Reforming Jury Trials

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Reforming Jury Trials

William W Schwarzert†

Do juries understand cases sufficiently to be able to decide them intelligently? The increasing complexity of litigation has raised the concern that often they do not. The jury system developed at a time when the issues that came before jurors were generally within their common experience.¹ For the most part, these issues revolved around credibility and reasonableness of behavior.² That, of course, is no longer true. Jurors must now render verdicts on complex and technical issues arising under securities, environmental, patent, product liability, antitrust, and other laws in cases that are often lengthy and involve vast amounts of complicated evidence.³

The challenge today is how to make these cases understandable to jurors.⁴ Much of their complexity is the product of lawyers' work—excessive discovery and proliferation of evidence and is-

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¹ Director, Federal Judicial Center; United States District Judge, Northern District of California, 1976-1990. I thank my law clerks, Jon Bernhardt and Charlene Morrow, my externs Thomas Zellerbach and Lai Wong, and Elizabeth Loftus, Edith Greene, Robert F. Hanley, Harry M. Reasoner, the Honorable John F. Grady, and the Honorable Stanley A. Weigel for their help and suggestions.

² Cases of the magnitude regularly encountered today were beyond the contemplation of judges and lawyers when the jury system developed. Lord Campbell, later Lord Chancellor, speaking in 1847 of a complicated accounting action, said “that it would be ‘a mere mockery’ to bring such an action before a jury. Why, he exclaimed, a judge at nisi prius would say that if they sat for a fortnight they could not try such a case.” Patrick Devlin, Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 Col L Rev 43, 67 (1980).

³ See, generally, id.


⁵ This paper does not address the much mooted issue whether complex cases should be tried to juries, and whether the Seventh Amendment requires it. See, for example, In re U.S. Financial Securities Litigation, 609 F2d 411 (9th Cir 1979); In re Japanese Electronics Products Antitrust Litigation, 631 F2d 1069 (3d Cir 1980); Peter W. Sperlich, The Case for Preserving Trial by Jury in Complex Civil Litigation, 65 Judicature 395 (1982). Nor does it address other methods suggested for dealing with complex cases. Its purpose is limited to examining means of improving jury trials.

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sues—and judges’ passivity and permissiveness. And much of the difficulty they present to jurors flows from the way they are tried.

Some of the obstacles to jury comprehension arise from the taboos and superstitions that surround jury selection and jury conduct during the trial. They are reflected in purely random juror selection, formalistic instructions given at the end of the case, and in prohibitions against jurors taking notes, questioning witnesses, talking to each other about the case and learning about such things as insurance coverage and treble damages. These accoutrements of jury trials are remnants of another day when the adversary process dominated the trial and jury comprehension was of little concern. Today, they produce trials which leave jurors floundering in a mass of disconnected and obscure evidence and legal mumbo jumbo. Some lawyers may favor this state of affairs because it invites appeals to emotion. Some judges may favor it, thinking it lessens their burdens and responsibilities and the risk of reversible error.

But the old ways will no longer do. Unless trial by jury is reformed, it may lose credibility and sink into disrepute. If we accept the premise that jurors are capable of deciding complex cases, then we should treat them as responsible persons and not hobble their capacity to understand the cases before them.

My purpose here is to examine methods to enhance jury comprehension. Some of these methods are now coming into use, though they face resistance from an inherently conservative legal establishment. Others may be considered unthinkable. This article asks the reader to think about jury trials under a Rawlsian analysis: if we were to create that institution now, what would be the original position on the issues raised?

Proposals for improving jury comprehension, no matter how minor, call for trade-offs. Each will encounter opposing arguments: that it is burdensome, that it jeopardizes jury neutrality, that it interferes with the adversary process, that it may impair jury deliberations. I make no claim that any of these proposals is necessarily cost-free. But there are costs as well, though sometimes hidden, when juries decide cases they do not understand.

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* Sperlich, 65 Judicature at 417.

* Gerry Spence: “I never have tried a complex case . . . all cases are reducible to the simplest of stories . . . . The problem is that we, as lawyers, have forgotten how to speak to ordinary folks.” John Kenneth Galbraith: “[T]here are no important propositions that cannot be stated in plain language.” Quoted in Saul M. Kassin and Lawrence S. Wrightsman, The American Jury on Trial: Psychological Perspectives 127, 152 (Hemisphere, 1988).

I generally make no distinction in this article between civil and criminal cases. There is no a priori reason why jury comprehension should not be enhanced in both. But it is clear that change must be approached with greater caution in criminal cases, for any departure from the norm provides grounds for appeal. That, however, should not preclude efforts to bring about improvements.

I. PRETRIAL

The jury trial begins long before the judge seats the last juror and the lawyers make their opening statements. The die is cast during the pretrial process—what is done, and more often what is not done, during that process largely determines the scope of the issues to be tried, the admission of evidence and the length of the trial. The conventional approach is for judges to do little more than set the trial date and perhaps require that lawyers exchange lists of witnesses and exhibits, leaving the trial to be run largely by the lawyers.

As a result, lawyers, if permitted, will try every issue, present every witness and offer every exhibit that might possibly persuade a jury to return a verdict in their favor. Understandably, lawyers do not take chances. That is no reason, however, why judges should not take active part in the pretrial process. By using methods such as those discussed here, they can promote jury comprehension and improve the quality of the trial.

Active judicial management has been attacked by commentators who fear it will undermine the adjudicatory process. But the critics of so-called managerial judges do not appear to have considered the benefits of management in improving the quality of adjudication, and in particular the quality of jury trials.  

Some also argue that because so few cases actually go to trial, it is a waste of the judge's time to conduct extensive pretrial proceedings. The steps suggested here do take time, but that investment is repaid manyfold by increases in the number of settlements and shorter trials.

* Professor Judith Resnik's leading article, Managerial Judges, 96 Harv L Rev 376 (1982), is silent respecting the use of the judge's pretrial and trial management powers to improve the quality of the trial. See also E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U Chi L Rev 306 (1986).
A. Issue Control

Judges serve a critical function in complex litigation by identifying and defining the issues that need to be tried. Repeatedly, judges and lawyers blunder into long and costly trials when a reasonably thorough pretrial would have disclosed issues that could have been resolved without trial. By exploring each asserted issue with the lawyers at pretrial, the judge may well conclude that some do not involve a genuine factual dispute, and hence that certain evidence need not be presented at trial. Even disputed issues that now go to trial could often be resolved as a matter of law on motions for partial summary judgment. In my own experience, weeks of trial have been saved by ruling before trial on issues about which there was no genuine evidentiary dispute, such as the interpretation of contracts or patents, the definition of the relevant market in antitrust cases, and the availability of defenses such as releases, sovereign immunity and statutes of limitations.

Some lawyers would rather go to trial than face the moment of truth at pretrial, and many judges either fear reversal or consider themselves too busy to do the necessary work. However, these attitudes impose costs and burdens on the parties and the justice system that can and should be avoided. Eliminating unnecessary issues shortens trials and improves jury comprehension. Doing so in no way interferes with the ability of the lawyers to present their cases, since there is no principle or policy that gives lawyers the right to try undisputed or irrelevant issues.

One way judges can promote issue identification and narrowing is by requiring lawyers to submit proposed substantive jury instructions before the pretrial conference. Lawyers should draft instructions to set forth clearly the governing rules of law and the factors controlling their application. The process of preparing such instructions and discussing them at the conference is an excellent vehicle for concentrating the participants' minds on defining and narrowing issues. Drafting forms of special verdicts and jury interrogatories also helps but does not substitute for the analytical process suggested here.

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B. Limiting the Scope of the Trial

Limiting the scope of the trial will also improve jury comprehension. Jurors do not have an unlimited attention span. Their capacity to absorb, retain and effectively use information (especially on unfamiliar subjects) is finite. Post-trial interviews with jurors invariably disclose complaints about the lawyers' prolixity and tendency to present too much evidence.

Rule 16 of the Federal Rules of Civil Procedure gives the judge specific authority to limit proof, and Rule 403 of the Federal Rules of Evidence authorizes exclusion of relevant evidence to prevent "undue delay, waste of time, and needless presentation of cumulative evidence." The judge has broad discretion in applying these rules.11

Detailed review of the proposed testimony and exhibits at the pretrial conference may disclose cumulative witnesses and evidence that is unnecessary because it relates to undisputed matters. The judge can limit the number of expert and character witnesses. The judge can also exclude cumulative exhibits and direct lawyers to redact or summarize voluminous exhibits.12

C. Imposing Time Limits

Controlling the length of trials is another device for improving jury comprehension.13 When a trial continues for several weeks, jurors become bored and exhausted, retaining only highlights of the evidence. The dioxin case against Monsanto Company is an extreme example; the trial lasted three and a half years in an Illinois state court. After the jury returned a $16 million verdict, a newspaper report quoted one of the jurors as saying that she only went along with the verdict to get it over with: "I'd been there for three and a half years, and I was really tired. I just wanted my peace of mind."14

Lengthy trials also narrow the selection of jurors, resulting in a less representative jury. Jurors available to serve in long trials are more likely to be unemployed or retired, female, and unmar-

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13 See, for example, SCM Corp. v Xerox Corp., 77 FRD 10 (D Conn 1977).
ried, and less likely to have a college education. Sometimes it is sufficient for the judge to urge the lawyers to keep the trial short and avoid unnecessary proof. But when judicial intervention appears necessary, a trial may be shortened not only by limiting the issues and evidence but also by limiting the time parties have to present their cases. Time limits are especially useful when it is difficult to determine in advance what evidence is immaterial or cumulative, and what testimony though possibly cumulative is nevertheless necessary (such as that of all witnesses to a disputed event). In such cases, judges have imposed time limits, often without objection, and occasionally even with the approval of counsel, by giving each side a specified number of trial days to present its case. To prevent prejudice to a side from its opponent's excessively long cross-examination, it is better to allow each side a specified number of hours to use, for both direct and cross-examination, as it sees fit. Time for cross-examination is then charged against the party conducting it.

Great care must, of course, be used in determining the number of hours allowed. The court should consult with counsel, find out the bases for their estimates, and set a fair and reasonable limit in light of the needs of the case. It is better to grant counsel a cushion for contingencies and hold them to the time limit than to have to rule on mid-trial requests for extensions. Such extensions defeat the purpose of the limitation and may be unfair to the side that conformed to the limit.

D. Streamlining the Trial

A variety of other steps can be taken at pretrial to smooth and speed the course of the trial. For example, in multiparty cases, the judge can limit the examination and cross-examination of any witness to one lawyer per side. Before the trial begins, the judge can require lawyers to mark and submit exhibits, and can rule on objections. Once the trial starts, lawyers can be directed to raise objections and other legal matters outside of regular trial hours, and to give the opponent a day's advance notice of the witnesses to be


called and the documents to be used. This will help avoid sidebar conferences and recesses, save time, and minimize distractions for the jury.

E. Courtroom Arrangements

In some recent complex cases, the courtroom had to be physically altered before trial in order to accommodate large numbers of lawyers or security concerns. This provides an opportunity for the court to consider improving arrangements for the jury. For example, the witness box can be moved to face the jury. While in the standard courtroom the witness looks away from the jury toward the interrogating lawyers, some modern courtrooms have a circular design in which the witness faces the jury as well as the lawyers. Jurors will probably be more attentive when a witness looks at them while testifying.

II. Jury Selection and Composition

A. Jury Selection

The process of calling prospective jurors is designed to produce a representative cross-section of the population for jury service. There is no right, however, to have a representative cross-section on any particular jury; indeed, there would be no way to achieve this result. Nor is there a right to a randomly selected jury. Thus, there is no reason why, from among a venire randomly called for service in a case, one should not select those who by education and experience seem to be best qualified to decide the particular case. We do not hire plumbers, dentists, mechanics or even lawyers by random draw from among their cohorts, let alone from the population at large. Society operates on the premise that skill and experience are relevant and permissible selection criteria.

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18 *Holland v Illinois*, 110 S Ct 803 (1990) (given a pool of jurors which represents a fair cross section of the community, the Sixth Amendment does not preclude the use of peremptory challenges to strike members of certain groups from the jury). See also *Frazier v United States*, 335 US 497, 507 (1948) (given a lawfully selected array, there is no cause to complain that the jury finally chosen happens not to be representative of the array or the community).

19 *United States v Wellington*, 754 F2d 1457, 1468 (9th Cir 1985) (holding no Sixth Amendment right to a randomly selected jury). The provisions of 28 USC §§ 1861 and following, pertaining to the random selection of jurors are designed to eliminate illegal discrimination in the selection process and to provide a fair cross-section of the community for the venire; they do not necessarily preclude modification of the pure random selection of jurors out of the venire.
Jury selection seems to be the outstanding exception to the practice of using expertise as a selection criterion. There may be reasons for this, but in complex cases, those reasons, and hence the reasons for random selection, become attenuated. The loss of random selection would not obviously favor one side over the other, so long as each side retains the right to exercise challenges for cause and peremptory challenges.

A non-random selection process could follow one of several procedures. One would be to allow each lawyer to select a given number of jurors following voir dire of the venire. Each side would be entitled to exercise peremptory challenges and challenges for cause against the jurors chosen by the opponent. From those remaining, each lawyer would then select a number equal to one-half of the number of jurors and alternates required. Thus, the jury would be composed entirely of jurors selected by each side. This procedure would necessarily require the parties' consent.

In an alternative procedure, the judge would select a sufficient number of prospective jurors following voir dire, based on their education and experience. The judge would then meet in chambers with counsel, discuss the list with them, consider their comments, rule on their challenges on the record, and at the end of the process, seat the jury that has been selected. Chief Judge John F. Grady of the Northern District of Illinois has used this procedure in several cases with the consent of the parties and to their and the court's apparent satisfaction. Whether the court could do so without the parties' consent is an open question, but the procedure may have sufficient merit to warrant experimentation. Some may object that this is undemocratic and gives too much power to the judge.

But where is it written that random selection is integral to the democratic process? Jurors rejected in one case would still be eligible to serve in others, particularly criminal cases where this process of selection would probably not be used. Permitting the judge to control the selection process does not mean he or she will

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20 Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.

G.K. Chesterton, The Twelve Men, in Tremendous Trifles 59 (Methuen & Co., 1930).

21 The judge has, in any event, considerable power to influence the trial in making discretionary rulings on challenges for cause and juror requests to be excused.
unfairly influence the outcome, unless it is assumed that the right to jury trial encompasses a right to have the least qualified jurors serve. It is difficult to derive from the Seventh Amendment a right to jurors who are loners, or who may be susceptible to a particular appeal, or who may fall into some other stereotypical classification presumed to favor one side or the other.

B. Voir Dire

Controversy abounds over the prevailing practice of judge-conducted voir dire in the federal courts. Some lawyers object because they feel that the probing for bias is insufficient. This objection can be overcome largely by using jury questionnaires, which have been successfully employed in complex cases. Questionnaires, completed by members of the venire and furnished to the lawyers and the judge before voir dire begins, can provide relevant information about the prospective jurors. With that information in hand, either judges or attorneys can conduct more focused voir dire, and attorneys can exercise challenges more wisely. If non-random selection is used, as suggested above, questionnaires will be especially helpful in making the selections.

C. Alternate Jurors

Under Federal Rule of Civil Procedure 47(b), the judge has discretion over the seating of alternate jurors in civil cases. Although that rule provides that alternates shall replace regular jurors in the order in which they are called, it does not by its terms preclude seating a jury of more than six in lieu of designating alternates. If that is done, the parties by stipulation can either retain any jurors in excess of six remaining at the end of the trial, or excuse them by drawing lots. Many judges now use this method, rather than designating alternates at the outset, reasoning that when none of the jurors regard themselves as supernumeraries

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22 Hanson v Parkside Surgery Center, 872 F2d 745, 748, (6th Cir 1989) (not reversible error for trial court to submit case to eight jurors, with no alternates designated); United States v Aguon, 851 F2d 1158, 1171 (9th Cir 1988) (although discouraging "unauthorized deviation(s) from standard procedure," harmless error not to designate until start of deliberations which two of fourteen jurors were alternates); United States v Rauch, 574 F2d 706, 707 (2d Cir 1978) (not reversible error not to designate alternate jurors until end of trial). See Manual at 142 n 45 (cited in note 9).
likely to be excused before deliberations begin, they will all be more attentive and responsible.

III. JURY INSTRUCTIONS

Scholars, judges and other commentators have devoted considerable attention to the subject of jury instructions. The form, timing and substance of instructions are all areas which judges and lawyers can reform in order to improve jury comprehension.

A. Form of Instructions

"The minute a thing is long and complicated," Will Rogers is said to have observed, "it confuses. Whoever wrote the Ten Commandments made them short. They may not always be kept, but they can be understood." Making a similar point, Winston Churchill urged communicators to get rid of "wooly phrases" and "not shrink from using the short expressive phrase, even if it is conversational." In recent years, judges and lawyers have made some progress towards instructing jurors in concise, plain English rather than verbose legalese. But much remains to be done. Judicial inertia and fear of reversal continue to make many judges reluc-
tant to adopt methods conducive to improved comprehension. Judge Jack B. Weinstein of the Eastern District of New York has urged that jury instructions be viewed "as an opportunity to educate the jurors as we would want ourselves educated if we were in their position." Lawyers and judges can greatly aid jury comprehension by drafting instructions in plain English, tailoring them to the facts of the case, avoiding broad generalizations that make their application more difficult, and providing the jury with decision trees or algorithms to follow in their deliberations.

B. Preinstructions

The case for giving the jury preliminary instructions at the start of the trial is compelling. Preinstructions are the logical corollary to the lawyers' opening statements. Especially in complex cases, it is, as one observer has said, "remarkably droll to instruct the jurors at the end of the trial as to what it has been all about, to what they should have paid attention, to what laws evidence was to be related, and how they should have regarded what they have heard." Or, as another commentator has observed, not giving preinstructions is like telling jurors to watch a baseball game and...
decide who won without telling them the rules until the end of the
game.

Both Rule 51 of the Federal Rules of Civil Procedure and Rule 30 of the Federal Rules of Criminal Procedure now provide that the court, at its election, may instruct the jury before or after argument, or at both times. Thus the rules do not preclude giving preinstructions at the start of the trial, and the decisions have approved it so long as the jury is again instructed at the end of the case.\textsuperscript{32} Preliminary instructions are desirable for a number of reasons: substantive instructions provide a framework which will help the jury understand the issues in the case and organize and recall the evidence; procedural instructions will help jurors deal with questions of credibility and inference as they come up, rather than retrospectively.\textsuperscript{33}

The principal argument against preinstructions is that they require the judge to make rulings which may later turn out to be erroneous. But if the judge conducts the thorough pretrial recommended above, giving consideration to the final instructions, he or she will be prepared to make the rulings required to preinstruct. While this will take some time, it will save much more in trial time and enhance jury comprehension.

Another argument against preinstructions is that they may cause jurors to make up their minds too soon.\textsuperscript{34} Some evidence indicates, however, that jurors arrive at tentative opinions in the case early in the trial, regardless of whether they are preinstructed.\textsuperscript{35} The benefits of improved comprehension outweigh any concern over such tentative opinions. Moreover, if jurors do form early opinions, it is better that they should have first received some instructions.

\textsuperscript{32} United States v Ruppel, 666 F2d 261, 274 (5th Cir 1982) (while the court approved the trial judge's decision to follow the "better practice of instructing the jury on the fundamentals of a criminal trial prior to taking any evidence," the initial instructions must be included in the final charge); Jerrold Electronics Corp. v Wescoast Broadcasting Co., 341 F2d 653, 665 (9th Cir 1965) (where the judge gave instructions before and after argument, the preinstructions were found not prejudicial).

\textsuperscript{33} Manual at § 22.431 (cited in note 9); Strawn & Munsterman, 65 Judicature at 446 (cited in note 30); \textit{PLI} at 480 (cited in note 17).

\textsuperscript{34} Report of the Committee on Juries of the Judicial Council of the Second Circuit 43 (August 1984) ("2d Cir Report").

\textsuperscript{35} Kassin & Wrightsman, \textit{The American Jury} at 132, 135-36, 145 (cited in note 6).
Judges increasingly are giving procedural and substantive preinstructions. Studies confirm the desirability of doing so. One Second Circuit study concluded that the practice was useful and that the additional burden it placed on counsel and judges would become less important as it became routine.

C. Final Instructions

Many judges are giving jurors one or more copies of the charge or a tape recording of it. Appellate courts have approved this practice so long as jurors are instructed that they must consider the charge in its entirety. A survey of lawyers indicates that they overwhelmingly favor allowing the jury to see the charge. Similarly, a survey of jurors showed that over three-quarters wanted access to the written instructions during deliberations; some jurors have asked to have individual copies for ready reference.

Availability of the written charge in the jury room is almost certain to assist the jury in arriving at an informed verdict while reducing the need to send questions to the judge and to have parts of the charge re-read. The fear that it will lengthen deliberations and cause juries to hang has not been substantiated. An experiment conducted by the Second Circuit produced predominantly favorable results.

Some judges felt that having to prepare written instructions added to their burdens, but that effect can be minimized by storing standard instructions in computers or word processors and adapting them as necessary for the particular case. The process of preparing a written charge may have the incidental benefit of creating an incentive to make it short. As an alternative to a written charge, the judge's oral charge can be tape recorded and the recording given to the jury.

Although traditionally judges have given instructions after the closing arguments, many have now concluded that it makes more

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36 Bermant, Protracted Civil Trials at 50 (cited in note 16).
38 2d Cir Report at 42 (cited in note 34).
43 2d Cir Report at 76 (cited in note 34).
sense to give most of them at the close of the evidence before the arguments. Lawyers commonly give jurors a preview of the instructions in their closing arguments; this will be unnecessary if the instructions are given first. Moreover, the closing arguments will be more meaningful to jurors if they have first been given the law which they must apply to the facts. The Federal Rules have been amended to permit this practice. The judge would be well-advised, however, briefly to instruct the jury again after the lawyers' closing arguments on the rules governing their deliberations and their duty to follow the law as stated in the instructions.

Finally, in the appropriate circumstances, the judge may want to comment on evidence. Federal judges clearly have authority to do so as long as the way in which they do it does not improperly influence the jury. In a complex case, where the jury may be misled by counsel's argument on a matter foreign to their experience, an explanatory comment may be advisable to ensure fair consideration. For example, I informed a jury in an antitrust case, in which plaintiff claimed monopolization, that leasing of equipment, as opposed to outright sale, is a normal business practice which standing alone is not suspect.

D. Forms of Verdict

Federal Rule of Civil Procedure 49 offers several options on the form of verdict to be submitted to the jury. One requires the jury to answer written interrogatories on issues of fact in addition to returning a general verdict. This helps focus the jury's attention on key factual issues and may ease appellate review of complex cases. But it also creates a risk of internally inconsistent verdicts.

The court may require instead that the jury return a special verdict by responding only to specific questions on the material factual issues. This obviates the need to instruct on the law since the court will then apply the law to the facts found by the jury. Requiring a special verdict can simplify the jury's task and provide it with a clear road map for its deliberations. But basing the decision of a complex case, turning on mixed questions of law and fact, on a series of questions "susceptible of categorical or other brief

46 FRCP 51; FRCrP 30 and Notes of the Advisory Committee.
48 For a useful discussion, see Charles L. Weltner, Why the Jury Doesn't Understand the Judge's Instructions, 18 Judges' J (Spring 1979).
answers," as Rule 49(a) requires, will often be problematic. Special verdicts are, however, an option for judges to consider. Whether their use is advisable in any particular case depends on the nature and complexity of the issues to be decided.

E. Levelling with Jurors

Our legal system's single-minded devotion to a somewhat mechanistic notion of "fairness" has led us to keep from the jury important information that we fear might have an improper effect on the verdict. This practice reflects the condescension with which courts often treat jurors: we make them wait while the lawyers and the judge wrangle; we keep them in the dark about much of the proceedings, including the trial schedule; and we question them during voir dire in a manner many jurors find offensive. All of these practices can breed deep resentment.

The same attitude keeps us from telling jurors about such matters as the parties' insurance coverage, dismissal of or settlement with other parties, or trebling of damages in antitrust cases. The argument against full disclosure is that the information may unfairly influence jurors. But the assumption that keeping information from jurors will keep them from thinking about matters that commonly arise in the daily affairs of the public is nonsense. Jurors today are generally too sophisticated not to conjecture about such things as insurance or missing defendants. They bring with them to the jury room much information—and probably as

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** "It's not right!" snapped Larry, who was usually one of the least outspoken jurors. "Every time something important happens they go into chambers to work it out."

"Yeah," said Frank, also usually quiet. "That really gets me. Then after they talk it out behind that closed door they come back and just read a few legalsounding words out of a book. They treat us like ... uh, animals. No, like machines."

"Yeah," said Larry, "and I bet they don't act like machines in chambers. Back there I bet they talk and ask questions of each other like humans."

... Ernie watched the Judge and the attorneys leave and he could feel the blood pulsing in his hands as he gripped his chair. They were going behind closed doors as they'd been doing all trial long, and Ernie felt cheated, betrayed, and so he gripped his chair and at this moment he felt like quitting, like getting up and walking out and telling all these professionals to stick it up their ass. It was an outrage! Here they were, the jury, the "sole judges of the facts," and they knew nothing!

Villasenor, People vs. Juan Corona at 23, 196 (cited in note 26).

** In a survey of 1590 former jurors conducted for the Ninth Circuit, the most frequent complaint was being kept waiting, and not knowing why. 9th Cir Report at 5, 11 (cited in note 42).
much misinformation—about matters that could affect their verdict. Not telling them the facts only encourages them to speculate, and that speculation is as likely to be wrong as right, resulting in unfairness and prejudice. We would do better to face reality and level with jurors by giving them facts accompanied by appropriate cautionary instructions.\(^\text{61}\)

A recent study of 352 members of 38 jury panels in state and federal courts in Philadelphia ("Philadelphia study") revealed that half of the jurors assumed that defendants were covered by insurance, and over half of those jurors thought this had some effect on their decision.\(^\text{62}\) Their assumptions about insurance, however, were not necessarily in accord with the facts. Keeping the truth about insurance from jurors, therefore, may actually lead to unjust results.

Courts have disagreed over whether to let jurors know about the trebling of damages in antitrust cases. The majority are opposed, presumably because they want to protect the plaintiff against prejudice.\(^\text{63}\) That desire, however, does not keep jurors from bringing to the deliberations information or misinformation picked up elsewhere. For example, after the jury had returned a verdict in an antitrust case tried in my court, one of the jurors told me that he had heard from his daughter who was a law student that the damages would be quadrupled by the court! Surely in that case it would have been better to tell the jury the whole truth.\(^\text{64}\)

\(^{61}\) A sample instruction concerning insurance might read:

In this case, both the plaintiff and the defendant have insurance. The law does not permit you to be influenced by that fact. A plaintiff who pays premiums to buy insurance coverage is no less entitled to recover damages than one who does not. An insurance company that covers a defendant is entitled to exactly the same fair consideration by you as the defendant itself. Whatever it pays out it must ultimately collect from its insureds such as defendant.

\(^{62}\) See, for example, Noble v McClatchy Newspapers, 533 F2d 1081, 1090-91 (9th Cir 1975), vacated on other grounds, 433 US 904; Lehrman v Gulf Oil Corp., 500 F2d 659, 666-67 (5th Cir 1974); Pollock & Riley, Inc. v Pearl Brewing Co., 498 F2d 1240, 1242-43 (5th Cir 1974); Embry-Riddle Aeronautical University v Ross Aviation, Inc., 504 F2d 896, 905 (5th Cir 1974); Semke v Enid Automobile Dealers Assoc., 456 F2d 1361, 1370 (10th Cir 1972). But see Bordonaro Bros. Theatres, Inc. v Paramount Pictures, Inc., 203 F2d 676, 679 (2d Cir 1953). Treble damage instructions have been approved, however, where necessary to avoid confusing the jury. Standard Industries, Inc. v Mobil Oil Corp., 475 F2d 220, 223-24 (10th Cir 1973) (treble damage instruction approved where subject discussed in pretrial newspaper publicity and in closing argument); Noble, 533 F2d at 1091; Pollock & Riley, Inc., 498 F2d at 1243.

\(^{63}\) A sample instruction might read:

The antitrust laws require that whatever damage verdict you return must be trebled. That is a policy decision Congress has made. It must not be considered by you. It is your
Much of the problem discussed in this section may stem from the fact that judges and lawyers are out of touch with jurors. While they tend to harbor stereotypical assumptions about jurors, they rarely communicate with them outside the formal setting of the courtroom. Judges who have taken the time and trouble to meet informally with jurors after they returned their verdict have found the exchanges revealing and instructive. Listening to jurors after the trial can help judges improve the process by disclosing the degree of jury comprehension and suggesting ways to improve it. Similarly, lawyers can learn from listening to jurors after the verdict; if more did, they would be less likely to patronize jurors or try to play on their emotions. Some jurors may prefer not to discuss their experience, and they should, of course, be advised that they have no obligation to do so. But most jurors appreciate the attention and are glad to respond.

Some may be concerned about the effect of juror interviews on post-trial motions. Federal Rule of Evidence 606(b) severely limits the use of juror affidavits to attack a verdict. In the rare case where an expected post-trial motion may involve a question of juror conduct, the judge will have to use discretion in talking to jurors. The great benefits of communication between judge and jury, however, warrant taking some risk.

IV. PRESENTATION OF EVIDENCE

Although much has been written and said about how to try cases effectively to juries, the fundamental truth is often overlooked: a trial is an exercise in education. The most effective advocacy is not a slashing argument but a clear and well-organized exposition of the facts. Yet lawyers allow their preoccupation with the adversary process to get in the way of their teaching function. The presentation of evidence should serve to teach the jury, especially in complex cases. A number of techniques have proven effective. One is to use plain English. Lawyers and witnesses, especially experts, habitually use technical jargon to the consternation of jurors. When attorneys ask short and simple questions, and witnesses give short and direct answers, all in plain English, jurors will be better able to comprehend evidence. As Dizzy Dean is said
to have responded when told that he had fractured his toe, "Hell, it's not fractured, it's broken."

Much evidence becomes more comprehensible when presented with visual aids, such as a chart summarizing data, a chronology, an enlarged picture of an object, a diagram of a building, or a map. Juror surveys have shown that charts and diagrams have a powerful impact. In one survey, 92 percent of jurors said they were a major (50 percent) or at least a minor (42 percent) factor in their decision. Diagrams, models or videotapes make testimony about a physical object more meaningful and less time-consuming. Videotapes are particularly effective because jurors are accustomed to acquiring information from the television screen and thus react favorably to video presentations. Occasionally, lawyers may want, with the court's consent, to use visual aids for demonstration only without offering them as exhibits.

When the subject matter is technical, a tutorial before the trial for both jurors and the judge can be very helpful. This technique has been successfully used in high technology cases by Judges Pamela Rymer and William Gray of the Central District of California. Experts acceptable to the parties make the presentation, which is sufficiently basic to be non-controversial.

A mix of methods can be used to help jurors organize and remember the evidence. The court should take advantage of Federal Rule of Evidence 1006, which permits the use of summaries to present the contents of voluminous writings. The underlying evidence on which the summary is based need not be received into evidence, so long as it is made available to the opponent. Jurors should have access to exhibits while witnesses are testifying about them. Overhead projectors or juror notebooks can serve this purpose. Loose-leaf notebooks, provided by the court, may include, in addition to copies of key exhibits, fact stipulations, the preliminary instructions, chronologies or time line charts, lists of witnesses, a glossary of technical terms, and other relevant items. Mounting pictures of each witness, as he or she testifies, on a poster board in the courtroom or jury room, will also help jurors remember testimony.

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66 Guinther, The Jury in America at 67-68 (cited in note 29); PLI at 473-75.
67 PLI at 476-78.
68 Id at 469-70.
69 Id at 470-71.
These are some of the techniques for improving the presentation of evidence in complex cases. While their use is the lawyers' responsibility, the judge should encourage it to enhance jury comprehension and expedite the trial. At the same time, the judge should urge the lawyers to avoid techniques having the opposite effect. Reading depositions is a prime example: Few courtroom activities are less informative and more boring to jurors, who consistently complain about it in post-trial interviews. While occasionally a particular snippet of verbatim testimony can be important, for the most part the information in depositions can be presented in summaries. Often counsel will arrive at summaries by stipulation, especially when encouraged by the court. In a major antitrust case recently tried, the court required each side to submit, in advance of trial, summaries of deposition testimony it proposed to use. The opponent could object and submit counter-summaries. Differences the parties were unable to resolve were then submitted to the judge or magistrate for decision before trial.

Another perennial problem is that the volume of exhibits may overwhelm the jurors during deliberations. Common sense should tell us that jurors will not know what to do with exhibits during deliberations if they comprise thousands of pages. Should each juror read all of them? Should some read all? Should each read only arbitrarily selected excerpts? Lawyers should not offer, and the judge should not receive, more written material than any juror could read and absorb within an hour or two. For what is the point of exhibits jurors will not read? Instead, summaries and excerpts should be used as much as possible, and for those exhibits that must be received in their entirety, jurors should be given finding aids to help them locate what they need during deliberations.

V. JUROR CONDUCT

Chief Judge Warren Urbom of the District of Nebraska has succinctly described the way we treat jurors: "Jurors are rarely brilliant and rarely stupid, but they are treated as both at once." We expect jurors to remember and understand brilliantly the facts

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60 See also Cecil, Lind & Bermant, Jury Service at 27-31, 39 (cited in note 15) ("Jurors who heard pretrial instructions, were permitted to take notes and inspect documents and exhibits, and were permitted to examine charts and diagrams indicated that all these devices were helpful in enabling them to understand the evidence.").

61 PLI at 478-79.


63 Urbom, 61 Neb L Rev at 425 (cited in note 40).
and the law of complex cases, but often we think them too stupid to be trusted to take notes, ask questions, and in other ways take an active part in the acquisition and management of the information necessary to render an informed verdict.\textsuperscript{44}

\section*{A. Selection of the Foreperson}

Jurors traditionally have elected their foreperson. This is normally the first decision the jury makes when it retires to deliberate. Some judges, however, have taken the selection from the jury to save time and avert hurt feelings or disappointment. They designate the foreperson, either on the basis of the information disclosed during voir dire or arbitrarily, for example, by naming whoever is seated first as juror number one.

There is much to be said for letting the jurors elect the person whom the majority views as the leader. With the support of the majority of jurors, the foreperson is likely to be more effective in the important role of chair of the deliberations. Moreover, if we trust the jury with the responsibility of deciding the case, we should also trust them to select their foreperson.

\section*{B. Note-Taking}

The trial court has discretion over whether to permit jurors to take notes.\textsuperscript{46} Although long discouraged, note-taking has now become widely accepted.\textsuperscript{46} Most judges presiding over a lengthy or complex case would not be comfortable having to decide it without taking notes. Yet some continue to oppose juror note-taking. They believe that unless every juror takes notes, those who do will dominate the deliberations. They worry that note-taking will distract

\textsuperscript{44} Kassin & Wrightsman, \textit{The American Jury} at 131 (cited in note 6).
\textsuperscript{46} See, for example, \textit{United States v Bertolotti}, 529 F2d 149, 159-60 (2d Cir 1975); \textit{United States v Maclean}, 578 F2d 64, 65 (3d Cir 1978); \textit{United States v Polowichak}, 783 F2d 410, 413 (4th Cir 1986); \textit{United States v Rhodes}, 631 F2d 43, 45 (5th Cir 1980) (while jury note-taking is a matter within the discretion of the trial court, the court emphasized the need to instruct the jury on the proper use of notes during deliberation); \textit{United States v Johnson}, 584 F2d 148, 157-58 (6th Cir 1978); \textit{United States v Braverman}, 522 F2d 218, 224 (7th Cir 1975) (the decision to allow a jury to take notes as well as the procedures for note-taking are matters within the sound discretion of trial court); \textit{United States v Anthony}, 565 F2d 533, 536 (8th Cir 1977) (the length and complexity of case was such that note-taking may have assisted jury in sorting out evidence); \textit{Toles v United States}, 308 F2d 590, 594 (9th Cir 1962) (no abuse of discretion in trial judge's decision to permit note-taking); \textit{United States v Riebold}, 557 F2d 697, 705-6 (10th Cir 1977) (the ultimate purpose to be served is that of aid and assistance to the jurors); \textit{Goodloe v United States}, 188 F2d 621, 622 (DC Cir 1950); Withey, 24 Ariz L Rev at 722 (cited in note 10).
\textsuperscript{46} Urbom, 61 Neb L Rev at 409-17 (cited in note 40).
jurors from observing witness demeanor and listening to the testimony, and that the notes may be faulty or misleading. It seems more likely, however, that a juror who takes notes will be forced to concentrate and try to understand what he hears, and that his notes will help him remember the evidence.\textsuperscript{67}

In the Philadelphia study, the judges found no problems with note-taking and generally favored it. The jurors, too, generally favored it; 70 percent took notes. Eighty-nine percent had no problem with the accuracy of information recorded by their peers. Only about a third of the jurors said that note-takers led or dominated the deliberations, but those jurors might have done the same had note-taking not been permitted. Eighty-nine percent of the notetakers said they would do so again.\textsuperscript{68} Similarly, in a Ninth Circuit study, 81 percent of jurors favored allowing jurors to take notes.\textsuperscript{69} A more limited Second Circuit study reached similar results; it concluded that, while note-taking was not always useful, it did no harm and often helped.\textsuperscript{70} The results of these studies suggest that judges should permit and perhaps even encourage note-taking.\textsuperscript{71}

The decision whether or not to take notes should, however, be left to the individual jurors. Only those who are comfortable with it will take notes, and to prevent those jurors from doing it may make them feel that an already difficult job has been made even harder. The judge should instruct that each juror’s notes are only for his or her personal use and should not be read or given to anyone else.

C. Questions by Jurors

Permitting jurors to ask questions during the trial is more controversial than note-taking. In most jurisdictions, the trial judge

\textsuperscript{67} Kassin & Wrightsman, \textit{The American Jury} at 128-29 (cited in note 6).

\textsuperscript{68} Guinther, \textit{The Jury in America} at 68-69 (cited in note 29).

\textsuperscript{69} 9th Cir Report at 11, 17 (cited in note 42). To the same effect, see Cecil, Lind & Bermant, \textit{Jury Service} at 30 (cited in note 15).

\textsuperscript{70} 2d Cir Report at 62 (cited in note 34). See also Bermant, \textit{Protracted Civil Trials} at 49-50 (cited in note 16).

has discretion over the matter. Conventional wisdom holds that the lawyers who are familiar with the case are in the best position to determine what questions should be asked. It is the lawyers’ job to present the case, and the jury’s to decide it from the evidence received. If a lawyer does the job poorly, he and his clients suffer the consequences. Moreover, permitting jurors to ask questions, some fear, could be disruptive and could convert jurors from intelligent listeners to active participants, if not partisans. Jurors may develop their own ideas about the case and attempt to pursue them by asking questions; to allow such questions could prejudice a party’s case (for example, a juror could ask whether the defendant’s product has been involved in other lawsuits). Some of their questions may be answered by later witnesses, and thus be unnecessary; others may not be material to the theory on which the case is being tried.

Courts have, however, also seen benefits in permitting questions. Common sense tells us that some jurors at some time during the trial will not understand some of the evidence being offered: it may be the meaning of a word, the significance of an exhibit, or a part of an answer lost in a moment of distraction. What judge would want to decide a complex case without being able to ask a question? How much more important, then, is it for jurors, to whom the entire process and much of the material may be foreign, to be able to ask questions? A juror who becomes con-

72 De Benedetto v Goodyear Tire & Rubber Co., 754 F2d 512, 516-17 (4th Cir 1985) (although the court considered that the “practice of juror questioning is fraught with dangers which can undermine the orderly progress of the trial,” the record revealed no bias in the 95 questions asked over a three week long trial; moreover, the court found that “the vast majority of jurors’ questions were technical in nature and reflect a commendable degree of understanding and objectivity by the jury”); Urbom, 61 Neb L Rev at 417 (cited in note 40).


74 See, for example, United States v Callahan, 588 F2d 1078, 1086 (5th Cir 1979); United States v Witt, 215 F2d 580, 584 (2d Cir 1954); DeBenedetto v Goodyear Tire & Rubber Co., 754 F2d 512, 516 (4th Cir 1985) (although juror-questioning and questioning by trial judge are clearly distinguishable, both are matters within the trial court’s discretion).

75 Then Ernie started to talk about how the judicial system was outdated from the jury’s point of view—that, hell, so much more could be done with a jury than just have them sitting there like mummies all trial long. Cal and Victor agreed, and Larry and Frank, who were sitting nearby, also agreed. Jury members, because they weren’t professionals, were treated like the least important people in the courtroom when, hell, they were the ones who ultimately made the final decision. Why weren’t they allowed to ask a question now and then through the Judge? Why couldn’t they write down what they believed the attorneys had neglected to ask and submit these questions to the Judge and have the Judge ask the question? Why didn’t the system make some use of their collective mind?

Villasenor, The People vs. Juan Corona at 166 (cited in note 26).
fused early in the trial may miss the significance of later evidence. Such a juror will not be an effective participant in the deliberations and may be dominated by those who claim to have understood the evidence.

Lawyers cannot clear up juror confusion or lack of understanding if they do not know it exists. And even if the case is well tried, jurors may have questions. Not all of those questions will necessarily be appropriate to ask, but if jurors are permitted to ask for clarification or reiteration, they will be less dependent on other jurors for answers and better able to arrive at an informed verdict.

In the Philadelphia study, 80 percent of the jurors said that they wanted to question witnesses and 49.5 percent still had questions they wanted answered at the end of the case. The reaction to a Second Circuit experiment allowing jurors to ask questions was predominantly favorable. A University of Wisconsin study found that none of the feared disadvantages materialized; jurors did not appear to take sides but were more attentive and confident of their verdicts. Chief Judge John F. Grady has also permitted jurors to ask questions in several cases and has encountered no problems.

If jurors are permitted to ask questions, they should be instructed appropriately at the beginning of the case. The judge should tell them that the purpose is to help them understand the evidence and should caution them to ask questions only for clarification of the evidence, not to develop or explore theories or arguments of their own. Jurors should be told that the questions will be subject to objections by counsel, that the court may rule them out of order with or without objection, and that they are to draw no inferences from such rulings.

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76 Guinther, The Jury in America at 295, 310 (cited in note 29).
78 Minnesota Test Allows Jurors to Ask Questions, The Recorder 2 (June 8, 1989); Kassin & Wrightsman, The American Jury at 130 (cited in note 6).
79 Strawn & Munsterman, 65 Judicature at 447 (cited in note 30); PLI at 471-72 (cited in note 17).

A sample instruction might read:

You may ask questions of the witnesses if you find it necessary to clarify their testimony. The purpose is to help you understand the evidence. So if there is something in the direct or cross-examination of a witness you do not understand, write it down and give your question to [the bailiff] before the witness is excused.

You must let the lawyers try the case, however, so do not ask questions that might be interpreted as argument or as trying to prove some point of your own. The lawyers, of course, are entitled to object to any question, and I may rule it out of order if it is inappropriate.
Questions should be submitted in writing, usually before the witness leaves the stand. Some judges permit jurors to question witnesses directly and have not encountered problems; in a highly technical case, where it is important that jurors understand testimony as it comes in, this may be desirable. Under either procedure, the judge should decide initially whether to allow the question and, if so, give the attorneys an opportunity to object.

D. Discussions among Jurors

Judges routinely instruct jurors not to discuss the case with anyone, including the other jurors, during the trial. The purpose is to insulate individual jurors against outside influence and help them keep an open mind.

In a complex and lengthy case, however, it defies reason to expect jurors, who may be confused, troubled, and perhaps overwhelmed by the unaccustomed responsibility, not to share their concerns and look to their colleagues for help and mutual support. One study suggests that over 10 percent of jurors violate the injunction not to discuss the case.

Again, is it better to turn away from the truth or to face it? At the cost of tolerating a slight departure from the conventional deliberation process, we could gain the benefit of improved comprehension by allowing jurors to talk with each other about what they hear and see as the trial progresses. Discussion among jurors may reveal areas of misunderstanding or confusion that jurors could then clarify by questioning the witnesses or the judge. It may also help ease the tension that jurors experience sitting on a long and complicated case. That such discussions may influence the views of some jurors before the trial is over is not objectionable, since any tentative opinion so formed must still stand the test of full debate among the entire jury during the deliberations. In any event, the lonely juror who, unable to talk to the others, remains confused during the trial is not likely to be an effective participant in the verdict deliberations.

Permitting jurors to talk to each other about the case during the trial may have other positive effects. There is evidence that the

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80 Manual at § 22.42 (cited in note 9). A study sponsored by the American Judicature Society is currently under way, with over one hundred judges participating. See Lis Wiehl, The Law: After 200 Years, the Silent Juror Learns to Talk, NY Times B5 (July 7, 1989); Rorie Sherman, Wider Role for Jurors Is Studied; Mushrooms?, Natl L J 3 (July 10, 1989).

opinions jurors form early in the trial often become their decisions later. It is possible that a juror may be less prone to form and hold to an early opinion if he or she hears that others view the evidence differently. Discussions with other jurors may suggest to a juror different perspectives and interpretations that will lead to more thoughtful and open-minded consideration of the case. Although the benefits of relaxing the traditional rule are not provable, the rule’s disadvantages seem sufficiently clear to justify jettisoning this unnatural and burdensome restriction.

Judges should, of course, continue to instruct jurors not to talk about the case to, or in the presence of, anyone not on the jury under any circumstances, to keep an open mind during the trial, and eventually to reach a verdict only after full discussion with all the other jurors.

E. Requests for Read-Back of Testimony

Surprisingly, some judges will not grant jury requests to have trial testimony read back, presumably on the theory that unless all relevant testimony is read back, jurors may get a distorted picture. Yet we ought to give jurors whatever assistance we can to help them arrive at an informed verdict. The jury’s judgment of what it needs should be respected within reasonable limits.

VI. RESTRUCTURING THE TRIAL

A. Bifurcation of Issues

Bifurcation is a well-established practice sanctioned by Federal Rule of Civil Procedure 42(b). Typically, courts use it to avoid a trial of damage issues in cases where liability may not be found. Threshold issues such as contract interpretation, statutes of limitations, or market definition may be appropriate for separate trial if the outcome could substantially affect the remainder of the litigation. Bifurcation can produce economies except where much of the evidence must be produced at both trials.

A variation on this theme is structuring the trial to try one issue at a time. Instead of having the plaintiff present his entire case followed by defendant’s, it may be practical to single out a

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pivotal issue such as causation and hold a trial on that issue only. Depending on the verdict, the trial would then move to the next issue. This procedure permits the jury to concentrate on one major issue at a time therefore improving jury comprehension.85

The procedure of trying one issue at a time can be made more effective by requiring all critical witnesses, particularly experts, to remain available during the trial of that issue. This would enable the jury or the court, after hearing the opposing experts, to ask questions of experts who have previously testified. Experts do not always fully disclose the reasoning that leads them to differ with each other; they usually do not explain that their opinions are the product of a choice among different (often unarticulated) assumptions or risk assessments. Creating in effect a confrontation of experts at trial by allowing questioning back and forth will help uncover the reasons for their differences and should significantly aid jury comprehension.

B. Interim Statements or Summations

The traditional opening statement serves as a road map for the jury. But, like travellers on a long trip, jurors may find that they must consult their maps more than once to find their way.86 Some lawyers have used "interim summations" to meet this need. In Westmoreland v CBS, Judge Pierre N. Leval, expecting a lengthy trial, gave counsel on each side two hours for interim summations. Each side could use its time as it chose, so long as it did not interfere with its opponent's presentation of evidence or the court's schedule. During 62 days of trial, plaintiff's counsel gave 43 summations and defense counsel 41. In general, these occurred at the start or the conclusion of a witness' direct or cross-examination; the average summation lasted less than two and one-half minutes.87

Interim summations have been used in other cases, including a lengthy antitrust case recently tried in the Eastern District of Texas before Judge Robert M. Parker.88 In that case, the court allowed six hours of interim argument per side. Plaintiffs' attorneys

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85 Strawn & Munsterman, 65 Judicature at 445 (cited in note 30).
86 Moreover, a study indicates that jurors do not find opening statements particularly helpful. Cecil, Lind & Bermant, Jury Service at 39 (cited in note 15).
87 Leval, 12 Litigation at 8, 66-67 (cited in note 17).
88 Energy Transportation Systems, Inc. v Burlington Northern, et al, No 13-84-979-4 (cited in note 62). See also John Jenkins, The Litigators 35, 54 (Doubleday, 1989) (describing additional cases in which interim summations have been used).
used interim arguments to outline the purpose of various witnesses' testimony and to illustrate how the evidence related to the court's preliminary instructions. Defendants used it to outline forthcoming cross-examination and to highlight the points they would cover. At times attorneys referred to excerpts from the daily transcript to remind jurors of key testimony and to show discrepancies between testimony and documents. Attorneys for both sides pointed out gaps in the other side's proof and explained unfavorable evidence.

Interim summations have been found useful; some believe that they aid jury comprehension and tend to keep the jury more open-minded. But a clear understanding of their purpose and permissible limits is necessary. In the cited cases, the courts permitted interim arguments, which had the effect of anticipating the final arguments at the close of the evidence. This could make the trials excessively contentious and interfere with the jury's ongoing and open-minded evaluation of evidence.

An alternative approach is to use interim statements as supplements to the opening statement. The initial opening statements could then be relatively brief. From time to time during the trial, counsel would be able to supplement them by explaining forthcoming testimony and exhibits, and showing their relationship to the evidence as a whole. The format would be expository, not argumentative.

Some have suggested that judges might give interim summations or instructions. The hazards of doing so are obvious; the judge's own evaluation of the weight or effect of evidence may influence, or be perceived to influence, judicial summations. The jury's attention may be diverted to what the judge regards as important; the independence of their judgment may be suspended; and opinions may be formed prematurely.

**Conclusion**

The danger of embracing jury trials too fervently is that we may irreparably harm them. An excessively sentimental attachment to the jury as it has been may turn it into an anachronism. We have to guard against the creation of a new school of legal thinking: Law and Nostalgia. And we must escape the shackles of habit and tradition to make more effective use of juries. A genuine

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commitment to jury trials must therefore be accompanied by openness to enlightened change if the new demands of complex litigation are to be accommodated. The suggestions made in this article may help to point the way.