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Should Jurors Be Permitted to Discuss the Evidence Prior to Deliberations?

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The National Center for State Courts recently completed research examining the effect of permitting jurors to discuss the evidence prior to final deliberations in civil cases. In this column, I have summarized the more interesting findings The National Center has published in a number of longer and more detailed papers on this topic.[1]

The most controversial rule adopted by the Arizona Supreme Court in 1995 as part of its comprehensive set of jury reform measures was a requirement that judges inform jurors in civil cases that they may discuss the evidence prior to deliberation, subject to certain guidelines provided by the judge at the beginning of trial. All jurors, and only the jurors, must be present during these discussions. Jurors are further admonished that since they have not heard all of the trial evidence, they should only discuss the evidence and not form final verdict preferences.

The Arizona Supreme Court based its new rule on several justifications. First, was the sure, albeit unacknowledged, understanding that jurors often speak to each other and to others contrary to the usual admonition "not to." Second, was the realization that when jurors are together waiting for the trial to resume between breaks—and this wait can be quite long at times—why not let them talk about the only thing they have in common: the trial. Finally, a great deal of social science research has demonstrated that people have better comprehension and retention of new information if they are given the opportunity to discuss it.

Despite these reasons, a long history of caselaw argues against permitting jurors to discuss the evidence prior to deliberations. *Winebrenner v. U.S.*[2] provides the most comprehensive and succinct discussion. That court said jurors give the prosecution's or plaintiff's case more credence since they hear that evidence first, giving that party an unfair advantage at trial. This is called a primacy effect. It also claims jurors who discuss the evidence will form more concrete opinions about their verdict preferences and will be less willing to change their minds, even in light of persuasive evidence. The possibility of premature judgment is the strongest argument against jurors discussing the evidence prior to deliberations. The court also pointed out that because the jurors are not aware of their instructions on the application of the facts to the law as given in the final instructions, they could form incorrect opinions. A full discussion of the advantages and disadvantages of juror discussions can be found in *Jury Trial Innovations*.[3]

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[1] 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; 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;* 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

[2] Winebrenner v. United States, 147 F.2d 322, (8th Circuit, 1945)

[3] Munsterman, G. Thomas, Paula L. Hannaford and G. Marc Whitehead, eds. Jury Trial Innovations. Williamsburg, VA: National Center for State Courts, 1997 http://www.ncsc.dni.us.

To evaluate the Arizona rule, we proposed an experiment in which courts randomly assigned trials to one of two conditions. Under the first, jurors were prohibited from discussing the evidence as they are traditionally admonished; under the second condition, jurors were told they could discuss the evidence according to the new rule. The National Center's plan was to collect data for 100 trials under each condition and then compare survey responses by judges, attorneys, litigants, and jurors to identify differences in outcomes, jury dynamics, jury satisfaction, and judge, attorney, and litigant perceptions of the procedure. The State Justice Institute[4] provided funding for this project and the Arizona Supreme Court provided critical administrative leadership and support. The Superior Courts in Maricopa, Mohave, Pima, and Yavapai Counties participated as pilot sites. These courts conduct more than 80 percent of the civil jury trials each year.

We began the experiment with a pilot test of the surveys and data collection protocols. As part of the test, we asked interested jurors to come back and be interviewed so we could determine if we are getting at the desired information and to see if the jurors had any problems with the questionnaires or the process. Many volunteered and were interviewed.

Juror interviews provided some interesting first impressions of the procedure. Some jurors did not want to talk about the case for various reasons. For example, the requirement that all the jurors be present put forth some logistical complications, such as when some wanted to go for a smoke when others wanted to discuss the evidence. Jurors did report they were careful to avoid taking a stand on who should prevail. Several jurors who volunteered to be interviewed did so because they had been on juries when they could not discuss the evidence and wanted to support the change.

Thanks to their comments, and those of the other participants, and with the help of an advisory committee, we revised the questionnaires and the procedures to be used. Data collection began in June 1997 and was completed in January 1998.

To answer the concern of whether jurors were making up their minds earlier and not changing them when they were allowed to discuss the evidence we asked three questions:

- When did you start leaning to one side or the other?
- When did you change the direction in which you were leaning?
- When did you make up your mind as to whom should win the case?

Tables 1, 2 and 3 illustrate the responses to these questions. Notice we did not get the desired 100 trials but had data from 75 trials in which jurors where not permitted to discuss the evidence and 84 trials in which they were permitted to discuss the evidence. Of the 84 trials, jurors did not have any discussions in 26 of these trials, which tended to be shorter and less complex.

The first impression one gets in looking at the three tables is how similar the responses are across the two conditions. In Table 1, the point in the trial in which jurors reported that they started to lean was almost the same under both conditions. No early trial impact of discussions is evident. In Table 2, we see that only 4.0 percent of jurors who did not discuss the evidence never changed their minds, and only 2.4 percent of the discussion jurors never changed their minds. Discussion did not seem to inhibit them from changing their minds. Almost 15 percent of jurors changed their minds more than once during the trial. Finally, in Table 3 we see that the point in the trial when they made up their minds did not differ as well.

As a further test of the trials and jury decisions we asked the trial judges which side had the stronger case. The judge and jury agreed in 82 percent of the trials and there was no difference between the two conditions. Judges and jurors were very positive as to the use of the procedure of permitting jurors to discuss the evidence, although the attorneys and litigants were less enthusiastic.

[4] SJI-96-12A-B-181.

Table 1

"When did you start leaning to one side of the other?"

Began to lean during…	Juror Discussions %	No Discussions %
Plaintiff's opening	5.3	4.1
Defendant's opening	4.4	4.6
Plaintiff's evidence	22.8	24.8
Defendant's evidence	18.5	18.9
Plaintiff's closing	4.6	3.8
Defendant's closing	9.5	8.8
Judge's instructions	7.0	6.7
Jury discussions	7.0	5.7
Jury deliberations	20.9	22.7
	n=681	n=613

Table 2

"When did you change the direction in which you were leaning?"

Changed during…	Juror Discussions %	No Discussions %
Never changed	2.4	4.0
Plaintiff's opening	4.4	4.6
Defendant's opening	9.9	14.8
Plaintiff's evidence	15.1	17.9
Defendant's evidence	10.7	8.3
Plaintiff's closing	10.7	10.0
Defendant's closing	4.6	6.5
Judge's instructions	8.1	5.2
Jury discussions	21.4	21.9
Jury deliberations	39.3	38.4
	n=700	n=630

Table 3

"When did you decide who should win the case?"

Decided during…	Juror Discussions %	No Discussions %
Plaintiff's opening	1.9	1.6
Defendant's opening	2.5	2.1
Plaintiff's evidence	8.8	8.4
Defendant's evidence	10.2	12.6
Plaintiff's closing	6.5	3.6
Defendant's closing	12.3	10.5
Judge's instructions	4.6	5.7
Jury discussions	8.0	8.2
Jury deliberations	45.3	47.1
	n=700	N=609

The slight differences between the two conditions do not show a pattern or significant problems associated with permitting jurors to discuss the evidence. In particular, concerns about premature judgment are not supported by these findings, which may mean that those concerns are unfounded or it may mean that we were unable to detect them. Our data consisted of the jurors' own reports about their internal decision-making process, which can be an unreliable measure.

One of the purported advantages of this reform is that jurors who are permitted to discuss the evidence during trial may be less inclined to discuss the case with family and friends (and possibly be exposed to out-of-court information about the case). In those cases in which jurors were prohibited from discussing the evidence, 14 percent said they did discuss the case with family and friends, whereas those who could discuss the case reported a slightly lower number of 11 percent. So we did see some reduction.

This is the first time actual jurors have been asked this type of question, and the first time this procedure of permitting jurors to discuss the evidence has been evaluated. The final answer is not in as to whether jurors should be allowed to discuss the evidence prior to deliberation, but we will say in this study we saw no indication that fears about the procedure are real. We did see that some of the advantages are real. Additional research is continuing in Arizona and the results from that work should be available in a year. Again, the serious student is referred to the more scholarly papers cited earlier in this article. We would remiss if we did not thank the Arizona Supreme Court and the trial courts that participated for their courage and cooperation in this evaluation.

As always, I am interested in your reactions and stories. Contact Tom Munsterman.

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