

IADC NATIONAL JURY TRIAL INNOVATIONS PROJECT

Updated 08.08.2005

Delaware Jury Innovations

Regarding Jury Innovation Recommendations: *The function of the Delaware Task Force on the More Effective Use of Juries was to solicit systematic information from jurors themselves about their expectations, experiences, and reactions to jury duty in Delaware. The Task Force undertook surveys of jurors who had served on a jury trial and made recommendations regarding jury reform based on the survey information. Those recommendations were included in a June 1, 1998 report.*

1. Note Taking

Juror Note-Taking

For many years, jurors in civil and criminal trials in Delaware have had the option, in the court's discretion, to take notes. The majority of Delaware Superior Court judges permit jurors to take notes in certain cases. Practice varies among judges concerning whether jurors are permitted to take their notes into the jury room during recesses, but most do not.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Juror Note-Taking: Task Force Recommendation

The task force supports juror note-taking on a case-by-case basis. Super.Ct.Civ.R. 39 could be amended by adding a new subdivision (d) to the rule which would state as follows: "(d) In a jury trial, the court may instruct the jurors that they may take notes regarding the evidence and keep the notes for the purpose of refreshing their memory when they retire for deliberation. The court shall provide materials suitable for this purpose. During recesses of the trial the jurors shall be permitted to have access to their notes in the jury room. After the jury has rendered its verdict, the notes shall be collected by the bailiff who shall promptly destroy them."

<http://www.dsba.org/AssocPubs/tfrep.htm>

2. Juror Handbooks/Notebooks

Juror Notebooks

In several lengthy civil cases, juror notebooks have already been utilized in Superior Court with very favorable juror reaction.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Juror Notebooks: Task Force Recommendation

In all lengthy trials, trials of complex cases, and even in certain routine cases, jurors should be supplied with juror notebooks for the keeping of documents or information, e.g., juror notes; preliminary and, eventually, final instructions; lists of witness names (and possibly photos); copies of key exhibits; and, where helpful, a glossary of terms. The creation and use of a juror notebook is seen as an aid to juror understanding and recall of the evidence. While recognizing that these aids may not be advisable for routine trials of short or moderate duration, jury notebooks are of considerable value to jurors in trials of complex cases and for unusually long trials. Whether they are used in a given trial and decisions regarding the contents of the notebooks ought to be left to the discretion of the individual trial judge. To clarify the judge's authority in this regard and in order to encourage the use of juror notebooks in appropriate cases, the committee recommends a modest addition of language to Super.Ct.Civ.R. 39(a) and Super.Ct.Civ.R. 39(aa): "In its discretion, the court may authorize the use of notebooks for jurors during trials to aid the jurors in performing their duties."

<http://www.dsba.org/AssocPubs/tfrep.htm>

3. Juror Questions and Questioning of Witnesses

Juror Questions:

Delaware practice governing jury trials prohibit jurors from asking questions directly of a witness or of the lawyers.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Juror Questions: Task Force Recommendation

The Task Force defers making a recommendation regarding juror questioning in civil cases until experimentation with juror questioning provides a clearer picture of the costs and benefits of the process. For purposes of experimentation, the Task Force recommends that the recommended amendment to Super.Ct.Civ.R. 43(a) be adopted as an Interim Rule for a period of one year. The Task force recommends that the following language be added to Super.Ct.Civ.R. 43(a) to assure jurors the right to ask questions in civil trials: "Juror Questions. At the discretion of the trial judge, jurors shall be permitted to submit written questions of witnesses to the court." The Task force would also suggest that the official comment to this rule, interim or permanent, contain the procedural safeguards thought necessary by the authorities cited: the jurors should be instructed about the procedures for juror questions in advance of the taking of evidence; jurors' questions must be in writing and left unsigned; jurors should be instructed to give their questions to the bailiff; if a juror has a question for a witness about to leave the witness stand, the juror should communicate that fact to the court; after receiving the question, the judge must allow counsel an opportunity to object to it out of the presence of the jury.

<http://www.dsba.org/AssocPubs/tfrep.htm>

4. Juror Pay/Compensation

Juror Compensation

Jurors are not paid, but they are reimbursed for some of the expenses they incur as a result of jury duty. The reimbursement rate is \$20 a day. In New Castle County, if you are not selected for a trial, or only serve on a trial lasting one day, you will not receive reimbursement for this service. Jurors selected for trial lasting more than one day will be reimbursed after the initial day of service. Jurors in Kent and Sussex counties receive the \$20 a day reimbursement for every day they are required to report for jury service during their two-week term.

http://courts.delaware.gov/Jury%20Services/?juror_faq_ans.htm#juror14

Jurors shall be paid a per diem rate of \$20.00 which shall serve as a daily allowance for reimbursement for travel, parking and other out-of-pocket expenses. An employer shall not consider the reimbursement described in this subsection as pay. Jurors whose term of service is 1 day or 1 trial shall not receive reimbursement for the first day of service. The State shall pay for food, lodging and other necessary expense during the sequestration of a jury.

10 Del. C. § 4514 (LEXIS 2005)

5. Alternate Jurors

The Court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

DE R SUPER CT RCP Rule 47 (WEST 2005)

Alternate Jurors: Task Force Recommendation

In civil cases, no alternate juror shall be excused at the end of the case. All jurors who remain at the close of arguments should deliberate upon and decide the case. Unanimity shall be required regardless of the number of jurors deliberating.

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6. Discussions pre-deliberation

Pre-Deliberation Discussions: Task Force Recommendation

After being admonished not to decide the case until they have heard all the evidence, instructions of law and arguments of counsel, jurors should also be told, at the trial's outset, that they are permitted to discuss the evidence among themselves in the jury room during recesses. Structured jury discussions of the evidence during trial will benefit the jurors and the trial in a number of ways:

- a. Juror comprehension will be enhanced, given the benefits of interactive communication;
- b. Questions can be asked and impressions shared on a timely basis rather than held until deliberations or forgotten;
- c. A juror's tentative or preliminary judgments might surface and be tested by the group's knowledge; and
- d. Divisive "fugitive" conversations and cliques might be reduced, given the opportunities for "venting" in the presence of the entire jury in the jury room.

Super.Ct.Civ.R. 39(a) and Super.Ct.Civ.R. 39(aa) should be amended to provide that: "Trial jurors shall be instructed that they are permitted to discuss the evidence among themselves in the jury room during recesses from trial, when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.

<http://www.dsba.org/AssocPubs/tfrep.htm>

7. Deliberation

N/A

8. Length of Service

Length of Service (One-day One trial Jury Service)

Delaware has instituted the one trial or one day approach for jury service in New Castle County.

<http://www.dsba.org/AssocPubs/tfrep.htm>

9. Length of Time Restrictions on Trials

Time Limits for Trials

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) **avoid needless consumption of time**, and (3) protect witnesses from harassment or undue embarrassment.

DE R REV Rule 611 (WEST 2005)

Time Limits for Trials: Task Force Recommendation

Given the benefits to the parties, jurors and the court system of trials that are as short as fairness permits, judges ought to be given express authority, by rule, to impose reasonable time limits on trials or portions of trials. Judges are already given such authority, by implication, under DRE 611. The most important factors under this recommendation are: (1) Limitation on the total amount of time for the entire trial; and, (2) Time limits on discrete portions of the trial, e.g., how long each side will be allowed for opening and/or closing statements.

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10. Judge's Responses to Jury Questions

N/A

11. Jury Size

Jury Size

The parties may stipulate that the jury shall consist of any number less than 12 or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

DE R SUPER CT RCP Rule 48 (WEST 2005)

Jury Size: Task Force Recommendation

The Task Force has considered a proposal to reduce the number of jurors in civil cases to less than twelve and would not support a recommendation to do that.

<http://www.dsba.org/AssocPubs/tfrep.htm>

12. Number of Jurors Needed to Return a Verdict

N/A

13. Juror Admonition

N/A

14. Jury Nullification

Jury Nullification: Task Force Recommendation

Juries should not be instructed on the subject of jury nullification. In civil jury trials, jurors should be instructed that they must follow the law in the

instructions, and apply the law that is read and given to them in the final instructions. Attorneys should not be permitted to argue jury nullification. However, attorneys should be allowed to request and argue for a ‘just’ result or verdict.

<http://www.dsba.org/AssocPubs/tfrep.htm>

15. The Use of Plain English

Plain English

A committee, chaired by Judge Susan Del Pesco, completed a standard civil jury instructions handbook. The product was edited by a linguistics expert with a view toward juror comprehension. These instructions are intended to be written for the jury, with their needs in mind, not for the appellate court. They will be understandable to an adult with a high school reading level.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Plain English: Task Force Recommendation

Judges and lawyers should keep legalese and other technical terms to an absolute minimum at trial. Instructions on the law should be clear and understandable language. The legalese and other technical jargon frequently used by attorneys and judges during trial is lost on most jurors and is a major source of confusion and frustration for them. The Task Force also recognized that remarks between and among lawyers and judges and those made by them to the jurors during trial must often sound like a foreign language to the jurors. Technical legal terminology is used too often, when plain English will do. Sometimes judges and trial lawyers even lapse into Latin in front of the jury. Too often jurors are spoken down to. At the same time, communications intended for their consumption go right past them. The language of trials should be demystified for the jury. The new standard jury instruction handbooks, for both civil and criminal cases, will go a long way to demystify the language of trials.

<http://www.dsba.org/AssocPubs/tfrep.htm>

16. Absence of the Jury

N/A

17. Jury Instructions

Jury Instructions

At the close of the evidence or at such earlier time as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The Court may instruct the jury before or after the arguments are

completed and such other times, including prior to the introduction of evidence, as the Court may desire. No party may assign as error the giving or the failure to give an instruction unless a party objects thereto before or at the time set by the Court immediately after the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the party's objection. Opportunity shall be given to make the objection out of the hearing of the jury.

DE R SUPER CT RCP Rule 51 (WEST 2005)

Delaware's civil rules neither require nor forbid the giving of substantive preliminary instructions.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Because of the advantages of furnishing at least several copies of jury instructions to the jury, most if not all Delaware Superior Court judges do so. However, it is only in the most serious cases in which every juror has been supplied with a copy of the instructions.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Jury Instructions: Task Force Recommendation

The judge's preliminary and final instructions should be in writing. Each juror should be given copies of both. The jurors should be able to take their copies of the jury instructions with them to the jury room, especially during deliberations. Studies of the practice of furnishing jurors with written copies of the judge's legal instructions show that there are many advantages such as increased understanding of the instructions; facilitation of deliberations; reduction in the number of questions about the instructions during deliberations; and increased confidence of the jurors in their verdict. The Task Force was of the unanimous view that a copy of the final instructions ought to be given to each juror in all complex civil cases and that they be able to take their individual copies with them into deliberations. To assure jurors these rights in every case, Super.Ct.Civ.R 51 should be amended to read: "The court's final instructions on the law shall be in written form and at least four copies of the final instructions shall be furnished to the jury upon retiring for deliberations. In every complex civil case, each juror shall be furnished with a copy of the final jury instructions upon retiring for deliberations." The Task Force felt that providing copies of the preliminary instructions to the jury should be left to the sound discretion of the Court.

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Furthermore, to increase juror understanding of the law and its relation to the case, their understanding of closing arguments, and to facilitate the arguments, the final instructions ought to be read before closing arguments by counsel. The traditional method of instructing juries is that such instructions be given following closing arguments. However,

SuperCt.Civ.R. 51 permits the judge to charge the jury before or after arguments, or both. The Task Force found that Delaware Superior Court judges often follow tradition by instructing after the attorneys argue despite the obvious appeal in reversing that order so that jurors can learn of the law they are to apply before hearing counsel sum up. Studies of instructing juries before argument as opposed to after, suggest a number of advantages. For one, jurors are better equipped to evaluate the arguments generally. When they have heard the law first, jurors are at an advantage when they attempt to integrate the attorney's summations of the facts with the instructions. Finally, since the jury has already been instructed, counsel are relieved of the awkward, if not unseemly, task of "predicting" for the jury what the instructions will be and of explaining legal concepts they may not have heard yet. At the same time, the sentiment of the Task Force opposes changing Super.Ct.iv.R. 51 to require that jury instructions precede closing arguments. These Rules, as currently written, give the Court discretion as to when the Court should give its final instructions. The Task Force feels that continued discretion in this area is desirable.

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Expanding Scope of Preliminary Instructions: Task Force Recommendation

Preliminary jury instructions should be expanded in scope to include elements of the charge or claim and any known defenses. They should be case-specific where possible and always in plain English. In complex or technical cases, definitions of terms and other information that would help orient the jury to the case should be included. Given before opening statements and the evidence, they ought to deal with more than procedural and housekeeping matters. Preliminary instructions should be both substantive and case-specific. At a minimum, the jury ought to be informed of what the plaintiff in a civil case must prove to win. In addition, definitions of technical terms and elements of the offenses or claims and anticipated defenses should be included. In technical or complex cases, the instructions could contain a glossary of terms or other information that would help orient the jury to the case. The language of the preliminary jury instructions ought to be case-specific wherever possible, identifying the parties by name and referring to the incident or transaction in specific descriptive terms. Super.Ct.Civ.R. 51 should be supplemented by adding the following language: "Immediately after the jury is sworn, the court may, in its discretion, in any civil case instruct the jury concerning its duties, its conduct, the order of proceedings and the elementary legal principles that will govern the proceedings." Preliminary jury instructions shall comply with applicable rules and should inform the jury of the legal rules applicable to any claim or anticipated defense. Where necessary or helpful, a glossary of terms may also be provided. Also, in the court's discretion, copies should be provided to the jury and to counsel.

<http://www.dsba.org/AssocPubs/tfrep.htm>

18. Child-Care for Jurors

Child Care

Out of a total of 432 trial jurors surveyed by the Task Force, most of the trial jurors did not report child care expenses associated with jury duty. Ninety-six percent (or 416 of the 432 jurors) had no child care expenses, while 4% (16 jurors) did. Of those who did report child care expenses, though, the amount was often substantial: Eight of the sixteen had expenses of \$50 or more during their term of service, including three with child care bills for jury duty of over \$100. The range was from \$3 to \$195, with an average total bill of \$66 for those jurors who had child care expenses.

<http://www.dsba.org/AssocPubs/tfrep.htm>

19. Jury Room

N/A

20. Accommodation

N/A

21. Juror's Bill of Rights

N/A

22. Materials Permitted in Possession of the Jury

N/A

23. Various Rules

N/A

24. Various Recommendations

Mini-Openings: Task Force Recommendation

The Task Force does not support having the judge have counsel give a brief, non-argumentative opening statement about their cases before questioning. As an alternative, the Task Force recommends that in civil cases the trial judge encourage counsel to prepare a single page summary of facts and issue for the judge to read to the jury before voir dire.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Juror Privacy: Task Force Recommendation

While the Task Force agrees a juror's privacy should be protected it does not suggest that the trial judge monitor lawyer questions to prevent unreasonable and unnecessary intrusions into the privacy of jurors' lives, that the trial judge should provide alternatives for jurors who do not wish

to answer particular questions in open court of, or that the jury panel should be informed of these options.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Juror Pools: Task Force Recommendation

Superior Court draws jurors from two source files: Voter's Registration and Licensed Drivers. The names of all residents in your county who either vote or drive are compiled by a computer in the State's Office of Information Systems in Dover, Delaware. If you both vote and drive, you still should only be on the list once because the computer eliminates duplicate names. Only about 5% of Delaware's population do not vote or drive.

http://courts.delaware.gov/Jury%20Services/?juror_faq_ans.htm#juror14

Juror Contact: Task Force Recommendation

The Task Force recommends amending Rule 3.10(d) of the *Rules of Professional Conduct* to read, "If any counsel in a civil case requests, the trial judge (or Court official taking the verdict) may permit any jurors so desiring to speak with any counsel interested. The Court may designate a location in the courthouse for that purpose." The intent of this recommendation is to accommodate natural juror curiosity and potentially improve future trial presentation. The opportunity is expressly not designed to be used by counsel to accumulate support for post trial procedures. Hence, counsel are not permitted to probe into jury deliberations. Any information obtained may not be included in any motion or appeal without prior approval, separately determined by the trial judge upon application made to the Court no later than the close of business of the Court on the court day following the rendition of the verdict by the jury.

<http://www.dsba.org/AssocPubs/tfrep.htm> Rule 3.10 relating to communication with or investigation of jurors, however, was repealed July 1, 2003. (DE R RPC Rule 3.10 (WEST 2005))

Deposition Summaries: Task Force Recommendation

To reduce the tedium of reading the contents of a deposition to the jury, and in order to improve juror comprehension of the relevant deposition testimony counsel should be encouraged and, in some cases, required to prepare concise written summaries of depositions for reading at trial. Copies of the summaries should be provided to the jurors before they are read. The reading of depositions at trial, question and answer by question and answer, is a tedious exercise that often drives the most committed jurors to distraction. Deposition reading also unduly prolongs many civil trials. Where the attorneys are unable to agree upon part of a summary (separate summaries of direct and cross-examination), the court should offer to settle any differences. Copies of the written summaries may be, in the court's discretion, provided to the jurors prior to their being read.

Once the summary is read, the jurors' copies could be collected or left with the jurors. To accomplish this goal, the Task Force recommends that Super.Ct.Civ.R. 32 be amended by adding the following to Super.Ct.Civ.R. 32(e): "In its discretion, and in lieu of a reading of an uncontroverted deposition's text or a portion thereof, the court may require the reading of a concise written summary of a deposition sought to be used at any hearing or trial.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Batson Safeguards: Task Force Recommendation

In order to protect the rights of the parties and of potential jurors, trial judges should be vigilant and, where necessary, take the initiative to assure that there is an objective and verifiable race, ethnic and gender-neutral basis for every peremptory strike of a potential juror.

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Use of Modern Technology: Task Force Recommendation

Trial lawyers and judges should become more aware of the availability, advantages and costs of the technologies, present and future, that can aid the parties in case presentation and the jury in understanding and recalling evidence. Courtroom technology can improve juror understanding and makes trials more interesting by simplifying, clarifying and demonstrating large amounts of information, by increasing juror attention to and memory of the evidence as they are given greater opportunity to visualize the material, and by facilitating instantaneous recall of evidence. Utilization of currently available technology in trials is very low. Among the apparent reasons is a lack of information about availability, advantages and costs for lawyers, their clients, and judges. The Task Force notes that the Delaware Supreme Court has established a committee to address these issues and facilitate greater and appropriate use of current and future technology.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Not Keeping Jurors Waiting While Instructions are Settled: Task Force Recommendation

The trial judge and counsel should have the final jury instructions substantially ready by the close of evidence. If additional preparation is needed following the close of evidence, the jurors should be released, overnight if necessary, in order to avoid keeping them waiting. Frequently, juries are kept waiting for long periods of time while instructions are being settled by the judge and attorneys. A requirement that proposed instructions dealing with substantive issues be submitted no later than the start of trial ought to be and is now, at least with regard to civil cases, uniformly enforced. Even in those few case where it is not practicable to seriously consider final instructions until the close of

evidence, the jury ought to be sent home, or at least given a long break, while the instructions are discussed, settled and a record and copies made.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Making Jury Instructions Understandable: Task Force Recommendation

In addition to jury instructions in plain English, they should be case-specific where possible (e.g., use of parties' names) and should give the jury some suggestions regarding the deliberation process. Experts tell us that jury instructions should be as case-specific as possible, utilizing parties' names and actual fact issues in more complex cases. The more closely tailored the law to the case the higher the level of comprehension. In addition, the more instructions there are, the greater the task in understanding them. Accordingly, the volume should be reduced to the absolute minimum. Finally, many jury experts stress the need for the jury to hear from the judge at least a brief discussion about deliberation and group decision-making processes.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Assisting Jurors in Coping with Fears of Contact or Retaliation: Task Force Recommendation

When jurors express what appear to be reasonable concerns about the dangers of being contacted or made the target of retaliation during or following trial, the court should, after notice to the parties, conduct a debriefing and make referrals to law enforcement authorities as necessary.

<http://www.dsba.org/AssocPubs/tfrep.htm>

Soliciting Jurors' Reactions to their Courthouse Experiences: Task Force Recommendation

The jury manager and should conduct regular surveys of juror responses to jury service in general and to the trial in particular. Survey results should be tallied and reviewed by judges, jury managers and court policy makers. The Task Force supports the concept that jurors' reactions be surveyed, but would suggest it be done by an exit survey conducted by the jury manager. This process is already in force in New Castle County.

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