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Improving Jury Comprehension in Complex Civil Litigation

Committee on Federal Courts of the New York State Bar Association

IMPROVING JURY COMPREHENSION IN COMPLEX CIVIL LITIGATION

COMMITTEE ON FEDERAL COURTS OF THE NEW YORK STATE BAR ASSOCIATION*

I. INTRODUCTION

It is by now commonplace that jury trials in federal civil actions have become increasingly lengthy and complex. It is by no means rare for the duration of a trial to be measured in months rather than weeks or days. Complexity may take many forms: legal issues may be multiple, overlapping, and arcane; factual issues may be highly technical or otherwise difficult to comprehend; and even where not studded with abstruse technical evidence, a trial record may tax a jury's powers of comprehension and assimilation simply by its sheer size.

In a long and complicated trial, there is likely to be much evidence that the jury does not understand, appreciate the significance of, or, when the time to deliberate finally arrives, even remember. It is a small wonder then that judges, legal scholars, social scientists, and even jurors themselves have begun increasingly to question whether trial by jury is either an efficient or a fair means of resolving highly complex litigation. Then Chief Justice Burger sparked the debate in his August 1979 address to the Conference of State Chief Justices,[1] and the debate has continued unabated ever since. Indeed, courts have disagreed as to whether the seventh amendment guaranty of jury trial extends to cases of such complexity that a jury may be unable to discharge its functions of finding the facts and applying the law thereto in an informed, rational manner.[2]

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* This Article is based upon the Report drafted by the Subcommittee on Juries and approved by the Committee on Federal Courts of the New York State Bar Association, issued July 12, 1988. The Subcommittee on Juries is comprised of Michael A. Cooper, Valerie Cohen, Melanie L. Cyganowski, Mitchell A. Lowenthal, Jonathan Miller, and Robert Wise, Jr. The opinions contained in this Article do not constitute the official position of the New York State Bar Association unless and until adopted by the House of Delegates.

[1] Burger, *Can Juries Cope with Multi-Month Trials?*, 3 AM. J. TRIAL ADVOC. 448 (1980).

[2] *Compare In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 *passim* (3d Cir.

We will not join that debate. However, recognizing that juries will continue to be called upon to decide factually and legally complex cases, we believe it may be useful to summarize and discuss some of the techniques that are available to increase the likelihood that a jury verdict will reflect a fidelity to both the evidentiary record and the trial judge's instructions. Those techniques can be divided roughly into four categories: (i) ordering the issues for trial, (ii) the conduct of the evidentiary portion of a trial, (iii) the trial judge's final instructions, and (iv) the form of the jury verdict.

There are four distinct actors (or sets of actors) in every trial: counsel for the parties, witnesses, the trial judge, and the jury. To keep this Article within manageable bounds, we will focus principally on the judge and jury, although we acknowledge that counsel and witnesses play major roles in maximizing jury comprehension in complex and, for that matter, simple cases.

II. Ordering the Issues to be Tried

Virtually every case presents a number of issues for a jury to resolve. Thus, in the paradigm personal injury action, the jury typically must decide whether the defendant breached a statutory or common law duty, whether that breach of duty proximately caused injury to the plaintiff, and what money damages the plaintiff can establish by a preponderance of the evidence. The issues may easily multiply. Thus, again using the personal injury action as a model, the defendant may challenge the factual basis for personal jurisdiction or plead the statute of limitations as an affirmative defense; the plaintiff may be charged with contributory or comparative negligence or with assumption of the risk; and the defendant may implead a third party on a claim for contribution or indemnification. Typically, these issues are all decided in a single trial, but they need not be.

An action may be divided into separate issues or groups of issues to be tried and submitted for decision sequentially rather than contemporaneously. In civil litigation, rule 42(b) of the Fed-

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1980) (right to jury trial does not necessarily apply to complex antitrust issues) *with In re* United States Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979) ("we refuse to read a complexity exception into the Seventh Amendment"), *cert. denied*, 446 U.S. 929 (1980). Courts are divided over the meaning and significance to be attributed to the Supreme Court's statement in Ross v. Bernhard, 396 U.S. 531 (1970), that "the 'legal' nature of an issue," for the purpose of deciding whether there is a right to jury trial, is determined by considering, *inter alia*, "the practical abilities and limitations of juries." *Id.* at 538 n.10.

eral Rules of Civil Procedure provides ample authority for dividing a case in this manner. Rule 42(b) authorizes a "separate trial" of a separate "claim" or "issue," or "any number" of claims or issues, "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." The only limitation embodied in the rule is that the right to trial by jury shall be "preserv[ed] inviolate."[3]

Threshold issues such as personal or subject-matter jurisdiction or venue may be tried preliminarily, as may affirmative defenses such as the statute of limitations or waiver. The most common form of bifurcation has been to separate the liability phase of a trial from the damages phase on grounds of expedition and economization (expending time and money on proof of damages can be obviated if a plaintiff is unable to establish liability) or avoidance of prejudice (proof of severe injury may prejudice a defendant's contention that it did not manufacture the product causing that injury). On occasion, even a single element of liability, such as causation, may be isolated for trial.

Although considerations of economy and efficiency frequently predominate on a motion for separate trial under rule 42(b), the prospect of improved jury comprehension may be a significant factor. For example, issues or claims may be separately tried in patent or antitrust cases because of the legal and/or factual complexity which frequently characterizes such cases. Given the liberality with which rule 18(a) permits joinder of unrelated claims between the same parties, rule 42(b) may be employed to order separate trials so that jurors do not become confused in trying to keep separate their consideration of unrelated issues of fact and law.

Segregation of issues for separate trial can improve jury comprehension by (i) reducing the volume of evidence, arguments, and

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[3] FED. R. CIV. P. 42(b). In criminal prosecutions, Federal Rule of Criminal Procedure 14 confers authority, loosely akin to the court's powers under rule 42(b) in a civil action, to divide the trial of an indictment or information into separate segments. *See* FED. R. CRIM. P. 14. Rule 14 authorizes a district judge to order "an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires" if necessary to avoid prejudice to a defendant or the government. *Id.* Among the factors to be considered in deciding whether to order a severance are the complexity of the indictment or information, the estimated length of the trial, and disparities in the alleged involvement of, and amount of proof against, the defendants. *See* United States v. Gallo, 668 F. Supp. 736, 749 (E.D.N.Y. 1987). A weighing of these factors will determine whether a unitary trial will reasonably assure that the jury decides each defendant's guilt or innocence only on the basis of evidence admissible against that defendant. *See id.*

instructions with which the jury must deal at the time, and (ii) concentrating the presentation of evidence and thereby reducing the interval between the time when the jury hears the evidence and when it must assimilate that evidence in its deliberations.

However, courts should continue to invoke rule 42(b) with caution, for separate trials can entail a price where a case is not terminated by the first trial. Evidence and arguments may have to be duplicated, thereby actually prolonging the case.[4]

Moreover, the general flavor of a case can be lost during piecemeal consideration of its components. In the context of a mass tort case, the United States Court of Appeals for the Sixth Circuit noted the "danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the court, replacing it with a sterile or laboratory atmosphere in which causation is parted from the reality of injury."[5] The trial judge may guard against this risk by ordering the proof in a unitary trial and submitting an issue for decision by the jury by special verdict when the proof on that issue is complete.

Finally, it is worth recalling in connection with the delineation of issues for trial that the "formulation and simplification of the issues" is the very first subject enumerated in rule 16(c)[6] which the court and counsel should consider at a pretrial conference.

III. Conduct of the Trial

Frequently a jury is given no framework other than counsel's opening statements to assist it in comprehending, evaluating, and remembering evidence as it is received into the record day after day, week after week, during a lengthy trial. Normally only at the end of the trial is the jury instructed as to its role and the rules of law which it must apply to the evidentiary record. Is this a satisfactory state of affairs? Or, as Judge Prettyman put the question

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[4] It has been determined empirically that when liability and damages are bifurcated and liability is found, juries take longer in the aggregate to deliberate on liability and damages separately than they do when those issues are tried jointly. *See* Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 Harv. L. Rev. 1606, 1621 (1963). The authors of the Harvard article did conclude, however, that overall, the general use of bifurcated trials results in a time savings because frequently the jury avoids deliberating damages. *See id.*

[5] *In re* Beverly Hills Fire Litig., 695 F.2d 207, 217 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

[6] *See* Fed. R. Civ. P. 16(c).

(and provided the answer):

> What manner of mind can go back over a stream of conflicting statements of alleged facts, recall the intonations, the demeanor, or even the existence of the witnesses, and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events? The *human* mind cannot do so.[7]

Fortunately, there is a growing realization that a jury need not be left to its own devices throughout a trial and that there are a number of techniques available to provide guidance, enhance comprehension, and improve memory. We now review a number of those techniques.

A. Preliminary Instructions

Rule 51 of the Federal Rules of Civil Procedure calls for the trial judge to instruct the jury at the close of the evidence.[8] But by then, as various empirical studies have demonstrated,[9] many jurors have already reached more or less tentative decisions, and are in effect being told to reconsider views already formulated. Preliminary instructions, delivered before the first witness is called or the initial exhibit received, can reduce the tendency to reach premature judgments and otherwise lead to more informed verdicts.

The delivery of preliminary instructions was included in a series of experiments conducted during 1983 and 1984 by district judges in the Second Circuit under the supervision of the Committee on Juries of the Circuit's Judicial Council. The Committee's report noted four possible advantages of pre-instruction: (i) enhancement of the jury's ability to remember evidence, resulting from the observed phenomenon that attention and memory are more acute when an individual understands what he or she is looking for; (ii) improving a jury's ability to assimilate evidence and relate it to the relevant issues by providing a table of contents for the trial; (iii) helping jurors to identify and, it is hoped, thereby resist prejudices they may bring with them to the courtroom; and (iv) assisting the jury in evaluating credibility and drawing reasonable inferences by providing guidance on these subjects before, not

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[7] Prettyman, *Jury Instructions—First or Last?*, 46 A.B.A. J. 1066, 1066 (1960).

[8] FED. R. CIV. P. 51.

[9] *See* I. HOROWITZ & T. WILLGING, THE PSYCHIATRY OF LAW, INTEGRATIONS AND APPLICATIONS 189 (1984).

only after, the jurors are required to perform these tasks.[10]

Although the Second Circuit pre-instruction experiment was of limited scope (three judges and a total of fourteen trials), a majority of participating judges and counsel favored the procedure. In a broader study conducted in Wisconsin, the judges and attorneys similarly favored the procedure; judges who delivered preliminary instructions reported a greater measure of satisfaction with the jury's verdict than those who did not.[11] Moreover, pre-instructed jurors were significantly more satisfied with the conduct of the trial in a number of respects than jurors not given preliminary instructions; the former found preliminary instructions decidedly helpful in remembering, evaluating, and organizing the evidence, understanding the law, and applying the law to the facts.[12]

We have recently conducted a survey of the Bar in New York State on various aspects of federal court practice, including the desirability of preliminary instructions. Of the 1,209 attorneys expressing views on this subject, seventy-three percent favored pre-instruction of the jury and only eighteen percent disagreed.[13]

There appears to be no persuasive reason why preliminary instructions on procedural matters, such as the respective roles of the trial judge, counsel, and the jury, should not be given in every case. Indeed, pre-instruction on substantive matters, although it may be equally helpful, requires greater effort on the part of both court and counsel (including, ideally, a charging conference) and runs the risk of oversimplifying the issues to be tried. However, the advantages of pre-instruction noted above may outweigh these concerns.

B. Interim Instructions, Commentary, and Summations

Direct communication with the jury by counsel has traditionally been limited to opening statements at the outset of the case and summations at its close. Likewise, substantive instructions to

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[10] JUDICIAL COUNCIL OF THE SECOND CIRCUIT, REPORT OF THE COMMITTEE ON JURIES 42-43 (Aug. 1984) [hereinafter 1984 SECOND CIRCUIT REPORT].

[11] COMMITTEE ON IMPROVING JURY COMMUNICATIONS, WISCONSIN JUDICIAL COUNCIL, DRAFT FINAL REPORT 17-18 (May 1985) [hereinafter WISCONSIN REPORT].

[12] *Id.* at 16-17. A number of Ninth Circuit jurors surveyed in 1986 also suggested that pre-instruction would be helpful. SURVEY OF JUROR ATTITUDES, NINTH CIRCUIT JUDICIAL COUNCIL, FINAL REPORT 7 (1986) [hereinafter NINTH CIRCUIT REPORT]. "That way," one juror said, "we would have a much better idea what to look for during a trial." *Id.*

[13] N.Y. ST. B.A. SURVEY OF THE BAR 45 (June 29, 1988) [hereinafter 1988 NYSBA SURVEY].

the jury by the court traditionally have come only at the end of the trial and, to some extent more recently, at its beginning. During the span of time between these two points, which in a lengthy trial may last several weeks or months, typically neither counsel nor the court communicates directly with the jurors about the significance of the evidence unfolding before them. As a result, the jury is often at a loss to understand how the evidence relates to the issues in the case or what principles of law govern its significance. This disadvantage may be removed by having the trial judge or counsel, or both, address the jury intermittently during the trial, thus providing the jurors with opportunities over the course of a lengthy trial to hear explanations, both partial and impartial, of complicated evidence and legal principles.

For example, at logical breaks in the flow of testimony, the trial judge might review and summarize the evidence, explain the legal issues, or instruct (or reinstruct) the jury on applicable legal principles. Another method the trial judge might employ would be to allow counsel to periodically address the jury to sum up, provide an introduction for new evidence, offer explanations of evidence that has been introduced, or pose questions for the jury to consider.

Both techniques address the same problem: the absence of opportunity over a long period of time for the jury to hear explanations of complicated evidence or legal principles. While neither technique has received much use in protracted cases, each offers the possibility of significant benefits in improved juror comprehension and memory.

1. Interim Instructions and Evidentiary Summaries by the Court

In a lengthy trial, there are several advantages to be gained from the practice of having the trial judge give interim instructions to the jury or periodically review and summarize the evidence, or do both.[14]

First, interim instructions and evidentiary summaries may enhance the jury's ability to remember the evidence presented at trial, since a juror's attention and memory is sharper when that juror first understands what he or she is looking for and when evi-

[14] A comprehensive discussion of judicial commentary on evidence may be found in Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161 (1988).

dence, once presented, is then periodically reviewed. Second, by serving as a sort of continually updated roadmap of the issues in the case, interim instructions may increase the jury's ability to organize and assimilate evidence and, ultimately, to connect that evidence to the legal issues on which it bears. Third, periodic reviews of the evidence may keep fresh in the jurors' minds previously introduced information which is crucial to the jury's ability to comprehend the meaning or assess the significance of evidence that will be presented weeks or months later. Fourth, interim instructions on matters of procedure (*e.g.*, presumptions, the nature of reasonable inferences, or the evaluation of credibility), when timely given, should put such procedural concepts in context and allow jurors to appreciate their significance while perceiving the events of trial to which they may relate, rather than retroactively during deliberation. Fifth, interim instructions, when targeted to discrete issues as they are presented during trial, may be better understood and more effectively applied by the jury than when they are buried in an omnibus charge at the close of trial.

On the other hand, there also appear to be several potential disadvantages to a trial judge's use of interim instructions and evidentiary summaries in a lengthy trial. It is possible that whatever tendencies jurors may have to decide on the outcome of a case early in the trial will be compounded by any instructions or comments on the evidence given before the presentation of all of the evidence is complete.[15] Additionally, both interim instructions and evidentiary summaries may have the effect of focusing all members of the jury on the same evidence and legal issues. To the extent that the deliberative process is enriched by a diversity of motivations, memories, viewpoints, attitudes, and sensitivities, this process may be diminished by the uniformity that interim commentary by the court might encourage. Finally, if interim instructions and summaries are more abbreviated than any initial pre-instruction or the closing charge and marshalling of the evidence, they may result in an oversimplification of the issues being tried.

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[15] A variety of social science studies suggest that individuals have a persistent tendency to reason in a confirmatory manner once they have been provided with or settled on a specific hypothesis. *See, e.g.*, P. WASON, PSYCHOLOGY OF REASONING; STRUCTURE AND CONTENT (1972); Snyder, *Hypothesis-testing Processes In Social Interaction*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1202-12 (1978).

2. Interim Summations by Counsel

Allowing counsel to make interim summations to the jury was first given prominence, if not first utilized, in the highly publicized libel trial of *Westmoreland v. CBS.* In that case, which occupied sixty-two trial days over a five-month period before a settlement was reached, each side was allowed up to a total of 120 minutes for interim summations between the opening and closing arguments; the trial judge, Honorable Pierre N. Leval, permitted counsel to speak directly to the jury as the case was being conducted. Counsel could use their time whenever and however they saw fit—in blocks of time as short or as long as counsel felt necessary to accomplish the point they were attempting to make.[16]

During the case, counsel gave interim summations eighty-four times (plaintiff's counsel used the device forty-three times). The longest of these summations lasted about ten minutes, and the shortest ran only about seventy to ninety seconds; on average, they took less than two and a half minutes. Counsel used interim summations at different times for different purposes. Their most frequent use appears to have been at the start or finish of a witness' direct or cross-examination. Occasionally, however, the examining counsel would stop to address the jury midway through his examination or upon receipt in evidence of a document or item of demonstrative evidence. While the use of interim summations typically instigated a responsive summation by the opposing counsel, it did not always do so.

Other than in *Westmoreland*, the technique of allowing interim summations by counsel seems to have been little used. The advantages, however, of employing such summations, particularly in a protracted and complex case, may be significant in terms of increasing juror comprehension and recall.

Interim summations enable counsel to break up otherwise massive presentations of evidence, clarify key points for the jury, put the evidence they have just heard in context, explain the significance of their proof or the opposing party's proof, and comment on its strength or weakness. In a lengthy trial, where the elements of various claims or defenses are built up bit by bit through the

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[16] The only restriction the court imposed was that an attorney could not use an interim summation unduly to interfere with his adversary's presentation of evidence or with the court's schedule. *See* Leval, *From The Bench:* Westmoreland v. CBS, LITIGATION, Fall 1985, at 7-8, 66-67.

testimony of numerous witnesses and exhibits over the course of weeks or months, allowing counsel periodically to pull together otherwise unconnected pieces of evidence may substantially improve the jury's understanding.

Moreover, interim summations may keep the jury's attention focused on the evidence. All lawyers have witnessed jurors tune out the presentation of evidence where, for example, the witness' voice is monotone or deposition transcripts are being read. Allowing counsel periodically to address the jury affords counsel the opportunity to bring the jury back into what is going on in the courtroom. Finally, an interim summation affords counsel the chance to keep the jurors' minds open while the other side is presenting its case by illuminating both confirmatory and contradictory evidence and explaining its significance.

On the other hand, there are possible pitfalls to allowing counsel to address the jury during the presentation of the evidence. There is a risk that in reaching its decision the jury will focus on what counsel say the case is about, rather than on what is actually shown by the evidence presented. It is plausible, for example, that some jurors might feel that they do not have to concentrate on the testimony or exhibits because one of the lawyers will explain the meaning of the evidence either immediately before or following its introduction. Further, in the absence of tight control by the court, the practice may be subject to abuse by some lawyers who will misuse any opportunity to address the jury if they can get away with it.

C. Note-taking and Questions by Jurors

Jurors generally are viewed, or at least treated, as passive participants in a trial. Lawyers and, on occasion, judges question witnesses; jurors normally do not. Lawyers and judges take notes to facilitate their recollection of evidence and record their impressions of its significance; jurors normally do not. An observer unfamiliar with the American legal system might fairly ask why we impose these handicaps on the trial participant with the weightiest role, that of reaching a decision. Neither reason nor experience requires that we do so.

1. Juror Note-taking

Unlike certain state judicial systems,[17] there is no federal statute or rule governing the subject of note-taking by juries, and the determination as to whether or not to allow such note-taking is left to the sound discretion of the trial judge.[18]

The asserted advantages of juror note-taking are premised on the fairly straightforward belief that jurors are more likely to understand and remember what they both see and hear, not just hear alone. From this premise, it follows that note-taking is likely to be a valuable aid in increasing jurors' attentiveness, helping them focus more logically and clearly on important issues, and refreshing memory. It is not surprising that jurors themselves are in favor of note-taking.[19]

Critics of juror note-taking contend that there is an undue risk that jurors intent upon taking notes may miss important testimony and/or be distracted from focusing their attention on the demeanor of a witness, that jurors will attach too much significance to notes and too little to their independent recollections, and that the most assiduous note-takers may dominate the jury. To guard against these risks, trial judges commonly instruct juries, when note-taking is permitted, that (i) the notes are to be used only as an aid to a juror's memory and are not to be accorded precedence over the juror's independent recollection of the facts; (ii) jurors should not be influenced by other jurors' notes; and (iii) jurors should not allow note-taking to become more important than, or to distract them from, the trial proceedings.

Empirical studies have tended to confirm that the advantages of note-taking outweigh the disadvantages, and a majority of attorneys appear to favor the practice.[20] Thus, it has been observed that jurors permitted to take notes request less frequently that portions of the transcript be read during their deliberations, and such jurors

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[17] *See, e.g.*, ILL. REV. STAT. ch. 78, para. 36(b) (1987) (entitling a petit juror in any Illinois court to take notes); WIS. STAT. §§ 805.13(2)(a), 972.10(1)(a) (Supp. 1987-1988) (jurors entitled to take notes unless the trial judge states on record reasons for prohibiting note-taking).

[18] *See, e.g.*, United States v. Polowichak, 783 F.2d 410, 413 (4th Cir. 1986); United States v. Bertolotti, 529 F.2d 149, 159-60 (2d Cir. 1975).

[19] Eighty-one percent of the jurors in the Ninth Circuit survey supported, with fifty-six percent "strongly" supporting, juror note-taking. NINTH CIRCUIT REPORT, *supra* note 12, at 9, 11; *see* J. CECIL, E. LIND & G. BERMANT, JURY SERVICE IN LENGTHY CIVIL TRIALS 29 (1987).

[20] *See* 1984 SECOND CIRCUIT REPORT, *supra* note 10, at 71; WISCONSIN REPORT, *supra* note 11, at 22-23.

are better able to pinpoint which sections of the transcript they wish to have read to them.[21] Significantly, jurors in note-taking trials reported that note-takers did not exercise more influence than non-note-takers.[22]

A recent survey of the New York Bar produced some interesting data on this subject. Antitrust and bankruptcy lawyers favored juror note-taking; personal injury lawyers did not. Moreover, the more trials to verdict in which a lawyer had participated, the less likely it was that he or she approved of the practice.[23]

2. Questions by Jurors

Of the array of jury comprehension techniques currently in use, permitting questions by jurors may be the least frequently employed. Thus, in a study conducted by the Wisconsin Judicial Council, participating judges had used the technique in only one percent of their previous trials, and most of the participating attorneys had never before tried a case where jurors were permitted to formulate questions for the witnesses.[24]

Proponents of permitting questions by jurors point out that it permits jurors to actively participate in a trial, thereby causing them to be more attentive throughout; that counsel can employ jurors' questions as "feedback" on how the trial is progressing, permitting counsel to focus their attention on particular concerns or confusion manifested by juror questions; and that the device provides a "check" on counsel, promoting the thorough questioning of witnesses and assuring that information is elicited which the jurors believe is necessary to reach an informed verdict.

Critics of questioning by jurors counter that the procedure can take up a good deal of time; that jurors, who are not familiar with the rules of evidence, will often bring up irrelevant, improper, or excluded subjects in their questions; that the procedure can be generally disruptive of the orderly conduct of a trial; that juror questions can undermine the adversary process by interfering unduly with counsel's trial strategy; and that jurors may employ questioning as a vehicle for expressing preconceived views.

Clearly, questioning by jurors, if permitted at all, must be sub-

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[21] 1984 SECOND CIRCUIT REPORT, *supra* note 10, at 69.

[22] WISCONSIN REPORT, *supra* note 11, at 21.

[23] 1988 NYSBA SURVEY, *supra* note 13, at 43.

[24] WISCONSIN REPORT, *supra* note 11, at 9-11.

ject to tight controls. Trial judges who permit such questioning generally instruct jurors that they will be permitted to pose questions only at the conclusion of both the direct and cross-examination of any particular witness, and that questions must be submitted in writing so that their propriety may be reviewed by the court and counsel out of the jury's presence.[25]

As for experiential satisfaction with juror questioning, the empirical data is scant and somewhat conflicting. Jurors, perhaps not surprisingly, generally favor the technique, even though most do not accept the invitation to pose questions. Trial judges tend to be divided on the issue: those who favor the technique emphasize cases where insightful jurors have asked an overlooked question, while those opposed focus on the delay caused by having to stop a trial, review a question out of the jurors' presence, and take arguments on its appropriateness. Attorneys seem more often than not to be opposed to the technique,[26] believing that its "feedback" benefits are outweighed by its disruption of what counsel have historically considered solely within their province: controlling the order of proof at trial and the manner in which their respective cases are presented.

IV. The Final Charge to the Jury

Having discussed various techniques for improving jury comprehension, recall, and assimilation of evidence that may be employed before and during a trial, we turn to the final charge to the jury. At this juncture, the jurors are told (or reminded, if the court has given preliminary or interim instructions) that they alone are the exclusive judges of the facts and that, upon being instructed as to the law, they are to render their verdict by applying those instructions to the facts they find.

One may reasonably question whether jurors can accomplish this task when presented with instructions that, in Judge Bok's

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[25] It is submitted that the court should further instruct that questions should be factual and not reflect sympathy with a party's position, that a refusal to ask a particular question should not be held against a party, and that there are a number of reasons why a question may be considered inappropriate, including not only rules of evidence but also the possibility that a later witness will be called to testify upon the subject matter raised by the particular question.

[26] In this Committee's recent survey of the New York Bar, 616 responding attorneys (forty-nine percent) disapproved of questioning by jurors, while 508 attorneys (forty-one percent) favored the practice. 1988 NYSBA Survey, *supra* note 13, at 40. A higher percentage of the more experienced trial lawyers disapproved of the practice. *Id.*

words, often douse them "with a kettleful of law . . . that would make a third-year law student blanch."[27] Too often both lawyers and judges bypass the opportunity to teach jurors and increase jury comprehension by providing clearer instruction in understandable terms and offering specific guidance as to how various items of evidence received throughout the lengthy trial may be related and assessed.

A. Preparation of Instructions

Concerned that the unwillingness of American judges to comment on the evidence "often dilutes the jury instruction to incomprehensible boilerplate,"[28] former Chief Judge Weinstein of the Eastern District of New York has urged that the jury charge be viewed "as an opportunity to educate the jurors as we would want ourselves educated if we were in their position."[29] Judge Weinstein has suggested: (i) avoiding unnecessary use of legalistic terminology, relying instead upon "basic English" with instructions, to the extent possible, in clear and simple terms; and (ii) having the trial judge both summarize and comment upon the evidence, offering the jury specific guidance in evaluating witnesses' credibility and marshalling the evidence in some sort of organized fashion.[30]

One specific technique for improving the comprehensibility of the jury charge—and reducing the risk of reversible error—is for trial judges to write out their proposed instructions in advance, distribute copies to opposing counsel, and permit counsel to comment specifically on them at a charging conference.[31] While this practice appears more the exception than the rule, it clearly enhances the opportunity for both counsel and court to ensure that the charge presents an accurate exposition of the law as it applies to the case at hand. Moreover, to the extent that the trial judge chooses to comment upon the evidence, written instructions provide counsel with the opportunity to review whether the court's comments are balanced and do not favor one party.

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[27] C. BOK, I, TOO, NICODEMUS (1946), *quoted in* Weinstein, *supra* note 14, at 166.

[28] Weinstein, *supra* note 14, at 162.

[29] *Id.* at 166.

[30] *Id.* at 170, 174-76.

[31] *Id.* at 170.

B. Timing: When Should the Court Deliver its Final Instructions to the Jury?

Prior to being amended in 1987, rule 51 of the Federal Rules of Civil Procedure required that the court instruct the jury after the completion of closing arguments by counsel.[32] Rule 51, as amended, now affords greater flexibility: "The court, at its election, may instruct the jury before or after argument, or both."[33]

The accompanying Notes of the Advisory Committee explain the benefits that may be realized by having the court instruct the jury before closing arguments:

> [I]t gives counsel the opportunity to explain the instructions, argue their application to the facts and thereby give the jury the maximum assistance in determining the issues and arriving at a good verdict on the law and the evidence . . . . Moreover, if the court instructs before an argument, counsel then know the precise words the court has chosen and need not speculate as to the words the court will later use in its instructions.[34]

Perhaps because less than one year has passed since the amendment to rule 51, the great majority of judges in the Southern and Eastern Districts of New York continue the longstanding federal tradition of instructing the jury after counsel have completed their closing arguments. However, even in other jurisdictions where courts have long had discretion to determine the timing of delivering instructions, the practice of delivering instructions after attorneys' closing arguments appears to be favored. For example, sixty percent of trial court judges surveyed in Wisconsin usually delivered instructions to the jury after the completion of summations.[35]

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[32] J. MOORE, MOORE'S FEDERAL PRACTICE RULES PAMPHLET, PART I 562-63 (1988).

[33] FED. R. CIV. P. 51.

[34] FED. R. CIV. P. 51 advisory committee's note. The Advisory Committee also commented that jurors are more likely to be "fresh" and consequently more attentive to instructions delivered prior to closing arguments. *Id.* While this may often be so, former Chief Judge Weinstein has contrasted his personal experience:

> [S]o long as the jurors are given a short break following closing arguments, they are likely to be eager to pay attention to the neutral arguments of the judge after having been surfeited with lawyers' arguments tailored to meet their clients' needs.

Weinstein, *supra* note 14, at 171 n.30.

[35] WISCONSIN REPORT, *supra* note 11, at 2.

C. *Providing Typewritten Instructions to the Jury*

Jurors clearly favor the provision of written instructions for their use during deliberations. They view written instructions as affording substantial benefit in understanding the trial and increasing the likelihood that their verdict will be "based upon a complete and proper understanding of the judge's instructions."[36]

Members of the Bar tend to agree. In this Committee's recent survey, more than seventy percent of the responding New York lawyers agreed that jurors in civil trials should be permitted to review the written charge during deliberations.[37] The response of lawyers surveyed in Wisconsin was similarly positive, although the provision of written instructions to the jury did not influence these same attorneys' satisfaction with the trial.[38]

In sharp contrast to the views held by lawyers and jurors, however, the response from the Bench appears far less enthusiastic. Thus, while twelve of the fourteen judges who participated in the Second Circuit experiment in which jurors were furnished written copies of the charge after its delivery initially responded positively, only one judge continued to use this method two years later—and did so rarely.[39]

Among the concerns voiced by the judges were the following: (i) providing written instructions to jurors encouraged them to "interpret the law on their own" and thus discouraged them from seeking further guidance from the court, including making additional requests for clarifying instructions; (ii) the seemingly simple logistics of preparing written instructions were in fact a "nightmare," time consuming and very taxing upon the court's limited staff resources; (iii) especially when written instructions were given to jurors during delivery of the charge, judges felt unnecessarily restrained from extemporizing or in any way departing from the text; and (iv) even when instructed not to do so, jurors may nonetheless overemphasize one portion of the charge to the exclusion of the others.[40]

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[36] *Id.* at 26; *see* NINTH CIRCUIT REPORT, *supra* note 12, at 9; J. CECIL, E. LIND & G. BERMANT, *supra* note 19, at 4.

[37] 1988 NYSBA SURVEY, *supra* note 13, at 44.

[38] WISCONSIN REPORT, *supra* note 11, at 27.

[39] 1984 SECOND CIRCUIT REPORT, *supra* note 10, at 78-79; COMMITTEE ON JURIES OF THE JUDICIAL COUNCIL OF THE SECOND CIRCUIT, FOLLOW-UP SURVEY REPORT 10 (Apr. 1986) [hereinafter 1986 SECOND CIRCUIT FOLLOW-UP REPORT].

[40] 1984 SECOND CIRCUIT REPORT, *supra* note 10, at 80-83.

On the other hand, potential benefits cited by the responding judges included a saving of court time (avoiding having to bring the jury back from the jury room for a clarifying instruction) and the facilitation of better understanding and retention by the jurors of the court's instructions. The latter benefits were thought particularly helpful in a longer or more complex trial.[41]

D. Providing a Tape Recording of the Instructions to the Jury

The overall response toward tape-recording of the trial judge's instructions for use during jury deliberations is far more guarded from the perspective of both the Bench and the Bar.[42] In contrast to the favored use of providing written instructions to jurors for use during deliberations, only a fairly slim plurality (forty-one percent to thirty-four percent) of the lawyers surveyed recently by this Committee expressed the opinion that judges should tape-record their live jury instructions for later replay by jurors upon their request.[43]

Similarly, although the judges participating in the Second Circuit experiment providing a tape recording of the court's charge to the jurors initially responded that it was "very helpful," none were using the procedure two years later.[44]

V. FORMS OF VERDICTS

Rule 49 of the Federal Rules of Civil Procedure sets forth three broad forms of verdict that may be submitted to a jury in a civil case: special verdicts, general verdicts, and general verdicts with interrogatories.[45] While general verdicts are the most popular form of civil jury verdict, the trial court has virtually unfettered discretion to submit either special verdicts or a general verdict with interrogatories.[46] Choosing among these alternatives is not

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[41] *Id.*

[42] Although some jurors in the Ninth Circuit study independently suggested that the judge's instructions should be videotaped for later replay during deliberations, *see* NINTH CIRCUIT REPORT, *supra* note 12, at 7, we are not aware of any survey of the actual use of this device.

[43] 1988 NYSBA SURVEY, *supra* note 13, at 44.

[44] 1984 SECOND CIRCUIT REPORT, *supra* note 10, at 86; 1986 SECOND CIRCUIT FOLLOW-UP REPORT, *supra* note 39, at 11.

[45] FED. R. CIV. P. 49. The form of verdict presented to jurors in criminal cases raises issues not addressed here. *See generally* United States v. Coonan, 839 F.2d 886 (2d Cir. 1988) (use of special verdicts and interrogatories in RICO prosecution).

[46] Commentators report that a verdict has never been reversed on the ground that the

subject to scientific precision; each has desirable and undesirable features.

A. *Special Verdicts*

Special verdicts under rule 49(a) may take many forms, but are designed to limit the jury's function to resolving disputed issues of fact (or mixed questions of fact and law). In essence, once the jury responds to a series of questions relating to the material issues in the case, the trial court is then left to apply the law to the jury's findings.

There are two critical aspects of special verdicts. First, the factual questions submitted for the jury's resolution normally must be in a form that will permit clear and unambiguous answers, for the rule explicitly provides for "questions susceptible of categorical or other brief answer."[47] To preserve flexibility, the rule also empowers the trial judge to employ "such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate."[48] However, questions that call for anything other than categorical responses undermine the utility of special verdicts because they invite ambiguity and dispute over their meaning.

Second, the questions submitted must be sufficient to address all the material issues in dispute. While the jury is presumed to have addressed all such issues when rendering a general verdict, use of a special verdict provides a clear road map for identifying those issues the jury considered and any which it failed to consider. In the event a material factual issue is not presented to the jury, the parties are given the right to cure the omission, so long as they make prompt demand before the jury has retired. By failing to do so, the parties waive the right to trial by jury on those issues.[49]

Use of special verdicts affects the scope of the trial judge's charge to the jury. Federal Rule of Civil Procedure 49(a) requires the judge to "give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to en-

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court's use of a particular form of verdict was error. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2505, at 493 (1971 & Supp. 1987).

[47] FED. R. CIV. P. 49(a).

[48] *Id.*

[49] *See id.* Rule 49(a) further provides that "[a]s to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." *Id.*

able the jury to make its findings upon each issue."[50] The rule thus appears to permit the judge to omit any discussion of the legal consequences to the parties resulting from the jury's answers to particular questions. Indeed, some courts have suggested that advising the jury of the legal ramifications of their factual determinations is reversible error. In *Thedorf v. Lipsey*,[51] for example, the trial judge dismissed an automobile accident case on the basis of a relevant comparative negligence law because in a special verdict the jury found that both sides were equally at fault.[52] On his appeal, the plaintiff claimed the trial judge's failure to advise the jury of the effect of the comparative negligence law was reversible error.[53] In dictum, a unanimous Seventh Circuit strongly disagreed: "[I]t was not within the province of the jury to consider or determine the legal result of their special findings of fact. That was a question solely for the court."[54] Also in dictum, Judge Jerome Frank was even more adamant in *Skidmore v. Baltimore & Ohio Railroad*:[55]

> When using a special verdict, the judge need not—should not—give any charge about the substantive legal rules beyond what is reasonably necessary to enable the jury to answer intelligently the questions put to them. As, accordingly, the jury is less able to know whether its findings will favor one side or the other, the appeal to the jurors' cruder prejudices will frequently be less effective. "A perverse verdict may still be returned, granted a jury clever enough to appreciate the effect of its answers, and to shape them to harmonize with its general conclusions. But it is much more difficult . . . and by requiring the jury to return the naked facts only we may fairly expect to escape the results of sympathy, prejudice and passion."[56]

This view, however, is not universally held. Indeed, some modern commentators argue strongly that "the preferable rule" is to give the jury a general charge so that jurors will know the legal effect of their answers.[57] They argue, first, that inevitably the ju-

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[50] *Id.*

[51] 237 F.2d 190 (7th Cir. 1956).

[52] *Id.* at 192.

[53] *Id.*

[54] *Id.* at 193.

[55] 167 F.2d 54 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948).

[56] *Id.* at 66 (footnote omitted) (quoting CLEMENSTON, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 12 (1905)).

[57] 9 C. WRIGHT & A. MILLER, *supra* note 46, § 2509, at 513.

rors have some idea of the consequences to the parties of their answers. "If plaintiff's counsel argues eloquently that there is no evidence of contributory negligence, even a juror unfamiliar with that legal doctrine is likely to deduce that it will be in the plaintiff's interest for him to answer 'No' to the question asking about contributory negligence."[58] Worse, there is a danger that the jury will guess incorrectly about the law and shape their answers in a wholly improper fashion.[59]

A second argument raised by the commentators, and some jurists, goes directly to the role of juries in dispensing justice. They argue that attempting to shield jurors from the legal consequences of factual determinations undermines a fundamental role juries play: permitting the tempering of "strict rules of law by the demands and necessities of substantial justice."[60] Indeed, for this reason Justices Black and Douglas urged that rule 49 be repealed.[61]

The use of special verdicts avoids many of the difficulties of explaining to lay jurors the intricacies of legal doctrine. Even where jurors are aware of the consequences to the parties of their answers, either through direct instruction from the court or intuition, special verdicts can assist in correcting errors of law on appeal. Assuming the jurors' answers are adequately supported by the evidence, legal errors committed by the trial court in entering judgment can usually be rectified without need for a new trial. The virtues of special verdicts are so widely perceived that a majority of attorneys recently surveyed by this Committee agreed that a trial judge should usually employ a special verdict form even where all parties are opposed to its use.[62]

B. General Verdicts and General Verdicts with Interrogatories

At the opposite pole from special verdicts are general verdicts, the most common form of civil jury verdict in the United States.

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[58] *Id.* at 512-13.

[59] *Id.* at 513; *see, e.g.*, Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 632 (E.D. La. 1975) ("the better view is that a jury is entitled to know what effect its decision will have. The jury is not to be set loose in a maze of factual questions, to be answered without intelligent awareness of the consequences.") (citations omitted).

[60] Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199, 201 & n.13 (1966).

[61] *See* 374 U.S. 865, 867-68 (1963) (statement accompanying 1963 amendments to Federal Rules of Civil Procedure).

[62] 1988 NYSBA SURVEY, *supra* note 13, at 42-43. A substantial majority (seventy-nine percent) favored the use of special verdicts, if requested by any party. *Id.* at 43.

Rather than answering specific factual questions, jurors return generalized verdicts on the ultimate issues in the case. The court is therefore required to instruct the jury on all applicable legal principles, and the jury is left to find the facts and apply them to the law as instructed by the court.

General verdicts with interrogatories, as permitted by rule 49(b), lie somewhere in between. They highlight particular issues for the jury's attention, but still require jurors to render general verdicts. Since the jury is expected to render a general verdict, the court's instructions on the law are broad, and the jurors are aware of the legal consequences to the parties of particular conclusions.

Focusing the jurors' attention on particular issues has several beneficial consequences. The jury's deliberations can be directed by the court to the key issues in an action and the interrogatory answers may ease appellate review, avoid the need for new trials, or at least narrow their scope.

By adopting features of special and general verdicts, however, the use of general verdicts with interrogatories opens the door to inconsistent answers that alone may exacerbate litigation. Rule 49(b) itself envisions three permutations:

> When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.[63]

Identifying and resolving these potential conflicts has engendered a good deal of litigation, undermining the utility of rule 49(b) general verdicts with interrogatories and suggesting that this form of verdict injects confusion into the jury deliberation process. One judge has gone so far as to argue that rule 49(b) verdicts offer "nothing but trouble."[64]

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[63] FED. R. CIV. P. 49(b).

[64] Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 339-40 (1968); *see* Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84, 93 n.31 (5th Cir. 1966) (Brown, J.).

VI. Conclusion

The challenges of a complex civil jury trial are daunting but not necessarily insurmountable. Various techniques are available to aid jurors in performing their tasks of recalling and assimilating the evidence, comprehending the trial judge's instructions, and reaching a verdict that rationally applies those instructions to the facts found by the jury. These techniques range from bifurcation before trial to choice of the most appropriate form of verdict at the end of a trial. Not all of these techniques will be helpful in every case, but counsel and the trial judge should consider whether at least some of them hold the promise of increasing the likelihood of achieving the result sought in every trial: an informed, impartial, and just verdict.