

January 2001

Re-Examining Wyoming's Jury Trial Procedures - Introductory Letter

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Lehman, Larry L. (2001) "Re-Examining Wyoming's Jury Trial Procedures - Introductory Letter," *Wyoming Law Review*. Vol. 1: No. 1, Article 2.

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WYOMING LAW REVIEW

VOLUME 1

2001

NUMBER 1

RE-EXAMINING WYOMING'S JURY TRIAL PROCEDURES—INTRODUCTORY LETTER

*Honorable Larry L. Lehman**

In 1996, Professor Brad Saxton began a comprehensive survey of jurors. The result of that survey, published in a 1998 report, revealed that those who served as jurors felt they could have provided a better service if they had more tools available to them than traditionally allowed by our courts.

In response to that juror survey, then-Chief Justice Taylor appointed the Commission on Jury System Improvement. With Professor Saxton as chairman, the Commission was made up of 19 members including judges from all levels of the judiciary, practicing attorneys of various disciplines, court clerks, academics from the University of Wyoming, and, perhaps most importantly, citizens who had served as jurors in our state trial courts.

For two years, this Commission met regularly. Since Wyoming was one of the last states to examine this issue, information was readily available from other states. Significant efforts were also made to obtain input from the bench and the bar during the process. At the conclusion of that two-year period, a set of recommendations was submitted which in fact provides tools to assist jurors in the performance of their duties. Those tools include more information about the case before it begins, an opportunity for jurors to record their thoughts in notes, methods to obtain individual copies of instructions and exhibits, and, when appropriate, to have jurors' questions answered.

* Honorable Larry L. Lehman is the Chief Justice of the Wyoming Supreme Court.

These tools are clearly necessary to any of us who first sit down with a client, and ultimately represent those clients in a trial. Those are all tools any trial judge uses when he makes a decision without a jury. It is difficult to quarrel with the jurors' request to utilize the same tools.

It is with sincere appreciation of the hard work of this Commission, which included countless hours of debate and frustration that inevitably accompanies new ideas, that I announce the adoption of the recommendation of this Commission. The Board of Judicial Policy and Administration voted to adopt rules reflecting the recommendation with an effective date of January 1, 2001.

The adoption was made with the objective to review the effectiveness of the rules two years subsequent to their adoption. The purpose of the rules is to enhance the satisfaction and effectiveness of our citizens whom we ask to serve as jurors. Should any rule fall short of that goal, it will be re-examined to determine the wisdom of continuing the practice.

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RE-EXAMINING WYOMING'S JURY TRIAL PROCEDURES

Initial Recommendations of the Wyoming Commission on Jury System Improvement

August 2000

This document was developed under grant number SJI-00-N-001 from the State Justice Institute. The points of view expressed are those of the Wyoming Commission on Jury System Improvement and do not necessarily represent the official position or policies of the State Justice Institute.



Financial support for the project that resulted in this report was also provided by the George Hopper Faculty Research Fund of the University of Wyoming College of Law.

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I. INTRODUCTION

In the summer of 1998, the Wyoming Supreme Court appointed the initial members of the Wyoming Commission on Jury System Improvement (hereinafter the "Commission"). The Commission's members have included judges from all levels of the judiciary, practicing attorneys from all sections of the bar, court clerks, academics from the University of Wyoming, and former jurors.¹

Part of the impetus for the Court's appointment of the Commission came from other jurisdictions that have recently implemented innovations in their jury trial procedures.² Many of these jurisdictions report that their jurors are more confident, more comfortable, and potentially more effective as a result of the reforms. The Court thus charged the Commission with the task of examining Wyoming's jury trial system and considering whether new procedures and policies might be implemented to improve the system's functioning.

The Commission commenced its work by compiling a fairly comprehensive list of procedural innovations that have recently been implemented in other jurisdictions. To this list the Commission added a number of other topics or issues that seemed germane to a general assessment of the effectiveness of Wyoming's current jury trial procedures. Examples of topics that were added to the list include methods of selecting jury pools, length of terms of jury service, compensation for jury duty, voir dire practices, "readbacks" of testimony during jury deliberations, and potential renovations of courtrooms and jury rooms to enhance jurors' comfort and convenience.

The Commission's initial list of issues for examination proved to

1. Judicial representatives who have served or are serving on the Commission include the Honorable Larry L. Lehman, the Honorable Robert A. Castor, the Honorable Jeffrey A. Donnell, the Honorable Nancy J. Guthrie, the Honorable John O. Housel, the Honorable David B. Park and the Honorable Barton R. Voigt. Court clerk representatives are Joyce Boyer and Bonnie Petsch. Attorney members are Kim D. Cannon, James E. Fitzgerald, Becky N. Klemt, Catherine MacPherson, Gerald R. Mason, William M. McKellar, Kevin P. Meenan, Patrick J. Murphy, Wyatt R. Skaggs, and Julie Nye Tiedeken. Former jurors include Shirley J. Cheramy and Robert Norris. The academic representatives are Assistant Professor Martin J. Bourgeois (psychology), Professor Theodore E. Lauer (law), and Professor Brad Saxton (law).

2. Among the jurisdictions that have recently studied and/or implemented innovations in jury trial procedures are Arizona, Colorado, and Utah. See *LIAISON: AN UPDATE FROM THE TASK FORCE ON STATE JUSTICE INITIATIVES 4-6* (ABA Litigation Section, August 1997).

be quite lengthy, and the Commission thus decided to tackle the issues in several phases. Subsequent reports will address other aspects of Wyoming jury trials; this first report explains the results of the Commission's examination of a number of potential innovations in jury trial procedures. The innovations that the Commission examined for purposes of preparing this first report included the following: (1) juror note taking; (2) juror notebooks; (3) use of expanded jury questionnaires; (4) provision of copies of jury instructions to each juror; (5) use of expanded preliminary instructions; (6) use of "mini-opening statements" before voir dire; (7) use of deposition summaries at trial; (8) allowing jurors to submit questions for witnesses; (9) use of a "juror handbook" to assist in educating jurors about jury service; (10) use of a "juror orientation videotape" to assist in orientation of jurors; (11) use of a "jury deliberation guide" to assist jurors in structuring their deliberations; and (12) simplification and clarification of jury instructions.

Section II of this report details the Commission's recommendations on each of these potential innovations. Section III then concludes the report by briefly describing the work that the Commission intends to complete in the next two years to prepare additional reports and recommendations for the Wyoming Supreme Court.

II. INNOVATIONS IN TRIAL PROCEDURES

The Commission spent approximately eighteen months examining potential innovations in trial procedures. In the course of that examination, Commission members reviewed reports from jurisdictions that have experimented with innovations and surveyed social science research that explored particular innovations in trial procedures.³ The Commission also solicited and reviewed comments from judges and attorneys about their reactions to a broad range of potential changes in the trial procedures used in the Wyoming courts.⁴

3. In conducting its investigations and formulating its recommendations, the Commission relied heavily on the information gathered and presented by the authors of *JURY TRIAL INNOVATIONS* (G. Thomas Munsterman, Paula L. Hanniford & G. Marc Whitehead, eds. 1997) (published by the National Center for State Courts). The Commission acknowledges its debt to these authors and would like to express its appreciation for their research and insights.

4. In this regard, in March of 2000 Wyoming Supreme Court Chief Justice Larry L. Lehman sent a letter to all members of the Wyoming State Bar who are now actively practicing law in Wyoming. Chief Justice Lehman's letter included a summary of the innovations that the Commission considered for purposes of this report; the letter invited bar members to submit comments about the potential innovations. Many Wyoming bar members submitted comments, and the Commission carefully considered those comments as it formulated the recommendations included in this report.

This section discusses the results of the Commission's examination of these innovations in trial procedures. The section discusses twelve different potential innovations, describing how each would function, issues that might arise during implementation, and potential advantages and disadvantages. For each potential innovation, the section states the Commission's recommendation in bold-faced type, followed by an explanation of the Commission's reasons for the recommendation. Where appropriate, the Commission suggests language for new or amended court rules or other measures that may be required to implement the recommendations; this language is included in the Appendices to this report.

1. Juror Note Taking

Description: Some Wyoming judges currently permit jurors to take notes during trial, but many judges do not allow jurors to do so.⁵ In jurisdictions that have determined that courts should routinely permit jurors to take notes, the courts inform jurors at the beginning of trial that they may take notes during trial. Jurors are provided with notepads and pens or pencils. Many courts require that jurors turn in notes they have taken either daily or at the end of trial, and some courts destroy the jurors' notes after the trial has concluded. The courts that permit jurors to take notes generally instruct jurors at the beginning of trial about applicable restrictions on their use of their notes, and the courts usually advise the jurors that jurors' written notes do not control over the jurors' collective recollections of the trial evidence.

Issues:

- Who pays for the note taking materials (pads, pens) that are distributed to jurors?
- What happens to jurors' notes during and after trial?

Perceived Advantages:

- Jurors who are allowed to take notes may be better able to keep track of and recall the information they receive during trial.
- Jurors who are able to refer back to notes they took dur-

5. No current Wyoming statute or court rule prohibits courts from allowing jurors to take notes, but no statute or court rule requires judges to do so or gives judges any guidance about the procedures they should follow if they permit jurors to take notes.

ing trial may feel more confident and comfortable as they can use their notes to refresh their recollections during their deliberations.

- Jurors who are permitted to take notes may remain more engaged in and attentive at trial.
- Juries that have been permitted to take notes may tend to make fewer requests during deliberations to have portions of trial testimony read back by the court reporter.⁶
- Jurors apparently want to be able to take notes, and jurors may feel more comfortable and satisfied with their jury service if they are allowed to take notes to assist them in recalling important evidence or instructions.⁷

Potential Disadvantages:

- Note taking might distract jurors from listening with complete attention to witness testimony or instruction by the judge.
- Jurors who are better (or at least more comprehensive) note takers may have disproportionate influence during deliberations.
- If jurors take notes home, the problem of extra-trial influences on jurors' deliberations may be exacerbated.

Recommendation:

The Wyoming Supreme Court should adopt a rule requiring that trial courts (1) allow jurors to take notes, and (2) provide jurors with appropriate note taking materials and instructions about restrictions on jurors' use of their notes.

6. See JURORS: THE POWER OF TWELVE—REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES (November 1994) (*hereinafter* "Arizona Report") at 84 (reporting sense of Arizona courts that permit note taking that procedure has resulted in reduction in requests for "readbacks" of trial record).

7. Jurors who were not permitted to take notes frequently complain—after their trials have concluded—that they wished they had been able to take notes during the trials; many of these jurors suggest that the procedures should be changed to allow jurors to take notes. See Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59 (*hereinafter* "Jury Study") at 111 and Appendix H (1998).

Explanation: The Commission concludes that the potential advantages of permitting jurors to take notes outweigh the potential disadvantages, as long as the courts employ appropriate procedures to protect against abuses.⁸ Jurisdictions that have recently completed examinations of their jury trial procedures have uniformly concluded that courts should routinely permit jurors to take notes at trial.⁹ In addition, social scientists recently have completed several studies that have suggested that note taking does not cause jurors to become distracted during trial or permit jurors who take more notes to assume disproportionate influence on the jury's deliberations.¹⁰ To address concerns about potential extra-trial influences on jurors, courts should permit jurors to take their notes with them and review them during recesses, but should not permit jurors to take their notes home, either during or after trial. The Commission also concludes that the jurors' notes should be collected and destroyed by the court immediately after the trial concludes.

To assist the Wyoming Supreme Court in considering implementation of this recommendation, Appendix A-1 to this report includes a proposed court rule explaining the procedures that courts should follow in administering note taking by jurors. Appendix A-1 also includes a proposed pattern jury instruction for courts to use to explain to jurors how they may take and use notes.

2. Juror Notebooks

Description: Some jurisdictions are beginning to routinely use "juror notebooks" in lengthy or complex trials.¹¹ In these jurisdictions,

8. The judges and clerks who participated on the Commission concluded that the costs involved in providing jurors with note taking materials would not be a significant factor that would cause the trial courts to oppose this innovation.

9. See, e.g., *Arizona Report* at 85; WITH RESPECT TO THE JURY: A PROPOSAL FOR JURY REFORM—REPORT OF THE COLORADO SUPREME COURT COMMITTEE ON THE EFFECTIVE AND EFFICIENT USE OF JURIES 42 (February 1997). See also CIVIL TRIAL PRACTICE STANDARDS (American Bar Association Section of Litigation, February 1998) (*hereinafter* "ABA CIVIL TRIAL PRACTICE STANDARDS") at 6 ("The court should ordinarily permit jurors to take notes during the proceedings and use them during deliberations.")

10. See, e.g. Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials*, 18 LAW & HUMAN BEHAV. 121 (1994) (reporting on empirical study that did not verify suggested disadvantages or advantages of notetaking); compare Lynne ForsterLee, Irwin A. Horowitz & Martin Bourgeois, *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 LAW AND HUMAN BEHAV. 567 (1994) (reporting on study that suggested notetaking may have beneficial effects on jurors' comprehension and recall).

11. No current Wyoming statute or court rule prohibits courts from providing jurors with these types of notebooks, but no statute or court rule requires judges to do so or gives judges any guidance about the procedures they should follow if they give jurors

the courts provide jurors with notebooks to assist them in following and remembering information presented during trial. Notebooks typically include blank paper for notes, general instructions for jurors, copies of pertinent case-specific instructions, and copies of important exhibits, which may be highlighted. Notebooks may also include glossaries of key technical terms, pictures of witnesses and a copy of the juror handbook, if one is available.¹²

Issues:

- Who pays for jurors' notebooks?
- What procedures will trial courts use to determine the materials that will be included in notebooks?

Perceived Advantages:

- Notebooks may help jurors keep track of and recall information received at trial.
- If instructions are included in the notebooks, jurors may refer to them at different stages at trial, and jurors may then be more familiar and comfortable with instructions by the time of deliberations.

Potential Disadvantages:

- Notebooks may distract jurors from listening with complete attention to witness testimony.
- If jurors take notebooks home, the problem of extra-trial influences on jurors' deliberations may be exacerbated.
- The tasks of determining the contents of and preparing juror notebooks may prolong and complicate pretrial proceedings.
- Juror notebooks will involve additional expense.

notebooks.

12. Later in this section, the report will discuss the Commission's recommendation that the Wyoming courts should prepare a "juror handbook" to educate jurors about jury service. See *infra* at section II(9).

Recommendation:

The Wyoming Supreme Court should adopt a rule authorizing the use of juror notebooks in appropriate cases and specifying appropriate court procedures for cases in which juror notebooks will be used.

Explanation: The Commission concludes that the potential advantages of juror notebooks outweigh the potential disadvantages, as long as the trial courts have discretion to decide—after consultation with counsel—when juror notebooks would be helpful and when they would be unnecessary.¹³ The trial courts should also have discretion, in consultation with counsel, to determine the types of materials that will be included in jurors' trial notebooks when notebooks will be used. To address concerns about potential extra-trial influences on jurors, courts should permit jurors to take their notebooks with them and review them during recesses, but should not permit jurors to take their notebooks home, either during or after trial. The Commission also concludes that the contents of jurors' notebooks should be collected and destroyed by the court after the trial concludes, although one copy of the contents of the notebooks provided to the jurors should be retained as part of the trial record.

To assist the Wyoming Supreme Court in considering implementation of this recommendation, Appendix A-2 to this report includes a proposed court rule explaining the procedures that courts should follow in cases in which they decide to use juror notebooks. Appendix A-2 also includes a proposed pattern jury instruction for courts to use to explain to jurors the purposes of the notebooks and appropriate restrictions on jurors' use of the notebooks. The Commission concludes that use of these procedures should help alleviate the potential problem that use of juror notebooks may prolong and complicate pretrial proceedings.

3. Expanded Use of Jury Questionnaires

Description: Wyoming's trial courts already routinely use a relatively short juror questionnaire that jurors complete when summoned for jury service at the beginning of a term. In some jurisdictions, the courts routinely encourage counsel to submit more detailed, case-specific questionnaires that prospective jurors will complete before voir dire.¹⁴

13. Again, the court clerks and judges on the Commission concluded that the expense and time involved in preparing and distributing the notebooks to jurors would not be prohibitive.

14. Many of Wyoming's trial courts are already using expanded, case-specific juror

Issues:

- Who pays the costs of copying and distributing expanded questionnaires?
- What procedures will the trial courts use to administer the development, distribution, collection, and timely review (by counsel) of expanded jurors' questionnaires?

Perceived Advantages:

- Voir dire may be shortened, as counsel may receive critical information in advance that otherwise would have to be developed in voir dire.
- Prospective jurors may respond more completely and candidly on a written questionnaire than they would in open court.
- If properly trained in how to formulate questionnaires, lawyers may be able to learn more from prospective jurors for intelligent use of peremptory challenges and challenges for cause.
- Courts and lawyers may be better able to avoid disputes over perceived voir dire abuse by counsel.

Potential Disadvantages:

- The procedure may be costly.
- Use of detailed questionnaires may prolong or complicate the process of trial preparation.
- Many attorneys are unsophisticated about use of questionnaires, and additional training may be required to facilitate effective use of the technique.

Recommendation:

The Wyoming Supreme Court should adopt a rule specifically authorizing the use of expanded case-specific jury ques-

questionnaires in cases involving particularly sensitive or complex issues of juror qualification and bias.

tionnaires in appropriate cases and specifying the procedures that trial courts should use in cases in which expanded juror questionnaires will be used. The Court should also require statewide use of an improved standardized jury questionnaire that prospective jurors will fill out when first summoned for jury duty. The Wyoming State Bar should provide CLE programs that will help attorneys learn to use expanded juror questionnaires effectively.

Explanation: The Commission concludes that the potential advantages of expanded, case-specific jury questionnaires outweigh their potential disadvantages, as long as the trial courts have discretion to decide—after consultation with counsel—when expanded jury questionnaires would be helpful and when they would be unnecessary. Use of expanded juror questionnaires is not prohibited by Wyoming’s current statutes and court rules, and Wyoming courts that have already experimented with expanded questionnaires have reported favorably on the experience, citing many of the advantages discussed above. The Commission concludes that trial courts would benefit, however, from a court rule specifying the procedures that the courts should follow when using expanded, case-specific juror questionnaires. The court rule should also specify that the litigants may be required to pay the costs of copying and mailing expanded case-specific jury questionnaires in cases in which the court and counsel agree that an expanded questionnaire would be helpful.

To assist the Wyoming Supreme Court in considering implementation of this recommendation, Appendix A-3 to this report includes a proposed court rule specifying the procedures that trial courts should employ when using expanded, case-specific juror questionnaires. The Commission is also in the process of developing a new model jury questionnaire for consideration by the Wyoming Supreme Court; the Commission believes it would be helpful for the Court to encourage or require trial courts around the state to commence using this model questionnaire (with any appropriate jurisdiction-specific modifications) to promote greater uniformity of jury selection practices.

4. Copies of Instructions for Jurors

Description: Many of Wyoming’s courts provide the jury with only one copy of the jury instructions, and the jurors must share that copy during their deliberations. In some Wyoming courts, and in courts in some other jurisdictions, the judges provide a copy of the jury instructions to *each* juror. In some of these jurisdictions, jurors may receive a

three-ring binder or other type of notebook to assist them in keeping the instructions in order.

Issues:

- Who makes and pays for the copies of jury instructions?
- At what point in the trial process should jurors receive the instructions?

Perceived Advantages:

- Many jurors apparently would like to have a copy of the jury instructions, and they may feel more comfortable about the trial if they have their own copy of the instructions to which to refer at pertinent times during trial.¹⁵
- If jurors have a copy of the instructions and can read along with the judge as the judge instructs the jury, they may be better able to understand and use the instructions.¹⁶
- Jurors may be more comfortable during deliberations—and deliberations may be more efficient and effective—if each juror has the juror's own copy of the instructions to refer to, rather than having to share one copy of the instructions with all of the other jurors.

Potential Disadvantages:

- The trial process may become more cumbersome if courts have to take additional time to prepare multiple copies of the jury instructions and disseminate a copy to each juror after the court has finally determined which instructions the court will use in charging the jury.
- Jurors who have their own copy of the instructions but

15. See *Jury Study*, *supra* note 7, at 110 and Appendix H (a number of jurors who participated in the study suggested that the courts should routinely provide copies of the jury instructions to all jurors).

16. Cf. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 146 (1988) ("Educational psychologists, interested in the didactic value of different methods of communication, have found that students comprehend and remember more material when they obtain it through reading texts rather than listening to lectures.").

read at a different pace than the judge does may become distracted and stop following along with the judge as the judge charges the jury.

- The procedure will involve additional expense.

Recommendation:

The Wyoming Supreme Court should adopt a rule requiring that the trial courts provide each juror with the juror's own copy of the jury instructions.

Explanation: The Commission concludes that the advantages of providing jurors with their own copies of the jury instructions outweigh the potential disadvantages. The procedures will necessarily involve some additional copying expenses and some additional time at trial, but the court clerks and judges who served on the Commission believed that the additional expense and time would not be so significant that the courts would resist the procedure.

To assist the Wyoming Supreme Court in considering implementation of this recommendation, Appendix A-4 to this report includes a proposed court rule explaining the procedures that courts should follow in making copies of jury instructions available to jurors.

5. Expanded Preliminary Instruction

Description: By statute and rule, Wyoming's judges are required to instruct the jurors about applicable law before counsel make closing arguments.¹⁷ Judges vary considerably, however, in terms of how much instruction they give to jurors at the commencement of trial.¹⁸

17. See WYO. STAT. ANN. § 1-11-205(a)(v)-(vii) (Lexis 1999); WYO. STAT. ANN. § 7-11-201(a)(v)-(vii) (Lexis 1999); WYO. R. CIV. P. 51; WYO. R. CRIM P. 30.

18. The statutes and rules governing jury instructions do not clearly establish that Wyoming's trial courts can give jurors case-specific instructions at the commencement of trial, as well as (or instead of) at the end of trial. For example, Rule 51 of the Wyoming Rules of Civil Procedure provides:

(a) General Instructions. At any time the court may give to the jury such general instructions as to the duties and functions of the court and jury, and the manner of conducting the trial, as it may deem desirable to assist the jury in performing its functions. Such instructions, exclusive of rulings which are recorded by the court reporter for inclusion in any record, shall be reduced to writing, numbered and delivered to the jury with the other instructions and shall be a part of the record in the case.

(b) Further Instructions; Objections. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written

Where courts use expanded preliminary instructions, the court and counsel confer before trial and attempt to identify all the instructions that the court can safely give to the jury as the trial commences. The judge then gives those instructions that would seem potentially helpful to the jury, before opening statements.

Issues:

- In giving more comprehensive instructions at the beginning of trial, could the court give the jurors instructions that will not be supported by the evidence that ultimately is presented at trial?
- What procedures will the courts use to determine which instructions the jurors should receive before trial commences?

Perceived Advantages:

- Jurors may be able to use the information they receive at trial more intelligently if they understand in advance the context in which they will be required to analyze and evaluate that information.¹⁹
- Repetition can assist recall and comprehension, and jurors who have heard key instructions both at the begin-

requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. Before the argument of the case to the jury has begun, the court shall give to the jury such instructions on the law as may be necessary and the same shall be in writing, numbered and signed by the judge, and shall be taken by the jury when it retires. No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

WYO. R. CIV. P. 51.

19. See KASSIN & WRIGHTSMAN, *supra* note 16, at 144-45:

Advocates for the use of preliminary instructions are guided by two arguments. The first is that people are more efficient as information processors when they have a unifying theme or schema within which to organize their input. Providing jurors with a legal framework before they hear the evidence and arguments should enable them to appreciate the relevance of facts as they appear, and should facilitate their comprehension and recall of the most significant information. [Footnote omitted]

See also MUNSTERMAN ET AL., *supra* note 3, at 19 (“[E]mpirical research has revealed that jurors instructed both before and after the evidence are better able to integrate facts and law than jurors instructed only after evidence is presented.”)

ning and at the end of trial may be better able to appreciate the instructions' significance and apply them effectively.

Potential Disadvantages:

- By giving more comprehensive instructions at the beginning of trial, the court might unfairly frame the issues and/or unfairly constrain counsel's flexibility during trial.
- The process of determining which instructions the court should give at the onset of trial might complicate and prolong pretrial.

Recommendation:

The statutes and rules governing jury instructions should be amended to (1) clarify that the trial courts may give jurors case-specific instructions at the beginning of the trial, (2) encourage the trial courts to give more comprehensive instructions at the beginning of trial, and (3) specify the procedures that trial courts should use when determining which preliminary instructions the jurors will receive. The Commission also recommends that the Wyoming Supreme Court ask the Wyoming Civil and Criminal Pattern Jury Instructions Committees to designate which of the existing pattern instructions would likely be helpful as preliminary instructions in many or most trials.

Explanation: The Commission concludes that the potential advantages of expanded preliminary instruction outweigh the potential disadvantages, as long as the courts exercise appropriate discretion to avoid giving instructions that the evidence may not support or that may unfairly constrain counsel's flexibility to pursue alternative theories at trial.²⁰

To assist the Wyoming Supreme Court in considering implementation of this recommendation, Appendix A-5 includes proposed amendments to the statutes and rules governing jury instructions, to clar-

20. The Commission notes that use of expanded preliminary instructions may be particularly risky in criminal cases, as inappropriate initial instructions may unfairly constrain defendants' choice of trial strategies as trials develop. For this reason, courts should give preliminary instructions about issues such as potential defenses or lesser included offenses, if at all, with utmost caution.

ify that expanded preliminary instruction is permissible and specify the procedures that the courts should use when “pre-instructing.”

6. “Mini Opening Statements” Before Voir Dire

Description: Experienced Wyoming trial counsel already use voir dire as an opportunity to begin to educate potential jurors about the case, even as the current rules governing voir dire prohibit counsel from “arguing” the case.²¹ Some jurisdictions have addressed the need for potential jurors to appreciate the context that prompts particular voir dire questions by permitting counsel to give a brief, “mini-opening statement” before voir dire.²² In these “mini opening statements,” counsel preview the importance evidence they expect to present at trial and the basic issues involved in the case.

Issues:

- How will the parameters for appropriate “mini” opening statements be defined, to protect against abuse by counsel?

Perceived Advantages:

- Prospective jurors can respond more intelligently to voir dire questioning when they have a better sense of the context that prompts counsel’s questions.
- Use of the “mini” opening statement procedure may reduce the need for trial judges to decide on an ad hoc basis if counsel are violating the rules governing voir dire by inappropriately previewing the anticipated trial evidence.

Potential Disadvantages:

- Lawyers may use this procedure even more aggressively than they use current voir dire procedures to begin arguing the case and to “shop” for favorable jurors.

21. See WYO. R. CIV. P. 47(c)(2) (During voir dire, “[t]he court shall not permit counsel or a *pro se* party to attempt to precondition jurors to a particular result, . . .”); see also WYO. R. CIV. P. 47(c)(3) (“In voir dire examination, counsel or a *pro se* party shall not . . . (D) [i]nstruct the jury on the law or argue the case.”)

22. See, e.g. *Arizona Report*, *supra* note 6, at 59.

Recommendation:

At this time, the Wyoming Supreme Court should not adopt a rule authorizing the use of “mini” opening statements. The Court should, however, modify existing rules governing voir dire to clarify that it is appropriate and permissible for counsel in voir dire to preview some of the evidence from the case to help prospective jurors better understand the reasons for certain lines of voir dire questioning.

Explanation: The Commission concludes that the advantages of “mini” opening statements before voir dire do not outweigh the potential disadvantages and that it would not be advisable for the Court at this time to adopt a rule requiring routine use of “mini-opening statements” before voir dire. The Commission concludes that the purposes that “mini-opening statements” are intended to serve are likely better served if trial judges appropriately inform the prospective jurors about the context of the cases involved before voir dire commences. The Commission also concludes, however, that the rules governing voir dire should be liberalized to clarify that it is appropriate and permissible for counsel in voir dire to preview some of the evidence from the case to help prospective jurors better understand the reasons for certain lines of voir dire questioning.

To assist the Wyoming Supreme Court in considering implementation of this recommendation, Appendix A-6 includes proposed amendments to the rules governing voir dire practices, to clarify the permissible uses by counsel during the voir dire process of factual information from the case.

7. Deposition Summaries

Description: Wyoming’s courts generally follow the traditional practice in which deposition testimony is presented to jurors by having the actual deposition transcript (or portions of it) read into the record. Some jurisdictions are now using procedures under which the trial court urges or requires counsel to prepare written summaries of deposition testimony for use at trial. The court instructs counsel to share their proposed deposition summaries with opposing counsel before trial and to attempt to work out differences of opinion about inclusions, omissions and characterizations. Deposition summaries that result from these procedures are read at trial, or copies of the summaries are admitted as trial evidence and given to jurors for their review. The procedure is used in lieu of having the full deposition or significant excerpts read into evidence at trial.

Issues:

- What procedures will be used to assist counsel in reaching agreement on appropriate summaries?
- How should deposition summaries be presented to the jury?

Perceived Advantages:

- Jurors (and others) are spared the tedious experience of having lengthy depositions read at trial.
- Deposition summaries can present the important information from the depositions in a succinct form that is easier for jurors to use and more efficient.
- Use of the procedure may shorten trial.

Potential Disadvantages:

- The procedures used for preparing the deposition summaries might complicate and prolong the process of preparing for trial.
- If counsel disagree about particular aspects of a summary, time-consuming intervention by the court may be required.
- Jurors might pay more attention when deposition testimony is read by a "witness" than they will pay when a paraphrased summary is read by counsel or a judge.
- If a copy of summary is received in evidence, the jurors might pay more attention to it than they do to witness testimony that is presented orally at trial.

Recommendation:

At this time, the Wyoming Supreme Court should not adopt a rule requiring the use of deposition summaries.

Explanation: The Commission concludes that the advantages of "deposition summaries" do not outweigh their potential disadvantages, at

least if the procedure is *required*.²³ Commission members noted that existing procedures already permit counsel at trial to use excerpts of depositions, rather than entire depositions. Similarly, counsel may use stipulations at trial to present efficient summaries of unnecessarily time-consuming deposition testimony. The Commission concludes that these existing procedures adequately serve the purposes that the deposition summary procedure is intended to serve, and that a new rule is thus not necessary.

8. Juror Questions for Witnesses

Description: Several jurisdictions have recently implemented procedures in which jurors are permitted during trial to submit questions to be asked of witnesses before the witnesses are excused.²⁴ The jurors generally submit the questions in writing; the trial judge reviews the questions privately with counsel, rules on any objections and then asks witnesses those questions that are not legally inappropriate. The court gives jurors a general instruction at the beginning of trial about the procedures that will be used for jurors' questions, and warns the jurors that not all of the questions they submit will in fact be asked, as some of their questions may be legally inappropriate. One variant of the procedure permits trial counsel to review questions that jurors submit and then to ask the questions if trial counsel wishes to do so.

Issues:

- What procedures should the trial court use to receive and review questions that jurors submit?

Perceived Advantages:

- Jurors apparently want to be able to ask questions, and they may feel more comfortable and confident in their role as decision-makers if the answers to their questions provide the information they believe to be necessary for informed deliberations.²⁵

23. The Commission notes that no rule would prevent a trial judge and counsel from agreeing to use deposition summaries in a particular case, if the court and counsel agreed that use of summaries would be more efficient and effective than having deposition testimony read into the record.

24. See, e.g. *Arizona Report*, *supra* note 6, at 90; see also ABA CIVIL TRIAL PRACTICE STANDARDS, *supra* note 9, at 9 ("If it will assist the jury to understand the evidence or to determine a fact in issue, the court may permit jurors to submit written questions for witnesses.")

25. See *Jury Study*, *supra* note 7, at 117 and Appendix H (many jurors who partici-

- Jurors may be more attentive and engaged if not restricted to a passive role during trial proceedings.
- Counsel may be able to learn from jurors' questions the areas/issues about which jurors are preoccupied or concerned, and counsel may be able to adjust their presentation of evidence and arguments at trial to address jurors' concerns.

Potential Disadvantages:

- Jurors who are permitted to ask questions may inappropriately assume a role as advocates for a particular side during the trial.
- The procedure may prolong trial.
- Jurors will ask inappropriate questions (e.g., "Why didn't insurance cover the loss?"), and some jurors may draw unwarranted or unfair inferences about what the answers would have been when the court declines to ask particular questions.
- The procedure may interfere with the lawyers' ability to control and restrict the presentation of evidence at trial.
- If used, the procedure may require liberalized rebuttal practices.

Recommendation:

The Wyoming Supreme Court should adopt a rule for civil trials (1) requiring that trial courts allow jurors to submit questions for witnesses, and (2) specifying appropriate court procedures for administering jurors' questions. At this time, the Wyoming Supreme Court should not adopt a rule requiring trial courts to allow jurors to submit questions for witnesses in criminal trials.

Explanation: A majority of the members of the Commission (and a significant number of the attorneys who submitted comments to

pated in the study complained after trial that they were not permitted to ask questions that they believed to be important).

the Commission) conclude that the potential advantages of permitting jurors to submit questions for witnesses outweigh the potential disadvantages, as long as appropriate procedures are employed to protect to the extent practicable against the potential disadvantages. A majority of the members of the Commission also concludes that the rule should require trial courts in civil cases to allow jurors to submit questions; the Commission thus recommends that the rule should make the courts' use of this innovation mandatory.

The members who favor this innovation are persuaded to support it by (1) the potential for this innovation to prevent unnecessary confusion on the part of jurors at trial; (2) the argument—pressed by former jurors—that jurors as responsible decision-makers deserve a mechanism by which they can seek information they believe to be necessary for informed deliberations, as long as the information they seek is not of a type that would be legally inappropriate for jurors to consider; (3) the belief that trial courts can use appropriate procedures to minimize the potential disadvantages involved in allowing jurors to submit questions for witnesses; and (4) the largely positive reactions the Commission heard from jurors, judges and attorneys who have participated in trials in jurisdictions in which jurors are permitted to submit questions for witnesses.

A substantial minority of the members of the Commission (and a significant number of the attorneys who submitted comments to the Commission) oppose this innovation, concluding that the potential disadvantages of the procedure outweighed its potential advantages. The members who oppose the innovation are particularly concerned about (1) potential detrimental effects on counsel's ability to control and restrict the presentation of evidence at trial; (2) the potential for jurors to ask inappropriate questions and draw unfair inferences or become frustrated if the trial court refuses to submit the inappropriate questions to witnesses; (3) the potential that some jurors may ask questions that will cause other jurors to become confused or distracted from a focus on more pertinent evidence; (4) the danger that permitting jurors to ask questions may encourage some jurors to assume an inappropriate role as advocates in the proceedings; and (5) potential unfairness to a plaintiff if jurors submit questions during the defense case that were not submitted during plaintiff's case-in-chief, when plaintiff's witnesses were available and could have addressed the questions.

The Commission as a whole agrees that the potential disadvantages involved in the use of this procedure present especially serious concerns in criminal trials. In particular, allowing jurors to submit questions for witnesses may cause jurors to become confused about the op-

eration of the presumption of innocence and the requirement that the prosecution must present evidence sufficient to prove guilt beyond a reasonable doubt before a jury can convict. Jurors who are permitted to submit questions for witnesses in criminal trials may also be especially likely to ask inappropriate and prejudicial questions relating to potential prior bad acts, or questions suggesting improper inferences from a defendant's decision not to testify. Because of these concerns, the Commission concludes that the Wyoming Supreme Court should preserve the status quo for criminal trials, and thus should not at this time require trial courts to allow jurors to submit questions for witnesses in criminal trials. After our trial courts have had several years of experience using the procedure in civil cases, the Wyoming Supreme Court may wish to have the Commission re-examine the question of whether the procedure could safely be used in criminal trials as well as in civil trials.

To assist the Wyoming Supreme Court in considering implementation of this recommendation, Appendix A-7 to this report includes a proposed court rule explaining the procedures that courts should follow in administering jurors' questions for witnesses. The rule clarifies that the trial court should permit counsel to ask follow-up questions after a witness has responded to a juror's question(s); the rule also confirms that use of this new procedure may require trial courts to allow counsel more latitude in presenting rebuttal evidence. Appendix A-7 also includes a proposed pattern jury instruction for courts to use to explain to jurors the purposes and procedures for jurors' questions for witnesses.

In part because this innovation is fairly controversial, prompting more opposition than other innovations the Commission considered, the Commission concluded that it should commit to a careful review of how this "juror question" innovation works during the initial phase of its implementation. Accordingly—if this innovation is implemented—the Commission will gather information during the first two years that the innovation is used in civil trials, to permit assessment of how the innovation is working. The information that the Commission will gather will include (1) data about how many and what types of questions are being asked in trials; (2) reactions from judges, attorneys and jurors in cases in which jurors were permitted to submit questions for witnesses; (3) details about problems, if any, that have arisen because of jurors' questions for witnesses; and (4) participants' suggestions, if any, for refinements in the procedures used for administering jurors' questions for witnesses. At the conclusion of the two-year study period, the Commission will prepare and submit to the Wyoming Supreme Court a supplemental report and recommendations specifically addressing the "juror questions" innovation and whether use of the innovation should be continued, discontinued or refined.

9. Juror Handbooks

Description: Some jurisdictions have prepared short “juror handbooks” to educate jurors about jury service.²⁶ The courts generally distribute these handbooks to jurors when they are first summoned for a term of jury service, or when they arrive at the court after being summoned for potential service in a particular trial. The handbooks typically contain basic information about the juror’s role and responsibilities during trial, a synopsis of trial procedures, a glossary of terms the juror will likely encounter, and a directory of court personnel whom the juror may call or approach for assistance, if needed.

Issues:

- What topics should a jury handbook include?
- At what point in the process should jurors receive the handbook?
- Jury handbooks must be prepared with great care, to ensure that they do not present issues in a way that could predispose jurors toward a particular result or party in particular cases.
- Who pays for the costs of preparing and copying the handbooks?

Perceived Advantages:

- Many jurors apparently feel that they do not receive sufficient information educating them about their jury service, and a juror handbook may help jurors feel more comfortable and confident about jury service.
- Jurors may perform more effectively if they have a better understanding of (1) the role that they will play during their jury service; (2) the roles that judges, court staff, attorneys, parties and witnesses will play; and (3) the procedures that the court will use in administering the trial.
- If each juror receives a juror handbook, jurors can refer to the handbook at appropriate times during trial or de-

26. See, e.g. JUROR’S HANDBOOK (New York State Unified Court System 1998).

liberations to refresh their recollection and understanding of topics that the handbook covers.

Potential Disadvantages:

- Preparation of an appropriate juror handbook and production of a sufficient number of copies will involve a considerable amount of work and some expense.

Recommendation:

The Wyoming Supreme Court should authorize the Commission to prepare a juror handbook and—once the handbook is available should adopt a rule requiring that the trial courts distribute a copy to each juror at the beginning of their term of jury service.

Explanation: The Commission concludes that an appropriate juror handbook would be very helpful to jurors. The task of preparing the handbook should not be especially daunting, given the availability of juror handbooks from other jurisdictions that may serve as models. The Commission would anticipate making a draft of the juror handbook available for review and comment by members of the bench and bar before finalizing the handbook for use by the courts.

10. Juror Orientation Video

Description: Many jurisdictions have prepared juror orientation videotapes to educate jurors about jury service;²⁷ these videotaped orientations may be designed as complements to juror handbooks, when handbooks are available. The courts generally show these videotapes to jurors when they are first summoned for a term of jury service, or when they arrive at the court after being summoned for potential service in a particular trial. The videotapes generally cover basic information about the juror's role and responsibilities during trial, an explanation of trial procedures, an explanation of terms the juror will likely encounter, and an introduction to court personnel whom the juror may call or approach for assistance, if needed. Many of the videotapes also include some historical information about the development of our modern jury trial procedures, to impress upon jurors the importance of the role that they will play and the extent to which our jury system depends upon their willingness to participate responsibly.

27. In the course of its investigations, the Commission borrowed and reviewed copies of these types of orientation videotapes from a broad range of jurisdictions.

Issues:

- What topics should a juror orientation videotape cover?
- At what point in the process should jurors review the videotape?
- Juror orientation videotapes must be prepared with great care, to ensure that they do not present issues in a way that could predispose jurors toward a particular result or party in particular cases.
- Who pays for the costs of preparing and distributing copies of the videotapes?

Perceived Advantages:

- Many jurors apparently feel that they do not receive a sufficient orientation to jury service, and a juror orientation videotape may help jurors feel more comfortable and confident about jury service.
- Jurors may perform more effectively if they have a better understanding of (1) the role that they will play during their jury service; (2) the roles that judges, court staff, attorneys, parties and witnesses will play; and (3) the procedures that the court will use in administering the trial.
- A juror orientation videotape may be a more effective method than a juror handbook for educating some jurors about the material that a juror handbook would typically cover; the videotape can also remind viewers, however, that their juror handbooks cover many of the same topics and will be available throughout the trial as a reference source.

Potential Disadvantages:

- Preparation of an appropriate juror orientation videotape and production of a sufficient number of copies will involve a considerable amount of work and some expense.

Recommendation:

The Wyoming Supreme Court should authorize the Commis-

sion to commence preparing a juror orientation videotape and—once the videotape is available—should encourage trial courts to use the videotape as part of their juror orientation procedures.

Explanation: The Commission concludes that a juror orientation videotape would be very helpful to jurors. The task of preparing the videotape will be facilitated by availability of juror orientation videotapes from other jurisdictions that may serve as models.²⁸

11. Jury Deliberation Guide

Description: The American Judicature Society recently completed a project in which it prepared a short, written "Guide for Jury Deliberations."²⁹ The guide does not present jurors with rigid guidelines for deliberations, nor does it suggest that any one model is the most appropriate model for successful deliberations. Instead, the guide discusses a variety of deliberation techniques and strategies that juries may choose to use. The guide also attempts to answer particular questions that many jurors report having had about the deliberation process as they began to deliberate.

Issues:

- Can a guide offer helpful guidance to jurors without inappropriately constraining jurors' flexibility to fashion their own deliberation process?
- At what point in the process should jurors receive the deliberation guide, if one is available?
- Any guide to jury deliberations must be prepared with great care, to ensure that it does not push jurors toward a model of deliberations that could predispose jurors toward a particular result or party in particular cases.

28. At least some of the cost of preparing the videotape may be defrayed by use of funds remaining in the grant awarded to the Commission by the State Justice Institute, as the Commission has not used all of the allotted funds in preparing this "first phase" report.

29. See BEHIND CLOSED DOORS: A RESOURCE MANUAL TO IMPROVE JURY DELIBERATIONS, American Judicature Society (1999).

Perceived Advantages:

- Many jurors apparently feel that they commenced jury deliberations with almost no sense of how they should proceed, and that they would have been more comfortable and effective if they had received more guidance about potential strategies for deliberations.³⁰
- Many jurors may have little experience with group decision-making, and a deliberation guide may help juries design strategies for efficient and constructive deliberations.
- Fewer juries may deadlock, if guidance about deliberation strategies assists juries in deliberating constructively and effectively.

Potential Disadvantages:

- Juries may feel constrained to use techniques suggested in the guide, rather than developing their own, potentially more helpful strategies for deliberating.
- The process by which juries initially decide how to deliberate may itself be an important step by which jurors begin to develop both rapport with each other and strategies for group conversation; if so, the availability of deliberation guidelines may curtail or inhibit that initial process and detract from jurors' early rapport building.

Recommendation:

At this time, the Wyoming Supreme Court should not adopt a rule requiring use of a "Guide for Jury Deliberations."

Explanation: The Commission concludes that the potential disadvantages of a "Guide for Jury Deliberations" appear to outweigh the perceived advantages, at least until more information becomes available concerning how jurors are using the guide in jurisdictions in which jurors receive it. A majority of the members of the Commission are concerned that a "deliberation guide" would inevitably constrain jurors in their deliberations and subtly (and inappropriately) steer them towards a

30. See *Jury Study*, *supra* note 7, at Appendix H; see also BEHIND CLOSED DOORS, *supra* note 29, at 3-5.

particular model of decision making. (A substantial minority of the members of the Commission did not share this concern, and the juror representatives on the Commission felt strongly that a “deliberation guide” would be helpful to jurors and should be made available to juries.) Other members of the Commission believe that a guide is unnecessary, as the trial court can provide guidance about deliberation both in the jury instructions and in appropriate juror pre-trial orientation procedures. Still other members of the Commission felt that a “deliberation guide” would be disadvantageous because the process by which jurors figure out how they will deliberate is itself an important component of jury deliberations, and that process might be shortchanged if the jurors were given a jury deliberation guide. For these reasons, the Commission concludes that use of a “Jury Deliberation Guide” is inadvisable in the Wyoming courts at this time.

The American Judicature Society and other researchers are continuing to revise the existing “Guide for Jury Deliberations” and to gather information about how the guide is functioning in jurisdictions where it is being used. The Wyoming Supreme Court may wish to direct the Commission to monitor progress in other jurisdictions on this issue and to report back, in the next phase of the Commission’s work, on whether use of a jury deliberation guide should be reconsidered.

12. Clarifying Jury Instructions

Description: Considerable evidence suggests that many jurors have trouble understanding the existing pattern jury instructions.³¹ Many of the pattern instructions might be edited considerably, to state the legal rules they address in terms that jurors can understand and apply.

Issues:

- Who will undertake the task of editing jury instructions to make them easier for jurors to understand?
- Can a mechanism be designed to assure trial courts and counsel that the Wyoming Supreme Court will accept the simplified instructions as legally accurate statements of applicable law?
- Revised instructions must be prepared with great care, to ensure that they do not state the rules they address in a

31. See, e.g., *Jury Study*, *supra* note 7, at 81-109.

manner that could predispose jurors toward a particular result or party in particular cases.

Perceived Advantages:

- Jurors work hard to apply the jury instructions,³² and jurors may be both more comfortable and accurate in their decision-making if the instructions they apply are clear and understandable.
- Public confidence in the justice system should increase if the courts actively seek to ensure that jurors clearly understand the rules that the courts instruct them to apply.

Potential Disadvantages:

- If no mechanism exists to assure trial judges and counsel that the simplified instructions are acceptable to the Wyoming Supreme Court, trial judges and counsel will be reluctant to use the simplified instructions.
- The task of simplifying and clarifying the pattern instructions is extremely difficult and time consuming.
- When attempting to craft “plain English” instructions, the drafter usually will be required to use language that differs from the language the Wyoming Supreme Court used in announcing its opinion, and the process of “translation” may result in an instruction that does not fully or fairly effectuate the Wyoming Supreme Court’s intended interpretation of the applicable rule.

Recommendation:

The Wyoming Supreme Court should direct the Commission to continue to work with the standing Civil and Criminal Pattern Jury Instruction Committees toward production of “plain English” jury instructions that will be easier for jurors to understand and use. The Court should also meet with the pattern instruction committees to consider if a procedure

32. See *Jury Study*, *supra* note 7, at 83 (noting that the juries involved in the Wyoming jury study on average reported spending about 31% of their deliberation time addressing the instructions).

can be designed to vest simplified instructions with the imprimatur of the Wyoming Supreme Court.

Explanation: No one can dispute that our jury trial procedures would be improved dramatically if the trial courts provided jurors with easily-understood jury instructions. The goal of producing comprehensible instructions is elusive, however, as the task of translating appellate court decisions into language that will be accessible to lay jurors is a very difficult one.

The Commission has been working with the Wyoming Civil Pattern Jury Instruction Committee toward the goal of refining and simplifying jury instructions. At this stage, the Commission recommends that the Court direct the Commission to continue in these efforts in the next phase of the Commission's work. The Commission also recommends that representatives of the Court meet with the pattern instruction committees (1) to ensure that the pattern instruction committees understand the Court's perspective on the desirability of "plain language" instructions, and (2) to consider whether a procedure can be devised by which the Court could "approve" simplified pattern instructions, to encourage their use by Wyoming's trial courts.

III. ADDITIONAL ISSUES FOR THE COMMISSION'S CONSIDERATION IN THE NEXT PHASE

The recommendations in this report—if approved by the Wyoming Supreme Court—will establish an agenda for a significant share of the Commission's efforts during the next two years. In particular, if the Court elects to go forward with production of a juror handbook and/or a juror orientation videotape, the Commission will be devoting considerable effort in the next phase to planning and producing a handbook and/or an orientation videotape. The Commission also expects in the next phase to continue to work toward simplification of jury instructions.

In addition to these tasks, the Commission currently plans in the next phase to continue to gather information to assess methods of selecting jury pools, length of terms of jury service, compensation for jury duty, voir dire practices, "readbacks" of testimony during jury deliberations, and potential renovations of courtrooms and jury rooms to enhance jurors' comfort and convenience. The Commission will also consider other issues that jurors, judges and court staff, and bar members suggest for consideration as germane to the Commission's charge as defined by the Wyoming Supreme Court.³³

33. In this regard, the Commission welcomes comments from judges, court staff, bar members and members of the general public about the issues described here and

Finally, the Commission will be considering plans for public education activities concerning Wyoming jury trial procedures. Some of these efforts will involve presentations by Commission members to judges and attorneys, to familiarize them with new procedures that may be implemented as a result of the recommendations in this report. The Commission will also be considering what types of education activities—in addition to production of juror handbooks and orientation videotapes—may be helpful to better familiarize the public with our jury system and the public's role in that system. The members of the Commission believe that these public education efforts are important components of any comprehensive plan to bolster public confidence in and improve the functioning of our justice system.

about other topics or issues that the Commission may wish to examine. Individuals may contact any of the Commission members (listed in footnote 1) with their comments, or they may send comments to Brad Saxton, Associate Dean and Professor of Law, University of Wyoming College of Law, University Station P.O. 3035, Laramie, WY 82071-3035. Individuals may also send Professor Saxton e-mail (saxtonb@uwyo.edu) or call him at 307-766-6418.

APPENDIX A-1

Implementing Recommendation 1:

The Wyoming Supreme Court should adopt a rule requiring that trial courts (1) allow jurors to take notes, and (2) provide jurors with appropriate note taking materials and instructions about restrictions on jurors' use of their notes.

*Suggested Rule:*Rule No. ____ : Juror Note Taking

At the beginning of civil and criminal trials, the court shall instruct the jurors that they will be permitted to take notes during the trial if they wish to do so. The court shall provide each juror with appropriate materials for this purpose and shall give jurors appropriate instructions about procedures for note taking and restrictions on jurors' use of their notes.

The jurors may take their notes with them for use during court recesses and deliberations, but jurors shall not be permitted to take their notes out of the courthouse. The bailiff or clerk shall collect all jurors' notes at the end of each day of trial and shall return jurors' notes when trial resumes.

After the trial has concluded and the jurors have completed their deliberations, the bailiff or clerk shall collect all jurors' notes before the jurors are excused. The bailiff or clerk shall promptly destroy these notes.

Suggested Instruction:

Instruction No. ____

Jurors will be permitted to take notes during this trial, if they wish to do so. We have provided you with paper and a pen or pencil for this purpose. [We have also provided you with a personal notebook in which you should keep your notes.]

Please keep in mind that you are not *required* to take detailed

notes or any notes at all. If you do not take notes, you should rely upon your own recollection of the evidence, and you should not feel that you must be influenced by the notes that other jurors have taken if those notes conflict with your recollection of the information presented during the trial.

If you take notes, you should not allow the note taking to detract from your close attention to the testimony and demeanor of each witness and all other evidence presented during the trial. Notes taken by jurors are not evidence in the case, and jurors' notes must not be viewed as having more weight than jurors' independent recollections of the information presented at trial. Jurors' notes are only an *aid* to recollection and are not entitled to any more weight than jurors' recollections and impressions of the information presented at trial.

You may use your notes only here in the courtroom and in the jury room; you may take your notes from the jury room to the courtroom and from the courtroom to the jury room. You may not take your notes anywhere else.

You must turn your notes in to the bailiff before leaving the courtroom at the end of each day; the bailiff will return them to you when the trial resumes. Any notes the jurors have taken will be collected by the bailiff and destroyed after the trial has concluded and the jurors have completed their deliberations. You should not disclose your notes to anyone. Jurors may, however, share their notes with each other during the jury deliberations if they believe the notes will be helpful in reviewing the information presented during the trial.

Sources: Devitt, Blackmar, Wolff & O'Malley § 10.04 (4th ed. 1992), as modified; Proposed Colorado Jury Instructions 3rd No. 1:7 (with considerable modifications), as included in *Implementation Plan: Jury Reform in Colorado*, (March 12, 1998), supplementing WITH RESPECT TO THE JURY: A PROPOSAL FOR JURY REFORM—REPORT OF THE COLORADO SUPREME COURT COMMITTEE ON THE EFFECTIVE AND EFFICIENT USE OF JURIES (February 1997).

Use note: This instruction or one similar to it is required by Rule No. ____, which provides that the court shall permit jurors to take notes and give jurors "appropriate instructions" about note taking procedures.

APPENDIX A-2

Implementing Recommendation 2:

The Wyoming Supreme Court should adopt a rule authorizing the use of juror notebooks in appropriate cases and specifying appropriate court procedures for cases in which juror notebooks will be used.

*Suggested Rule:*Rule No. : Juror Notebooks

The court may provide all jurors with identical "juror notebooks" to assist the jurors in organizing materials the jurors receive at trial. Typical contents of a juror notebook include blank paper for note taking, stipulations of the parties, lists or seating charts identifying counsel and their respective clients, general instructions for jurors, and pertinent case-specific instructions. Notebooks may also include copies of important exhibits (which may be highlighted), glossaries of key technical terms, pictures of witnesses, and a copy of the court's juror handbook, if one is available.

During the trial, the materials in the jurors' notebooks may be supplemented with additional materials as they become relevant and are approved by the court for inclusion. Copies of any additional jury instructions given to jurors during trial or before closing argument should also be included in jurors' notebooks before the jurors retire to deliberate.

The trial court should generally resolve with counsel at a pretrial conference whether juror notebooks will be used and, if so, what contents will be included. (The court may require counsel in advance of the pretrial conference to confer and attempt to agree on the contents of notebooks.)

The jurors may take their notebooks with them for use during court recesses and deliberations, but jurors shall not be permitted to take their notebooks out of the courthouse. The bailiff or clerk shall collect all jurors' notebooks at the end of each day of trial, and shall return jurors' notebook when trial resumes.

After the trial has concluded and the jurors have completed their deliberations, the bailiff or clerk shall collect all jurors' notebooks before the jurors are excused. The bailiff or clerk shall promptly destroy the contents of the notebooks, except that one copy of the contents of the jurors' notebooks, excluding jurors' personal notes and annotations, shall be preserved and retained as part of the official trial record.

Suggested Instruction:

Instruction No. ____

We have provided you with a personal notebook to assist you in organizing materials that you will receive for your use during trial and during your deliberations. Please write your name on the first page of your notebook at this time, so that the bailiff or clerk can determine which notebook belongs to you and return it to you after periods when all notebooks have been collected for safekeeping. You may use your notebook only here in the courtroom and in the jury room; you may take your notebook from the jury room to the courtroom and from the courtroom to the jury room. You may not take your notebook anywhere else.

At the moment, your notebooks include: [List current contents]. At different times during trial, we may provide you with additional materials for insertion in your notebook. We will take recesses, if necessary, so that the task of inserting material in your notebook does not distract you from what is happening in the courtroom.

Your examination of materials in your notebook must not interfere with the trial proceedings or distract you from paying attention to what happens here in court.

Jurors must turn their notebooks in to the bailiff before leaving the courtroom at the end of each day; the bailiff will return notebooks to jurors when the trial resumes. The contents of the notebooks, including any notes you have taken or made on the materials in your own notebook, will be collected by the bailiff and destroyed after the trial has concluded and the jurors have completed their deliberations. Jurors should not share their notebooks with anyone.

Source: Proposed Colorado Jury Instructions 3rd No. 1:7A (with considerable modifications), as included in *Implementation Plan: Jury Reform in Colorado*, (March 12, 1998), supplementing WITH RESPECT TO THE JURY: A PROPOSAL FOR JURY REFORM -- REPORT OF THE COLORADO SUPREME COURT COMMITTEE ON THE EFFECTIVE AND EFFICIENT USE OF JURIES (February 1997).

APPENDIX A-3

Implementing Recommendation 3:

The Wyoming Supreme Court should adopt a rule specifically authorizing the use of expanded case-specific jury questionnaires in appropriate cases and specifying the procedures that trial courts should use in cases in which expanded juror questionnaires will be used. The Court should also require statewide use of an improved standardized jury questionnaire that prospective jurors will fill out when first summoned for jury duty. The Wyoming State Bar should provide CLE programs that will help attorneys learn to use expanded juror questionnaires effectively.

*Suggested Rule:***Rule No. : Case-Specific Juror Questionnaires**

In appropriate cases, the court may use case-specific juror questionnaires to gather information from prospective jurors in advance of jury selection. When case-specific questionnaires will be used, the court should require counsel to confer and attempt to reach agreement on the questions that will be included in the questionnaires. The court shall rule on inclusion or exclusion of any questions as to which counsel cannot agree, and the court in any event shall exclude any questions the court deems improper. The court shall note on the record the basis on which it overruled any objections to inclusion or exclusion of particular questions.

The court shall confer with counsel concerning the timing and procedures to be used (1) for disseminating questionnaires and collecting completed questionnaires from prospective jurors, and (2) to permit counsel adequate time and opportunity to review the completed questionnaires thoroughly before jury selection will begin.

In its discretion, the court may require that the costs of copying, disseminating and collecting the questionnaires be borne (1) by both parties, (2) by the party requesting use of the questionnaires, or (3) by the court. In the alternative, these expenses may be assessed against the losing party as part of the "costs."

APPENDIX A-4

Implementing Recommendation 4:

The Wyoming Supreme Court should adopt a rule requiring that the trial courts provide each juror with the juror's own copy of the jury instructions.

Suggested Rule:

Rule No. : Copies of Instructions for Jurors

The trial court shall provide each juror with the juror's own copy of all written instructions that the court reads to the jury before, during or at the conclusion of the trial. The court may include the copies of the instructions in the juror notebook provided to each juror, if juror notebooks will be used at trial. Jurors shall be permitted to take their copies of the instructions with them for reference during recesses and during their deliberations. Jurors shall not be permitted, however, to take their copies of the jury instructions out of the courthouse.

APPENDIX A-5

Implementing Recommendation 5:

The statutes and rules governing jury instructions should be amended to (1) clarify that the trial courts may give jurors case-specific instructions at the beginning of the trial, (2) encourage the trial courts to give more comprehensive instructions at the beginning of trial, and (3) specify the procedures that trial courts should use when determining which preliminary instructions the jurors will receive. The Commission also recommends that the Wyoming Supreme Court ask the Wyoming Civil and Criminal Pattern Jury Instructions Committees to designate which of the existing pattern instructions would likely be helpful as preliminary instructions in many or most trials.

Suggested Rule:

Amend WYO. R. CIV P. 51 and WYO. R. CRIM. P. 30 as follows (the proposed new language is indicated in bold-face type):

WYO. R. CIV P. 51:

(a) General Instructions. At any time the court may give to the jury such general instructions as to the duties and functions of the court and jury, and the manner of conducting the trial, as it may deem desirable to assist the jury in performing its functions. Such instructions, exclusive of rulings which are recorded by the court reporter for inclusion in any record, shall be reduced to writing, numbered and delivered to the jury with the other instructions and shall be a part of the record in the case.

(b) Further Instructions; Objections. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action up on the requests prior to their arguments to the jury. Before the argument of the case to the jury has begun, the court shall give to the jury such instructions on the law as may be necessary and the same shall be in writing, numbered and signed by the judge, and shall be taken by the jury when it retires. No party may assign as error the giving or the failure to give an instruction unless that party objects there to before the jury retires to consider its verdict, stating distinctly the matter

objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

(c) Preliminary Instructions. Before opening statements, the court shall provide jurors with any general and case-specific instructions that would seem likely to help jurors understand (i) their functions during trial, and (ii) the issues that they will be required to decide. These preliminary instructions should include any pertinent case-specific instructions that the court anticipates including in the final jury instructions, if the court concludes that it would be helpful to jurors to receive the instructions both at the beginning of the case and again before closing arguments. The court shall confer with counsel at the pretrial conference to determine which instructions should be given to jurors before opening statements. For preliminary instructions, the court shall follow the procedures set forth in subsections (a) and (b) with respect to objections and use of written instructions.

WYO. R. CRIM. P. 30

(a) At the close of the evidence or at such earlier time before or during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. Before instructing the jury the court shall conduct a formal instruction conference out of the presence of the jury at which the court shall inform counsel of the proposed action upon their requests and shall afford them an opportunity to offer specific, legal objection to any instruction the court intends to give and to offer alternate instructions. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury is instructed, stating distinctly the matter to which the party objects and the grounds of the objection. ~~The judge shall instruct the jury before the arguments and, if it becomes necessary, after the arguments.~~ Before the argument of the case to the jury has begun, the court shall give to the jury such instructions on the law as may be necessary and the same shall be in writing, numbered and signed by the judge, and shall be taken by the jury when it retires.

(b) The court shall also provide the jury with appropriate preliminary instructions at the beginning of the trial. Before opening statements, the court shall provide jurors with any general and case-specific instructions that would seem likely to help jurors understand (i) their functions during trial, and (ii) the issues that they will be required to decide. These preliminary instructions should include

any pertinent case-specific instructions that the court anticipates including in the final jury instructions, if the court concludes that it would be helpful to jurors to receive the instructions both at the beginning of the case and again before closing arguments. The court shall confer with counsel at the pretrial conference to determine which instructions should be given to jurors before opening statements. For preliminary instructions, the court shall follow the procedures set forth in subsection (a) with respect to objections and use of written instructions.

APPENDIX A-6

Implementing Recommendation 6:

At this time, the Wyoming Supreme Court should not adopt a rule authorizing the use of “mini” opening statements. The Court should, however, modify existing rules governing voir dire to clarify that it is appropriate and permissible for counsel in voir dire to preview some of the evidence from the case to help prospective jurors better understand the reasons for certain lines of voir dire questioning.

Suggested Rule:

Amend WYO. R. CIV P. 47(c)(3) and WYO. R. CRIM. P. 24(c)(3) as follows (the proposed new language is indicated in bold-face type):

WYO. R. CIV. P. 47(c)(3):

(3) In voir dire examination, counsel or a pro se party shall not:

- (A) Ask questions of an individual juror that can be asked of the panel or a group of jurors collectively;
- (B) Ask questions answered in a juror questionnaire except to explain an answer;
- (C) Repeat a question asked and answered;
- (D) Instruct the jury on the law or argue the case; or
- (E) Ask a juror what the juror’s verdict might be under any hypothetical circumstances.

Notwithstanding the restrictions set forth in subsections 47(c)(3) (A)-(E), counsel or a pro se party shall be permitted during voir dire examination to preview portions of the evidence from the case in a non-argumentative manner when a preview of the evidence would help prospective jurors better understand the context and reasons for certain lines of voir dire questioning.

WYO. R. CRIM. P. 24(c)(3):

- (3) In voir dire examination counsel or a pro se defendant shall not:
- (A) Ask questions of an individual juror that can be asked of the panel or a group of jurors collectively;
 - (B) Ask questions answered in a juror questionnaire except to explain an answer;
 - (C) Repeat a question asked and answered;
 - (D) Instruct the jury on the law or argue the case; or
 - (E) Ask a juror what the juror's verdict might be under any hypothetical circumstance.

Notwithstanding the restrictions set forth in subsections 24(c)(3) (A)-(E), counsel or a pro se defendant shall be permitted during voir dire examination to preview portions of the evidence from the case in a non-argumentative manner when a preview of the evidence would help prospective jurors better understand the context and reasons for certain lines of voir dire questioning.

APPENDIX A-7

Implementing Recommendation 8:

The Wyoming Supreme Court should adopt a rule for civil trials (1) requiring that trial courts allow jurors to submit questions for witnesses, and (2) specifying appropriate court procedures for administering jurors' questions. At this time, the Wyoming Supreme Court should not adopt a rule requiring or permitting jurors to submit questions for witnesses in criminal trials.

*Suggested Rule:*Rule No. _____ : Juror Questions for Witnesses*Civil Trials*

At the beginning of civil trials, the court shall instruct jurors that they will be permitted to submit written questions for witnesses if they have questions about the witnesses' testimony that have not been answered after counsel for all parties have finished examining the witnesses. The court shall also instruct the jurors that some questions they submit may not be asked, as some jurors' questions may be legally improper or otherwise inappropriate. The court shall provide jurors with paper and a pen or pencil with which they may write down questions for submission to the court.

Before each witness is excused, the court shall determine whether any jurors have questions for that witness. The court shall review jurors' written questions with counsel, out of the hearing of the jury, making the question part of the record. The court shall permit counsel to interpose objections, including objections based on litigation strategy or stipulation of the parties. The court shall rule on any objections, noting the basis of the ruling on the record. If the court determines that the question is not improper or unfairly prejudicial, the court shall read the question to the witness or permit counsel to read the question to the witness. The question may be modified as deemed appropriate by the court in consultation with counsel. After the witness responds to the question, the court shall permit counsel for both sides to ask follow-up questions if such follow-up questions appear to be necessary or appropriate.

The court shall permit counsel to present additional rebuttal evidence at trial if necessary to prevent unfair prejudice attributable to testimony that results from questions that jurors submit.

Criminal Trials

At the beginning of criminal trials, the court shall inform jurors that they will not be permitted to ask questions of witnesses during the trial.

Suggested Instruction:

Instruction No. _____ (Civil Trials)

During this trial, you will be permitted to submit written questions for witnesses, if you have questions about the witnesses' testimony that have not been answered after the attorneys have finished questioning the witnesses.

[We will use the following procedures to handle questions that you may have. After the attorneys have finished questioning each witness, I will ask the bailiff to collect a piece of paper from *each* of you. If you have no questions, please write "no questions" on the paper before folding it and giving it to the bailiff. If you have a question, write it down on the paper, fold it, and give it to the bailiff. The reason that I will ask each of you to submit a piece of paper, even if you have no question, is to protect the privacy of jurors who may wish to ask a question without being identified in open court as the source of that question.]

I will review any questions that you submit with the attorneys. After I have done so, any questions that I find to be proper will be posed to the witness before the witness is excused, and the attorneys may then ask some follow-up questions.

I ask you to keep several important points in mind as you consider whether to submit a question for a witness:

1. You should reserve your questions for points that you believe to be important to your ability to decide the issues in this case fairly.
2. You must remember that your role in this trial is that of a neutral fact-finder, not an advocate for one side or the other.

Accordingly, you should not use your questions to argue with a witness or to express opinions about a witness's testimony. **The sole purpose of your questions is to permit you to clarify testimony that you have not understood or that has failed to address a factual question that you believe to be important.**

3. Some questions that jurors submit may not be posed to the witness, for a few possible reasons. First, some questions are legally improper under our rules for jury trials, and I will not permit jurors (or attorneys) to ask those questions. Second, some questions that jurors may pose may be answered by witnesses who will testify later in the trial. **In any event, you should not guess or draw inferences about what a witness's answer might have been to a question that was not asked.** It would be unfair to the parties for you to draw such an inference, because your inference may be wrong, and the parties have the right to have you decide this case on the basis of the evidence that you have heard, rather than on the basis of your guesses or speculation about matters on which you did not hear testimony.

Source: CIVIL TRIAL PRACTICE STANDARDS at 9-14 (American Bar Association Section of Litigation, February 1998), with considerable modifications.

Use note: The court may wish to use the procedures outlined in the bracketed language in the instruction, to protect the privacy of jurors who may wish not to be identified in open court as the source of particular questions. The failure to use this procedure may cause some jurors to feel inhibited in submitting questions if they will be identifiable as the source of any questions they submit.

Instruction No. _____ (Criminal Trials)

Jurors are not permitted in criminal trials to ask questions of witnesses or of the attorneys. If, however, you are unable to hear what the Court, an attorney or a witness is saying, please raise your hand and the Court will see that the situation is corrected.

Source: Wyoming Criminal Pattern Jury Instruction No. 1.11 (1996), as modified.

