 13; Tex. R. Civ. P. 292.

¹⁶³ *Ibid.* The rule was taken from an earlier statute (Tex. Rev. Civ. Stat. Ann. art. 2204 (1926)) under which the requirement for signatures of the jurors was declared directory. *Tram Lumber Co. v. Hancock*, 70 Tex. 312, 7 S.W. 724 (1888); *Quanah & A. & P. Ry. v. R.D. Jones Lumber Co.*, 178 S.W. 858 (Tex. Civ. App. 1915) *error ref.*

¹⁶⁴ Tex. R. Civ. P. 293.

¹⁶⁵ *Wheeler v. Oxford*, 321 S.W.2d 188 (Tex. Civ. App. 1959); *Whitlow v. Moore*, 1 *White & Willson* § 1052 (Tex. Civ. App. 1883).

¹⁶⁶ *Rodriguez v. Texas Employers' Ins. Ass'n*, 35 S.W.2d 510 (Tex. Civ. App. 1930); *Lawrence v. Cananea Consol. Copper Co.*, 237 S.W. 959 (Tex. Civ. App. 1922) *error disp.*

in substance, "Members of the jury, speaking through your foreman, the court wishes to inquire whether you have been able to answer the questions the court has asked you in the charge?"

(3) Upon an affirmative answer, the judge should ask the bailiff or clerk to hand him the verdict. Although the rule¹⁶⁷ states that the clerk shall read the verdict aloud, it is not unusual for the judge himself to read it. Whoever reads the verdict should also read the name of the foreman who signed it.

(4) After the verdict is read, the judge should examine it carefully to see that it is complete, non-conflicting, non-defective, and signed by the foreman.

(5) The judge should ask counsel if they wish to examine the verdict; if so, this examination should be made in the court room in the presence of the jury. If some problem is present, the court and counsel should confer, either in chambers or at the bench, out of the jury's hearing.

(6) If the verdict is incomplete because the jurors have been unable to agree upon the answers to some of the issues, it becomes the duty of the judge, if he regards the jury as hopelessly hung, to instruct them in writing to answer such questions as they are able to answer and to sign and return their verdict.¹⁶⁸ The fact that certain immaterial and uncontrolling issues were not answered does not necessarily render the judgment void.¹⁶⁹ If sufficient questions to support a judgment are answered and returned as the jury verdict, a mistrial will be averted.¹⁷⁰ If the verdict contains conflicts between the answers to certain special issues, the court should instruct the jury to return to the jury room to deliberate further instead of accepting the verdict.¹⁷¹

¹⁶⁷ Tex. R. Civ. P. 293.

¹⁶⁸ *Colls v. Price's Creameries, Inc.*, 244 S.W.2d 900 (Tex. Civ. App. 1951) *error ref. n.r.e.*

¹⁶⁹ *Williams v. Patterson*, 170 S.W.2d 269 (Tex. Civ. App. 1943); *Oil Country Pipe & Supply Co. v. Carter*, 143 S.W.2d 831 (Tex. Civ. App. 1940) *error disp.*

¹⁷⁰ *Texas Life Ins. Co. v. Goldberg*, 184 S.W.2d 333 (Tex. Civ. App. 1944); 41-B Tex. *Jur. Trial - Civil Cases* §§ 575-79 (1953).

¹⁷¹ *Traders & Gen. Ins. Co. v. Carlisle*, 138 Tex. 523, 161 S.W.2d 484 (1942); *Lowrance v. Kenworthy*, 138 Tex. 132, 157 S.W.2d 879 (1942); *A.B.C. Stores, Inc. v. Taylor*, 136 Tex. 89, 148 S.W.2d 392 (1941); *Pacific Indem. Co. v. Anderson*, 350 S.W.2d 360 (Tex. Civ. App. 1961); *Texas Employers' Ins. Ass'n v. Childress*, 349 S.W.2d 326 (Tex. Civ. App. 1961) *error ref. n.r.e.*; *Argonaut Ins. Co. v. Newman*, 348 S.W.2d 761 (Tex. Civ. App. 1961), *rev'd on other grounds*, — Tex. —, 361 S.W.2d 871 (1962); *Barnett v. Rutledge*, 284 S.W.2d 944 (Tex. Civ. App. 1955) *error ref. n.r.e.*; *Meadolake Foods v. Estes*, 218 S.W.2d 862 (Tex. Civ. App. 1948) *error ref. n.r.e.*, 148 Tex. 13, 219 S.W.2d 441 (1949); Tex. R. Civ. P. 295.

(7) Either party has the right to test the unanimity of the jury verdict by requesting a poll.¹⁷²

(8) If the answers to the questions appear to be complete, free of conflicts, not defective, signed by the foreman, and unanimous, the judge should audibly announce, "The verdict is received as the verdict of the jury." Up to the time of the announcement that the verdict is received, any juror may withdraw his verdict; however, when the verdict is received, it acquires the finality of an official act,¹⁷³ and a mandamus will lie to compel the entry of a judgment on the verdict.¹⁷⁴

J. Discharge of Jury

Jurors should be discharged (a) when they cannot agree and both parties consent to their discharge or when they have been kept together for such time as to render it improbable that they can agree, (b) when in the opinion of the court any calamity or accident may require it, (c) when sickness or other cause has reduced their number below the number constituting the jury in such court, (d) when some event occurs that renders a fair trial improbable, or (e) when court finally adjourns before the jury agrees upon a verdict.¹⁷⁵ How long and under what circumstances a jury should be held together for further deliberations is left to the sound discretion of the trial judge.¹⁷⁶

The judge may exercise his discretion in discharging a juror, and he apparently may do so even without a judicial hearing in advance of the discharge.¹⁷⁷ Courts have discharged jurors because of mental disability,¹⁷⁸ drunkenness,¹⁷⁹ physical disability,¹⁸⁰ serious illness in

¹⁷² Tex. R. Civ. P. 294:

Either party shall have the right to have the jury polled. When a jury is polled, this is done by reading once to the jury collectively the general verdict, or the special issues and answers thereto consecutively, and then calling the name of each juror separately and asking him if it is his verdict. If any juror answers in the negative, the jury shall be retired for further deliberation.

¹⁷³ *State v. Finch*, 349 S.W.2d 780 (Tex. Civ. App. 1961); *DeBusk v. Cadenhead*, 346 S.W.2d 145 (Tex. Civ. App. 1961) *error ref. n.r.e.*; *Wheeler v. Oxford*, 321 S.W.2d 188 (Tex. Civ. App. 1959); *Lee v. Galbreath*, 234 S.W.2d 91 (Tex. Civ. App. 1950); 8 *Wigmore*, Evidence § 2355 (3d ed. 1940); 89 *C.J.S. Trial* § 487 (1955).

¹⁷⁴ *State v. Finch*, 349 S.W.2d 780 (Tex. Civ. App. 1961).

¹⁷⁵ Tex. R. Civ. P. 289.

¹⁷⁶ *Missouri, K. & T. Ry. v. Barber*, 209 S.W. 394 (Tex. Comm. App. 1919) (the trial court abused its discretion); *King v. Wise*, 1 S.W.2d 732 (Tex. Civ. App. 1927); Annot., 164 *A.L.R.* 1265 (1946); 41-B *Tex. Jur. Trial - Civil Cases* § 305 (1953).

¹⁷⁷ *Marvin Drug Co. v. Couch*, 134 S.W.2d 356 (Tex. Civ. App. 1939) *error disp.*; *Schebesta v. Stewart*, 37 S.W.2d 781 (Tex. Civ. App. 1930) *error disp.*; *Routledge v. Elmendorf*, 116 S.W. 156 (Tex. Civ. App. 1909) *error ref.*; 18 *Texas L. Rev.* 511 (1940).

¹⁷⁸ *Marvin Drug Co. v. Couch*, *supra* note 177; *Sunset Wood Co. v. Broadnax*, 136 S.W. 487 (Tex. Civ. App. 1911) *error ref.*

¹⁷⁹ *Routledge v. Elmendorf*, 116 S.W. 156 (Tex. Civ. App. 1909) *error ref.*

¹⁸⁰ *Schebesta v. Stewart*, 37 S.W.2d 781 (Tex. Civ. App. 1930) *error disp.*

the juror's family,¹⁸¹ certain types of misconduct,¹⁸² or disqualification.¹⁸³ There is no error if a juror is excused by consent.¹⁸⁴

The entire jury should be discharged if an event occurs during trial which renders a fair trial improbable.¹⁸⁵ The rule has been applied if the jury has been tampered with.¹⁸⁶ Furthermore, if the subject of insurance is injected improperly into the trial, the jury may be discharged.¹⁸⁷ If a juror conceals information on voir dire for which he is later disqualified, this may require the judge to discharge the entire jury.¹⁸⁸

After the jurors are discharged, they may not reassemble for the purpose of rewriting or clarifying their charge.¹⁸⁹ For reasons of public policy, a verdict should not be corrected by jurors after they have mingled with the public, the parties, and their friends. The remedy, even for a unanimous clerical mistake of the jury, is a new trial.¹⁹⁰

VI. CONCLUSION

The principles here stated represent the minimum information that all judges and lawyers should know. Jurors arrive in court without information about most of these rules, and it is important that they see justice administered intelligently. Aside from the case which a jury may witness and judge, there is a more transcending trial function. Forsythe, in commenting upon M. de Tocqueville's estimate of a jury trial, has recorded some of those lessons which jurors learn.

The jury, he continues, and especially the civil jury, serves to imbue the minds of the citizens of a county with a part of the

¹⁸¹ *Barker v. Ash*, 194 S.W. 465 (Tex. Civ. App. 1917) *error ref.*; *cf.* *Houston & T.C. Ry. v. Waller*, 56 Tex. 331 (1882), holding that a juror is not disabled by mere distress of mind caused by information of illness of his family.

¹⁸² *State v. Humble Oil & Ref. Co.*, 187 S.W.2d 93 (Tex. Civ. App. 1945), *petition for appeal denied*, 194 S.W.2d 811 (Tex. Civ. App. 1946).

¹⁸³ *Mundine v. Pauls*, 66 S.W. 254 (Tex. Civ. App. 1902); *cf.* *Zarate v. Villareal*, 155 S.W. 328 (Tex. Civ. App. 1913) *error ref.* Jurors may be examined further concerning their possible disqualification even after they are accepted for a case. *Galveston, H. & S.A. R.R. v. Paschall*, 92 S.W. 446 (Tex. Civ. App. 1906) *error ref.*

¹⁸⁴ *Tram Lumber Co. v. Hancock*, 70 Tex. 312, 7 S.W. 724 (1888).

¹⁸⁵ 41-B Tex. Jur. *Trial - Civil Cases* § 305 (1953).

¹⁸⁶ *Allala v. A.N. Tandy & Sons*, 59 S.W.2d 205 (Tex. Civ. App. 1933), *aff'd*, 127 Tex. 148, 92 S.W.2d 227 (1936); *Sunset Wood Co. v. Broadnax*, 136 S.W. 487 (Tex. Civ. App. 1911) *error ref.*

¹⁸⁷ At least it has been held not to be error to refuse a request for discharge if the connection of the insurance company with the case did not appear. *Levy v. Rogers*, 75 S.W.2d 304 (Tex. Civ. App. 1934) *error disp.*

¹⁸⁸ *Traders & Gen. Ins. Co. v. Cossman*, 212 S.W.2d 865 (Tex. Civ. App. 1948) *error ref. n.r.e.*

¹⁸⁹ *Salinas v. Stillman*, 25 Tex. 12 (1860); *Crosby County Cattle Co. v. McDermott*, 281 S.W. 293 (Tex. Civ. App. 1926); *Ellis v. State*, 11 S.W. 111 (Tex. Civ. App. 1889).

¹⁹⁰ *Caylat v. Houston, E. & W.T.R.R.*, 113 Tex. 131, 252 S.W. 478 (1923); *Commercial Standard Ins. Co. v. Miller*, 48 S.W.2d 618 (Tex. Comm. App. 1932); *Bozalina v. Burton & Co.*, 152 S.W.2d 879 (Tex. Civ. App. 1941).

qualities and character of a judge, and this is the best mode of preparing them for freedom. It spreads amongst all classes a respect for the decision of the law; it teaches them the practice of equitable dealing. Each man in judging his neighbor thinks that he may be also judged in his turn. This is in an especial manner true of the civil jury; for although hardly any one fears lest he may become the object of a criminal prosecution, everybody may be engaged in a lawsuit. It teaches every man not to shirk from the responsibility attaching to his own acts; and this gives a manly character, without which there is no political virtue. It clothes every citizen with a kind of magisterial office; it makes all feel that they have duties to fulfill toward society, and that they have a part in its government; it forces men to occupy themselves with something else than their own affairs, and thus combats that individual selfishness, which is, as it were, the rust of the community.