

# **The Arizona Jury Past, Present and Future Reform**

## **Executive Summary**

Hon. Michael A. Yarnell (Ret)

Adjunct Professor  
Judicial Education, Courts & Technology  
University of Canberra School of Law

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# The Arizona Jury: Past, Present and Future – Executive Summary

## INTRODUCTION

**Jurors are rarely brilliant and rarely stupid,  
but they are treated as both at once.<sup>1</sup>**

The jury system is an integral part of America's rule of law and judicial system. Jury service impacts hundreds of thousands of Arizona citizens every year.<sup>2</sup> Jury reform is all about identifying, facilitating and maximizing the positive benefits of jury service – for justice, for the community, and for the individual juror.

This paper presents the genesis, implementation and future of Arizona jury reform from the author's viewpoint . In association with the University of Canberra Law School this paper is a supporting reference document for a series of jury workshops and other lectures presented in Australia during November 2005.<sup>3</sup>

The paper is divided into five sections. Section One presents a basic overview of Arizona jury structure. Section Two summarizes the Arizona jury reform movement. Section Three summarizes various jury studies based primarily on Arizona jury research. Section Four presents a discussion of Arizona jury practice, with reference to both the Arizona jury reform recommendations and the August 2005 American Bar Association Principles for Juries & Jury Trials.<sup>4</sup> Section Five deals with future jury reform in Arizona, identifying areas of continuing opportunity and discussing various issues relating to the impact of technology.

## ARIZONA JURY STRUCTURE

Every system of rule of law, judicial system, and jury system is particular to the history, culture and practices of the respective jurisdiction. In the United States, jury systems and practice vary significantly between the federal system and the systems in each of the fifty states.<sup>5</sup> Jury systems also vary between various federal district courts,

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<sup>1</sup> W. Schwarzer, Reforming Jury Trials, 1990 U. Chi. Legal. F. 119, 137 (quoting Warren K. Urborn, Toward Better Treatment of Jurors By Judges, 61 Neb. L. Rev. 409,425 (1982), reprinted in 132 F.R.D. 575, 590 (1991).

<sup>2</sup> An estimated one million Americans serve as jurors every year, and more than five times that number report to local court houses for duty. American Bar Association, The American Jury Initiative, Online Media Kit (2005). Available at <http://www.abavideonews.org/ABA301/index.htm>

<sup>3</sup> The author retired from fulltime trial court judging for the Arizona Superior Court of Maricopa County at the end of January 2005, after serving some thirteen years from his appointment on October 1, 1991. Prior to appointment to the bench, the author spent twenty years in the private practice of law, primarily commercial litigation in the areas of real property, finance, and construction. See generally <http://www.michaelyarnell.com> A copy of the full paper, with Internet hyperlinks, is available at the author's web page and at the University of Canberra Law Schools web page at <http://www.blis.canberra.edu.au/schools/law/>

<sup>4</sup> American Bar Association, Principles For Juries & Jury Trials, August, 1005. Available at <http://www.abanet.org/juryprojectstandards/principles.pdf>

<sup>5</sup> A detailed summary all state court systems, including jury systems, is found at David B. Rottman, Carol R. Flango., et al., *State Court Organization* 1998 (June, 2000). Conference of State Court Administrators and the National Center For State Courts. Available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf>

## The Arizona Jury: Past, Present and Future – Executive Summary

between the fifty states, among local jurisdictions within states, and even between judges in a single court. While jury reform efforts of the past twenty years in the United States have benefited from this rich tapestry of varying practices, there is an underlying constitutional right to jury trial, in both criminal and civil matters, which ties these disparate systems to common goals and aspirations.<sup>6</sup>

The basic provisions for the trial jury size and unanimity in Arizona are set out in the Constitution and in A.R.S. 21-102, which provides:

- A. A jury for trial of a criminal case in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons, and the concurrence of all shall be necessary to render a verdict.
- B. A jury for trial in any court of record of any other criminal case shall consist of eight persons, and the concurrence of all shall be necessary to render a verdict.
- C. A jury for trial in any court of record of a civil case shall consist of eight persons, and the concurrence of all but two shall be necessary to render a verdict.
- D. In a court not of record, a jury for trial of any case shall consist of six persons. The concurrence of all in a criminal case and all but one in a civil case shall be necessary to render a verdict.
- E. The parties in a civil case, and the parties with the consent of the court in a criminal case, may waive trial by jury, or at any time before a verdict is returned consent to try the case with or receive a verdict concurred in by a lesser number of jurors than that specified above.<sup>7</sup>

Potential jurors are summoned from a jury list maintained by the jury commissioner from a jury list of all registered voters and all those with driver's licenses.<sup>8</sup> To be qualified to sit as a juror in Arizona, a person must: 1) be a citizen of the United States; 2) be a resident of the jurisdiction where summoned to serve; 3) never have been convicted of a

<sup>6</sup> A good resource guide to jury trial innovations in the United States is found at National Center for State Courts, *Jury Trial Innovations, Resouce Guide* (2005). Available at <http://www.ncsconline.org/WC/Education/JurInnGuide.htm> See also the American Judicature Society, National Jury Center Homepage (2005). Available at <http://www.ajs.org/jc/index.asp> A bibliography of resources on jury reform is found at Maricopa County Law Library Web Pages, *Jury Reform* (2004). Available at <http://www.superiorcourt.maricopa.gov/lawlibrary/Documents/Html/Bibliographies/JuryReform.asp> A leading resource on jury systems throughout the world is Neil Vidmar, ed., *World Jury Systems*, Oxford University Press (2002) Available for purchase at <http://www.oup.com/us/catalog/general/subject/Law/CriminalLawandProcedure/?view=usa&ci=0198298560>

<sup>7</sup> A.R.S. 21-102. Available at <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/21/00102.htm&Title=21&DocType=ARS>

<sup>8</sup> A.R.S. 21-301(B). Available at <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/21/00301.htm&Title=21&DocType=ARS>

## The Arizona Jury: Past, Present and Future – Executive Summary

felony, unless the juror's civil rights have been restored; and, 4) not be currently adjudicated mentally incompetent or insane.<sup>9</sup> Jurors may be temporarily excused only for specific statutory reasons:<sup>10</sup>

- A mental or physical condition causing the person to be incapable of performing jury service, supported by a doctors certification;
- That service would substantially, materially and adversely affect the public interest or welfare;
- That the person cannot currently understand the English language;
- That service would cause undue or extreme physical or financial hardship to the person or the person's family;
- The person is currently certified and employed as a peace officer;
- The judge or jury commissioner finds good cause for excusal based on a showing of undue or extreme hardship under the circumstances, including being temporarily absent from the jurisdiction or a lack of transportation; and
- The person is over seventy-five years of age.

Potential jurors must be disqualified if they are:

- Witnesses in the action.
- Persons interested directly or indirectly in the matter under investigation.
- Persons related by consanguinity or affinity within the fourth degree to either of the parties to the action or proceedings.
- Persons biased or prejudiced in favor of or against either of the parties.

<sup>11</sup>

The Arizona statutes mandate a statewide one-day or one-trial rule.<sup>12</sup> Much of Arizona jury reform has dealt with the juror experience after summons – such as voir dire procedures, trial procedures, jury instructions, juror satisfaction, and the like.

A brief sketch of the jury process after summons is helpful. On the day of jury service, those summoned jurors not excused via telephone or web checkin, report for service to the jury assembly room. The potential jurors check in and receive an orientation. Panels for particular trials are randomly drawn, the potential jurors are assigned a sequential number, and the panel is sent to a courtroom for voir dire. The trial jury is selected in juror number order from those not excused for by the judge for hardship, for cause, or peremptorily stricken by the parties.

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<sup>9</sup> A.R.S. 21-201. Available at

<http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/21/00201.htm&Title=21&DocType=ARS>

<sup>10</sup> A.R.S. 21-202(B). Available at

<http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/21/00202.htm&Title=21&DocType=ARS>

<sup>11</sup> A.R.S. 21-211. Available at

<http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/21/00211.htm&Title=21&DocType=ARS>

<sup>12</sup> A.R.S. 21-336.01. Available at <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/21/00336-01.htm&Title=21&DocType=ARS>

## The Arizona Jury: Past, Present and Future – Executive Summary

The trial jury is sworn, preliminary jury instructions given, opening statements heard, the trial evidence presented, final jury instructions given, closing arguments heard, and the jury retires to deliberate. In criminal cases involving capital punishment, after a decision of guilt, the jury hears the aggravation/mitigation sentencing portion of the capital trial. In criminal cases involving aggravating sentencing factors not an element of the underlying charge, the jury hears evidence on aggravating factors. A final verdict is reached, or a mistrial is declared if the jury reaches impasse, and the jury is discharged. Sometimes post-jury services are offered or suggested by the court

### THE ARIZONA JURY REFORM MOVEMENT

Arizona jury reform finds its genesis in the efforts of several key Arizona judges, court administrators and lawyers.<sup>13</sup> Judge B. Michael Dann's 1993 paper "*Learning Lessons*" and "*Speaking Rights*: Creating Educated and Democratic Juries,"<sup>14</sup> remains a leading presentation of the arguments for improved jury communication. Accurately identifying the central problem of jury performance as not one of juror competence, but rather juror communication, Judge Dann identified a primary problem in instituting suggested jury reforms to improve juror communication as "threatening the current balance of power that judges and lawyers have over the trial itself . . . [and contending that] . . . , the jury, a key democratic institution, could in fact be strengthened by a reallocation of such power and control."<sup>15</sup>

The legal model of the juror as a passive observer, an empty vessel to be filled, an object of one-way, linear communication, a complete and accurate recorder of information, is inaccurate and illogical.<sup>16</sup> Empirical research<sup>17</sup> concerning Arizona juries in operation has not only measured and evaluated the effect of various Arizona jury reforms,<sup>18</sup> it has, in its underlying data sets, clearly validated Judge Dann's jury communication arguments.

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<sup>13</sup> See American Bar Association, Committee on Jury Standards, *Standards Relating to Juror Use and Management*. Chicago, IL: American Bar Association (1993), based in part on the work of the Jury Standards Task Force of 1980-1983. The Hon. Roger Strand of the United States District Court For Arizona, previously a sitting judge in the Superior Court of Maricopa County, participated as a member of both the 1980-83 and 1991-92 ABA groups. Jury Standards were rearticulated by the American Bar Association in the ABA Standards For Criminal Justice: Discovery and Trial by Jury, Standard 15 (3<sup>rd</sup> ed., 1996). Available at [http://www.abanet.org/crimjust/standards/jurytrial\\_toc.html](http://www.abanet.org/crimjust/standards/jurytrial_toc.html)

<sup>14</sup> B. Michael Dann, "*Learning Lessons*" and "*Speaking Rights*: Creating Educated And Democratic Juries", 68 Ind. L. J. 1229 (Fall, 1993).

<sup>15</sup> *Id.*

<sup>16</sup> Within a short time, many academics supported the jury reform concepts and rationales. See e.g. Akhil Reed Amar and Vikram David Amar, *Unlocking The Jury Box*, 77 Policy Review (May-June, 1996). Available at <http://www.policyreview.org/may96/amar.html>

<sup>17</sup> Jury research based on Arizona data sets is presented in following sections of the paper.

<sup>18</sup> Judge Dann argued for the following reforms: case-specific jury orientation; mini-opening statements before voir dire; tailored preliminary jury instructions; juror notebooks; note taking by jurors; document (exhibit) control; questions of witnesses by jurors; interim summaries; simple, clear and case specific final instructions; final instructions prior to lawyer closing argument; written copies of instructions for each juror; inviting questions from jurors about instructions; greater assistance to jurors regarding questions during deliberations; allowing jurors to discuss the evidence as the case proceeds; and aiding jurors at impasse. Most, but not all, of these suggested reforms have been implemented in Arizona.

## The Arizona Jury: Past, Present and Future – Executive Summary

The Committee on More Effective Use of Juries produced a formal report, fifty-four recommendations<sup>19</sup>, and a proposed Bill of Rights for Arizona Jurors.<sup>20</sup> Effective December 1, 1995, the Arizona Supreme Court adopted various rule changes implementing many of the recommendations, including:

- Allowing written judge reviewed juror questions in civil and criminal cases
- Allowing the use of juror notebooks
- Allowing discussion of evidence by jurors during the trial in civil (but not criminal) cases
- Requiring giving substantive preliminary jury instructions
- Allowing mini-opening statements
- Allowing final instructions before attorney closing argument in civil and criminal cases
- Requiring a written copy of preliminary and final instructions be given to each juror
- Requiring confidentiality of juror addresses
- Allowing the use of the “struck” method of voir dire
- Allowing lawyer voir dire as a matter of right, but subject to control and time limits; and
- Allowing assistance to jurors at impasse.

In late 1996 the Committee on More Effective Use of Juries was reconvened to consider a dozen additional issues<sup>21</sup> and recommended:

- Improve compliance with jury summons through a program of better treatment of jurors and a public relations campaign;
- Improve jury facilities, including juror assembly rooms, jury box courtroom areas, parking lots, and disability accommodations;
- Cut the number of peremptory challenges by one-half, while expanding the definition of “for cause” dismissal used in voir dire;
- Allow structured jury discussions of the evidence during criminal trials (not just civil trials);
- Encourage or, in some cases, require the use of deposition summaries in civil cases;
- Educate judges and lawyers as to the advantages of presenting both sides’ trial expert witnesses back to back; and,
- Inform criminal juries of the potential range of punishment.

The greater use of deposition summaries in civil trials was adopted, however there were dissenting votes to limiting the number of peremptory strikes, discussion of the

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<sup>19</sup> Arizona Supreme Court, *Committee on More Effective Use of Juries, Summary of Recommendations* (July 2, 2004). Available at <http://www.supreme.state.az.us/jury/Jury1g1.htm>

<sup>20</sup> Arizona Supreme Court, *Committee on More Effective Use of Juries, Jurors Bill Of Rights* (July 2, 2004). Available at <http://www.supreme.state.az.us/jury/Jury1n.htm>

<sup>21</sup> Arizona Supreme Court, *Jurors: The Power Of 12, Part 2* (1996). Available at <http://www.supreme.state.az.us/jury/Jury2/jury2.htm>

## The Arizona Jury: Past, Present and Future – Executive Summary

evidence in criminal cases, and informing the jury in a criminal case of the possible punishment. None of these recommendations have been implemented.

By practice, a number of the recommendations to improve compliance with jury summons and the improvement of jury facilities has occurred. Some judges have also experimented with the idea of “back to back” trial court expert testimony, the current procedural and evidentiary rules being broad enough to allow such procedure.

On July 11, 2001, the Arizona Supreme Court created the “Ad Hoc Committee To Study Jury Practices and Procedures.”<sup>22</sup> In August 2002,<sup>23</sup> the Ad Hoc Committee recommended various actions relating to jury management and administration which covered the following areas:

- Quality of juror source lists;
- Centralizing jury list preparation;
- Enforcement of jury summonses;
- Standardizing excuse/postponement policy;
- Juror pay and compensations;
- Mandated statewide one-day/one-trial;
- Provide an educational program of the benefits of one-day/one-trial;
- Create a taskforce to implement statewide one-day/one-trial;
- Statewide adoption of a modified Juror Bill of Rights;
- Identify jurors by number, not name, when polling verdict result;
- Prepare a statewide Juror Management Reference Manual;
- Adopt revised Trial Jury Management Standards, Section 5-203 of the Arizona Code of Judicial Administration (attached as Exhibit C to the report);
- Continue to develop and implement a statewide public relations campaign on jury service;
- Establish a multi-disciplinary committee to examine and develop reforms of state and county grand jury systems, and
- No recommendation on the issue of accommodating non-English speaking jurors.

The Ad Hoc Committee issued a supplemental report in March 2003 considering further the issue of juror anonymity and discussing at length the arguments for and against juror anonymity.<sup>24</sup> The committee determined jurors’ names could be used in initial voir dire, but only juror numbers were to be used in polling after a verdict,<sup>25</sup> and this

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<sup>22</sup> Arizona Supreme Court, *Administrative Order No. 2001-69* (July 11, 2001). Available at <http://www.supreme.state.az.us/orders/admorder/orders01/2001-69.pdf>

<sup>23</sup> *Id.*

<sup>24</sup> Arizona Supreme Court, *Jury Practices and Procedures Committee Supplemental Report Concerning Juror Anonymity* (March, 2003). Available at <http://www.supreme.state.az.us/jury/SupRptJuryAnon.pdf>

<sup>25</sup> *Id.*, at 1.

## The Arizona Jury: Past, Present and Future – Executive Summary

recommendation has been implemented by rule change in Arizona.<sup>26</sup> The Ad Hoc Committee's recommendations regarding standardization for excusal from jury service, juror pay, and one-day/one-trial have been implemented in somewhat modified form through Arizona's adoption of the Jury Patriotism Act,<sup>27</sup> which: establishes a lengthy trial fund for juror compensation; increases a juror's protection from being fired or having to use vacation pay for jury service; increases the penalty for ignoring a jury summons; standardizes and tightens the grounds for excusal from service; grants one automatic postponement of service; provides for one-day/one-trial service; and, provides that if a juror serves on a jury, he or she will not be called again by the same court for two years.<sup>28</sup>

### RESEARCH ON ARIZONA JURIES

Significant academic papers and studies about how juries work, should work, or might work better, number in the many hundreds.<sup>29</sup> A summary of recent United States evaluative research on jury trial innovations,<sup>30</sup> discusses the methods used to study jury innovations and contains citations to recent empirical evaluations of eight widespread jury innovations:

- juror note taking
- allowing jurors to ask questions at trial
- preliminary jury instructions on the applicable law
- juror notebooks
- juror discussions of the evidence during civil trials
- final jury instructions before closing arguments
- suggestions from the judge regarding deliberations
- written copies of jury instructions for all jurors.

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<sup>26</sup> Arizona Supreme Court, Order Amending Rule 49(f), Arizona Rules of Civil Procedure, and Rule 23.4, Arizona Rules of Criminal Procedure, No. R-03-0017 (January 26, 2004). Available at

<sup>27</sup> V. Schwartz, M Behrens, and C. Silverman, *The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizens*, American Legislative Exchange Council (ALEC) (April, 2003). Available at [http://www.ijl.org/images/contentpdfs/030416\\_ALEJCJuryReport.pdf](http://www.ijl.org/images/contentpdfs/030416_ALEJCJuryReport.pdf) See also T. Carter, *Jury Duty As a Patriot Act; Model Bill Would Tighten Rules and Pay Jurors in Lengthy Trials*, 89 ABA Journal 24 (June 2003).

<sup>28</sup> Arizona House Bill 2520, Forty-sixth Legislature, First Regular Session (Signed by Governor May 12, 2003). As codified, a number of statutory sections were amended. The bill as signed is available at [http://www.azleg.state.az.us/DocumentsForBill.asp?Bill\\_Number=2520&image.x=19&image.y=8](http://www.azleg.state.az.us/DocumentsForBill.asp?Bill_Number=2520&image.x=19&image.y=8)

<sup>29</sup> The American Psychology-Law Society, Division 41 of the American Psychological Association, lists some 184 pages of citations to jury research. Available at <http://www.ap-ls.org/links/publishingJury.html> See also D. Devine, L. Clayton, B. Dunford, R. Seying, & J Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, Psychology, Public Policy, and Law (September, 2001). A list of jury scholars is found at American Judicature Society, Jury Center Web Page, Jury Scholars (2004 ). Available at [http://www.ajs.org/cjc\\_scholars.asp](http://www.ajs.org/cjc_scholars.asp)

<sup>30</sup> B. Michael Dann and Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, Court Review (Spring, 2004). Available at <http://aja.ncsc.dni.us/courtrv/cr-41-1/CR41-1Dann.pdf>

## The Arizona Jury: Past, Present and Future – Executive Summary

This section discusses empirical jury research based primarily on data from Arizona juries,<sup>31</sup> including some comments from the author's personal experience.

### 1. Civil Trial Juror Discussions Before Deliberation.

Arizona Rule of Civil Procedure 39(f)<sup>32</sup> allows pre-deliberation discussion by civil juries. Revised Arizona Jury Instructions (Civil) Fourth Edition (RAJI Civil 4<sup>th</sup>) (2005), Preliminary Instruction Number 9, provides, in part:

... There is one and only one limited exception to the foregoing rules [not to discuss the case]. During recesses from the trial, you may discuss the evidence presented at the trial, but: 1) only among yourselves; and 2) only when you are all together; and 3) only in the jury room.

Even though you may discuss the case under the conditions I have described, do not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Both sides have the right to have the case fully presented and argued before you decide any of the issues in the case. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of the trial.<sup>33</sup>

The first study of Rule 39(f) in Arizona began in 1997, allowed by an Arizona Supreme Court by order temporally suspending civil Rule 39(f) to allow posttrial questionnaires based on the selection of two sets of civil trials – one set where jurors were instructed to refrain from pre-deliberation discussions and another set where they were instructed discussions would be allowed, all with the informed consent of the judge, lawyers, parties and jurors.<sup>34</sup>

The resulting data set has lead to at least three published papers,<sup>35</sup> collectively referred to here as the Hannaford Study. The Hannaford Study found that 31% of the Discuss juries reported that they did not discuss the case before deliberation, and that 14% of the No Discuss juries reported that despite the admonition to refrain from

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<sup>31</sup> Perhaps the same environment and attitudes which have fostered jury reform efforts in Arizona have also allowed the Arizona courts, with the active consent of the judges, administrators, lawyers and litigants, to become data centers for jury research.

<sup>32</sup> Arizona Rules Of Civil Procedure, Rule 39(f) (1995).

<sup>33</sup> Revised Arizona Jury Instructions (Civil), Preliminary Instruction No. 9 (4<sup>th</sup> Ed., 2005).

<sup>34</sup> Arizona Supreme Court, Administrative Order No. 97-1 (1997). Available at <http://www.supreme.state.az.us/orders/admorder/orders99/pdf97/9701.pdf>

<sup>35</sup> Valerie P. Hans, Paula L. Hannaford and G. Thomas Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges and Jurors*, University of Michigan Journal of Law Reform, Winter 1999, vol. 32, no. 2;. See also Hannaford, Paula L., Valerie P. Hans and G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, Law and Human Behavior 24 (2000): 359-382; Hannaford, Paula L., Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman, *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, U. Tenn. L. Rev., Spring 2000, Volume 67, No. 3

## The Arizona Jury: Past, Present and Future – Executive Summary

discussion, they did discuss with other jurors. The Hannaford Study concluded jurors were “quite enthusiastic” about the reform and “claim it has positive effects.”<sup>36</sup>

The Hannaford Study was closely followed by Arizona Supreme Court Administrative Order No. 98-10, specifically authorizing the videotaping of select civil trials in Pima County (Tucson) to facilitate “in order to ascertain the impact of Rule 39(f)” and providing for the suspension of Rule 39(f) to establish a control group.<sup>37</sup> The final results of the videotaping study, as it relates to Rule 39(f), have been published,<sup>38</sup> hereinafter referred to as the Diamond Study.

The Diamond Study concluded that neither the full projected benefits, nor the full projected detriments, to jury discussions before deliberations were observed. In particular:

The Discuss jurors spent very substantial amounts of time and energy engaged in discussions about the trial. Jurors who were instructed that they were *not* permitted to talk about the evidence (No Discuss jurors) occasionally made remarks about the case, but their remarks were almost always brief and perfunctory. The longer and more complex the trial, the more Discuss jurors talked about the case. Jurors often used discussion to fill in the gaps in their knowledge, to review testimony and to clarify misunderstandings. They also shared differences in recall and in interpretation of the evidence. In complex cases, when factual questions arose about the evidence, discussion tended to improve the accuracy of recall.<sup>39</sup>

The study found that Discuss jurors frequently discussed the case when not all of the other jurors were present. Some individual jurors took an early position as to outcome, sometimes being corrected by other jurors, but the study found “no clear indication that they [early verdict statements] were responsible for altering case outcomes.”<sup>40</sup> Overall, the Diamond Study concluded:

In sum, our close look at the discussion process revealed evidence for some of the positive features and a few of the negative characteristics reflected in predictions about the effects of the innovation. A number of the predicted differences, both positive and negative, did not materialize at all, although the small sample size meant that we could detect only large effects.<sup>41</sup>

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<sup>36</sup> *Id.*, at 375.

<sup>37</sup> Arizona Supreme Court, Administrative Order No. 98-10 (February 5, 1998). Available at <http://www.supreme.state.az.us/orders/admorder/orders99/pdf98/9810.pdf>

<sup>38</sup> Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Jury Discussions During Civil Trials: Studying An Arizona Innovation*, 45 Ariz. L. Rev. 1 (2003). Available at <http://www.law.arizona.edu/Journals/ALR/ALR2003/vol451/Diamond.pdf>. A summary companion article is found at Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Inside The Jury Room: Evaluation Juror Discussions During Trial*, 87 Judicature 54-58, (2003).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, at 75.

<sup>41</sup> *Id.*, at 76

## The Arizona Jury: Past, Present and Future – Executive Summary

I, and other sitting judges in Maricopa County, have noticed that since jurors have been allowed to discuss the evidence in civil cases as the trial proceeds, jury deliberations at the close of the evidence seem to be less lengthy on average. This makes some common sense as the jurors have likely established their group dynamics and have been more informed on the evidence and issues as the trial progresses based on their discussions.

### **2. Effectiveness of Jury Admonitions and “Blindfold” Jury Instructions.**

The data compilation from the Arizona videotaping of fifty civil jury trials has provided an opportunity for empirical research of other jury communication issues. American juries are routinely instructed not to consider and to do, or not to do, certain things. Examples include topics such as not talking about the case with others, not doing any independent research, and not forming a final opinion as to the outcome of a case until all the case is submitted after evidence, argument and closing instructions.

Diamond and Vidmar used the database to study the effectiveness of rules of evidence, and jury instructions, that blindfold jurors to facts about the case that might influence their decisions in legally unacceptable ways.<sup>42</sup> The study focused on jury discussions about insurance and attorney's fees in selected civil cases by analyzing actual videotaped jury discussions.

The most common civil jury trials in Arizona involve persons injured in automobile accidents seeking money damages from those alleged at fault for the accident.<sup>43</sup> All automobile accident situations involve the possibility of insurance – both liability insurance covering the cost of defense and any adverse verdict for the defendant, and health insurance covering some or all of the cost of medical treatment for the plaintiff. The nature, existence, amount and payment of insurance is not relevant and not admissible on the issue of fault or the amount of compensation. However, by common sense and experience we know that civil jurors are aware of the likelihood of insurance and will spontaneously raise the subject.

The study finds that “talk about insurance was a strikingly common occurrence in the jury room” and occurred “in 85%” of the cases.<sup>44</sup> The authors posit a behaviorally informed approach to blindfolding by separating topics that are likely to arise spontaneously and those topics that are integral, or not integral, to an explanation of the facts. The authors conclude “ . . . a simple admonition cannot be depended upon to terminate juror conversations about insurance even though an admonition may be more successful than simply ignoring a juror question on the topic.<sup>45</sup>

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<sup>42</sup> Shari Seidman Diamond and Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857 (2001). Available at [http://eprints.law.duke.edu/archive/00000525/01/87\\_Va.\\_L.\\_Rev.\\_1857\\_\(2001\).pdf](http://eprints.law.duke.edu/archive/00000525/01/87_Va._L._Rev._1857_(2001).pdf)

<sup>43</sup> Fault is negligence (failure to exercise reasonable care in the situation) plus causation (contributing to the injury).

<sup>44</sup> Diamond and Vidmar, at 1876. Particular verbatim examples of actual jury discussions are presented.

<sup>45</sup> Id., at 1907-1908.

## The Arizona Jury: Past, Present and Future – Executive Summary

The authors suggest, as to the insurance topic and other topics that are likely to arise spontaneously and are not integral to an explanation of the events, the use of a “collaborative” instruction – that is one that explains the reason for the rule. For instance, the suggested insurance instruction is:

In reaching your verdict, you should not consider whether any party in this case [names] was or was not covered by insurance. As you many know, some plaintiffs are covered and some are not, and some have various forms of partial coverage. The same is true for defendants. The law does not allow the parties to present any evidence about insurance or lack of insurance or amount of insurance, and there is no way that you can accurately determine whether any party in this case has insurance coverage or, if they have it, how much insurance they have.

More importantly, insurance or lack of insurance has no bearing on whether the defendant [name] was or was not negligent or on how much damage, if any, the plaintiff [name] has suffered.<sup>46</sup>

For many years I have given, sometimes over objection by both plaintiff and defendant, an instruction in every automobile case jury, both in the preliminary and final instructions, reading:

You may believe one or more of the parties in this case has, or does not have, liability or health insurance. You are not to consider the existence or absence of insurance in reaching your decisions in this case.

I’m sure my giving this instruction was better than ignoring the situation. Having read this study, a better instruction would include the reasons and be more “collaborative.” In the last decade, the practicing bar has come to recognize the need for an insurance instruction. Arizona Revised Jury Instructions (Civil), 4<sup>th</sup>, Standard Instruction 9, titled “Insurance,” reads<sup>47</sup>:

In reaching your verdict, you should not consider [or discuss] whether a party was or was not covered by insurance. Insurance or the lack of insurance has no bearing on whether or not a party was at fault, or the damages, if any, a party has suffered.

### 3. Jurors Unanswered Questions.

The Arizona civil and criminal rules require that jurors be instructed they may ask questions of witnesses and the court.<sup>48</sup> Arizona Rules of Criminal Procedure, Rule

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<sup>46</sup> Id., at 1910.

<sup>47</sup> RAJI 4<sup>th</sup>, Standard Instruction No. 9

<sup>48</sup> Arizona Rules of Civil Procedure, Rule 39(b)(10). Available at

<http://azrules.westgroup.com/Find/Default.wl?DocName=AZSTRCPR39%28B%29&FindType=W&DB=AZ-TOC-WEB%3BSTAAZTOC&RS=WLW2%2E07&VR=2%2E0>

## The Arizona Jury: Past, Present and Future – Executive Summary

18.6(e)<sup>49</sup> contains substantially the same language. Recommended Arizona Jury Instructions (Civil) 4<sup>th</sup>, Preliminary Instruction No.11, titled “Questions By Jurors” (The same preliminary instruction is generally used in criminal cases.<sup>50</sup>) provides:

. . . If you have a question about the case for a witness or for me, write it down, but do not sign it. Hand the question to the bailiff. If your question is for a witness who is about to leave the witness stand, please signal the bailiff or me before the witness leaves the stand.

The lawyers and I will discuss the question. The rules of evidence or other rules of law may prevent some questions from being asked. If the rules permit the question and the answer is available, an answer will be given at the earliest opportunity. When we do not ask a question, it is no reflection on the person submitting it. You should attach no significance to the failure to ask a question. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers.

If a particular question is not asked, please do not guess why or what the answer might have been.

The data from the Arizona videotaping of fifty civil trials in Pima County, together with copies of the questions submitted by the jurors during the trial and deliberations, were used by Diamond, Rose, and Murphy to analyze how jurors treat an unanswered question.<sup>51</sup>

In the fifty civil trials, jurors submitted questions in forty-eight. In half the trials there were ten or fewer questions, with an average of 17.5 per trial. On average .76 questions were submitted per trial hour. Judges allowed 76% of the jurors' 820 questions to be asked. No instances of jurors submitting frivolous questions were found. The authors state:

The questions that the judges allowed were consistent with the observations from previous reports that jurors generally submit appropriate and relevant questions. For example, the jurors directed nearly half of their questions to expert witnesses, typically attempting to clarify their testimony or to understand the bases for their opinions. The juror questions that judges allowed ranged from simple questions about definitions, such as “What is a tear of the meniscus?” (for a physician) and “What does the ‘reasonable psychological probability’ mean?” (for a psychologist who testified using the phrase), to more complex attempts by jurors to understand the inferences made by the witness, such as “Is his post-traumatic stress a result of the

<sup>49</sup> Arizona Rules of Criminal Procedure, Rule 18.6(e). Available at <http://azrules.westgroup.com/Find/Default.wl?DocName=AZSTRCRPR18%2E6&FindType=W&DB=AZ-TOC-WEB%3BSTA AZ TOC&RS=WLW2%2E07&VR=2%2E0>

<sup>50</sup> Arizona Supreme Court, *Civil/Criminal Bench Book* (2005), p. 6-11.

<sup>51</sup> Shari Seidman Diamond, Mary R. Rose, and Beth Murphy, *Jurors' Unanswered Questions*, 41 Court Review 20-29 (Spring, 2004). Available at <http://aja.ncsc.dni.us/courtry/cr-41-1/CR41-1Diamond.pdf>

## The Arizona Jury: Past, Present and Future – Executive Summary

confrontation, or a result from his childhood? Specifically, could his breakdown be from another accident?" and "Not knowing how he was sitting, or his weight, how can you be sure he hit his knee?" (for an engineer testifying about an accident reconstruction).<sup>52</sup>

The judge formally acknowledged less than a third of the 197 disallowed questions.

<sup>53</sup> The authors state:

After an issue is raised by a juror and the juror's question is not answered, the issue may simply be dropped and not discussed among the jurors at all, or it may receive further attention from the jurors. That further attention can take one of three forms. First, a juror may mention having posed a question, note that there was no answer, and accept the lack of an answer without complaint or even with understanding (e.g., by asserting that the issue must, in fact, be irrelevant). Second, consistent with the worries of those apprehensive about juror questions, the jury may chafe at the non-response, casting the judge's decision in a negative light. Finally, jurors not given an answer to their question may consider what the answer actually is.<sup>54</sup>

When jurors attempted to fill in the blank by providing an answer, their attempts to do so varied by type of question – less so for unanswered questions about legal standards (15%) and more so for unanswered questions about insurance (79%). The authors conclude:

Although jurors appreciate the opportunity to submit questions, they rarely express disappointment or even surprise when the judge does not supply them with an answer.<sup>55</sup>

After pointing out that there are ancillary benefits to unanswered questions, such as keeping the jury more on track of relevant issues, the authors conclude:

The need to leave some juror questions unanswered offers no justification for missing the opportunity to assist jurors in reaching well-grounded decisions.<sup>56</sup>

This author's experience over the years with juror questions is wholly consistent with the foregoing research findings. One notable juror question that made the headline in the Judges lunchroom was "Do we have to listen to the lawyers' continued repetition during closing arguments?"

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<sup>52</sup> *Id.*, at 22.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*, at 25.

<sup>55</sup> *Id.*, at 27.

<sup>56</sup> *Id.*, at 29.

#### 4. Hung Criminal Juries.

The National Institute of Justice and the National Center for State Courts have conducted a study on deadlocked felony criminal juries, also known as hung juries, in two phases. The first phase was to collect nationwide statistics about hung jury rates in state and federal courts. The second phase was a questionnaire based on in-depth jurisdiction study of four state trial courts, one of which was the Arizona Superior Court in Maricopa County (Phoenix).<sup>57</sup> The authors of the study have published an executive summary<sup>58</sup> and a detailed report (which includes the executive report).<sup>59</sup> The study states:

Using multiple approaches to explore the data, we learned what differentiates a hung jury from one that reaches a verdict. Consistent themes of weak evidence, problematic deliberations, and jurors' perception of unfairness arose in the hung jury cases.<sup>60</sup>

The authors concluded that jury deliberation dynamics is a critically important factor in the ultimate outcome of the trial, and thus recommend increased guidance on how to conduct effective small-group discussions. The authors also conclude that evidentiary factors, such as incomplete or ambiguous evidence, play the major role in hung juries. Through their data set analysis, the authors were able to identify some cause of jury deadlock in 43 of the 46 cases<sup>61</sup> and summarize:

A substantial majority of cases featured two or more reasons for the deadlock. Juror concerns about the fairness of the law were present in slightly more than one-quarter of the cases, yet they occurred as the sole reason for the hung jury in only three cases, less than 7% of the total. Similarly, dysfunctional deliberations were not the sole reason in any single case, although they contributed to juror deadlock in nearly one-third of the cases. This is particularly notable when we recall that evidentiary factors were more likely to affect jurors who ultimately held out against the majority than for jurors who joined in a unanimous verdict despite individual preferences for a different outcome to the trial. Although non-evidentiary

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<sup>57</sup> The other three courts were Superior Court of Los Angles County, the Supreme Court of Bronx County, and the District of Columbia Superior Court.

<sup>58</sup> Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman, *Are Hung Juries a Problem, Executive Summary* (September 30, 2002). National Institute of Justice, National Center for State Courts. Available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuriesExecSumPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesExecSumPub.pdf)

<sup>59</sup> Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman, *Are Hung Juries a Problem*, (September 30, 2002). National Institute of Justice, National Center for State Courts. Available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuriesPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf) The report is most complete and extensive. Only some of the data and conclusions are presented here.

<sup>60</sup> *Id.* at 3.

<sup>61</sup> Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman, *Are Hung Juries a Problem*, (September 30, 2002). Table 6.1 at 76. National Institute of Justice, National Center for State Courts.

## The Arizona Jury: Past, Present and Future – Executive Summary

factors do play a role in hung juries, they usually do so only in combination with fairly strong evidentiary factors.<sup>62</sup>

As to approaches to decrease or minimize hung juries, while admitting that non-majority verdict systems would necessarily decrease the hung jury rate, the authors question that approach as “. . . not necessarily addressing the actual cases – namely, weak evidence, poor interpersonal dynamics during deliberations, and jurors’ concerns about the appropriateness of legal enforcement in particular cases.”<sup>63</sup>

The authors accurately point out that addressing juror deadlock as a result of weak evidence are within the control and power of the prosecution. Similarly, juror perceptions of fairness of the charges falls within the purview of prosecutorial discretion.<sup>64</sup>

From a system and judge’s point of view, what happens to the defendant and the charges after the jury hangs is important. From a subset of the data set, the study concludes that fully 53% of hung jury cases did not result in a retrial (21.6 % being dismissed and 31.8% pleading guilty). Of the 32% that were retried, the conviction, acquittal and hung jury rates mirrored the initial trial distribution.<sup>65</sup> As a policy matter, one must ask if the system cost of retrial of one in three hung jury cases is reasonable in light of the primary reasons for a jury to hang -- weak evidence and overcharging. In this author’s view, the proper approach to the hung jury problem is stronger cases and less overcharging, not the elimination of the unanimity requirement.<sup>66</sup> As stated by the authors of this study:

Yet the arguments favoring jury unanimity are compelling. Unanimity requires jurors to listen and consider the views of all other jurors. Additionally, minority jurors deliberating under unanimity requirements have more opportunity to present their arguments and report greater satisfaction with their participation in jury duty. In contrast, juries that are not required to return a unanimous verdict deliberate for shorter periods of time and, as expected, often stop deliberating once the majority has garnered the necessary number of votes. The quality of the deliberation also differs: verdict-driven deliberation is more common in majority decision rule groups, while evidence-driven deliberation is more characteristic of unanimity decision rule groups. As Abramson characterized the process, juries operating under unanimity requirements strive to understand the evidence and apply the judge’s instructions; juries that are not required to return a unanimous verdicts strive for a sufficient number of votes.

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<sup>62</sup> *Id.*, at 86.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, at 87.

<sup>65</sup> *Id.*, at 27.

<sup>66</sup> In many jurisdictions, including Maricopa County, where a very high percentage of criminal felony cases are resolved by guilty plea, it is common for the prosecution to include one or two “extra” or “higher penalty” charges to facilitate plea bargaining. At times, the jury will see this overcharging and hang on some counts, while convicting on others.

Neilson and Winter address proposals for non-unanimous verdicts as a means to reduce or eliminate hung juries. They examined the effect on the statistical probabilities of a non-unanimous verdict, as there are error rates in any legal decision. A judge or jury may convict an innocent defendant, or acquit a guilty defendant. Both of these situations result in an error that is socially costly. They argue that eliminating hung juries from the list of possible options would force the jury to either acquit or convict, increasing the probability that the decision would be incorrect. Thus, while retrials are often costly, the social cost of a wrongful acquittal or wrongful conviction should be weighed against it. Allowing a hung jury decreases the likelihood of an inaccurate verdict. [Footnotes Omitted]<sup>67</sup>

### **1. Jury Nullification.**

Based on the same data set that resulted in the Hung Jury study above, Hannaford-Agor and Hans looked at jury nullification in their paper *Nullification at Work? A Glimpse From the National Center for State Courts Study of Hung Juries*.<sup>68</sup> The authors note that “jury nullification is, in essence, a counter-majoritarian measure.”<sup>69</sup> The popular press, focusing on selected widely reported hung jury cases, speculates the incidence of jury nullification, allegedly race or ethic background based, is growing.<sup>70</sup>

After various multivariate analysis of many possible predictive factors, the authors concluded:

Indeed, it is striking that only those variables related to evidentiary characteristics of the case, and the juries’ assessments of the courts, are predictive of their perceptions of outcome fairness. Race, the factor to which jury nullification is often attributed, loses its statistical significance when multiple factors are considered simultaneously.<sup>71</sup>

In other words, when a case has weak or ambiguous evidence, or in a setting where the jurors have a low opinion of the court system, jury nullification may occur. However, the study notes that hung juries almost always occur when a number of predictors are present. This study concludes:

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<sup>67</sup> *Id.*, at 14.

<sup>68</sup> Paula L. Hannaford-Agor and Valerie P. Hans, *Nullification At Work? A Glimpse From The National Center for State Courts Study of Hung Juries*, 78 Chicago-Kent Law Review 1249 (2003). Available at [http://lawreview.kentlaw.edu/articles/78-3/hannaford\\_hans.pdf](http://lawreview.kentlaw.edu/articles/78-3/hannaford_hans.pdf)

<sup>69</sup> *Id.*, at 1250. Noting that in the state of South Dakota, in November 2002, a state constitutional amendment to allow and instruct criminal juries on nullification was defeated by a 78% margin.

<sup>70</sup> Joan Biskupic, In Jury Rooms, Form of Civil Protest Grows, Washington Post, February 8, 1999, page A1. Available at <http://www.washingtonpost.com/wp-srv/national/jury080299.htm>

<sup>71</sup> *Id.*, 1270.

## The Arizona Jury: Past, Present and Future – Executive Summary

The jury's collective sense of the fairness of the law it is asked to apply to the facts in the case, then, is often related to the jury's verdict. However, finding an association between jury verdicts and the perceived fairness of the law is not discovering the smoking gun of jury nullification. It could be incidental to other factors in the case. We would have more evidence of possible nullification if we discovered that the evidence in a case was evaluated by the jury or the judge as compelling for the prosecution, the jury hung or acquitted, and rated legal fairness was low.

In this author's experience, jury nullification is simply not a common problem in felony trials. If the jury perceives the law as unfair, or the state as overreaching, they (or at least some members) will be more skeptical of the strength of the evidence and the credibility of the prosecution witnesses. In this author's view, the remote possibility of jury nullification – basically the refusal of one or more jurors to follow their oath to follow the law after they have heard the evidence – is not a threat to the legitimacy of the system and in rare and infrequent cases is an important protection against overreaching by the state.

### 2. Judge-Jury Agreement in Criminal Cases.

In their paper *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, Theodore Eisenberg, et al. make further use of the hung jury questionnaire data set.<sup>72</sup> Eisenberg, et al. confirmed "... that judges and juries do sometimes disagree, and that the general direction of the disagreement suggests less judicial sympathy for defendants."<sup>73</sup> The study found that judges "are willing to convict in cases much less favorable to the prosecution, as ranked by the juries' view of the evidence, than are juries."<sup>74</sup> Figure 2 graphically demonstrates this conclusion<sup>75</sup>:

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<sup>72</sup> Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, G. Thomas Munsterman, Stewart J. Schwab, and Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 Journal of Empirical Legal Studies 171-206 (March, 2005).

Abstract available at <http://www.blackwell-synergy.com/doi/abs/10.1111/j.1740-1461.2005.00035.x>

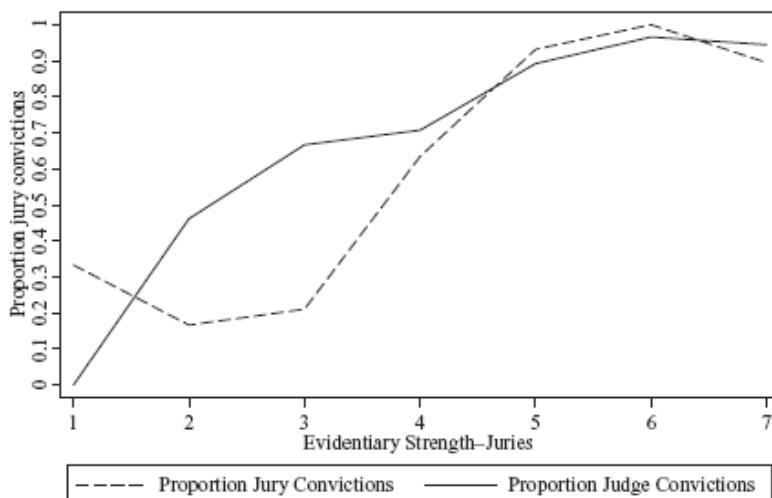
<sup>73</sup> *Id.*, at 185.

<sup>74</sup> *Id.* at 189.

<sup>75</sup> *Id.*

## The Arizona Jury: Past, Present and Future – Executive Summary

Figure 2: Convictions and evidentiary strength: juries' view of the evidence.



SOURCE: NCSC data covering trials at four sites in 2000–2001.

While Eisenberg, et al., found that jury ratings of case complexity varied from those of the judge, they also found that “the rates of disagreement are not strongly associated with complexity, regardless of which adjudicator’s assessment of complexity is used.”<sup>76</sup> After multivariate analysis, Eisenberg, et. al, state:

By controlling for multiple observers’ views of evidentiary strength, we can confirm with additional rigor, albeit in a smaller sample, Kalven and Zeisel’s finding that judges tend to convict more than juries—at least in the class of cases selected for trial by jury. We find little evidence that this effect is a function of evidentiary complexity or legal complexity. Judges simply appear to have a higher conviction threshold than juries. But we do not find evidence that this effect persists in every locale. A replication with more locales is needed to fully explore the persistence of the different conviction threshold.

Juror effects include a greater willingness of male jurors to convict, and more highly educated juries being less willing to convict than judges. Minority juror effects are mixed. They provide little explanatory power of convictions and somewhat greater power in explaining when judges and juries disagree. However, the effects do not persist at significant levels in models that control for locale. A richer set of locales is necessary to sort out minority- group effects, again suggesting the need for a larger study.<sup>77</sup>

This author’s experience is consistent with the study conclusions. The general feeling that judges are more prone to convict means that in criminal cases a defendant seldom waives trial by jury. It is common lunch talk among defense counsel that a jury is

<sup>76</sup> *Id.*, at 191.

<sup>77</sup> *Id.*, at 204.

## The Arizona Jury: Past, Present and Future – Executive Summary

more likely to acquit than a judge. However, in some cases defense counsel will advise her client to waive a jury. Based only on this author's experience, it seems such cases are either evidentially very strong or very weak.

The State, which also has a right to a jury, seems to never object to a defendant's waiver of a jury. It is thought the defendant waives a jury when the evidence for conviction is particularly strong either in hopes of sentencing leniency or sometimes as part of a semi-plea bargain for the dropping some sentencing enhancements, additional charges, or perhaps a recommendation of leniency from the prosecutor. The defendant also is prone to waive a jury in those cases where the evidence is very weak and the defendant presents a poor appearance to the jury (tattoos or such). Defense counsel seem to understand the judge will often acquit if at least a *prima facie* case is not present.

### **7. Some Passing Observations About Jury Reform and Empirical Jury Research.**

As empirical research into the effectiveness of jury reforms continues, some common themes seem to be emerging. Juries are group decision makers. The dynamics of group decision making is thus central to jury function. One needed element for effective group decision is accurate information, delivered in an understandable format. Most jury reforms deal with that element by treating the jurors as more active and less passive – in essence treating jurors for what they are – adult learners. As stated by Robert D. Myers, Ronald S. Reinstein, and Gordon Griller in *Complex Scientific Evidence and The Jury*:

Two central participants in the courtroom are the ultimate beneficiaries of reform-oriented jury approaches when heavy doses of scientific evidence are the subject of an unfolding courtroom drama: jurors, and more importantly, litigants. Contemporary behavioral research, and Arizona's jury reform experience, substantiate that comprehension and understanding are significantly enhanced when information is actively processed.<sup>78</sup>

However, it is becoming clear from the empirical research that in addition to good information, good group decision making requires effective small group dynamics and problem solving skills. B. Michael Dann, Valerie P. Hans, and David H. Kaye recently completed the final technical report on *Testing the Effects of Selected Jury Trial Innovations on Juror Comprehension of Contested mtDNA Evidence*.<sup>79</sup> That study, based on videotape presented mock trials in a controlled experiment, tested jury comprehension of the same mtDNA evidence using various jury innovation conditions. The report states:

It is quite intriguing that whatever effects occur emerge only after jury deliberation. That discussion period appears to be crucial in assisting jurors

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<sup>78</sup> Robert D. Myers, Ronald S. Reinstein, and Gordon M. Griller, *Complex Scientific Evidence And The Jury*, 83 *Judicature* 1-11, at 9 (November-December, 1999). Available at

[http://www.ornl.gov/sci/techresources/Human\\_Genome/publicat/judicature/article10.html](http://www.ornl.gov/sci/techresources/Human_Genome/publicat/judicature/article10.html)

<sup>79</sup> B. Michael Dann, Valerie P. Hans, and David H. Kaye, *Testing The Effects Of Selected Jury Trial Innovations On Juror Comprehension Of Contested mtDNA Evidence, Final Technical Report* (August, 2005). Available at <http://www.ncjrs.gov/pdffiles1/nij/grants/211000.pdf>

## The Arizona Jury: Past, Present and Future – Executive Summary

with how to understand and employ scientific evidence. We are currently in the process of transcribing the mock jury deliberations, with an eye to analyzing how the scientific evidence is discussed in different groups. That may provide us with more insight about the role of deliberation in jury comprehension of complex testimony about mtDNA.<sup>80</sup>

### ARIZONA JURY REFORMS IN PRACTICE

In August 2005 the American Bar Association General Assembly formally adopted the *Principles for Juries & Jury Trials*.<sup>81</sup> The American Jury Project<sup>82</sup> members were and are the leaders of American jury reform.<sup>83</sup> The nineteen ABA Jury Principles, and their subparts, embody the tradition of the American Jury and virtually all the recent American jury innovations and reforms.

#### **1. ABA Jury Principle 1 – The Right To Jury Trial Shall Be Preserved.**

Almost without exception all States guarantee the right to civil jury trial in cases above the level of small claims court. In this regard, American jurisprudence differs greatly from most other countries. Neil Vidmar comments:

Legal practitioners and scholars whom I encounter in my travels outside the borders of the United States frequently challenge me to explain the “crazy,” “outrageous” system by which we allow groups of untutored lay persons to decide civil disputes.<sup>84</sup>

Many Americans who have not served on juries, and some who have, share this sentiment. Many, as in Neil Vidmar’s example, bring up the popularly reported McDonald’s case where a civil jury in New Mexico awarded \$160,000 in compensatory damages and \$2.7 million in punitive damages to a woman who spilled hot coffee on herself. People are surprised to learn the underlying facts. McDonalds had kept its coffee many degrees hotter than home-brewed coffee or the coffee of its competitors, knowing for over five years of serious burns resulting from the coffee through over 700 complaints. McDonalds had never consulted a burn specialist, reduced the temperature of its coffee, or warned consumers. The seventy-nine-year-old woman suffered second and third degree burns to her private parts. The jury also learned the plaintiff had tried to settle the suit for a much more modest amount before trial, initially around \$20,000 to cover her medical expenses. The jury’s punitive damage award was equal to two days’ worth of the

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<sup>80</sup> *Id.*, at 74.

<sup>81</sup> American Bar Association, Principles For Juries & Jury Trials, August, 1005. Available at <http://www.abanet.org/juryprojectstandards/principles.pdf>

<sup>82</sup> See <http://www.abanet.org/juryprojectstandards/home.html>

<sup>83</sup> Arizona judges and lawyers were well represented, including the chair of the project, Phoenix lawyer Patricia Lee Refo (ABA Litigation Section Chair, 2002-2003); co-chair of the project, Tempe Municipal Court Judge Louraine Arkfeld (ABA Judicial Division Chair, 2004-2005); and member B. Michael Dann (Retired Maricopa County Superior Court Judge).

<sup>84</sup> Vidmar, Neil J., "The American Civil Jury for Auslander (Foreigners)" . Duke Journal of Comparative & International Law, Vol. 13, No. 3, p. 95, Summer 2003. Available at

[http://eprints.law.duke.edu/archive/00001039/01/13\\_Duke\\_J.\\_Comp.\\_&\\_Int%27I\\_L.\\_95\\_\(2003\).pdf](http://eprints.law.duke.edu/archive/00001039/01/13_Duke_J._Comp._&_Int%27I_L._95_(2003).pdf)

## The Arizona Jury: Past, Present and Future – Executive Summary

McDonald's corporation's profits from selling coffee.<sup>85</sup> Many are ignorant that the trial judge reduced the punitive damage award to \$480,000, for a total award of \$640,000 – and that the case was later settled for an undisclosed amount, presumably less than the award.

Vidmar makes the same point that I often make with civil jurors during voir dire – only the unusual story makes the news. Reporting extraordinary jury results is, in Vidmar's accurate words: ". . . endemic with media coverage of jury awards."<sup>86</sup> Vidmar concludes, after reviewing various research (including research based on Arizona data mentioned in this paper), that:

A substantial body of systematic empirical studies indicates that the American civil jury system is not as erratic or unreasonable as portrayed in the media. Whether it involves issues of liability, responses to experts, attention to the judge's instructions or damage awards, the civil jury performs much better than many people believe. . . . American society could not afford the caprice and craziness ascribed to juries. Examined from this pragmatic perspective, it should not be surprising that the empirical research into the performance of the civil jury yields a generally positive picture, especially when considered in the context of the formal and informal controls on errant verdicts.<sup>87</sup>

### **2. ABA Jury Principle 2 – Citizens Have The Right To Participate In Jury Service And Their Service Should Be Facilitated.**

The six subparts of ABA Jury Principle 2 deal with jury qualifications and eligibility, the time required for service, the number of persons called, providing a suitable environment for jurors, and jurors receiving a reasonable fee for service.<sup>88</sup> Arizona does well in implementing ABA Jury Principle 2 in most areas. With passage of the Juror Patriotism Act Arizona has reduced qualifications, standardized grounds for excusal, provided for state wide one-day/one-trial service, and provided for increased juror compensation for trials that last ten days or more.<sup>89</sup>

The number of jurors summoned and used In Maricopa County Superior Court each year is large. For the year from July 1, 2003 through June 30, 2004, there were

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<sup>85</sup> The underlying facts are included in Vidmar's paper, and are now well documented and publicized. See, e.g., [http://www.centerjd.org/free/mythbusters-free/MB\\_mcdonalds.htm](http://www.centerjd.org/free/mythbusters-free/MB_mcdonalds.htm)

<sup>86</sup> Vidamar, at 97.

<sup>87</sup> Vidmar, at 131.

<sup>88</sup> For jury system management issues see G. Thomas Munsterman, *Jury System Management*, National Center for State Courts (1996) and G. T. Munsterman and Paula L. Hannaford-Agor, *The Promise and Challenges of Jury System Technology*, National Center for State Courts (March 31, 2003).

<sup>89</sup> See *Supra*, Section One. For trials lasting ten days or more, the amount jurors can receive is based on their loss up to \$100/day for court days four through ten and up to \$300/day from day eleven through the end of their obligation.

## The Arizona Jury: Past, Present and Future – Executive Summary

1,596 trials which requested jurors (1,257 criminal trials, plus 326 civil trials).<sup>90</sup> For these trials 56,556 jurors were requested for the courtrooms with an average panel size of 35.1. 127 of the 1,596 trials did not proceed for various reasons (mostly those cases settled at the last minute). 12,724 jurors were actually selected and sworn in after voir dire with an average of 8.7 jurors per trial.<sup>91</sup> The average length of all trials was 3.3 days (3.1 days for criminal trials, 4.2 days for civil trials). 84.8 % of the jurors who were present in the jury assembly room were sent to a courtroom.

Non-English speaking potential jurors are becoming more common in Arizona. The ABA Jury Guidelines talk of courts providing language interpreters for jurors. In Arizona lack of fluency in English is ground for excusal from a jury, but not a disqualification. Sign language interpreters are routinely provided for hearing impaired jurors in Maricopa County, in part due to the provisions of the American With Disabilities Act.

Foreign language interpreters are provided for criminal defendants and criminal witnesses, but not for jurors – primarily due to funding constraints. Bilingual jurors are often seated, but those who are not fluent in English are rarely accommodated. This issue of multi-lingual juries is a topic in jury reform discussions in Arizona and the United States.<sup>92</sup> It is reported that a few trial judges in Arizona have ordered language assistance for otherwise qualified jurors or potential jurors.<sup>93</sup> In 1996 the reconvened Committee on More Effective Use of Juries looked at, but took no position on, the multi-lingual jury issue. In June, 2005, the Maricopa Superior Court organized a Jury Advisory Committee that is looking into the issue of non-English speaking jurors.<sup>94</sup> The issue of multi-lingual juries is apt to become more common in our increasingly multi-lingual, multi-cultural world.

### **3. ABA Jury Principle 3 – Juries Should Have 12 Members.**

This principle goes significantly beyond Arizona jury practice with twelve jurors only in criminal cases where the possible punishment exceeds thirty years in prison. All other Arizona Superior Court juries are eight persons in both criminal and civil matters.<sup>95</sup> The comment marshals an argument based on empirical and other social research that twelve person juries, as opposed to six person juries:

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<sup>90</sup> All the figures of jury summons and usage statistics in Maricopa County come from Maricopa County Superior Court Jury Commissioner Bob James to the author. These statistics are maintained by the court in the ordinary course.

<sup>91</sup> In Arizona Superior Court, criminal trials with a possibility of 30 years or more prison have twelve jurors (plus alternates), all other criminal and all civil juries have eight jurors (plus alternates).

<sup>92</sup> Tom Munsterman, Multi-Lingual Juries (2000). Available at

[http://www.ncsconline.org/WC/Publications/KIS\\_JurMan\\_Trends99-00\\_Pub.pdf](http://www.ncsconline.org/WC/Publications/KIS_JurMan_Trends99-00_Pub.pdf)

<sup>93</sup> Jeffrey S. Sirtola, *Language Assistance and Arizona Jurors*, (August, 2003). Available at <http://legalminds.lp.findlaw.com/list/courtinterp-l/msg08367.html>

<sup>94</sup> The Spanish speaking population in Maricopa County exceeds 20% of the population and is rapidly growing. New Mexico is the only state that routinely, pursuant to the New Mexico State Constitution, provides foreign language interpreters for jurors. New Mexico Constitution, Article VII, Sec. 3. State v. Singleton, 130 N.M. 583 (2001).

<sup>95</sup> See the general discussion at: Margo Hunter, *Reducing Jury Size*, Public Law Research Institute (Spring 1996). Available at <http://w3.uchastings.edu/plri/spr96tex/jurysiz.html>

## The Arizona Jury: Past, Present and Future – Executive Summary

- Deliberate longer
- Have better recall of the trial testimony
- Are more likely to produce accurate results
- Reduce the number of outlier verdicts not reflecting community values
- Are more likely to return verdicts in accord with community values
- Are more representative of the community
- Are not significantly less efficient or more expensive than six person juries<sup>96</sup>

It is not likely that Arizona will return to twelve person civil juries – primarily because the civil bar and its clients appear satisfied with eight person civil juries. Consideration might be seriously given to a return to twelve persons in criminal juries, however the prosecution bar and lobby is very influential and would likely oppose such a move. The criminal bar, both prosecution and defense, seem to be the most conservative about any jury changes.

### 4. ABA Jury Principle 4 – Jury Decisions Should Be Unanimous.

While recommending unanimous jury verdicts in all civil cases, this principle also states:

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, except . . . [by stipulation].<sup>97</sup>

Five-sixths is 83.3%. Arizona civil juries decide with six of eight votes, or 75%. It is unlikely either the unanimity recommendation or the five-sixths recommendation in civil trials will be adopted in Arizona, again because there is no significant dissatisfaction among the civil bar or their clients with the current system. Maricopa County has had success in using civil “short trials” by stipulation in small tort cases where a jury of three of four jurors is used in one-day trials.<sup>98</sup>

A primary concern for the use of non-unanimous juries is the measured marginalization of the dissenting jurors.<sup>99</sup> The issue of unanimity is tied, to some extent, to the issue of jury size. A discussion of state court jury sizes has been presented by the

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<sup>96</sup> *ABA Jury Principles*, at 16-18. The fourteen studies on jury size cited in the comment are not repeated here.

<sup>97</sup> *ABA Jury Principles*, at 21.

<sup>98</sup> G. Thomas Munsterman, *A Cost Free Jury Trial?*, 18 *The Court Manager* 35( 2004). Available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_JuryNewsCostFreeTrialPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_JuryNewsCostFreeTrialPub.pdf) A brief description of the Maricopa County civil short trial is found on the court’s web pages at <http://www.superiorcourt.maricopa.gov/adr/programs/programs.asp#B>

<sup>99</sup> Leonard Post, *Study: Dissenting Jurors Get Short Shrift*, *National Law Journal* (August 8, 2005). Available at <http://www.law.com/jsp/article.jsp?id=1123684510991> commenting on a study pending publication concerning dissenting jurors based on the 50 videotaped Arizona trial database.

## The Arizona Jury: Past, Present and Future – Executive Summary

National Center for State Courts.<sup>100</sup> A recent review of the literature in relation to jury size presents the pros and cons of large and small juries. That review concludes:

Based on a review of the literature, it is evident that reducing the size of juries will save money, yet likely be less representative of the community. Much of the literature questions the accuracy and predictability of smaller-sized juries. Predictability is the cornerstone for parties in a dispute. Effective plea bargaining and settlement attempts rely upon more predictable outcomes. In sum, evaluating the best size for a jury incorporates many considerations. To name a few, courts should weigh the cost, representation of the community, predictability of awards, accuracy (such as in recalling evidence), and the importance of how easily the group can reach consensus.<sup>101</sup>

Further published studies are expected on this issue of non-unanimous juries in civil cases based on the Arizona Jury Project videotaped data set.<sup>102</sup>

### **5. ABA Jury Principle 6 – Courts Should Educate Jurors Regarding The Essential Aspects Of A Jury Trial.**

Many courts, including Maricopa County Superior Court, have web sites with jury information,<sup>103</sup> include jury information with the summons, and have audio-video presentations for the jurors when they arrive at the courthouse.

The 1995 Arizona Jury Reforms included amended civil and criminal rules of procedure requiring written preliminary jury instructions before opening statements by counsel, with a written copy given to each juror, and including elementary substantive rules of law that apply to the case.<sup>104</sup>

There are standard recommended civil and criminal jury instructions to refrain from talking about the case and conducting any independent investigation.<sup>105</sup> It is common for trial judges to add an admonition to refrain from the use of dictionaries and the Internet during trial. In light of the popularity of blogging, an admonition not to blog the jury experience until the juror is discharged might also be advisable!

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<sup>100</sup> National Center For State Courts, Juries Research Services, *Jury Size* (2003). Available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_JurySizePub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_JurySizePub.pdf)

<sup>101</sup> Nicole L. Walters, *Does Jury Size Matter?: A Review of the Literature*, National Center for State Courts, Judicial Council of California (August, 2004). Available at [http://www.courtinfo.ca.gov/reference/documents/jury\\_size\\_report.pdf](http://www.courtinfo.ca.gov/reference/documents/jury_size_report.pdf)

<sup>102</sup> Shari Seidman Diamond and Mary Rose, *The Unanimity Rule in Jury Trials*, Abstract for Presentation at Loyola Law School (March 29, 2005). Available at [http://www.luc.edu/law/facworkshops/unanimity\\_rule.pdf](http://www.luc.edu/law/facworkshops/unanimity_rule.pdf)

<sup>103</sup> See Maricopa County Superior Court, Jury Service (2005). Available at <http://www.superiorcourt.maricopa.gov/jury/index.asp> and Arizona Supreme Court, Jury Service (2005). Available at <http://www.superiorcourt.maricopa.gov/jury/index.asp>

<sup>104</sup> Arizona Rules of Civil Procedure, Rules 51(a) and 51(b)(3); Arizona Rules of Criminal Procedure, Rules 18.6(c) and 21.3(d).

<sup>105</sup> Recommended Arizona Jury Instruction (Civil), Preliminary Instruction 9 (4<sup>th</sup> ed., 2005); Arizona Supreme Court, *Civil/Criminal Bench Book* (2005), pp. 6-15 & 6-16.

## **6. ABA Jury Principle 7 – Courts Should Protect Juror Privacy Insofar As Consistent With The Requirements Of Justice And The Public Interest.**

It is not uncommon in Maricopa County to use written juror questionnaires to cover particularly sensitive subjects such as prior sexual abuse. In every case, jurors being examined during voir dire are advised they may discuss any matter out of the presence of the public and other jurors, with just the judge and the attorneys present. This author has found that in practice an important part of the implementation and maintenance of juror privacy is the active control by the trial judge of the lawyer voir dire process.

## **7. ABA Jury Principle 11 – Courts Should Ensure That The Process Used To Empanel Jurors Effectively Serves The Goal Of Assembling A Fair And Impartial Jury.**

ABA Jury Principle 11 covers jury questionnaires, the voir dire process and procedure, challenges for cause, peremptory challenges, alternate jurors, and anonymous juries. ABA Principle 11 contemplates a balanced approach to voir dire, including questioning by both the judge and the attorneys. While actual voir dire practice in Arizona varies from judge to judge and case to case, under the 1995 jury reforms voir dire by the attorneys must be allowed, but may be reasonably limited in scope and time, and terminated for abuse.<sup>106</sup>

ABA Principle 11, Subdivision E, contemplates the use of the “struck” method of voir dire, where the entire panel is examined before any potential juror is excused for cause, rather than the more traditional “strike and replace” method, where a subset of the jury panel is examined with each juror in the box replaced from the panel as stricken for cause. The “struck” method is encouraged, but not mandated, by Arizona’s 1995 jury reforms.<sup>107</sup> A majority of judges in Maricopa County use the “struck” method.

ABA Principle Number 11 supports retention of peremptory strikes in both civil and criminal cases. In its second report in 1998, The Committee on More Effective Use of Juries recommended decreasing the number of peremptory strikes in Arizona from ten per side to five in capital cases, from six per side to three in other felony cases, and from four per side to two in civil cases (misdemeanor criminal cases remaining at two per side)<sup>108</sup> This recommendation did not meet with a favorable reception from the bar in Arizona and has not been implemented.<sup>109</sup>

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<sup>106</sup> Arizona Rules Of Civil Procedure, Rule 47(b)(2); Arizona Rules of Criminal Procedure, Rule 18.5(d).

<sup>107</sup> Arizona Rules Of Civil Procedure, Rule 47(a)(1), 1995 Comment; Arizona Rules of Criminal Procedure, Rule 18.5(b), 1995 Comment.

<sup>108</sup> Arizona Supreme Court, *Jurors: The Power Of 12, Part 2* (1996). Available at <http://www.supreme.state.az.us/jury/Jury2/jury2.htm> The full text of the report is available at but must be manually paged.

<sup>109</sup> See Paula L. Hannaford-Agor and Nicole L. Waters, Examining Voir Dire In California, National Center For State Courts (August, 2004). Available at [http://www.courtinfo.ca.gov/reference/documents/voir\\_dire\\_report.pdf](http://www.courtinfo.ca.gov/reference/documents/voir_dire_report.pdf) This study recommends reducing the number of peremptory challenges, based at least in part on the observation that not all peremptory

## **8. ABA Jury Principle 12 – Courts Should Limit The Length Of Jury Trials Insofar As Justice Allows And Jurors Should Be Fully Informed Of The Trial Schedule Established.**

The ABA Jury Principles comment that jurors often complain about the “repetition and redundancy of trial testimony.”<sup>110</sup> Such has been this author’s experience and that of many other judges. It is very difficult for the lawyers, with out some guidance from the court, to set and maintain firm time limits. On the other hand, cases presented within a specified time frame are always better and more persuasively presented.

Arizona and Maricopa County have been in the forefront of managing trial time more effectively. It is not uncommon in civil trials, after consultation with the lawyers, to place overall time limits on case presentation. A typical pretrial order provides a specific number of hours for each party’s use, including all voir dire, opening statements, direct and cross examination, legal arguments and closing arguments. This is called the “chess clock” method. This technique has been very successful by the author and is well accepted by counsel. It is the general occurrence that each side does not use all of its allocated time.

## **9. ABA Jury Principle 13 – The Court And Parties Should Vigorously Promote Juror Understanding Of The Facts And Law.**

The ten subparts of ABA Jury Principle 13 contain the heart of Arizona’s implemented jury reforms, including: taking notes; trial notebooks; submission of written questions to witnesses; discussion of evidence before deliberations; mini or interim openings and closings; grouping expert witnesses by topic; and use of summaries, charts and computer simulations.

### **a. Taking Notes.**

In Arizona jurors in both criminal and civil cases must be instructed they may take notes,<sup>111</sup> may refer to them during recesses and during deliberations,<sup>112</sup> but should not be overly influenced by the notes of others. In this author’s experience about one-half the jurors appear to be active note takers. One juror, after discharge, commented to the author “I cannot believe that some court’s do not allow jurors to take notes.”

### **b. Trial Notebooks.**

The use of jury trial notebooks is strongly encouraged in both criminal and civil trials in Arizona, although not required.<sup>113</sup>

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challenges are used by the lawyers in California. In Arizona, most peremptory challenges are used by the lawyers.

<sup>110</sup> ABA Jury Principles, at 87.

<sup>111</sup> Arizona Rules of Civil Procedure, Rule 39(p); Arizona Rules of Criminal Procedure, Rule 18(d).

<sup>112</sup> Arizona Rules of Civil Procedure, Rule 39(d)(3); Arizona Rules of Criminal Procedure, Rule 18.6(d).

<sup>113</sup> Arizona Rules of Civil Procedure, Rule 47(g); Arizona Rules of Criminal Procedure, Rule 18.6(d).

c. Juror Questions

The Arizona Criminal and Civil Rules require the judge instruct the jury they may ask written questions of witness and the court, unless the court “for good cause, prohibit[s] or limit[s] the submission of questions to a witness.”<sup>114</sup> The standard jury instruction reads:

If you have a question about the case for a witness or for me, write it down, but do not sign it. Hand the question to the bailiff. If your question is for a witness who is about to leave the witness stand, please signal the bailiff or me before the witness leaves the stand.

The lawyers and I will discuss the question. The rules of evidence or other rules of law may prevent some questions from being asked. If the rules permit the question and the answer is available, an answer will be given at the earliest opportunity. When we do not ask a question, it is no reflection on the person submitting it. You should attach no significance to the failure to ask a question. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers.

If a particular question is not asked, please do not guess why or what the answer might have been.<sup>115</sup>

While the court is given wide discretion by the rule to not allow jury questions to witnesses, such action is rarely taken. The typical procedure is to conduct a very short side bar conference to determine any disagreement among counsel and the court as to whether the question should be asked (and if there is disagreement, sometimes to take a short break), and then have the judge ask the question of the witness. The lawyers are then given an opportunity to follow up with the witness. In this author’s experience, juror questions are almost always relevant, factually based, and helpful to the development of the case. The impact of allowing jury questions on the trial proceedings, and on the time necessary for trial, has not been significant.

d. Discussion of evidence before deliberations.

In Arizona the civil jury may, in the judge’s discretion, be instructed as to discussing the facts and evidence during recesses as the case proceeds prior to final deliberations.<sup>116</sup> In practice, it is very rare for a Maricopa County judge in a civil jury trial not to instruct the jury they may discuss the evidence as the case proceeds. The standard instruction is part of the “boiler plate” of Preliminary Instruction No 9 and reads:

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<sup>114</sup> Arizona Rules of Civil Procedure, Rule 39(b); Arizona Rules of Criminal Procedure, Rule 18.6(e).

<sup>115</sup> Recommended Arizona Jury Instruction (Civil), Preliminary Instruction 11 (4<sup>th</sup> Ed., 2005); Arizona Supreme Court, *Civil/Criminal Bench Book* (2005), p. 6-16 & 16-17

<sup>116</sup> Arizona Rules of Civil Procedure, Rule 39(f).

## The Arizona Jury: Past, Present and Future – Executive Summary

I am now going to say a few words about your conduct as jurors. I am going to give you some do's and don'ts, mostly don'ts, which I will call "The Admonition." This admonition is designed to prevent jury tampering and any appearance of jury tampering, something that cannot be tolerated in our system of justice.

Do wear your juror badge at all times in and around the courthouse so everyone will know you are on a jury.

Do not do any research or make any investigation about the case on your own. Do not view or visit the locations where the events of the case took place. "Research" includes doing things such as looking up words in a dictionary or encyclopedia, or using treatises or similar sources with respect to any of the issues involved in the case. Research also includes searching on the internet or using other electronic devices to obtain information. The reason for this is that you have to base any decision on the evidence that is produced here in the courtroom.

Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you can't talk about it until it is over.

It is your duty not to speak with or permit yourselves to be addressed by any person on any subject connected with the trial. If someone should try to talk to you about the case, stop him or her or walk away. If you should overhear others talking about the case, stop them or walk away. If anything like this does happen, report it to me or any member of my staff [insert phone number] as soon as you can. To avoid even the appearance of improper conduct, do not talk to any of the parties, the lawyers, or witnesses about anything until the case is over, even if your conversation with them has nothing to do with the case. For example, you might pass an attorney in the hall, and ask what good restaurants there are downtown, and somebody from a distance may think you are talking about the case. So, again, please avoid even the *appearance* of improper conduct.

The lawyers and parties haven been given the same instruction about not speaking with you jurors, so do not think they are being unfriendly to you. When you go home tonight and family and friends ask what the case is about, remember you cannot speak with them about the case. All you can tell them is that you are on a jury, the estimated schedule for the trial, and that you cannot talk about the case until it is over.

## The Arizona Jury: Past, Present and Future – Executive Summary

There is one and only one limited exception to the foregoing rules. During recesses from the trial, you may discuss the evidence presented at the trial, but: 1) only among yourselves; and 2) only when you are all together; and 3) only in the jury room.

Even though you may discuss the case under the conditions I have described, do not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Both sides have the right to have the case fully presented and argued before you decide any of the issues in the case. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of the trial.

If at any time during the trial you have difficulty hearing or seeing something you should be hearing or seeing, or if you have personal distress for any reason, raise your hand and let me know.

If you have any questions about parking, restaurants, or other personal matters relating to your jury service, feel free to ask one of the court staff. But, remember that the admonition applies to court staff, as it does to everybody else, so do not try to discuss the case with court staff.

Before each recess, I will not repeat the entire Admonition I have just given you. I probably will refer to it by saying, “Please remember the Admonition,” or something like that. However, even if I forget to make reference to it,<sup>117</sup> remember that the Admonition still applies at all times during the trial.

The experience with Maricopa County civil trials has been most positive. Attorneys, many of whom argued against the practice, have become supporters. Civil trial jurors are more attentive. They are more involved. In combination with the ability to ask questions, the attorneys are more informed as to whether or not the jury is following and understanding the evidentiary points being presented. In the author’s estimation, there is simply no downside to allowing the practice.

### e. Mini or interim openings and closings.

The 1995 Arizona Jury Reform amendments provide, in both the criminal and civil rules:

The parties may, with the court’s consent, present brief opening statements to the entire jury panel prior to voir dire. On its own motion the court may require counsel to do so.<sup>118</sup>

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<sup>117</sup> Recommended Arizona Jury Instruction (Civil), Preliminary Instruction 11 (4<sup>th</sup> Ed., 2005).

<sup>118</sup> Arizona Rules of Civil Procedure, Rule 47(b)(2); Arizona Rules of Criminal Procedure, Rule 18.5(c).

## The Arizona Jury: Past, Present and Future – Executive Summary

The Arizona Civil/Criminal Bench Book (2005) provides the judge in both criminal and civil trials should consider mini-opening statements prior to the main part of juror voir dire and includes that item on suggested pretrial checklists.

### f. Grouping expert witnesses by topic.

ABA Jury Principle 13, subpart G, urges parties and the courts to be open to alteration of the sequencing of expert witness testimony. Grouping of expert witnesses by topic was recommended in the section report of the Committee on More Effective Use of Juries, however the topic is not addressed in the Arizona Civil/Criminal Trial Bench Book. The civil and criminal rules of procedure do not directly address the issue. However, Arizona Rule of Evidence 611(a) provides the court “shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . .”<sup>119</sup> The 1995 Comment addresses effective document control during trial, but does not address grouping experts.

In at least one complex civil case involving numerous alleged construction defects in new homes, a Maricopa County trial court judge ordered that the experts be grouped by topic – for instance plaintiff’s expert on soils conditions, followed “out of order” by defendants’ expert on soils conditions. The jury, judge, and the lawyers were happy with that procedure.

### g. Use of summaries, charts and computer simulations.

The topic of use of summaries, charts and computer simulations to aid jury comprehension was not directly addressed by The Committee on More Effective Use of Juries. To the extent addressed at all in the Arizona Civil/Criminal Trial Bench Book, it is addressed as a trial exhibit issue. The civil and criminal rules of procedure do not directly address the issue. However, Arizona Rule of Evidence 1006 provides that the “contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation.”<sup>120</sup>

Maricopa County Superior Court is committed to making technology routinely available in its courtrooms, as are many courts.<sup>121</sup> The use of PowerPoint presentations in opening and closing statements is becoming commonplace in both criminal and civil trials.<sup>122</sup> The taking of civil depositions via video is now sanctioned by rule.<sup>123</sup> As a result, impeachment of witnesses by prior videotaped deposition is becoming more common. Particularly in more complex civil cases the use of all digitalized trial exhibits is becoming

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<sup>119</sup> Arizona Rules of Evidence, Rule 611(a).

<sup>120</sup> Arizona Rules of Evidence, Rule 1006.

<sup>121</sup> Maricopa County Superior Court, E-Courtroom (2005). Available at <http://www.superiorcourt.maricopa.gov/ecourtroom/index.asp>

<sup>122</sup> The City of Phoenix prosecutor routinely uses PowerPoint slides in Driving Under The Influence criminal trials, and discloses those PowerPoint slides on its web page. See

<http://phoenix.gov/AGENCY/PHXPROS/powerpoint.html> Included are various short streaming videos.

<sup>123</sup> Arizona Rules of Civil Procedure, Rule 30(b)(4).

common, as is trial management software that organizes all trial materials and facilitates jury display.

## **10. ABA Jury Principle 14 – The Court Should Instruct The Jury In Plain And Understandable Language Regarding The Applicable Law And The Conduct Of Deliberations.**

A major thrust of ABA Jury Principle 14 is that all jury instructions should be “in plain and understandable language.” Pattern or uniform jury instructions, such as those used in Arizona, save time and reduce the likelihood of reversal on appeal. Despite continued efforts by those who draft standard instructions, various studies reveal that jury instructions “remain syntactically convoluted, overly formal and abstract, and full of legalese.”<sup>124</sup> Published literature widely supports the concept of plain English jury instructions.<sup>125</sup>

The development of plain English jury instructions in Arizona is a particular challenge given the requirements of the Arizona law that instructions must not comment on the evidence, generally must take a “restatement” of the law approach, and generally must not be “verdict directing” in nature. The Arizona approach to the issue has been the use of broad based standing committees of State Bar Of Arizona to draft and revise recommended civil<sup>126</sup> and criminal jury instructions.<sup>127</sup>

ABA Jury Principle 14, subpart A, provides for final instruction to the jury either before or after lawyer closing argument. In Arizona’s 1995 jury reforms, comments to the civil and criminal rules were added encouraging judges to give the bulk of final instructions prior to lawyer closing argument.

While judges in Arizona routinely give procedural instructions after closing argument particularly covering verdict forms,<sup>128</sup> it is still relatively rare for judges to offer any particular advice on deliberation procedures. Such instruction would include suggestions regarding the process of selecting a presiding juror and the conduct of deliberations. The comments to ABA Jury Principle 14, subdivisions C and D, state:

. . . courts should advise that the presiding juror generally chairs the deliberations and ensures a complete discussion before any vote. The court should note that each juror should have an opportunity to be heard on every issue and should be encouraged to participate. Jurors should be told that

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<sup>124</sup> Peter M. Tiersma, *Jury Instruction in the New Millennium*, 36 Ct Rev. 28 (1999), cited at ABA Jury Principles, p. 108.

<sup>125</sup> Ellen Chilton and Patricia Henley, *Jury Instructions: Helping Jurors Understand the Evidence and the Law*, Public Law Research Institute (Spring, 1996). Available at <http://w3.uchastings.edu/plri/spr96tex/juryinst.html>

<sup>126</sup> State Bar of Arizona, Civil Jury Instruction Committee, Recommended Jury Instructions (Civil) (4<sup>th</sup> Ed., 2005), available at <http://www.myazbar.org/SecComm/Committees/CJJI/ciji.cfm>

<sup>127</sup> State Bar of Arizona, Criminal Jury Instruction Committee, Interim Recommended Jury Instructions (Criminal) (2005). Available at <http://www.myazbar.org/SecComm/Committees/CRJI/crji.cfm>

<sup>128</sup> In more complex cases, crafting verdict forms can serve as a template or decision tree directing the jury as to necessary steps in the decision process.

they should not surrender an individual opinion or decision merely to return a verdict. The court should further inform the jurors that they may be asked, when the verdict is returned, if the verdict is in fact their individual verdict. By providing those suggestions, courts are explaining the functions of the presiding juror and deliberations. Those explanations serve to equip the jurors for the task at hand.<sup>129</sup>

Some judges have on occasion, with approval of counsel, passed out to the jury before deliberations the American Judicature Society's pamphlet *Behind Closed Doors: A Guide For Jury Deliberations.*<sup>130</sup>

#### **10. ABA Jury Principle 16 – Deliberating Jurors Should Be Offered Assistance When An Apparent Impasse Is Reported.**

ABA Jury Principle 16 is drawn directly from the 1995 Arizona jury reforms which allow the court to offer additional instructions or further proceedings in the event the jury announces an impasse in deliberations. The Arizona criminal and civil rules provide:

If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the judge may direct that further proceedings occur as appropriate.<sup>131</sup>

The comment to the criminal and civil rule provides the following suggested jury instruction:

This instruction is offered to help your deliberations, not to force you to reach a verdict.

You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.

If you still have disagreement, you may wish to identify for the court and counsel which issues or questions or law or fact you would like counsel or court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.

I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that

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<sup>129</sup> ABA Jury Principles, Principle 14, Comment at 111.

<sup>130</sup> American Judicature Society, *Behind Closed Doors: A Guide for Jury Deliberations* (1999). Free copies may be ordered from the society at <http://www.ajs.org/cart/storefront.asp>

<sup>131</sup> Arizona Rules of Civil Procedure, Rule 39(h); Arizona Rules of Criminal Procedure, Rule 22.4.

you could reach a verdict as a result of this procedure, it would be wise to give it a try.<sup>132</sup>

## CONTINUING JURY REFORM IN ARIZONA

Jury reform is of ongoing concern to the bench and bar in Arizona. A number of the original fifty-four recommendations in the “Jurors: The Power of 12” report, and subsequent jury study committee recommendations, have not been implemented in Arizona. A number of the ABA Jury Principles are not actively practiced or implemented in Arizona.

This section presents this author’s view of “round three” of the Arizona Jury Reform movement, suggesting particular jury reform efforts which should pursued in Arizona over the next decade.

### **1. Continue efforts to achieve application of prior Arizona recommendations.**

While there are many unimplemented recommendations detailed in this paper, three strike this author as most important. They are: 1) aiding jurors in the mechanics of deliberation; 2) allowing pre-deliberation discussion of evidence prior to deliberations in criminal cases; and, 3) allowing the jury to know the range of punishment.

### **2. Develop and implement jury communication recommendations that incorporate court technology.**

ABA Jury Principle 13, subpart G, urges the parties and courts to “be open to a variety of techniques to enhance juror comprehension .. [such as] the use of computer simulations, deposition summaries and other aids.”

Today’s jurors receive information most effectively as they do in everyday life: in multi-media fashion sound bites. They are not used to lengthy “speaking head” presentations. In many ways judges and lawyers “have a PBS mind, in and MTV world.”<sup>133</sup> Any trial judge is familiar with the glazed look and inattention of jurors when long, complex, or uninteresting traditional testimony is presented. Judges all too often see the lawyer and witness engaged in a complex dialogue over key paragraphs in a document, when no one on the jury has a copy of the document.

The use of integrated implementation of readily available, affordable, and easy to use court technology to improve juror communication should an affirmative requirement in trial courts. Training in the use of such techniques should be required of judges and lawyers. The use of digitalized exhibits, with a big screen or individual screens for the jurors, witness, lawyers, court reporter and judge is increasingly common, but far from

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<sup>132</sup> *Id.*, 1995 Comment.

<sup>133</sup> Jimmy Buffett, I Don’t Know, I Don’t Care, Song Lyrics. “Why does the sun set in the west and why does my heart keep beating in my chest what ever happened to the Duke of Earl I gotta PBS mind in an MTV world.” Available at <http://www.lyricsfreak.com/jimmy-buffett/71847.html>

## The Arizona Jury: Past, Present and Future – Executive Summary

universal. The presentation of summaries and check lists by PowerPoint is increasingly common and very effective when well done. When digitalized exhibits are used, the jury should have access to those exhibits in the jury room during deliberations, either via the court network or on a stand alone computer.<sup>134</sup> Jurors should be given, if they wish, laptop computers for note taking.

One traditional reason for not making a transcript of the trial testimony available to jurors is the cost. Another is the fear of a jury picking out one piece of the evidence and ignoring another. The increasing use of digitalized audio or audio-video recordings for the court record, together with the use of real-time stenographic court reporting in some courts, effectively removes the cost issue. The advent of easy to use computer aided search and retrieval effectively limits the other. It makes no sense to make that portion of the court record consisting of written trial exhibits available to the jury, but not the readily searchable digital audio, audio-video, or real- time stenographic transcript equally available.

### **3. Develop and implement public education and outreach about jury function and duty.**

The first recommendation of “*Jurors: The Power of 12*” in 1994 was to undertake programs of public education about juries and jury service.<sup>135</sup> In 2002 the National Center for State Courts undertook a national program to increase citizen participation in juries. The program promotes public awareness and understanding of jury service and supports state and local court improvements to the jury system through the promotion of citizen outreach and improving the conditions of jury service.<sup>136</sup>

The American Bar Association has formed the Commission on the American Jury with honorary chair United States Supreme Court Justice Sandra Day O'Connor and co-chairs New York Chief Judge Judith Kaye, Chicago lawyer Manuel Sanchez, and Oscar Criner, foreman of the Arthur Andersen 2002 trial jury. The ABA Commission on the American Jury is charged with outreach to the public, the legal profession, and the courts. A wealth of information is available at the ABA Jury Initiative web pages, although it does not appear that a public outreach program has been published for the 2006-2007 time frame.

Public outreach and education about the jury system is critical to the survival of the American jury. William L. Dwyer, a veteran litigator and United States District Court Judge, tells us:

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<sup>134</sup> Official Comment 5 to Arizona Rules of Evidence, Rule 611, provides: “At the close of the evidence in a trial involving numerous exhibits, the trial judge shall ensure that a simple and clear retrieval system, e.g. an index, is provided to the jurors to assist them in finding exhibits during deliberations.” Doesn’t this include digitalized exhibits and their index?

<sup>135</sup> Arizona Supreme Court, *Committee On More Effective Use Of Juries, List of Recommendations* (July 2, 2004). Available at <http://www.supreme.state.az.us/jury/Jury1e.htm>

<sup>136</sup> Ann L. Kieth and Paula L. Hannaford-Agor, *A National Program to Increase Citizen Participation in Jury Service, Jury Management, Trends in 2002* (2002). Available at [http://www.ncsconline.org/WC/Publications/KIS\\_JurMan\\_Trends02\\_Pub.pdf](http://www.ncsconline.org/WC/Publications/KIS_JurMan_Trends02_Pub.pdf)

## The Arizona Jury: Past, Present and Future – Executive Summary

The founders of the American republic would be surprised to learn that the jury's survival is in doubt. When they wrote the Constitution, trial by jury was widely seen as "the very palladium of free government," to use a phrase from *The Federalist Papers*, and would no more have been abandoned than would the ballot box.<sup>137</sup>

A public outreach effort of patterned public education in the public schools, in community groups and with media outlets would directly aid juror communication if many ways. Citizens would have a better idea about the function of jurors and the jury. Response rates to jury summons should increase. A greater portion of the public would become educated about methods of rational discourse, mutual respect, and effective decision making. The overall legitimacy of, and respect for, the judicial system would be maintained and perhaps enhanced.

### CONCLUSION

Arizona has come a long way since the beginning of jury reform efforts over a decade ago. Arizona has occupied a national leadership position in jury reform efforts. Arizona citizens through jury service have a better opportunity to participate meaningfully in the third branch of government. Much has been accomplished.

Many of the first generation leaders and change agents of Arizona jury reform have retired or are nearing retirement. The second waive of empirical study has compiled several remarkable data sets that will be of continued use to jury researchers for many years. The third stage of Arizona jury reform has arrived.

In this author's view continued efforts should concentrate not only continue empirical research of those reforms in place and under consideration, but should specifically:

1. Continue efforts to achieve application of prior Arizona recommendations:
  - a. Aiding jurors in the mechanics of deliberation;
  - b. Allowing pre-deliberation discussion of evidence in criminal cases; and,
  - c. Allowing the criminal jury to know the range of possible punishment.
2. Develop and implement jury communication recommendations that incorporate court technology.
3. Develop and implement public education and outreach about jury function and duty.

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<sup>137</sup> William L. Dywer, *In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy*, St. Martins Press (2002) at 1.