# Jury Trial Innovations:

# Perceptions vs. Reality


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# Jury Trial Innovations: Perceptions vs. Reality

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*No Man shall be taken and imprisoned or dis-seized of any free tenement or of his liberties or free custom or outlawed or exiled, or in any other way destroyed except by the lawful judgment of his peers.*

**Magna Carta**

## I. Introduction

Although jury innovation and jury reform issues may seem like a new topic, a search of appellate records indicates that state and federal courts have been examining and making decisions about juror note-taking and juror questions of witnesses since 1825.

Since that time, legal scholars, courts and bar associations have studied and experimented with various types of jury innovations and jury reforms, with little consensus on the advantages and disadvantages. The lack of agreement does not appear to be based in disagreement about proper procedures to bring about innovations or reform. Most recent studies indicate that similar if not identical procedures are used in almost every venue where reforms are introduced or examined.

Likewise, the lack of agreement does not appear to be based on lack of information or lack of experience with new procedures. Many proponents and opponents of jury innovations appear quite satisfied with the information and experiences they have accumulated.

A close review of the arguments of most proponents and opponents of jury reforms indicates that the probable basis for disagreement is that until recently, there has been no reliable empirical research into the purported advantages and disadvantages of jury innovations. Therefore, attorneys, judges, and legal scholars have been relegated to limited experimentation and opinions based upon preconceived notions.

For the most part, judges who have instituted jury innovations are the same judges who take bold steps in other areas of court practice and who consistently search for ways to improve the satisfactory operation of their courts and court systems. Recently, however, judges and attorneys all over the United States have taken progressive steps toward instituting changes in the trial of cases, which have resulted in increased satisfaction about the operation of trials and in enhanced performance by juries.

One of the problems in addressing these issues is that there has been too much “opinion” and too little objective research. This paper will review the current status of discourse and research into the most widely recognized types of jury innovations and jury reforms, which have been examined.

In exploring these topics, however, it becomes clear that the "innovations" being discussed are generally quite modest and the benefits to our judicial system quite clear.

## II. The Controversy and the Debate

### A. Background and Purpose of the Jury System

The jury trial is a basic concept of the American system of justice and has been instrumental in preserving individual rights and serving the interests of the public (American Bar Association, 1993).

Throughout our history, American men and women of ordinary capacities have sat in judgment of others in an attempt to decide disputes based upon common sense principles. These citizens have generally used their best efforts to understand the basis for each dispute and have attempted to fashion a decision, which was in keeping with their sense of values and beliefs.

Our system of justice and its protection of citizen rights with the use of a jury say as much about our values as it does about the logistics of courtroom decision making. Historically, our forefathers were concerned about the protection of freedom from tyranny by providing for justice to be applied by common ordinary citizens. The authors of our system of justice were not as concerned about the "correctness" of a jury's decision as they were about a litigant's rights to have a fair trial.

Over time, with the extraordinary revolutions in technology and communications, the public has tended to take freedom for granted, and has demanded that jurors make "correct” decisions. These demands are generally arbitrary and motivated by one's personal perceptions and biases and by expectations of perfection, which have been promoted by modern consumerism.

### B. Voices of Dissatisfaction With the Jury System

In trying to understand litigants and their transactions, jurors’ abilities are enhanced or limited by their individual characteristics. These characteristics include their attitudes about specific issues, their life experiences, their personalities, their general values and beliefs, and their demographic characteristics. These characteristics are generally carved into a juror's makeup, but are somewhat malleable depending upon the psychological messages and nature of the information to which they are exposed in tria
l.

Ironically, it is the same human characteristics, which our forefathers admired, that have caused the most criticism of jury decision making. Critics of juries and jury decision making find these human characteristics to be failings and believe that

the jury's ability to hear all the evidence and to make ultimate and binding decisions should be limited.

Supporters of broadened jury discretion and enhanced involvement of jurors in trial tend to except the human element in jurors and seek to augment the human characteristics with the same learning and decision making tools that are available to the rest of the public in making important decisions.

### C. Jury Criticisms and Responses

Criticisms of jurors and jury decision making have come from politicians, media commentators, corporate leaders and countless other sources.

Juries have been criticized for knocking downward "legal guardrails" (Tackett, 1996), for consuming too much court time and being unreliable (Posner, 1995). Writing for the majority on the United States Supreme Court, Justice Souter wrote:

"Judges, not jurors are better suited to find the acquired meaning of patent terms. The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis. Patent construction in particular is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be." (*Markman vs. Westview Instruments, 1996).*

Defenders of broadened jury discretion and involvement in trial point to a number of aspects of courtroom procedures, which might cause misplaced criticisms of jurors. Many observers point to inadequate presentation of information by trial attorneys as a contributing cause of juror inability to completely comprehend one's position in a case.

Other commentators note that unlike other settings, jurors are brought into a trial with no orientation to the events under scrutiny, are given no resources to record information or to refer to for information, are given no opportunity to ask questions to complete their lack of understanding, are not told in advance what the ultimate issues will be, and finally are thrust into decision making mode with little or no guidance.

In an effort to respond to criticisms from the bar, the public, and from jurors, trial judges have attempted to fashion simple procedures intended to enhance jury learning and competence. Two of the innovations involve note-taking and questions by jurors.

This article discusses the nature of the most commonly used procedures for jury note-taking and questions and reviews the findings of empirical research, which has been conducted about them.

## III. Results of Research into Specific Issues in Jury Trial Reforms

Aside from non-scientific experiments which have been conducted by individual courts and court systems, social science and psychological researchers have conducted empirical research designed to understand the effects of juror note-taking and questions on the jury decision making process.

Some of the earlier research conducted in the 1970s and 1980s was successful in comparing the effects of note-taking vs. non note-taking or questioning vs. no questioning. However, much of the research suffered from methodological limitations (e.g. conducted in a laboratory vs. courtroom) or focused exclusively on juror reactions while excluding those of judges and attorneys.

More recent experiments have included large-scale field experiments in actual courtrooms and have included the experiences and observations of trial judges and attorneys. One such study used data collected from 67 trials in this aid of

Wisconsin, involving 29 different judges, 95 attorneys and 550 actual jurors.

Another experiment was obtained from a national sample of trials, which included in 75 civil and 85 criminal trials in 33 states and involving 103 judges, 220 trial attorneys and 1,229 actual jurors.

Other recent studies which have been conducted in this area and utilized laboratory settings and simulated juries produced findings identical or similar to those obtained in the Wisconsin and national studies.

## A. Juror Note-taking

As in most states, juror note-taking is a matter of discretion for the trial court (*Price v. State of Texas*, 1994).

### 1. Procedures Used or Tested

In all of the scientific experiments, jurors were permitted to take notes during all phases of trial, including deliberations, and were instructed with permission as soon as the jury was impaneled. In some instances, judges did not allow notes during closing arguments, but jurors were allowed to take notes to that point in the trial.

In those trials assigned to the "non-note-taking" condition, judges instructed jurors not to take notes and stated their reasoning on the record.

Combining the Wisconsin and national studies, juror note-taking was permitted in 135 trials. When jurors were given the opportunity to take notes, most jurors to advantage of the opportunity (66% in the Wisconsin study and 87% in the national study) but did not take extensive notes as a rule.

In the Wisconsin study, jurors took an average of 5.4 pages of notes over the average trial length of 2.3 days. In the national study, jurors took an average of 14.4 pages of notes in civil trials and 7.1 pages of notes in criminal trials. The average trial was 10 days in civil trials and 6 days in criminal trials.

### 2. Evaluation of Perceived Advantages

#### ***Notes are an aid to Memory***

Although jurors who took notes believed that their memory had been aided, a comparison of information recalled by jurors in the Wisconsin and national studies who took notes with those who did not indicated that there was no memory advantage to note-taking per se.

However, subsequent laboratory based experiments have indicated that on the measure of recall, note-takers outperform non-note-takers by significant margins.

#### ***Increase in Satisfaction***

The Wisconsin experiment detected only a slight increase in juror satisfaction with trials but the national study did not produce the same findings. However, the researchers found that in those trials where notes were allowed, that juror satisfaction with the trial procedure overall was quite high and that there was little opportunity for enhancement solely related to note taking.

### 3. Evaluation of Perceived Disadvantages

#### ***Distraction of jurors***

In the Wisconsin study judges and attorneys generally said they neither expected nor found note taking to be distracting. Interestingly, attorneys were more likely to report no problems with note taking if they had participated in trials in which notes were allowed.

Conversely, in other studies, judges and attorneys reported that they believed that note taking actually caused jurors to pay more attention to the case.

### ***Influence of note takers over non-note takers***

In the Wisconsin study, no evidence was found that note takers participated more in jury deliberations when aided by notes. Earlier laboratory studies by well-known researchers had also found that the increases in the variances in the number of jurors participating in deliberation were not significantly related to note-taking.

One limited laboratory study indicated that jurors in note-taking trials were less reliant on other jurors for information. Some jurors reported that other jurors who had taken notes persuaded them, but it was unclear from the results as to whether the persuasive ability of jurors was attributed to their persuasive skills or simply because of the note-taking.

### ***Accurate records of trial***

The Wisconsin and national studies both found that juror notes tended to be fair and accurate records of trial proceedings. One of the trial judges even wrote to the researchers stating that he was surprised that juror notes tended to agree with the transcript of the trial as well as other jurors' notes.

Much of the criticism of note-taking has centered on an argument that note-taking is a distraction for jurors. The argument is that jurors cannot listen and watch while they are taking notes.

However, 85 percent of jurors in the Wisconsin and national studies reported that the trial did not proceed to quickly for them to keep pace with the proceedings while taking notes.

### ***Note-taking favors one side***

Laboratory studies have shown that note-taking has no effect on the verdict or on the jurors' rating of attorney competence. Likewise, the Wisconsin and national studies did not reveal any significance between jurors taking extensive notes in the early phases of trial and their ultimate decisions.

However, attorneys in criminal trials were more likely than their civil counterparts to believe that the prosecution benefited from juror note-taking. Judges in those same trials believed that the defense benefited from note-taking.

(Other extensive research has determined that verdicts are issue or message driven and that the mechanics of trial is rarely a significant factor.)

### ***Note-taking consumes too much time***

Laboratory research, as well as the Wisconsin and national studies, have all indicated that note-taking did not affect jury deliberation time. There had been some speculation that jurors would take more time during jury deliberations to resolve discrepancies in notes. However, jurors stated clearly that little deliberation time had been devoted to discussing notes.

Similarly, judges and attorneys did not find any delays attributable to note-taking.

## 4. Conclusions and Recommendations

As a learning tool, note-taking is a benign activity which allows jurors to process information and record it for later recall. In both the Wisconsin and national studies, judges and attorneys were asked their general impressions of note-taking. In both studies, judges and attorneys stated that they had not expected note-taking to be problematic and did not find it to be so.

Researchers did find that there was a significant relationship between attorneys and judges who were enthusiastic about note-taking and those who had participated in a note-taking trial.

## B. Juror Questions to Witnesses

The Federal Rules of Evidence do not explicitly describe a procedure, which allows jurors to ask questions of witnesses (DeBenedetto vs. Goodyear, 1985). Rule 61 (A) states that a "court must exercise reasonable control over the mode and order of interrogating witnesses and of presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment and embarrassment."

As a matter within the discretion of the trial judge, there has generally been a preference or bias toward for allowing the judge or attorneys exclusively to ask all questions of the witnesses. Most courts have been reluctant to either encourage or discourage questions from jurors (*Penrod & Heuer*, 1998). Some states provide for juror questions by state law (e.g. *Lawson v. State,* 1996) or by rule (e.g. *Cohee v. State*, 1997).

Some observers have stated that a bias against allowing jurors to ask questions is based in objections to form as much as substance. Judges and attorneys are sometimes irritated by the lack of artfulness or proper trial advocacy form in which many juror questions are raised. Other irritations arise when jurors raise questions about matters which are inadmissible or which appear on the surface to disfavor one side or the other.

Trial judges and attorneys in favor of allowing jurors to ask questions either orally or in writing weigh the potential benefits to jurors against the potential harm to the parties. In complicated or complex cases such as conspiracy, patent, or antitrust cases trial judges have found that the facts are so complicated that jurors should be allowed to ask questions and order to perform their duties as fact finders.

Certainly in bench trials when trial judges act as fact finders, questions are freely asked the witnesses by the court. Supporters of jury questions would allow jurors to enjoy the benefits of asking questions in order to clarify matters.

### 1. Procedures Used or Tested

The standard procedure used and tested when allowing jurors to ask questions has involved written questions from jurors delivered to the trial judge who then determines the relevancy and admissibility of the information requested and either asks, reformats or this allows the question.

In the Wisconsin and national studies recommended instructions for participating trial judges generally stated as follows:

"In this trial, we request that you allow the jurors to direct written questions to any witness. After direct and cross-examination of each witness is complete, please ask jurors to submit any additional questions they may have, in writing, to you. If you find any such question patently objectionable, decline to ask it and explain to the jury that no adverse inference should be drawn from your ruling. If the question is facially acceptable, confer with counsel and rule on any objection (outside the hearing of the jury) raised before posing the question to the witness. If an objection is sustained, explain to the jury that no adverse inference should be drawn from your ruling." (Penrod & Heuer, 1998).

In the Wisconsin study, juror questioning was permitted in 33 trials and in the national study questioning was permitted in 71 trials. In the Wisconsin study 88 questions (2.3 questions per trial) were asked of which two-thirds were directed to the prosecution or plaintiff witnesses and one-third to defense witnesses.

In the national study, jurors chose to ask questions in only 51 of the 71 trials with an average of 5.1 questions per civil trial and 4.4 questions per criminal trial. Of these questions, 79 percent of questions were directed to plaintiff witnesses in civil trials and 77 percent to prosecution witnesses in criminal trials.

## 2. Evaluation of Perceived Advantages

### ***Questions promote juror understanding and alleviate doubts***

Common sense dictates that the ability to ask questions and receive answers is a method that would enhance the understanding of trial evidence and the transactions that are the basis of a dispute. In most instances courts look favorably upon questions that are formulated to elaborate or explain evidence which counsel has raised.

One of the concerns expressed has been that juror questions would go beyond matters previously raised. Therefore one of the focuses of research has been to determine the kind of questions jurors raise.

Laboratory and field research has consistently found that juror questions serve an explanatory or clarifying function. For example, in the national study, juror questions generally sought to clarify evidence, clarify law or in some other way sought to get to the truth. (Penrod & Heuer, 1998).

In the Wisconsin study, jurors who asked questions expressed a higher degree of satisfaction that the questioning of witnesses had been thorough and that the jury had enough information to reach a just verdict. In both the national and Wisconsin studies, trial attorneys expressed fears before trial indicating that juror questions might cause havoc with an attorney's trial strategy. However, attorneys who had participated in trials where questions were asked reported that juror questions did not adversely affect their strategy.

Conversely, attorneys discovered that the questions jurors asked had been anticipated in the normal course of case development. In those instances where juror questions had not been anticipated, attorneys were suddenly alerted to present information on aspects of the case that they had overlooked.

### ***Juror questions improve satisfaction***

In both the Wisconsin and national studies, jurors universally stated that they were quite satisfied with their experiences and that the ability to ask questions enhanced their ability to serve as jurors.

In addition, jurors stated that satisfaction with their verdict was not affected by the ability to ask questions.

Interestingly, judges indicated more satisfaction with juror questions than did trial attorneys. Some attorneys were still ambivalent about the uncertainties inherent in allowing disinterested parties to ask questions in a public forum.

## 3. Evaluation of Perceived Disadvantages

### ***Inappropriate questions***

In both the Wisconsin and national studies, researchers found that jurors asked appropriate questions even though they were unfamiliar with the rules of evidence and procedure.

In the Wisconsin study, trial judges and attorneys stated that they had not expected juror questions to be inappropriate and that their expectations were met. In the national study, attorneys were more skeptical than judges if they had had no prior experience with juror questions. However, after trial judges and attorneys universally found that the questions jurors had asked or appropriate.

### ***Reluctance to object***

Most jurisdictions require that attorneys raise objections to evidence and to questions at the time they are introduced into trial or they are waived. However, some attorneys felt that they might be reluctant to object for fear of offending a juror.

However, research has indicated that the fears are unfounded, particularly when a curing instruction is made from the bench.

In the Wisconsin study, attorneys objected to 17 percent of the questions submitted by jurors. In the national study, attorneys objected to 20 percent of questions submitted by jurors.

In these instances, the trial judge was asked to explain the basis of the ruling so that jurors would not draw an adverse inference.

In the national study, 65 of the 145 jurors who asked questions indicated that one or more of their questions had drawn an objection. Of these 65 jurors, 52 of them indicated on a 9-point scale that they were neither embarrassed nor angry about the objections. In addition, most of the jurors in the Wisconsin study indicated that they understood the basis for the attorney's objection.

### ***Inappropriate inferences***

Another fear of counsel has been that if an objection is sustained, the disadvantaged counsel might draw an inappropriate inference from the unanswered question. However, trial judges and attorneys who participated in the Wisconsin and national studies typically indicated that they did not expect and did not observed these consequences.

### ***Jurors becoming advocates***

Several cases have contained opinions of appellate judges indicating fears that allowing juror questions would cause a "gross distortion of the adversary system and a misconception of the role of the jury as a neutral fact finder in the adversary process" (*United States vs. Johnson,* 1989).

Other courts have expressed concerns about the "risks" of allowing jurors to ask questions or to interrogate witnesses.

However, laboratory and field research has found no significant effect on verdicts as a result of jury questions. In the national study, for example, researchers examined the agreement between judge and jury verdicts. In 69 percent of cases, the verdicts were identical.

Agreement between judges and jurors was actually higher in those cases in which questions were permitted. In those cases, 74 percent of verdicts were identical.

In response to questioning, jurors in both studies felt that neither attorney in the case was perceived less favorably as a result of the questioning-asking procedure. Favorability could be expected in those cases where jurors had become biased.

### ***Jurors place emphasis on their own questions***

In *United States v. Johnson,* the court indicated a concern that jurors would place more importance on the reactions and questions of each other than on questions presented in the normal adversarial process.

However, findings from the national study refute that position. For example, jurors indicated that the ultimate value of the questions that jurors had asked was modest. In addition, jurors indicated that less than 10 percent of their deliberation time (an average of 15 minutes) was spent discussing questions jurors had raised.

### ***Questions have prejudicial effect***

Another concern expressed in *United States v. Johnson* was that juror questions might cause a legally prejudicial effect on one party or the other.

One of the advantages of scientifically based research is that trends and relationships become apparent with a large sample size. In this instance, researchers could measure the existence of questions with trends in jury verdicts or in reactions from judges or jurors.

However, no such trend was observed in either the Wisconsin or national studies. The results of the studies clearly found that jury questions did not affect the pattern of jury verdicts and did not affect the agreement levels between judge and jury verdicts.

Judges, attorneys and jurors typically agreed that there appeared to be no prejudicial effects even though some attorneys had expected to see them.

## 4. Conclusions and Recommendations

Written juror questions have proven to be benign in causing an adverse effect in trial while at the same time greatly enhancing the understanding of evidence and information received by jurors in trial.

Clearly as in all instances where an adverse affect is feared, limiting instructions and procedures are helpful to remove any doubts and to establish confidence in the system.

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