

# IADC NATIONAL JURY TRIAL INNOVATIONS PROJECT

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## Federal Jury Innovations

### 1. Note Taking

The Federal Judicial Center has observed that “[p]ermitting jurors to take notes, once discouraged, has now become widely accepted.” MANNUAL FOR COMPLEX LITIGATION (Third) § 22.42 (1995). The vast majority of courts recognize that it is within the sound discretion of the trial judge to permit jurors to take notes. See, e.g., United States v. Darden, 70 F.3d 1507 (8<sup>th</sup> Cir. 1995); Esaw v. Friedman, 586 A.2d 1164, 1167-68 (Conn. 1991).

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### **ABA Recommendations on Juror Note-Taking**

Principle 13A of the ABA Principles for Juries and Jury Trials recommends that juries should be allowed to take notes during the trial. Juries should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence and should receive appropriate cautionary instructions on note-taking and note use. Jurors should also be instructed that after they have reached their verdict, all juror notes will be collected and destroyed. The court should ensure that jurors have implements for taking notes. The court should collect all juror notes at the end of each trial day until the jury retires to deliberate. After the jurors have returned their verdict, all juror notes should be collected and destroyed.

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Note-taking is encouraged because “[t]here is abundant evidence that individuals tend to be better able to recall events and testimony if they have taken notes at the time; the very process of writing things down helps to encode the events in one’s memory.” Empirical evidence also suggests that the disadvantages typically associated with juror note-taking are minimal, while the benefits are significant.

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### 2. Juror Handbooks/Notebooks

N/A

### 3. Juror Questions and Questioning of Witnesses

State and federal courts, both in civil and criminal cases, have overwhelmingly recognized that whether to allow juror questioning of witnesses is a matter vested in the sound discretion of the trial judge. See, e.g., United States v. Bush, 47 F.3d 511, 514-15 (2d Cir. 1995); State v. Doleszny, 844 A.2d 773 (Vt. 2004). The court in, United States v. Sutton found that “[j]uror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors’ minds, clearing up confusion, or alerting the

attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror.” 970 F.2d 1001, 1005 n.3 (1<sup>st</sup> Cir. 1992).

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The courts considering the propriety of juror questions have concluded that it is a matter within the discretion of the trial judge and the issue of whether juror questioning is proper is resolved by an examination of the trial court's exercise of discretion and whether that broad discretion has been abused. See De Benedetto v. Goodyear Tire & Rubber Co. (1985, CA4 SC) 754 F2d 512, 17 Fed Rules Evid Serv 433, 80 ALR Fed 879; and United States v. Callahan (1979, CA5 Ga) 588 F2d 1078, 79-1 USTC ¶ 9190, reh den (CA5 Ga) 591 F2d 1343 and cert den 444 US 826, 62 L Ed 33, 100 S Ct 49. It has been held that, in consideration of the dangers inherent in juror questioning, the discretion permitting it should be exercised only in compelling circumstances. See United States v Polowichak (1986, CA4 SC) 783 F2d 410 ; and De Benedetto v. Goodyear Tire & Rubber Co. (1985, CA4 SC) 754 F2d 512, 17 Fed Rules Evid Serv 433, 80 ALR Fed 879.

#### **ABA Recommendation on Juror Questioning of Witnesses**

Principle 13C of the ABA Principles on Juries and Jury Trials recommends that in civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses. Jury questioning can materially advance the pursuit of truth particularly when a jury is confronted with a complex case, complicated evidence or unclear testimony; juror satisfaction with the trial is also enhanced.

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### **4. Juror Pay/Compensation**

#### **Fees**

(a) Grand and petit jurors in district courts appearing pursuant to this chapter [[28 USCS §§ 1871](#) et seq.] shall be paid the fees and allowances provided by this section. The requisite fees and allowances shall be disbursed on the certificate of the clerk of court in accordance with the procedure established by the Director of the Administrative Office of the United States Courts. Attendance fees for extended service under subsection (b) of this section shall be certified by the clerk only upon the order of a district judge.

(b) (1) A juror shall be paid an attendance fee of \$ 40 per day for actual attendance at the place of trial or hearing. A juror shall also be paid the attendance fee for the time necessarily occupied in going to and returning from such place at the beginning and end of such service or at any time during such service.

(2) A petit juror required to attend more than thirty days in hearing one case may be paid, in the discretion of the trial judge, an additional fee, not exceeding \$ 10 more than the attendance fee, for each day in excess of

thirty days on which he is required to hear such case.

(3) A grand juror required to attend more than forty-five days of actual service may be paid, in the discretion of the district judge in charge of the particular grand jury, an additional fee, not exceeding \$ 10 more than the attendance fee, for each day in excess of forty-five days of actual service.

(4) A grand or petit juror required to attend more than ten days of actual service may be paid, in the discretion of the judge, the appropriate fees at the end of the first ten days and at the end of every ten days of service thereafter.

(5) Certification of additional attendance fees may be ordered by the judge to be made effective commencing on the first day of extended service, without reference to the date of such certification.

(c) (1) A travel allowance not to exceed the maximum rate per mile that the Director of the Administrative Office of the United States Courts has prescribed pursuant to section 604(a)(7) of this [title \[28 USCS § 604\(a\)\(7\)\]](#) for payment to supporting court personnel in travel status using privately owned automobiles shall be paid to each juror, regardless of the mode of transportation actually employed. The prescribed rate shall be paid for the distance necessarily traveled to and from a juror's residence by the shortest practical route in going to and returning from the place of service. Actual mileage in full at the prescribed rate is payable at the beginning and at the end of a juror's term of service.

(2) The Director shall promulgate rules regulating interim travel allowances to jurors. Distances traveled to and from court should coincide with the shortest practical route.

(3) Toll charges for toll roads, bridges, tunnels, and ferries shall be paid in full to the juror incurring such charges. In the discretion of the court, reasonable parking fees may be paid to the juror incurring such fees upon presentation of a valid parking receipt. Parking fees shall not be included in any tabulation of mileage cost allowances.

(4) Any juror who travels to district court pursuant to summons in an area outside of the contiguous forty-eight States of the United States shall be paid the travel expenses provided under this section, or actual reasonable transportation expenses subject to the discretion of the district judge or clerk of court as circumstances indicate, exercising due regard for the mode of transportation, the availability of alternative modes, and the shortest practical route between residence and court.

(5) A grand juror who travels to district court pursuant to a summons may be paid the travel expenses provided under this section or, under guidelines established by the Judicial Conference, the actual reasonable costs of travel by aircraft when travel by other means is not feasible and when certified by the chief judge of the district court in which the grand juror serves.

(d) (1) A subsistence allowance covering meals and lodging of jurors shall be established from time to time by the Director of the Administrative Office of the United States Courts pursuant to section 604(a)(7) of this [title \[28 USCS § 604\(a\)\(7\)\]](#), except that such allowance shall not exceed the allowance for supporting court personnel in travel status in the same geographical area. Claims for such allowance shall not require itemization.

(2) A subsistence allowance shall be paid to a juror when an overnight stay is required at the place of holding court, and for the time necessarily spent in traveling to and from the place of attendance if an overnight stay is required.

(3) A subsistence allowance for jurors serving in district courts outside of the contiguous forty-eight States of the United States shall be allowed at a rate not to exceed that per diem allowance which is paid to supporting court personnel in travel status in those areas where the Director of the Administrative Office of the United States Courts has prescribed an increased per diem fee pursuant to section 604(a)(7) of this [title \[28 USCS § 604\(a\)\(7\)\]](#).

(e) During any period in which a jury is ordered to be kept together and not to separate, the actual cost of subsistence shall be paid upon the order of the court in lieu of the subsistence allowances payable under subsection (d) of this section. Such allowance for the jurors ordered to be kept separate or sequestered shall include the cost of meals, lodging, and other expenditures ordered in the discretion of the court for their convenience and comfort.

(f) A juror who must necessarily use public transportation in traveling to and from court, the full cost of which is not met by the transportation expenses allowable under subsection (c) of this section on account of the short distance traveled in miles, may be paid, in the discretion of the court, the actual reasonable expense of such public transportation, pursuant to the methods of payment provided by this section. Jurors who are required to remain at the court beyond the normal business closing hour for deliberation or for any other reason may be transported to their homes, or to temporary lodgings where such lodgings are ordered by the court, in a manner directed by the clerk and paid from funds authorized under this section.

(g) The Director of the Administrative Office of the United States Courts shall promulgate such regulations as may be necessary to carry out his authority under this section.

28 USCS § 1871 (2005)

## **5. Alternate Jurors**

N/A

## **6. Discussions pre-deliberation**

### **ABA Recommendation on Preliminary Jury Deliberations**

Principle 13F of the ABA Principles for Juries and Jury Trials allows, in the court's discretion, jurors in civil cases to discuss evidence among themselves in the jury room during the trial. See Winebrenner v. United States, 147 F.2d 322 (8<sup>th</sup> Cir. 1945); United States v. Klee, 494 F.2d 394 (9<sup>th</sup> Cir. 1974); Meggs v. Fair, 621 F.2d 460 (1<sup>st</sup> Cir. 1980). In exercising its discretion to limit or prohibit jurors' permission to discuss the evidence amongst themselves during recesses, the court should consider the length of trial, the nature and complexity of the issues, and other factors that may be relevant on a case by case basis. State and federal trial judges who have studied juries and jury trials advocate use of this procedure, given its potential to improve juror comprehension by recognizing jurors' natural impulses to discuss at least limited aspects of their shared experience with fellow jurors as the trial unfolds.

<http://www.abanet.org/juryprojectstandards/principles.pdf>

## **7. Deliberation**

N/A

## **8. Length of Service**

N/A

## **9. Length of Time Restrictions on Trials**

### **Time Limits for Trial**

The court's power to impose reasonable time limits for trial derives from its inherent power and from codified sources such as Federal Rules of Civil Procedure 16(c)(4) and (15), Federal Rules of Evidence 403, 611(a) and 102, and analogous provisions in force in most states. See Gen. Signal Corp. v. MCI Telecomm. Corp., 66 F.3d 1500 (9<sup>th</sup> Cir. 1995).

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### **ABA Recommendation on Time Limits**

Principle 12 of the ABA Principles for Juries and Jury Trials recommends that courts should limit the length of jury trials insofar as justice allows and jurors should be fully informed of the trial schedule established. This principle seeks to minimize juror dissatisfaction by encouraging courts to manage trial time more effectively and to apprise jurors of trial developments and delays, so that jurors do not feel that their time is being wasted. The court should utilize its power to impose reasonable time limits. In addition to reducing wasted juror time, by shortening trials, time limits maximize court resources and reduce litigant costs. Time limits must be reasonable in light of circumstances of the case, they must be flexible and they cannot be arbitrary. Johnson v. Ashby, 808 F.2d 676, 678 (8<sup>th</sup> Cir. 1987).

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## **10. Judge's Responses to Jury Questions**

N/A

## **11. Jury Size**

The Seventh Amendment to the United States Constitution guarantees the right to jury trial in federal civil cases. As historically understood this guarantee required a jury “composed of not less than twelve persons.” Thompson v. Utah, 170 U.S. 343, 350 (1898). In 1970, for the first time, the Supreme Court retreated from the requirement of a jury of twelve. Williams v. Florida, 399 U.S. 78, 102 (1970). In Colgrove v. Battin, the Supreme Court held that juries with fewer than twelve members are constitutional in federal civil cases. 413 U.S. 149 (1973). The Court’s decisions were, in large measure, based on empirical studies that disputed the impact of jury size on effective decision making, on representativeness and on efficiency. Id. at 160.

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### **Number of Jurors--Participation in Verdict**

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

Review Court Orders which may amend this Rule

USCS Fed Rules Civ Proc R 48 (2005)

### **ABA Recommendation on Jury Size**

Principle 3 of the ABA Principles for Juries and Jury Trials seek to encourage a return to the twelve person jury in all non-petty criminal cases and in all civil cases where feasible. Studies have established that there are significant differences between the effectiveness of six and twelve member juries. Larger juries deliberate longer, and have better recall of trial testimony. Thus, they are more likely to produce accurate results.

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## **12. Number of Jurors Needed to Return a Verdict**

### **Number of Jurors--Participation in Verdict**

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

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It has been held that less than unanimous verdicts are permissible in civil cases because civil trials require a lesser standard of proof and have traditionally been afforded

more procedural flexibility than criminal litigation. See In Re Winship, 397 U.S. 358, 371-72 (1970) (Harlan J., concurring).

### **ABA Recommendation on Unanimity**

Principle 4 of the ABA Principles for Juries and Jury Trials recommends that in civil cases, jury decisions should be unanimous wherever feasible. A less-than-unanimous decision should be accepted only after jurors have deliberated for a reasonable period of time and if concurred in by at least five-sixths of the jurors. In no civil case should a decision concurred in by fewer than six jurors be accepted. However, at any time before verdict, the parties, with the approval of the court, may stipulate to a less-than-unanimous decision. To be valid, the stipulation should be clear as to the number of concurring jurors required for the verdict.

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### **13. Juror Admonition**

N/A

### **14. Jury Nullification**

N/A

### **15. The Use of Plain English**

N/A

### **16. Absence of the Jury**

N/A

### **17. Jury Instructions**

#### **Instructions to Jury; Objections; Preserving a Claim of Error**

(a) Requests.

(1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

(2) After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and

(B) with the court's permission file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out

of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and

(3) may instruct the jury at any time after trial begins and before the jury is discharged.

(c) Objections.

(1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) A party may assign as error:

(A) an error in an instruction actually given if that party made a proper objection under Rule 51(c), or

(B) a failure to give an instruction if that party made a proper request under Rule 51(a), and--unless the court made a definitive ruling on the record rejecting the request--also made a proper objection under Rule 51(c).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).

Review Court Orders which may amend this Rule  
USCS Fed Rules Civ Proc R 51 (2005)

### **ABA Recommendation on Preliminary Instructions**

Principle 6 of the ABA Principles for Juries and Jury Trials recommends that the court give preliminary instructions, both verbally and in writing, before the presentation of the parties' opening statements. These instructions should explain the jury's role and responsibilities, the basic general and specific underlying principles of law to be applied in the case and the order and nature of the presentations. In the preliminary instructions, the court should tell jurors what they should and should not do in the course of the trial. The preliminary instructions should provide jurors with the instructions governing juror note-taking, submitting questions for witnesses, the use of juror notebooks and the nature of the discussions concerning the evidence they are permitted to have among themselves during breaks in the trial. The preliminary instructions should describe the circumstances under which such activities are permitted and each juror should receive a copy of those instructions to consult during the trial. The preliminary instructions should also advise

jurors of their obligation to refrain from talking about the case outside the jury room until after the case is over. See, e.g., United States v. Venske, 296 F.3d 1284 (11<sup>th</sup> Cir. 2002); United States v. Brooks, 161 F.3d 1240 (10<sup>th</sup> Cir. 1998).

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### **18. Child-Care for Jurors**

N/A

### **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**

#### **Judge Comments and Summaries of the Evidence**

In the federal system, a trial judge is permitted to summarize and to comment upon the evidence and to express an opinion as to the facts of the case, provided that the judge makes it clear that the resolution of the disputed facts is a matter for the jury alone. Gant v. United States, 506 F.2d 518, 520 (8<sup>th</sup> Cir. 1974). A decision will ordinarily not be reversed on appeal because of such comments unless the appellate court finds that they were prejudicial to the losing party, particularly where the jury is instructed that they are the sole judge of the facts. Although the judge in the federal system is permitted to comment on evidence, it has also been held to be reversible error for the judge to express an opinion concerning the merits of the case. See, e.g., United States v. Diharce-Estrada, 526 F.2d 637 (5<sup>th</sup> Cir. 1976); United States v. Van Horn, 553 F.2d 1092 (8<sup>th</sup> Cir. 1977). This practice has been upheld, however, if there is no question of fact and only a question of law remains. See Gant, 506 F.2d at 518.

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#### **ABA Recommendation of Judge Comments and Summaries of the Evidence**

Principle 13D of the ABA Principles for Juries and Jury Trials recommends that the court should assist jurors where appropriate. The court should not in any way indicate to the jury its personal opinion as to the facts or value of evidence by the court's rulings, conduct, or remarks during the trial. When necessary to the jurors' proper understanding of the proceedings, the court may intervene during the taking of evidence to instruct on a principle of law or the applicability of the evidence to the issues. This should be done only when the jurors cannot be effectively advised by postponing the explanation to the time of giving final instructions. The court should exercise self-

restraint and preserve an atmosphere of impartiality and detachment, but may question a witness if necessary to assist the jury.

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#### **24. Various Recommendations**

N/A