



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 30 | Number 3

Article 16

4-1-1997

The Road to Reform: Judges on Juries and Attorneys

Franklin Strier

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Franklin Strier, *The Road to Reform: Judges on Juries and Attorneys*, 30 Loy. L.A. L. Rev. 1249 (1997).
Available at: <https://digitalcommons.lmu.edu/llr/vol30/iss3/16>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

THE ROAD TO REFORM: JUDGES ON JURIES AND ATTORNEYS

*Franklin Strier**

I. INTRODUCTION

As perhaps never before, trial reform roils the litigation scene. Policymakers in various states are considering numerous and diverse reform proposals.¹ Such proposals do not arise in a vacuum; they are responses to perceived deficiencies. This Article assesses the judicial popularity of twenty of these proposals as measured by the responses to a recent large-scale survey of the California judiciary. These findings are compared with prior large-scale judicial surveys on several of the same proposed reforms.

For simplicity, the considered proposals can be categorized into those dealing with juries and those addressing other trial reform topics. Public dissatisfaction with the jury system intensified decidedly after several highly controversial jury verdicts in California, most notably the O.J. Simpson criminal trial.² Shortly thereafter California joined Arizona and New York in a far-reaching reexamination of its jury system. Both California's judiciary and legislature studied the shortcomings of the system and evaluated an array of reform proposals.³

* Professor of Law, California State University, Dominguez Hills; B.S., 1965, Brooklyn College; J.D., 1969, Rutgers University. Professor Strier is the author of *Reconstructing Justice: An Agenda for Trial Reform* (1994). The research for this survey was partially funded by a grant from the California State University Research, Scholarship, and Creative Activities Awards Program.

1. See G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 218 (1996).

2. *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Oct. 3, 1995).

3. In 1995 the California Senate Judiciary Committee held hearings on jury reform to review a range of proposals directed at improving and strengthening the system. See generally STATE SENATE JUDICIARY COMM., JURY REFORM, July 27, 1995 (evaluating reforms to the California civil and criminal jury systems). The California Judicial Council reviewed prior reports and established a Blue Ribbon Commission on Jury System Improvement. See generally J. CLARK KELSO ET AL., FINAL REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT (1996).

Recent jury reform proposals addressed the following topics:

- Treatment and Management
 - court facilities
 - treatment by court staff, judges, and attorneys
 - jury fees and conditions of service
- Selection
 - sources of the jury pool
 - exemptions policy
 - peremptory challenges
- Structure
 - jury size
 - unanimity requirement
- Performance
 - pretrial orientation and instruction
 - cognitive aids such as note taking and question asking
 - simplified final instructions
 - deliberations

Dissatisfaction with juries, albeit a salient impetus to trial reform, is not the sole source of concern. Other trial issues, too numerous to itemize here, also draw much attention. Those resonating most relate to judicial administration and the role of the trial attorney. The two areas often intersect, as illustrated by proposals that expand the prerogatives of the trial judge to areas historically the near-exclusive domain of the attorney, such as shared voir dire or court-appointed expert witnesses. In adversarial trials generally, and in American courts in particular, attorneys—rather than judges—control the trial inquiry. Jury selection, evidence presentation, argumentation, and determination of the scope of litigation are exclusively within the attorney's bailiwick. A variety of complicated issues arise from such attorney domination, including the permissible bounds of zealous advocacy, the effect of imbalances in the skills of the opposing attorneys, and the impact of either on jury decision making. This Article looks at particular reform proposals falling within the two categories heretofore delineated: those seeking to improve jury competence and those countering

[hereinafter BLUE RIBBON COMM'N REPORT] (recommending reforms to the California civil and criminal jury systems).

the undesirable effects of attorney domination.

Identifying remedial measures merely begins the reform process. Judicial approval is arguably a *sine qua non* for trial reform. When significant changes in trial procedure are contemplated, judges need to be involved in the formulation of the changes because it is the judges who will inevitably be integral to implementation. As the “three-strikes” experience in California illustrated, if judges do not support a trial reform measure, implementation will be problematic even when broad public approval exists.

Waxing intolerance towards repeat criminal offenders led to California’s 1994 three-strikes law.⁴ The law requires a sentence of twenty-five years to life for certain felons with prior convictions.⁵ Two years after the law went into effect, however, nine percent of such sentences had been imposed for petty theft, thereby offending the sensibilities of many.⁶ Trial judges bridled at the loss of traditional judicial discretion in sentencing; some refused to enforce the law.⁷ In 1996 the California Supreme Court agreed with its trial court brethren, holding that allowing only prosecutors, and not judges, to disregard prior convictions in three-strikes cases violated the separation-of-powers doctrine.⁸ The ruling left trial judges with discretion to grant leniency by overlooking a felon’s prior crimes.⁹

In order to gauge judicial opinion of the reforms proposed here, all California Superior Court judges were surveyed during 1994-95. California Courts of Appeal judges and California Supreme Court justices were also surveyed—to see if there were any significant differences between trial and appellate judge attitudes. The overall response rate was 37%.¹⁰

4. CAL. PENAL CODE § 667(b)-(i) (West Supp. 1996).

5. *See id.* § 667(e)(2)(A)(ii).

6. *See* Dan Morain, *Democrats Offer Rival 3-Strikes Bill*, L.A. TIMES, July 19, 1996, at A3, A25. Although petty theft itself is a misdemeanor, people who commit petty theft and have a prior petty theft conviction face a felony conviction, rendering them subject to a three-strikes sentence if they also have a record of serious or violent crimes. *See* CAL. PENAL CODE § 667(b)-(i).

7. *See* Jenifer Warren, *Judge Says He’ll Defy “3 Strikes” Sentencing Law*, L.A. TIMES, July 22, 1994, at A1, A23.

8. *See* *People v. Superior Ct. (Romero)*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996).

9. *See id.* In reaction, Senator Tom Campbell, backed by the California District Attorneys’ Association, introduced a bill into the California State Senate to remove most of that discretion. *See* S. 331, 1995-96 Reg. Sess. (Cal.) (defeated in the California Senate Committee on Criminal Procedure on July 16, 1996).

10. Response rates have been rounded to the nearest percent. The response rate

The survey questionnaire identified twenty proposed reforms addressing areas of perceived jury incompetence and the problem of attorney domination in the form of mismatched attorneys or adversarial excess. The questions asked whether the respondents "would" or "do" allow or favor greater use of the proposed reforms. Possible answers were "Yes," "No," or "Sometimes." "Yes" and "Sometimes" were considered affirmative responses. Various majorities of respondents answered affirmatively to roughly half—nine of twenty—of the proposed reforms. Because no profound trial reform measure is likely to succeed without the support of a majority of the judiciary, only those proposals which received affirmative responses from a majority of the respondents are discussed in this Article.¹¹ The results are tabulated in the Appendix. The questionnaire also invited respondents to elaborate—with open-ended comments—upon their answers or to suggest other means for improving jury competence or mitigating the undesirable effects of attorney domination.¹²

for trial judges was 37%—287 out of 772. The response rate for appellate justices—including California Supreme Court justices—was 32%—30 out of 94. Responses were computer tabulated using the Statistical Package for the Social Sciences (SPSS), a commercially available statistical analysis program.

11. A majority of the judges did not respond affirmatively to 11 of the 20 proposed reforms. The reforms and the corresponding percentages responding affirmatively were:

- Written preinstructions for jurors: 24%
- Written transcripts for jurors: 30%
- Videotaped copies of the testimony for the jurors: 39%
- Specially qualified jurors in complex cases—either in criminal or civil cases (two questions): 28%
- Experimentation with a mixed lay-professional jury—either in all cases or complex cases only (two questions): 32%
- In camera voir dire: 37%
- Uninterrupted opening narratives by witnesses: 40%
- A trial advocacy skills course required for admission to the bar: 44%
- Restrictions on witness coaching: 15%.

12. Some of the open-ended comments raised noteworthy additional issues and suggestions. They included: limiting or eliminating attorney voir dire in civil cases—a recent California ballot initiative restricted attorney voir dire in criminal cases, *see* Crime Victims Justice Reform Act, Initiative Measure Proposition 115 (approved June 5, 1990) (sections pertaining to criminal voir dire codified at CAL. CIV. PROC. CODE §§ 223-223.5 (West Supp. 1996)); limiting the time allowed for attorneys to present their cases; limiting or eliminating peremptory challenges; giving judges more discretion to dismiss marginal cases; and using professional jurors. By far the most popular, however, was the proposal to eliminate juries in complex civil cases. Typical was the comment of Los Angeles County Judge John Zebrowski: "Juries are often not competent to decide complex questions. In no other walk of life do we purposely assign unqualified persons to determine important issues. Juries are good

Part II of this Article discusses the reforms proposed for improving jury performance to which a majority of the surveyed judges responded affirmatively. Part III does the same for reform proposals relating to attorney domination. Part IV characterizes the overall findings and suggests directions for future research.

II. IMPROVING JURY COMPETENCE

A. *Improve Jury Orientation: Respondents Were Asked if Juror Competence Could and Should Be Improved by Better Orientation*¹³

Two major national surveys studying the extent of public knowledge of the courts concluded that “startling ignorance” characterized the general public’s level of awareness of court operations.¹⁴ Better juror orientation could enhance jury competence by more effectively introducing and educating prospective jurors to basic legal concepts and trial procedures. Current programs—which are now haphazard and vary from state to state, county to county, and court to court—could be enlarged to more

for credibility questions and the like.” Response to Reform Proposals Questionnaire, John Zebrowski, Superior Court Judge of Los Angeles County (subsequently appointed to California Court of Appeal, Second District, on Oct. 17, 1995) (on file with the *Loyola of Los Angeles Law Review*).

13. See *infra* app., tbl. 1.

14. In 1977 the National Center for State Courts sponsored a study conducted by Yankelovich, Skelly and White, Inc., to profile the American public’s level of knowledge of the judicial system. Barry Mahoney et al., *Courts and the Public: Some Further Reflections on Data from a National Survey*, in STATE COURTS: A BLUEPRINT FOR THE FUTURE: PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON THE JUDICIARY 83, 92 n.2 (Theodore J. Fetter ed., 1978). The firm conducted personal interviews with 1931 members of the general public. See *id.* at 84. They found that “the public is, by and large, woefully ignorant of what most judges and lawyers would consider to be basic rules and concepts governing the operation of courts.” *Id.* at 87. The Yankelovich firm found this consistent with other surveys that sought to ascertain the extent of public knowledge of the courts. See *id.*

In 1983 the Hearst Corporation followed up on the Yankelovich survey with its own national survey and came to the same conclusion. See FRANK A. BENNACK, JR., THE HEARST CORPORATION, THE AMERICAN PUBLIC, THE MEDIA & THE JUDICIAL SYSTEM: A NATIONAL SURVEY ON PUBLIC AWARENESS AND PERSONAL EXPERIENCE 3 (1983). Using remarkably similar language, the report concluded that “[t]he American public . . . is woefully uninformed about the operation of our courts and the people who preside over them.” *Id.* at 3. “Even more importantly,” the report adds, “they are dangerously misinformed about some of the most fundamental principles upon which our concept of justice is based.” *Id.* As a salient example of public misinformation, the survey revealed that fully *half* of the public did not understand or appreciate the legal concept of innocent until proven guilty. See *id.* at 5.

substantive training sessions.

Courts may choose from a wide range of training and education programs to elevate juror sophistication. Handbooks, lectures, and audio-visual presentations ordinarily provide valuable information. Handbooks are available to jurors on their first day of service in most courts, but vary markedly in size, coverage, and content.¹⁵ Topics typically addressed include jury selection; the functions of the attorneys, judge, and jury; trial procedure; jury deliberations; and desired juror conduct.¹⁶ Other material may discuss the difference between criminal and civil cases; challenges for cause and peremptory challenges during jury selection; what constitutes evidence; what is meant by an inference; and when jury sequestration is necessary.¹⁷ The jury deliberations discussion may address deliberation procedure, restrictions on discussing the case, the meaning of the rule that the case must be decided on the evidence only, and the role of the foreperson.¹⁸

Orientation lectures vary as much as the handbooks. Lectures may be given by a judge or a jury clerk.¹⁹ Whether the lecture will be lengthy or brief, comprehensive or sketchy, administratively or legally oriented, detailed or abstract, depends on the identity of the lecturer and the time available.²⁰ The most effective lectures are those that are given by judges and that emphasize the importance of jury duty, explain the basic nature of the trial while avoiding sophisticated concepts, indicate the inherent uncertainties of the trial process, and do not reiterate information given in the handbook or audio-visual presentation.

Handbooks and audio-visual presentations have certain advantages over live lectures. They provide uniform information to all prospective jurors, usually speak to the most frequently asked questions, and do not consume the time of court personnel. Overall, well-executed orientations can convey essential information to prospective jurors while mitigating any apprehensions they may have about jury service. Such better prepared jurors tend to perform their duties more effectively, often to the satisfaction of

15. See G. THOMAS MUNSTERMAN ET AL., NATIONAL CENTER FOR STATE COURTS, *METHODOLOGY MANUAL FOR JURY SYSTEMS: IN SUPPORT OF THE LEAA INCENTIVE PROGRAM IN JUROR USAGE AND MANAGEMENT* 5-3 (1981).

16. See *id.* at 5-3 to 5-4.

17. See *id.* at 5-4 to 5-5.

18. See *id.* at 5-5.

19. See *id.*

20. See *id.*

the jurors themselves.

In California the jury commissioner is statutorily charged with the obligation to provide orientation for new jurors.²¹ Orientation videotapes are used in Los Angeles and Sacramento.²² Both convey information about the historical development of the jury system, the importance of juries in our constitutional system of government, the basic differences between civil and criminal cases, the role of the various participants in the court system, the process of jury selection and voir dire, the order of proof, and the deliberative function.²³ The California Blue Ribbon Commission on Jury System Improvements (Blue Ribbon Commission) recommended that the California Judicial Council, to which the Blue Ribbon Commission reported, produce a "statewide juror orientation videotape which can be used by jury commissioners, with or without modification, to satisfy the statutory obligation to provide juror orientation."²⁴ Several judges in the survey gave open-ended responses extolling the value of orientation. For example, Judge Jeffrey Gunther of Sacramento County wrote: "I do an extensive juror orientation and have found that it has great benefits."²⁵ Judge Richard Neidorf of Los Angeles County adds: "If done properly [orientation] could solve lots of problems, including unnecessary hung juries. The Judicial Council and/or State Bar should have a standardized orientation state wide."²⁶

B. Preinstruction: Respondents Were Asked if They Would or Do Allow Jurors to Hear the Judge's Instructions Before—as Well as After—Evidence-Taking²⁷

As if the wording of judicial instructions on the law were insufficiently troublesome to jurors, trial practice compounds the problem with timing strictures. Current trial procedure withholds nearly all of the substantive law from the jurors until *after* they

21. See CAL. CIV. PROC. CODE § 214 (West Supp. 1996).

22. See BLUE RIBBON COMM'N REPORT, *supra* note 3, at 80.

23. See *id.* at 80-81.

24. *Id.* at 81 (Recommendation 5.1).

25. Response to Reform Proposals Questionnaire, Jeffrey Gunther, Superior Court Judge of Los Angeles County (on file with the *Loyola of Los Angeles Law Review*) [hereinafter Gunther Response].

26. Response to Reform Proposals Questionnaire, Richard Neidorf, Superior Court Judge of Los Angeles County (on file with the *Loyola of Los Angeles Law Review*).

27. See *infra* app., tbl. 2.

hear all the evidence. The objective is to keep them open to all information. Whether that objective is met is uncertain. What is certain is that this ignorance-imposing stricture denies jurors the capacity to discriminate the key factual issues from the mass of information they receive. They must interpret the evidence without a sense of the legal requirements that must be met by the parties. Essentially, the rules of the game are unknown to the jurors until the game is over. Envision being the scorekeeper of an athletic contest without knowing what acts receive points or penalties until after the conclusion of the game. An already difficult task thus becomes harder.

Giving the jurors a preliminary version of the instructions before—in addition to after—the evidence is heard can rectify this problem. Some states already require this.²⁸ Judge William Schwarzer, Director of the Federal Judicial Center, calls these instructions “the logical corollary to the lawyers’ opening statements.”²⁹ Studies consistently show that preinstructing jurors with a preliminary charge before hearing the evidence would greatly facilitate various aspects of jury performance, such as improving juror integration of law and facts,³⁰ enhancing juror recall,³¹ improving juror focus on the relevant issues, enhancing jurors’ chances of applying the correct rule to the evidence,³² reducing juror questions during deliberations,³³ creating more informed verdicts,³⁴ and increasing juror satisfaction.³⁵ Further, researchers

28. See, e.g., ARIZ. R. CRIM. P. 18.6(c) (“Immediately after the jury is sworn, the court shall instruct the jury concerning . . . the elementary legal principles that will govern the proceeding.”).

29. William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 583 (1991).

30. See Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 163 (1977); Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Jury Verdicts*, 37 J. PERSONALITY & SOCIAL PSYCHOL. 1877, 1877 (1979); E. Barrett Prettyman, *Jury Instructions—First or Last?* 46 A.B.A. J. 1066 (1960); Vicki Lyn Smith, *The Psychological and Legal Implications of Pre-Trial Instruction in the Law* (1987) (unpublished Ph.D. dissertation, Stanford Univ.).

31. See Elwork et al., *supra* note 30, at 169-77.

32. See Amiram Elwork & Bruce D. Sales, *Jury Instructions*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 280, 291 (Saul Kassin & Lawrence Wrightsman eds., 1985).

33. See Leonard Sand & Steven Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 439-42 (1985).

34. See Commission on Fed. Courts, New York State Bar Ass’n, *Improving Jury Comprehension in Complex Civil Litigation*, 62 ST. JOHN’S L. REV. 549, 553 (1988).

35. See *Jury Comprehension in Complex Cases*, 1989 A.B.A. LITIG. SEC. 49-52.

Larry Heuer and Steven Penrod found in a 1989 survey of Wisconsin judges that the judges expressed more satisfaction with the verdicts of preinstructed juries and that preinstruction made the trial fairer.³⁶ Moreover, the judges stated that the anticipated disadvantages—that preinstruction disrupts the trial, adversely effects jury performance, or is impractical—did not materialize.³⁷ Despite these favorable empirical findings of behavioral science, few courts have yet to adopt this sensible reform.

To preinstruct without prejudice to either party, the court should require attorneys to submit proposed instructions to the court at the outset of trial. The judge can then apprise the jury of the basic uncontested legal doctrines involved. The Blue Ribbon Commission recommended that trial judges, in their discretion, preinstruct the jury on the substantive law involved in the case.³⁸

In surprising contrast with the results of this question, where 80% answered affirmatively that jurors should *hear* preinstructions, only 23% thought that jurors should be allowed to *see* written preinstructions. Also noteworthy about the responses to the latter question is that it is the only one showing a significant disparity between trial and appellate judges. Though only 21% of the trial judges said they would allow jurors to see preinstructions, a majority—52%—of the appellate justices answered affirmatively. Further research may ascertain the cause of this disparity.

*C. Juror Questions: Respondents Were Asked if They Would or Do Allow Jurors to Ask Questions*³⁹

The primary means of trial investigation—witness interrogation—is typically denied to the jury.⁴⁰ One might believe, there-

36. See Larry Heuer & Steven Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409, 409-30 (1989) [hereinafter Heuer & Penrod, *Instructing Jurors*].

37. See *id.* at 427-30. Research also indicates that the vast majority of jurors cannot suspend their decision until the end of the trial. See Robert Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 612. Hence there is a concern that preinstruction would further predispose the jurors to prejudice. But one study found to the contrary: Preinstructed jurors were more likely to *defer* judgment. See generally Smith, *supra* note 30 (concluding that preinstruction enhances juror performance).

38. See BLUE RIBBON COMM'N REPORT, *supra* note 3, at 93 (Recommendation 5.6).

39. See *infra* app., tbl. 3.

40. See Lisa M. Harms, Comment, *The Questioning of Witnesses by Jurors*, 27 AM. U. L. REV. 127, 132 (1977).

fore, that the occasional allowance of juror questions is a new trend. Yet English courts permitted juror interrogation as early as the eighteenth century.⁴¹ Moreover, juror questions were allowed by a few American courts in the nineteenth century, with the practice becoming formalized in the United States in the 1970s.⁴²

The court's authority to permit juror interrogation is clear.⁴³ Nevertheless, jurors rarely get to question a witness.⁴⁴ No state affirmatively offers or encourages the practice, although a majority of states permit the occasional request by a jury seeking to ask questions on its own initiative.⁴⁵

Why not allow juror questions? After all, "while justice is blind, jurors need not also be."⁴⁶ From the jurors' perspective the potential truth-seeking advantages of juror interrogation are obvious. Responses to juror questions can increase the information upon which the jury decides by fleshing out neglected evidence, clarifying the evidence and law, and identifying areas of misunderstanding.⁴⁷ Furthermore, by involving jurors more in the trial process, questions probably increase jurors' attention and interest in the case⁴⁸ and alleviate their doubts about the testimony.⁴⁹ Attorneys benefit too. They can restructure their evidence presentation to improve juror understanding based upon the omitted and misunderstood evidence revealed by the juror questions.⁵⁰ Juror

41. See WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAW 685 (Bernard C. Gavit ed., Washington Law Book Co. 1941) (1892). For a detailed history of jury questions, see Harms, *supra* note 40.

42. See Michael Wolff, *Juror Questions: A Survey of Theory and Use*, 55 MO. L. REV. 817, 818 (1990).

43. See *id.* at 818-19.

44. See *id.* at 818.

45. See Jonathan M. Purver, Annotation, *Propriety of Jurors Asking Questions in Open Court During Course of Trial*, 31 A.L.R.3d 872, 877 (1970).

46. Michael A. McLaughlin, *Questions to Witnesses and Notetaking by the Jury as Aids in Understanding Complex Litigation*, 18 NEW ENG. L. REV. 687, 697 (1983).

47. See Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121, 142 (1994) [hereinafter Heuer & Penrod, *Juror Notetaking*].

48. See Wolff, *supra* note 42, at 824.

49. See Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231, 237 (1988) [hereinafter Heuer & Penrod, *Field Experiment*]; Heuer & Penrod, *Juror Notetaking*, *supra* note 47, at 125.

50. See The Honorable B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1253 (1993); Heuer & Penrod, *Field Experiment*, *supra* note 49, at 231; Larry Heuer & Steven D. Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 NW. U.

questions may also flag juror biases to the judge and attorneys, thus facilitating corrective measures before jury deliberation when it becomes too late.

On the rare occasions when juror questions are permitted, a proposed question must first be approved by the judge. If approved, the judge usually gives the attorneys the opportunity to object. Tactically, this can pose a Hobson's choice to the attorney who objects to a juror's question: either risk offending the questioning juror or allow the introduction of possibly inadmissible and potentially damaging evidence in response to the question. In the latter event the only protection is the vigilance of the judge, who cannot be presumed to catch all inappropriate questions before they are answered nor all inadmissible testimony given in response to an improper juror question.⁵¹

The potential for upsetting traditional courtroom protocol is inherent in juror questions. They may result in surprises and destroy the attorney's strategy; they might become a nuisance to the judge; and the jury might draw inappropriate inferences if an attorney successfully objects to a juror's question. Another key concern over juror questions is that, at least theoretically, they can undermine juror impartiality. By asking questions, the juror may become an advocate or may develop biases that threaten the integrity of the system.⁵² Nonetheless, field studies by Heuer and Penrod failed to confirm any of these concerns.⁵³ Judges on the Blue Ribbon Commission who had permitted juror questions also reported the absence of negative consequences.⁵⁴ Convinced that the benefits of juror questions are real and the concerns largely speculative, the Blue Ribbon Commission recommended that judges advise jurors of their right to submit written questions.⁵⁵

L. REV. 226, 232 (1990); Hedieh Nasheri & Richard J. Rudolph, *An Active Jury: Should Courts Encourage Jurors to Participate in the Questioning Process?*, 16 AM. J. TRIAL ADVOC. 109, 146-47 (1992).

51. See Wolff, *supra* note 42, at 826-28.

52. See *id.* at 829-30.

53. See Heuer & Penrod, *Field Experiment*, *supra* note 49, at 251-58; see also Heuer & Penrod, *Juror Notetaking*, *supra* note 47, at 146-47 (finding that jurors do not become advocates). Moreover, any of these concerns can be remedied on appeal. See Wolff, *supra* note 42, at 839 n.123.

54. See BLUE RIBBON COMM'N REPORT, *supra* note 3, at 85-86.

55. See *id.* at 86-88 (Recommendation 5.3).

*D. Issue Separation: Respondents Were Asked if Greater Use Should Be Made of Issue-Separated Trials*⁵⁶

Current trial practice does not lend itself to juror comprehension of evidence because all issues are litigated at once. The evidence on all potential issues—no matter how lengthy, complicated, or technical—is heard in one nonsegmented, continuous trial. Partisan evidence presented by one side, often in disjointed segments, is separated by long delays from testimony on the same subject from opposing counsel. The resulting hodgepodge confounds the logical ordering of evidence often necessary for jurors to systematically consider and make findings on specific issues.

Complex cases exacerbate the problem. Jurors tend to confuse evidence in trials involving multiple parties, multiple causes of action, or multiple offenses. As a result, they use evidence admitted on one issue to resolve other issues.⁵⁷

A more juror-friendly approach would sever the trial issues. Potentially dispositive issues could be presented first; evidence from both sides could be heard and then resolved by the jury. In this way the scope of subsequent issues could be narrowed, and the need for some evidence would be obviated. Juries in both federal courts and many state courts, for instance, commonly consider the issues of liability separately before considering damages in a civil case.⁵⁸ A finding of no liability eliminates the need for the jury to hear any evidence related to damages. Experience also suggests that a finding of liability will encourage the parties to settle.⁵⁹

But the separation of liability and damages merely scratches the surface of possibilities. The liability issue, for example, can be further subdivided into serial consideration of the evidentiary components of duty, causation, and defenses.⁶⁰ This *seriatim* ex-

56. See *infra* app., tbl. 4.

57. See J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 750 (1988).

58. See Schwarzer, *supra* note 29, at 594-95; Louis Harris and Associates, Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spent at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 743 (1989).

59. See MANUAL FOR COMPLEX LITIGATION § 21.632 (3d ed. 1995).

60. When coupled with the use of special verdicts, discussed *infra* Part II.E, this degree of issue separation could dramatically foreshorten civil trials. A special verdict finding of no duty or no causation, for example, would obviate the need to hear

amination of issues should markedly enhance jury fact finding by enabling the jury to focus on one issue at a time. Evidence thereby becomes more orderly and understandable to the jurors. Even if all the issues must eventually be considered, the jurors' cognitive task is greatly simplified by mitigating the confusion that attends processing evidence on multiple issues. The longer and more complex the trial, the greater the potential benefits of issue separation. As longer trials become more commonplace, the appeal of such severed-issue trials grows. The need is evident. From 1968 to 1988 the percentage of civil trials in federal court that took no more than one day was halved while the number of trials lasting ten or more days almost quintupled.⁶¹

Despite the potential advantages and availability⁶² of issue severance, it is rarely used.⁶³ Yet a 1988 nationwide Harris poll of 1000 federal and state judges indicated strong judicial support for the practice.⁶⁴ The overwhelming majority said they had granted or required separation of issues and that, on balance, it helped rather than hindered the process.⁶⁵ One key advantage they cited was improving the fairness of the outcome; another was expediting settlements and the trial process.⁶⁶

In the present survey open-ended responses indicated several California judges were of like mind. Judge Jeffrey Gunther, for example, wrote that issue-separated trials "are shorter and settlement during the trial is more likely."⁶⁷ Not all judges were in consensus on this presumed benefit, however. Kern County Judge Roger Randall said, "I believe that issue-separated trials denigrate

all further evidence. There is always the possibility that an appellate court would reverse and remand, necessitating trial of the issues not presented to the jury. The relatively low likelihood of this, however, should not preclude terminating deliberations once the jury has made a dispositive decision.

61. See Stephen J. Adler, *Can Juries Do Justice to Complex Suits?*, WALL ST. J., Dec. 12, 1989, at B1, B6.

62. The federal courts and most state courts allow issue severance. See FED. R. CIV. P. 42(b) (permitting issue severance); CAL. CIV. PROC. CODE § 598 (West 1976 & Supp. 1997); HAW. R. CIV. P. 42(b); CONN. R. CT. § 133 (permitting cause of action severance but not issue severance).

63. See Louis Harris and Associates, Inc., *supra* note 58, at 743.

64. See *id.*

65. See *id.*

66. See *id.*

67. Gunther Response, *supra* note 25. Opposition to this proposal more likely originates from the bar than the bench. A 1988 study found that issue severance may decrease the likelihood of a plaintiff verdict. See Doyle W. Curry & Rosemary T. Snider, *Bifurcated Trials: How to Avoid Them—How to Win Them*, TRIAL, Mar. 1988, at 47.

the intelligence of jurors to keep issues separate, and are a tremendous waste of courtroom resources."⁶⁸

*E. Special Verdict Forms: Respondents Were Asked if Greater Use Should Be Made of Special Verdict Forms*⁶⁹

A direct way for judges to improve jury competence—particularly in complex cases where it is most needed—is to make more use of special verdict forms: the special verdict or the general verdict plus interrogatories.⁷⁰ Both would reveal some obvious errors in jury fact finding and deliberation, and avoid other mistakes. This has clear advantages. By allowing the judge to monitor the jury, its inconsistent findings and consideration of irrelevant factors become conspicuous. Special verdict forms are therefore more scientific than the commonly used general verdict and would lead to fewer appellate reversals.

Using the special verdict, the judge asks the jury to make specific findings of fact to which the judge applies the law and renders a verdict.⁷¹ Judges are relieved of delivering lengthy and complex instructions on legal doctrine, thus saving time. Similarly obviated is the need for the jury to ponder the meaning and application of legal jargon and concepts. Instead, the jury confines itself to that for which it is better suited: resolving factual issues. Juries can reasonably be expected to perform creditably if their function is limited to such jobs as determining whether the plaintiff purchased the defendant's product and used it as specified. An entirely less sanguine prospect arises if lay jurors are given a crash course on a complicated legal subject such as products liability—complete with nuances and jargon—and then required to apply that law to the facts as found. The longer and more legally convoluted the case, the more improbable it is that jurors will successfully master and apply the law. Curiously, the same jurors who, in the words of legendary Judge Curtis Bok, have been "treated like children while the testimony is going on, [are] then . . . doused with a kettleful of law during the charge that would make a third-year law student

68. Response to Reform Proposals Questionnaire, Roger Randall, Superior Court Judge of Kern County (on file with the *Loyola of Los Angeles Law Review*) [hereinafter Randall Response].

69. See *infra* app., tbl. 5.

70. See FED. R. CIV. P. 49 (authorizing both special and general verdicts).

71. See *id.*

blanch."⁷²

One major caveat qualifies the potential benefits of the special verdict. It denies the jury its traditional power to ignore the law in the interest of justice—jury nullification.⁷³ Another less radical special verdict form, the general verdict plus interrogatories, does not directly affect the jury nullification power. Under this procedure the judge requests the jurors to answer specific questions to see whether the jurors' verdict is consistent with their findings of fact.⁷⁴ If not, several remedies are available. Under the Federal Rules of Civil Procedure, for example, the judge can order a new trial, return the case to the jury for further consideration, or enter a verdict consistent with the specific answers even if contrary to the original verdict.⁷⁵

In a recent survey by Heuer and Penrod of 160 actual trials in thirty-three states, the use of special verdict forms was found consistently beneficial.⁷⁶ When special verdict forms were used, the jurors reported feeling more informed, better satisfied, and more confident that their special verdict reflected a proper understanding of the judge's instructions.⁷⁷ Furthermore, the jurors found the special verdict most helpful in dealing with large quantities of information.⁷⁸

72. CURTIS BOK, *I TOO, NICODEMUS* 261-62 (1946).

73. For a historical review and discussion of jury lawlessness, see MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* (1973); CHARLES REMBAR, *THE LAW OF THE LAND* (1980); and Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 *LAW & CONTEMP. PROBS.* 51 (1980).

74. *See* FED. R. CIV. P. 49(b).

75. *See id.*

76. *See* Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 *LAW & HUM. BEHAV.* 29, 50 (1994) [hereinafter Heuer & Penrod, *Trial Complexity*].

77. *See id.*

78. *See id.*

III. ATTORNEY DOMINATION

*A. Minimum Advocacy Skills: Respondents Were Asked if They Favored a Course in Trial Advocacy Skills as a Prerequisite for an Attorney to Represent a Client in Court*⁷⁹

Perhaps prodded by well-chronicled criticisms of trial counsel ineptitude,⁸⁰ some states, including California, have considered minimum advocacy skills training for trial attorneys.⁸¹ In addition to raising the quality of court representation, proponents hope such measures will mitigate the potential injustice that arises when opposing attorneys are of significantly disparate competence. A mismatch in attorney skills sabotages the assumption upon which optimal functioning of the adversary system is predicated: roughly equal competence of opposing counsel. One of the largest surveys of juror attitudes towards the trial experience tested this premise. Over 3800 individuals were polled upon completing their jury service in Los Angeles during a six-month period ending in 1988.⁸² A single set of findings was the perceived effect of mismatched attorney skills on trial outcome. Over one-half, 56%, felt mismatching can affect trial outcomes, and over one-third, 35%, said mismatching *did* affect the outcome of the trial they actually sat on.⁸³ Furthermore, almost two-fifths, 37%, thought that the difference in attorney skills was anywhere from "partly" to "completely" responsible for a "wrong decision" by the jury they sat on.⁸⁴

79. See *infra* app., tbl. 6. A related question asked if the respondents favored the same trial advocacy course as a prerequisite for admission to the bar; that is, to be required of *all* attorneys rather than just litigation attorneys. The judges were decidedly less enthusiastic about this proposal—only 43% responded affirmatively—presumably considering it unnecessarily broad.

80. In a famous critique former Chief Justice of the United States Warren Burger decried the lack of skills among trial advocates. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 227 (1973). Along with other inadequacies, he emphasized the lack of skill in direct and cross-examination and the time wasted in developing irrelevant facts. See *id.* at 234-35.

81. See Jean Guccione, *LACBA Opposes Proposal to Require Skills Training*, *L.A. DAILY J.*, Dec. 14, 1990, at 18.

82. See Franklin Delano Strier, *Through the Jurors' Eyes*, *A.B.A. J.*, Oct. 1988, at 79 (1988). The reported findings are subject to an important caveat: Merely because jurors believe something to be true does not make it true. These results show what jurors say they experienced and believe. There was no independent validation of the accuracy of juror perceptions, nor is it clear there could be.

83. See *id.* at 80.

84. See *id.*

Open-ended comments in the present survey shed more light on the judges' views of mismatching and trial attorney competence in general. Judge Roger Randall opined that "in the real world there will never be parity[,] . . . but speciality training in trial techniques will be a step in the right direction."⁸⁵ Riverside County Judge Charles Field observed:

The attorney courtroom competence issue is one with far-reaching implications for the whole system. . . . The lack of courtroom skills affects an attorney's ability to properly evaluate the case for settlement or alternative resolution, and affects their abilities to reasonably advise their clients, which is also a critical factor in expectations . . . (generally it precludes sensible resolution).⁸⁶

Judge Field goes beyond passive acceptance of this state of affairs. When, in his view, the attorneys "haven't a clue as to what's going on," he gives them a trial outline.⁸⁷ Judge Field reflects the views of many other respondents—indicated by open-ended narrative responses—who feel that attorney incompetence is of far greater concern than jury incompetence.

A heuristic model for the minimum skills program is the English barrister system. Barristers are litigation specialists. A barrister system, or a facsimile, would mitigate attorney mismatching of the sort found in many American courts. Using specialists on both sides potentiates the functioning of the adversary system and, with it, the chances of a just result.⁸⁸

Santa Cruz County Judge Thomas Black's comments are representative of those supporting the advocacy skills course proposal as a substitute for, or version of, the barrister system: "I think trial attorneys should be qualified as such—much like English Barristers—intern for 3-5 years. And only those certified may try cases to the bench! The playing field would be leveled[,] the quality of

85. Randall Response, *supra* note 68.

86. Response to Reform Proposals Questionnaire, Charles Field, Superior Court Judge of Riverside County (on file with the *Loyola of Los Angeles Law Review*) [hereinafter Field Response].

87. *Id.*

88. A 1976 pilot program undertaken in Yuma County, Arizona, augurs well for further experimentation with the barrister system. Funded by a grant from the Law Enforcement Assistance Administration, responses of the participating attorneys indicated the program's objectives were met and that an American barrister system is workable. See James D. Cameron, *The English Barrister System and the American Criminal Law: A Proposal for Experimentation*, 23 ARIZ. L. REV. 991, 997 (1981).

representation vastly improved[,] and reasonable settlements would likely occur with more frequency.”⁸⁹

*B. Judicial Questioning: Respondents Were Asked if Judges Should Question Witnesses Whenever the Attorneys Fail to Pose Important Probative Questions*⁹⁰

Whatever the merits of the minimum skills approach in addressing the mismatching problem, it still leaves control of the trial to the attorneys. The more attorney dominated and adversarial the trial, the more likely the incidence of mismatching. In the relatively nonadversarial inquisitorial trial method⁹¹—with which the adversary system is often contrasted—the judge has the primary responsibility to conduct the inquiry by calling and questioning witnesses.⁹² A common justification given for the greater authority of the judge is the need to equalize the parties.⁹³

We need not replace wholesale the adversary system with the inquisitorial system in order to ameliorate the mismatching prob-

89. Response to Reform Proposals Questionnaire, Thomas A. Black, Superior Court Judge of Santa Cruz County (on file with the *Loyola of Los Angeles Law Review*).

90. See *infra* app., tbl. 7. A companion question asked the respondents if judges should question witnesses “in order to avoid an obvious injustice.” The objective was to gauge the extent of commitment to the traditional trial judge role of passivity and nonintervention under the adversary system. Emblematic of this position is the comment of Orange County Judge Dennis Choate, who wrote, “Most lawyers have no idea how frustrating it is for a judge to watch them self[-]destruct before a jury—but the judge can *not* come to the rescue.” Response to Reform Proposals Questionnaire, Dennis S. Choate, Superior Court Judge of Orange County (emphasis in original) (on file with the *Loyola of Los Angeles Law Review*). The notion that the third-party adjudicator must generally remain passive in order to retain his or her impartiality is peculiar to American jurisprudence. Our domestic alternative dispute resolution mechanisms and the inquisitorial trial systems of Western Europe show this to be a myth. No scientific findings suggest that inquiry intended merely to clarify induces a fatal loss of discipline.

As it turned out, the question response was lopsided: 93% answered affirmatively. Given the strength of this response, it could hardly be considered a “reform” worthy of inclusion in the text. Apparently, the vast majority of judges already consider it their duty to question witnesses in order to avoid an obvious injustice.

91. The inquisitorial system is used most notably in the courts of continental European countries. See Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 478 (1996). Thus it is sometimes referred to as the Continental System. See *id.* Worldwide, more countries use the inquisitorial system than the adversary system. See *id.*

92. See *id.*

93. See Neil Brooks, *The Judge and the Adversary System*, in THE CANADIAN JUDICIARY 90, 111 (Allen M. Linden ed., 1976).

lem and enhance the jury trial search for truth. Rather, we can eclectically adopt one of the inquisitorial system's features—judicial questioning of witnesses. Many jurors share that view. In the Los Angeles juror survey, supplemental questioning from the judge was the suggestion selected most often by the jurors as “effective or desirable” to counteract the results produced by mismatched attorneys.⁹⁴

Other equally important advantages flow from judicial questioning. The judge can assist the jury by asking questions that an incompetent or marginally competent attorney neglects to pose. Another benefit is the reduced influence of lawyer theatrics and dirty tricks.⁹⁵ The occasional need for this judicial “safety net” escapes few who are familiar with adversary system trials.

It would betray a great naiveté to deny that litigators would regard anything more than an occasional question from the trial judge as a dangerous deviation from current trial procedure. More than a few judges would undoubtedly agree. Consider, for example, the impressions of Santa Clara County Judge Alden Danner: “An attorney may not ask what appears to be a probative question because the attorney has a tactic or strategy inconsistent with the question. A judge may not recognize the tactic or strategy. Thus, the judge may interfere with good attorney advocacy.”⁹⁶

Nevertheless, this proposal garnered one of the largest affirmative responses—75% overall and 87% from appellate justices, the highest affirmative response from that subgroup. The broad consensus may augur the adoption of reforms shifting procedural power from attorney to judge. Judicial rationalization for this change could emanate from a variety of perceptions, including: (a) the desire to assist the jury; (b) attorney incompetence or mismatching; and (c) responsiveness to public demand.

94. See Strier, *supra* note 82, at 79-80.

95. A complete taxonomy of trial attorney artifice would daunt the most ambitious writer. For an illustrative overview, see FRANKLIN D. STRIER, *RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM* 160-65 and accompanying notes (1994).

96. Response to Reform Proposals Questionnaire, Alden E. Danner, Superior Court Judge of Santa Clara County (on file with the *Loyola of Los Angeles Law Review*).

*C. Judicial Sanctions Against Pretrial Abuses: Respondents Were Asked if They Favored Greater Use of Judicially Imposed Sanctions Against Attorneys Guilty of Discovery Abuse or Dilatory Pretrial Tactics*⁹⁷

Delay can be a potent weapon in the trial attorney's arsenal. Incentives abound: incriminating witnesses may die or disappear, criminal defendants accused of nonviolent acts can usually remain free upon posting bail, and civil defendants can defer the payment of damages.

A related tactic is discovery abuse. Much of the blame for the length and expense of adversarial trials can be attributed to attorney abuse of the discovery process. Few limits exist as to the number of discovery requests a party can make as long as the requests are at least tenuously related to the action.⁹⁸

Initially, discovery was hailed as a boon to truth-seeking, fairness, and expedited case disposition.⁹⁹ No longer. Discovery abuses now constitute the single greatest source of dispute, delay, and cost in the trial system.¹⁰⁰ In the Harris survey abuse of the discovery process was the most frequently cited cause of runaway litigation costs.¹⁰¹ A large majority said that attorneys' use of discovery "as an adversarial tool to intimidate or raise the stakes for their opponents" was a major cause of excessive litigation costs.¹⁰² According to former President George Bush's Council on Competitiveness, more than 80% of the time and cost of the typical civil suit is attributable to discovery.¹⁰³

These sentiments were echoed in the present survey. Judge Charles Field noted that the

[c]urrent system *encourages* unreasonable . . . and aggressive discovery[,] . . . very little of which either benefits the client or encourages reasonable resolution of the case. The economics of the case, i.e., the resources available to one side versus the other, often dominate the outcome as

97. See *infra* app., tbl. 8.

98. See Nathan L. Hecht, *Discovery Lite!—The Consensus for Reform*, 15 REV. LITIG. 267, 268-69 (1996).

99. See *id.*

100. See *id.* at 267-68.

101. See Louis Harris and Associates, Inc., *supra* note 58, at 750

102. See *id.*

103. See PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 3 (1991).

much as mismatched attorney skills, because of the over-emphasis on irrelevant discovery.¹⁰⁴

Judge Roger Randall concurred with respect to the economic impact of discovery: "Greater attention should be paid to making discovery processes less burdensome on the parties and also to standardizing discovery methods with adequate sanctions for abuse of discovery, so that there is a level playing field going into the courtroom."¹⁰⁵

Depositions provide the "hardball" litigator with an especially effective adversarial weapon. As University of Missouri Law Professor Wayne Brazil explained, "[b]ecause depositions can be used to require the presence of the deponent for lengthy periods of time, they also have great adversarial potential for harassing and embarrassing adverse parties or witnesses and for disrupting their lives and businesses."¹⁰⁶ A survey of Chicago litigators found a similar widespread use of discovery as an aggressive tactical weapon.¹⁰⁷ The idea, said one survey respondent, is to "see if you can make them mad," to put them "through the wringer, through the mud," so that "they are frightened to be a witness and . . . are a much worse witness."¹⁰⁸

Not all discovery abuse emerges from unethical or illegitimate motives. Fear of malpractice liability contributes to discovery overuse. Like their physician counterparts who often leave no diagnostic tool unused—not because it is good medicine but out of fear of malpractice lawsuits—so too attorneys take depositions that are either too long or unnecessary, make document requests that are too voluminous, and inflict word-processor-generated interrogatories that have little relevance to the issues in the case.¹⁰⁹ Consequently, excess discovery prices many would-be civil litigants out of the market. Judge William Schwarzer estimated that discovery has made litigating a case for less than \$200,000 "rarely

104. Field Response, *supra* note 86 (emphasis added).

105. Randall Response, *supra* note 68.

106. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1329 (1978).

107. Wayne D. Brazil, *Civil Discovery: Lawyers' Views on Its Effectiveness, Its Principal Problems and Abuses*, AM. B. FOUND. RES. J. 787, 789-90 (1980).

108. *Id.* at 859.

109. See William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 JUDICATURE 178, 178-79 (Dec.-Jan. 1991).

economically feasible."¹¹⁰ He concluded that "[i]n short, the transaction costs of dispute resolution have reached unaffordable levels."¹¹¹

Other than mandatory disclosure, the most obvious remedy to these problems is enhanced judicial oversight and control. Greater judicial discretion to impose sanctions was the second most popular step—after time limits—to improve the discovery process among the Harris survey judges.¹¹² In the present survey greater use of judicial sanctions against pretrial attorney abuse was the most popular reform, receiving an 83% affirmative response.

*D. Neutral Expert Witnesses: Respondents Were Asked if Courts Should Make Greater Use of Court-Called Expert Witnesses*¹¹³

In a potential watershed development, federal Judge Samuel Pointer, presiding over a consolidated federal docket of more than 21,000 breast implant lawsuits, recently appointed a national panel of experts to advise the court.¹¹⁴ The panel's charge was to evaluate widely conflicting scientific studies on the link between gel breast implants and various diseases.¹¹⁵ Does this presage a trend? If it facilitates resolution of cases, such panels, and court-appointed experts in general, may indeed proliferate—a departure from the norm.

The use of expert testimony is on the upswing. Indeed, the sale of expert testimony has become a growth industry in a dazzling array of fields. The parade of expert witnesses in the Simpson case,¹¹⁶ for example, included specialists in ice cream and men's gloves. Studies show juries attach great weight to expert testimony.¹¹⁷ Thus, the hiring of an expert witness by one side strategically compels the other side to follow suit.

Current trial practice almost always confines expert testimony to the partisan experts hired by the parties—often to the detriment

110. *Id.* at 179.

111. *Id.*

112. See Louis Harris and Associates, Inc., *supra* note 58, at 738.

113. See *infra* app., tbl. 9.

114. See Julie Gannon Shoop, *Court Orders Search for Neutral Experts in Breast Implant Litigation*, TRIAL, Aug. 1996, at 15, 16.

115. See *id.*

116. *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Oct. 3, 1995).

117. See, e.g., Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 LAW & HUM. BEHAV. 385, 393 (1990).

of the fact finder. As illustration, consider the Simpson case,¹¹⁸ which etched a sorry but increasingly common courtroom tableau. Jurors became stupefied by the sharply competing testimonies of opposing experts. Juror attention visibly waned. What was supposed to be educative was instead combative and perplexing. This "battle of the experts" tends to confound juries.

The main problem is distortion. Powerful financial incentives induce hired expert witnesses to slant their opinions in order to satisfy their attorney clients. This exaggerates differences, minimizes consensus, and profoundly confuses jurors. Prolonged interrogation of expert witnesses usually leaves the jurors more puzzled than informed, more weary than focused.

Adversarial misuse of expert testimony exacerbates the situation. Overzealous attorneys often knowingly elicit dubious and unsubstantiated views from their experts. Because educating the jury may be at the bottom of the attorney's agenda, public cynicism towards expert testimony mounts.

Bored, confused, or both, jurors frequently give mind to the wrong things. Too often they attend to the personal characteristics of expert witnesses instead of the quality of their testimony. Jurors are easily enthralled by the expert who is the most engaging or superficially persuasive rather than the most authoritative.

These problems are avoidable. Judges could call their own experts to testify. Using federal procedure as an illustration, the Federal Rules of Evidence codify and particularize the inherent power of the trial judge by giving the trial court broad discretion to appoint an expert witness *sua sponte* or on the motion of any of the parties.¹¹⁹ The Rule sets out a relatively clear set of procedures to govern the process.

Reluctant to consume valuable court time in appointing experts and wary these experts would unduly influence jurors, judges rarely exercise this prerogative.¹²⁰ Nevertheless, extreme contradictions in the testimonies of the partisan experts that bewilder the

118. *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Oct. 3, 1995).

119. *See* FED. R. EVID. 706.

120. *See* PANEL ON STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS, NATIONAL RESEARCH COUNCIL, *THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS* (Stephen E. Fienberg ed., 1989); JOE S. CECIL & THOMAS E. WILLGING, *COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706* (1993).

jury warrant the appointment of impartial expert witnesses.¹²¹ The benefits are considerable.

Court-appointed expert witnesses would be compensated by the court—the cost being passed on to the parties as the court directs¹²²—with desirable results. Compensation begets allegiance. Court-based compensation would remove the financial pressure on expert witnesses to slant their testimonies. The impartiality and competence of the court-appointed expert would assist, rather than addle, the jury in reaching an informed verdict. Further, the tempering effect of the impartial expert may have a prophylactic effect on the excesses of the partisan experts and result in more settlements.

Expert witnesses are most often used in complex civil cases. In such cases a majority of the judges in the Harris survey favored the use of neutral expert witnesses in addition to those called by the parties.¹²³ Judge Roger Randall suggested how this might be facilitated:

As more and more courts in California go to direct calendaring of cases, it will be easier for the courts to identify cases at an early stage which need court appointed experts. I believe court appointed experts can avoid a great deal of confusion in the battle of the experts.¹²⁴

IV. CONCLUSION

With trial reform either recently effectuated, in process, or gaining prominence in several states, public attention increasingly shifts to judges, who are necessarily the linchpins of the process. The findings of this survey indicate that the judiciary may be more receptive to various procedural reforms than might popularly be believed—the conventional perception being that judges are conservative about such changes. Although only California judges were surveyed, the size of the survey population and the breadth of attitudes amongst our largest state's judiciary suggest that the findings may be extrapolated to the judiciary nationwide.

Judges strongly favored reforms geared towards improving juror comprehension of the evidence, thus the judicial support for

121. See *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 1000 (5th Cir. 1976).

122. See FED. R. EVID. 706(b).

123. See *Louis Harris and Associates, Inc.*, *supra* note 58, at 741.

124. Randall Response, *supra* note 68.

juror questions and issue separation. Collectively, these measures enhance independent juror fact finding while simplifying and properly categorizing the evidence free of any attorney influence.¹²⁵ Similar judicial support was found for reforms facilitating juror understanding of the law: juror preinstruction and improved juror orientation. Judges also favored greater use of special verdicts, which either relieve jurors of applying the law or enable judges to specifically monitor the accuracy of the application. Of distinct significance is that several of the proposed jury reforms supported by the surveyed judges—juror questions, improved orientation, and preinstruction—were later recommended by the Blue Ribbon Commission.¹²⁶

Reforms intended to counter the untoward effects of attorney domination or mismatching earned judicial backing as well. Requiring minimum advocacy skills for trial representation and urging more judicial questioning when attorneys fail to pose important probative questions each mitigate the injustice inherent in the presence of attorney incompetence or mismatched opposing attorneys. More consequential sanctions against pretrial discovery abuses and greater use of court-appointed neutral expert witnesses may salutarily reallocate procedural power from attorney to judge while retaining the essential adversariness of the trial.¹²⁷

This survey will hopefully be a prologue to future efforts. In the context of trial reform, research should replace rhetoric. Empirical research is not necessarily the answer; it is, however, the preferred starting point in determining the desired direction of trial reform policy. As recently argued, “[i]mproving the civil justice system requires thoughtful, objective analysis based on sound empirical data. The lack of systematic, cumulative data in this area makes it possible for far-reaching policy proposals to be advanced on the basis of tendentious anecdotes and numbers.”¹²⁸

125. Other similar proposals received substantial if not majority approval. Uninterrupted opening narratives by witnesses—40%; written transcripts of the testimony for jurors—30%; and videotaped copies of the testimony—39%; all amassed sizable affirmation.

126. See BLUE RIBBON COMM’N REPORT, *supra* note 3, at 80-81, 83-87, 90-93 (Recommendations 5.1, 5.3, and 5.6).

127. The endorsements of issue separation and court-appointed expert witnesses confirmed the sentiments of the judges in the major prior survey of judicial opinions. See Louis Harris and Associates, Inc., *supra* note 58, at 738-45.

128. Marc Galanter et al., *How to Improve Civil Justice Policy: Systematic Collection of Data on the Civil Justice System Is Needed for Reasoned and Effective Policy Making*, 77 JUDICATURE 185 (1994).

Research without clearly articulated purpose, however, yields information, not knowledge. In pursuing our research agenda, we need to look not only at what the trial players—judges, attorneys, jurors, parties—do, but also at what they think and feel. Is it not equally as important, for example, to know what judges and jurors think the purpose of damage awards are or should be as it is to know what they have awarded? Only when norms are articulated do we have a baseline to measure the extent that practice deviates from standards. Then we can devise corrective measures. In short, values should drive policy, and reforms should effectuate policy.

Accordingly, research should first identify the operative norms underlying our ideal trial justice system. The values so articulated should suggest lines of research inquiry designed to bridge the gap between theory and practice. Herewith, an illustrative sampling of proposed research topics: What kinds of disputes do we want juries—rather than judges, special panels, or alternative dispute resolution mechanisms—to try? How can technology make jury service more convenient? What is the ideal balance of attorney-judge power over the trial inquiry? What changes could improve jury performance without impairing the litigants' rights to a fair trial? These findings will, in turn, inform subsequent research seeking the optimal means of realizing the revealed values.

APPENDIX

Analysis of Responses to Reform Proposals Favored by a Majority of Those Responding

Figures represent *percentages*. "Always" or "Sometimes" responses were considered affirmative.

TABLE 1. IMPROVED JURY ORIENTATION

	Always	Sometimes	Total
Trial	48	13	61
Appellate	37	20	57
Combined	47	14	61

TABLE 2. PREINSTRUCTION

	Always	Sometimes	Total
Trial	70	10	80
Appellate	64	12	76
Combined	70	10	80

TABLE 3. JUROR QUESTIONS

	Always	Sometimes	Total
Trial	48	13	61
Appellate	37	20	57
Combined	47	14	61

TABLE 4. ISSUE SEPARATION

	Always	Sometimes	Total
Trial	52	16	68
Appellate	63	7	70
Combined	53	16	69

TABLE 5. SPECIAL VERDICT FORMS

	Always	Sometimes	Total
Trial	54	10	64
Appellate	52	13	65
Combined	54	10	64

TABLE 6. MINIMUM ADVOCACY SKILLS

	Always	Sometimes	Total
Trial	67	2	69
Appellate	56	-	56
Combined	66	1	67

TABLE 7. JUDICIAL QUESTIONING

	Always	Sometimes	Total
Trial	59	15	74
Appellate	79	8	87
Combined	61	14	75

*TABLE 8. JUDICIAL SANCTIONS
AGAINST PRETRIAL ABUSES*

	Always	Sometimes	Total
Trial	78	6	84
Appellate	64	9	73
Combined	76	7	83

TABLE 9. NEUTRAL EXPERT WITNESSES

	Always	Sometimes	Total
Trial	40	17	57
Appellate	35	13	48
Combined	40	16	56