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# AS GENERATIONS X, Y, AND Z DETERMINE THE JURY'S VERDICT, WHAT IS THE JUDGE'S ROLE?

*Chief Judge James F. Holderman\**  
*in collaboration with S. Ann Walls\*\**

## INTRODUCTION

As a federal trial judge for more than twenty years and a trial lawyer for several years before that, I have developed great admiration for the United States civil jury system. Over the years, I have observed thousands of jurors strive to discern the facts of a case from the evidence, apply those facts to the law, and return an appropriate verdict. I have observed that jurors overwhelmingly take their role as the judges of the facts very seriously. I have observed jurors put aside their personal obligations for however long is required of them and do their best to render justice by the verdict that they, as the jury, return. Yet I recognize that critics regularly have questioned the competence and integrity of the American civil jury.<sup>1</sup> Consequently, those of us in the legal profession, especially those of us who are trial judges, have an obligation to the litigants in each case and to society in general to make sure that the procedures of civil jury trials are as fair as possible so that justice can be rendered, to the greatest extent possible, by every jury's verdict.

Toward that end, I envision (and have already begun to observe) an increasing need to adjust the jury's role as a passive receptacle of information, to a more involved and interactive participant in resolving the factual disputes at trial. The primary reason for this need is the evolving generational culture from which jurors will continue to be selected. The next generations of jurors are a tech-savvy people that have grown up with televisions, computers, and the Internet.<sup>2</sup> They

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1. See generally VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1993).

2. See *infra* notes 28–36 and accompanying text.

are accustomed to receiving news and information on demand.<sup>3</sup> These next generations of jurors will grow increasingly impatient with the traditional lecture-narrative format that has historically been accepted as proper trial procedure. To allow these jurors to gather and process information during trial in ways that are familiar to them, judges and trial lawyers must implement procedures that use the jurors' information-gathering and decision-making experiences prior to entering the courtroom.<sup>4</sup> To produce a result that comports with our societal standards of justice, trial judges must therefore take an active role to keep jurors engaged and ensure that they get the necessary legal and factual information in the way they are accustomed.

Part II of this Article explores the changing relationship between judge and jury and then describes my positive experience with several jury-friendly tools that the Seventh Circuit Bar Association American Jury Project Commission designed to facilitate jury engagement.<sup>5</sup> Part III describes the novel ways that new generations of jurors absorb information.<sup>6</sup> Part IV provides an overview of trial procedures that judges can implement to engage jurors and increase juror comprehension.<sup>7</sup>

## II. THE JUDGE AND JURY RELATIONSHIP

A decade ago, noted legal scholars opined that the relationship between judge and jury has been one in which the judge had the authority to influence—indeed to control—the jury.<sup>8</sup> For example, for over a century after the inception of this country's judicial system, a judge could comment freely on the evidence before the jury or “could simply tell the jury to go back and try again if the verdict was not to the judge's liking.”<sup>9</sup> And in the early part of the country's history, judges would explain the law to jurors in terms that the judge tailored to the facts of the particular case.<sup>10</sup>

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3. See R. Rex Parris & James Wren, *Reaching Jurors Across the Generations*, TRIAL, Mar. 2008, at 19, 22.

4. The need to adapt trial procedures to accommodate jurors' needs is not novel. For example, the tradition of prohibiting jurors from taking notes during trial, which existed when I first started to practice law almost forty years ago, is now rejected almost universally.

5. See *infra* notes 8–26 and accompanying text.

6. See *infra* notes 27–47 and accompanying text.

7. See *infra* notes 48–87 and accompanying text.

8. Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 205–06 (1998).

9. *Id.*

10. *Id.* at 206 (citing 2 ROBERT E. KEHOE, JR., JURY INSTRUCTIONS FOR CONTRACT CASES 1202 (1995) (discussing the history of civil jury instructions)).

Over time, however, the judge's authority to influence and control the jury appropriately decreased.<sup>11</sup> The relationship between judge and jury has evolved into one in which, ideally, the trial judge acts as a neutral guide through the trial process so that the jurors can fulfill their responsibilities of finding facts based upon an impartial evaluation of the evidence presented by counsel. It is a delicate balance, to which a trial judge must be sensitive when conducting a jury trial, to guide the jury without influencing the outcome of the jury's determination.

If the trial judge succeeds in maintaining that balance and is truly a neutral advisor,<sup>12</sup> the general consensus among trial judges is that the jury performs very well.<sup>13</sup> A seminal study of the jury system conducted during the mid-twentieth century found that "judges agreed with juror verdicts in more than three-quarters of the cases they heard, and where they disagreed, the cases were ordinarily close on the facts."<sup>14</sup> In another study conducted two decades ago, "99% of federal judges and 98% of state judges believed that jurors made a serious effort to apply the law and 80% of federal judges and 69% of state judges rejected the idea that 'the feelings of the jurors about the parties often cause them to make inappropriate decisions.'"<sup>15</sup> In only a small percentage of the studied cases did federal and state judges feel that jurors' biases influenced their verdicts.<sup>16</sup> These statistics accurately reflect my personal experiences with civil juries. Civil juries can best perform their fact-finding responsibilities only when a neutral judge is sensitive to the jurors' desires to understand and fairly evaluate the evidence presented during the trial.

To ensure that jurors are able to reach a fair and just verdict, judges must provide jurors with tools that improve their comprehension of the evidence and their competence as decisionmakers.<sup>17</sup> The tools

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11. *Id.* at 205–08 (explaining that judges in most jurisdictions no longer interject their comments on the case or the evidence into the trial proceedings and may not unilaterally instruct jurors, but trial judges retain the power to set aside bad verdicts and summarily resolve cases before trial).

12. *Id.* at 208 ("The judge . . . should act as 'a real adviser to the jury.'" (quoting Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 311 (1915))).

13. Richard Lempert, *Why Do Juries Get a Bum Rap?: Reflections on the Work of Valerie Hans*, 48 DEPAUL L. REV. 453, 454 (1998).

14. *Id.* (citing HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 56–57, 104–17 (1966)).

15. *Id.* (citing LOUIS HARRIS ET AL., *JUDGES' OPINIONS ON PROCEDURAL ISSUES: A SURVEY OF STATE AND FEDERAL TRIAL JUDGES WHO SPEND AT LEAST HALF THEIR TIME ON GENERAL CIVIL CASES* 76, 79–80 (1987)).

16. *Id.* at 454–55.

17. See Paula L. Hannaford et al., *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247, 257 (1998).

that judges provided to jurors in the past have focused primarily on the judge's role of deciding what evidence is admissible at the trial for the jury to consider.<sup>18</sup> During the past several years, in addition to performing their role as evidentiary gatekeeper, judges have helped jurors understand the evidence, as well as the trial process, in a jury-friendly manner.<sup>19</sup>

As a co-chair of the Seventh Circuit Bar Association American Jury Project Commission, I recently had an opportunity to test some jury-friendly tools and found them to be very helpful to juries in my courtroom and well received by both jurors and lawyers. In October 2005, James Figliulo, then president of the Seventh Circuit Bar Association, designed the Seventh Circuit Commission in order to implement the proposals and principles that Robert Grey, then president of the American Bar Association, established in the American Jury Project.<sup>20</sup> With the guidance of Patricia Lee Refo and Professor Stephen Landsman,<sup>21</sup> the American Jury Project promulgated the *Principles for Juries and Jury Trials* as fundamental aspirations for the civil jury system. Principles proposed by the Project included educating jurors on the essential aspects of a jury trial<sup>22</sup> and promoting juror understanding of the facts and law.<sup>23</sup> The ABA adopted the principles as policy in February 2005 and distributed copies of the principles to members of the federal judiciary in August 2005, along with proposed courtroom procedures that trial judges could employ to promote the principles. In October 2005, federal trial judges in the Seventh Circuit began testing several of the principles by incorporating seven of the proposed courtroom procedures in actual civil jury trials.<sup>24</sup> Judges

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18. See Friedman, *supra* note 8, at 204 ("The whole massive law of evidence is a tribute to the jury as an institution. Without the jury, nobody would need most of these rules . . ."); Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 356 (1998) (examining the interrelatedness of the American law of evidence and the American jury system); see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

19. See Hannaford et al., *supra* note 17, at 261.

20. See SEVENTH CIRCUIT BAR ASS'N, AMERICAN JURY PROJECT COMMISSION MANUAL (2005), available at <http://www.7thcircuitbar.org/associations/1507/files/01ProjectManual.pdf>.

21. Patricia Lee Refo was then the ABA Litigation Section Chair, and Professor Stephen Landsman was the ABA American Jury Project's Reporter and a member of the Seventh Circuit Commission.

22. AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS, princ. 6, at 7 (2005), available at [www.abanet.org/juryprojectstandards/principles.pdf](http://www.abanet.org/juryprojectstandards/principles.pdf) ("Courts should educate jurors regarding the essential aspects of a jury trial.").

23. *Id.* princ. 13, at 17 ("The court and parties should vigorously promote juror understanding of the facts and the law.").

24. See James F. Holderman, *Trying the ABA's Principles for Juries and Jury Trials*, LITIG., Spring 2007, at 8, 8-9 (discussing implementation of testing throughout the Seventh Circuit).

tried these seven procedures in Phase One of the Seventh Circuit Commission's testing: (1) using twelve-person juries; (2) using jury selection questionnaires; (3) providing the jury preliminary instructions on the applicable substantive law; (4) employing trial time limits; (5) allowing jurors to submit questions during trial; (6) allowing counsel to make interim statements to the jury during trial; and (7) instructing the jury on methods of deliberation.<sup>25</sup> In Phase Two, from February 2007 through April 2008, the Seventh Circuit Commission continued testing four procedures: (1) questions by the jury during trial; (2) interim statements to the jury by counsel; (3) twelve-person juries; and (4) preliminary substantive jury instructions.<sup>26</sup>

Based on my experience with the Seventh Circuit Commission's testing, I believe that the American Jury Project's proposed procedures are the type of neutral tools that trial judges should implement to aid future generations of jurors in performing their fact-finding duties so that future juries will return appropriate verdicts based on a fair assessment of the evidence and an appropriate application of the law.

### III. JURORS: THE NEXT GENERATIONS

Today, of course, most United States trial judges are a part of the "Baby Boomer" generation, born between approximately 1945 and 1964.<sup>27</sup> However, people in Generation X, the generation of Americans born between about 1965 and 1980,<sup>28</sup> make up over forty percent of all American jury venires.<sup>29</sup> It is Generation X and the generations that follow, Generations Y and Z, that judges must consider when evaluating ways that new courtroom procedures can enhance jury comprehension.

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25. See SEVENTH CIRCUIT BAR ASS'N, *supra* note 20, at i.

26. SEVENTH CIRCUIT BAR ASS'N, AMERICAN JURY PROJECT COMMISSION MANUAL PHASE TWO (2007), available at <http://www.ilnd.uscourts.gov/judge/HOLDERMAN/7thCircuitAmericanJuryProjectPhaseTwo-ProjectManual.pdf>.

27. Richard S. Eynon, *Four Generations of Lawyers: Bridging the Gaps*, RES GESTAE, Apr. 2007, at 5 (Baby Boomers born between 1946 and 1964); Tracy L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?*, 9 LEGAL WRITING (J. LEGAL WRITING INST.) 119, 120 (2003) (Baby Boomers born between 1943 and 1960).

28. SONYA HAMLIN, WHAT MAKES JURIES LISTEN TODAY 35-36 (1998) (Generation X born between 1961 and 1981); Eynon, *supra* note 27, at 5 (Generation X born between 1965 and 1979); Gary S. Gildin, *Reality Programming Lessons for Twenty-First Century Trial Lawyering*, 31 STETSON L. REV. 61, 61 (2001) (Generation X born between 1966 and 1976); McGaugh, *supra* note 27, at 120 (Generation X born between 1961 and 1981); Parris & Wren, *supra* note 3, at 20 (Generation X born between 1966 and 1976, or alternatively, between 1961 and 1981).

29. Parris & Wren, *supra* note 3, at 20; see HAMLIN, *supra* note 28, at 36 (projecting that Generation X-ers will make up forty-one percent of jury venire by the year 2000).

A typical Generation X-er, before he or she reached the age of eighteen, spent 22,000 hours watching television.<sup>30</sup> That is more than twice the time Generation X-ers spent in a classroom.<sup>31</sup> Additionally, Generation X-ers have come of age with the widespread use of computers and the Internet in our culture.<sup>32</sup> Following in their footsteps is Generation Y. Members of Generation Y, also known as the Millennials, were born between approximately 1980 and 2000<sup>33</sup> and were raised with computers dominating their world. They “are as comfortable with the Internet as most [older] people are with the telephone”<sup>34</sup> and “use[ ] the Internet for practically everything—for communication, news, research and entertainment.”<sup>35</sup> Members of Generation Z, the generation of Americans born during the current decade, will be even more comfortable with, and dependent upon, computer technology because they are part of “the first generation to be born into a digital world.”<sup>36</sup>

These emerging generations of jurors, products of the computer age, consequently have a different way of learning than past generations.<sup>37</sup> For example, Generations X and Y<sup>38</sup> are less likely to have mastered learning “tasks primarily through books [and lecture] and are more likely to have grown accustomed to the color, sound, and motion of visual entertainment” incorporated into their learning environment through the use of computerized instruction.<sup>39</sup> Excessive exposure to such visual stimulation during childhood and adolescence affects the way that members of Generations X and Y receive and absorb information, as well as the way they process information cogni-

30. Parris & Wren, *supra* note 3, at 22.

31. *Id.*

32. McGaugh, *supra* note 27, at 124–25.

33. Eynon, *supra* note 27, at 5 (Generation Y born between 1980 and 2000); McGaugh, *supra* note 27, at 120 (Generation Y born “1982–?”); Parris & Wren, *supra* note 3, at 22 (Generation Y born between 1977 and 1994).

34. Parris & Wren, *supra* note 3, at 22.

35. Eynon, *supra* note 27, at 5.

36. See Wikipedia, Generation Z, [http://en.wikipedia.org/wiki/Generation\\_Z](http://en.wikipedia.org/wiki/Generation_Z) (last visited Sept. 10, 2008) (Generation Z refers to people born after 1995, “but is used more often to refer to people born after the year 2000.” (internal citation omitted)).

37. Eric A. DeGroff & Kathleen A. McKee, *Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles*, B.Y.U. EDUC. & L.J. 499, 505 (2006); Gildin, *supra* note 28, at 61 (explaining that today’s jurors receive and evaluate information differently than past generations of jurors).

38. I have focused my discussion on Generations X and Y because the earliest born of Generation Z have just begun their formal education and little is known yet about Generation Z’s learning habits. It can be surmised, however, that the changes in learning that took place with Generations X and Y will only increase with Generation Z’s total emersion in technology.

39. DeGroff & McKee, *supra* note 37, at 505.

tively.<sup>40</sup> One consequence of childhood emersion in television, computers, and visual learning is that Generations X and Y are “used to getting their information . . . in 10- to 30-second bites”<sup>41</sup> and hence are “conditioned to spending very little time and effort to complete the task of information gathering.”<sup>42</sup> As a result of their exposure to technology, Generations X and Y also have shorter attention spans than any preceding generation.<sup>43</sup>

Additionally, outside the courtroom, the daily lives of Generations X and Y are immersed in computers and electronic communication.<sup>44</sup> They are accustomed to jumping from one website or television station to another, gathering information on demand.<sup>45</sup> They have limited patience to wait when receiving information.<sup>46</sup> One commentator has labeled this impatience in receiving information as the “right not to be bored.”<sup>47</sup> This “right not to be bored” may not be shared by those of us from previous generations, but trial judges must be cognizant of this new generational attitude because all future generations will be products of the same cultural experience.

#### IV. ENSURING FUTURE JUROR COMPREHENSION AS AN ONGOING ENDEAVOR

The challenge over the next several years will be to incorporate procedures into the trial process that will keep jurors, who bring with them the experience and expectation of instant access to information in a culture that provides information on demand, engaged in the courtroom. Volumes have been written on how trial lawyers can keep Generation X and, to a lesser extent, Generation Y engaged during trial.<sup>48</sup> As stated earlier in this Article, trial judges also must imple-

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40. *Id.*

41. Lisa Brennan, *Pitching the Gen-X Jury: As Jurors Get Younger, Law Schools Are Thinking More Like MTV*, NAT'L L.J., June 7, 2004, at 1.

42. HAMLIN, *supra* note 28, at 39 (emphasis omitted).

43. Parris & Wren, *supra* note 3, at 22 (“Their attention span is as short as one zap of a TV dial.”); Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 25 REV. LITIG. 633, 638 (2006); Eynon, *supra* note 27, at 5 (noting that both Generations X and Y have shorter attention spans than past generations); Neil E. Aresty, *Presentation Software: Go Visual*, 6 LAW TECH. NEWS, Oct. 1999, at 45 (“The younger juror does not have the attention span of our parents’ generation.”).

44. Eynon, *supra* note 27, at 5.

45. Michael Maggiano, *Motivating the Modern Juror*, 23 TRIAL LAW. 279, 279 (2000).

46. *Id.*; Gilden, *supra* note 28, at 68 n.24.

47. McGaugh, *supra* note 27, at 124.

48. See, e.g., HAMLIN, *supra* note 28; DOUGLAS L. KEENE & RITA R. HANDRICH, JURORS FOR THE NEXT FIFTY YEARS: GENERATION X (2002), available at [http://www.keenetrial.com/pdfs/kt\\_gen\\_x.pdf](http://www.keenetrial.com/pdfs/kt_gen_x.pdf); Katrina Grider, *Goodbye Flip Charts, Hello Plasma Screens*, 68 TEX. B.J. 567 (2005); Henry J. Reske, *Generation X Jurors a Challenge*, A.B.A. J., Oct. 1995, at 14.



ment tools that will engage these generations of jurors, who may otherwise be bored by the traditional format of trial procedures.<sup>49</sup> The following Sections discuss three procedures that I have found useful thus far in this endeavor.<sup>50</sup>

A. *Allowing Jurors to Submit Written Questions to Witnesses*

Jurors of Generations X and Y need an active information-gathering environment if they are to become and remain engaged while lawyers present evidence during trial. To make the courtroom more interactive for jurors, judges should allow them to submit written questions for witnesses to answer during the evidence phase of trial. The ABA's American Jury Project proposed this procedure to help promote juror comprehension of the facts and law<sup>51</sup> and several federal district judges in the Seventh Circuit employed the procedure during Phase One and Phase Two of the Seventh Circuit Commission's testing.<sup>52</sup> The procedure was "predicated on the notion that, with appropriate safeguards, juror questioning can materially advance the pursuit of truth."<sup>53</sup> The American Jury Project believed that, by allowing jurors to submit written questions after attorney questioning, the likelihood that the jurors would concentrate on the evidence being presented would increase.<sup>54</sup>

Traditionally, federal trial judges have not allowed jurors to submit questions to witnesses during trial,<sup>55</sup> so I must admit that I was, at first, skeptical of the procedure's usefulness. After observing the procedure in my courtroom, however, I discovered that most of the jurors' questions merely sought clarification of evidence that lawyers elicited through questioning witnesses, which allowed lawyers to dispel any jury confusion about the evidence while the lawyers could still present evidence.<sup>56</sup> The jurors' questions rarely sought testimony on a

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49. See *supra* notes 3–4 and accompanying text.

50. See *infra* notes 51–87 and accompanying text.

51. AM. BAR ASS'N, *supra* note 22, princ. 13(C), at 18–19 (discussing advantages of allowing jurors to submit questions to witnesses).

52. SEVENTH CIRCUIT BAR ASS'N, *supra* note 20; SEVENTH CIRCUIT BAR ASS'N, *supra* note 26.

53. SEVENTH CIRCUIT BAR ASS'N, *supra* note 20, at V-1 to V-2; see also Holderman, *supra* note 24, at 9–10 (discussing the procedures I used to allow jurors to submit written questions to witnesses in my courtroom).

54. SEVENTH CIRCUIT BAR ASS'N, *supra* note 20, at V-1.

55. Although allowing jurors to submit questions to witnesses was new to federal trial judges, it is not a new concept. See Holderman, *supra* note 24, at 10; see also Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1929 (2006).

56. Holderman, *supra* note 24, at 10–11.

subject that was inadmissible.<sup>57</sup> Moreover, in my role as a neutral guide to the jury, allowing jurors to submit questions to witnesses gave me an opportunity to explain to the jury why certain questions could not be asked and allowed me to bring the jurors' focus back to the pertinent evidence when necessary.<sup>58</sup>

My judicial colleagues on the district courts of the Seventh Circuit have described similar experiences when they have allowed jurors to ask questions of witnesses during trial. Indeed, United States District Judge Michael J. Reagan of the Southern District of Illinois informed me that he will never conduct another trial without allowing jurors to submit questions because of the substantial benefits he has observed as a result of using the procedure.<sup>59</sup> These conclusions are shared by other trial judges who have used the juror questioning procedures in the past,<sup>60</sup> as well as by the results of a recent study conducted by Professors Shari Seidman Diamond, Mary R. Rose, Beth Murphy, and Sven Smith based upon observations of use of juror questions in the Arizona state trial courts and the federal trial courts of the Seventh Circuit.<sup>61</sup>

Moreover, allowing jurors to submit written questions to witnesses provided benefits to the trial process beyond merely clarifying the evidence presented by the attorneys. Juror questions provided an insight into the jurors' thinking and areas of interest during the trials that the lawyers would not have otherwise had.<sup>62</sup> The jurors were more engaged and attentive to the evidence presented by the lawyers.<sup>63</sup> And, after the jurors reached a verdict, they appeared to be more confident of the correctness of their decision because they were confident that they had understood the evidence.<sup>64</sup>

Permitting jurors to ask questions of witnesses has attracted its fair share of concern from both judges and lawyers. The four criticisms most often aired are: (1) jurors may assume the role of advocate for one side over another; (2) jurors may interpret the judge's failure to ask a question as an indication that testimony on the issue is irrele-

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57. *Id.* at 10.

58. *Id.*

59. Michael J. Reagan, United States District Judge, Remarks at the Seventh Circuit Judicial Conference in Chicago (May 9, 2006).

60. See Eugene A. Lucci, *The Case for Allowing Jurors to Submit Written Questions*, JUDICATURE, July-Aug. 2005, at 16, 17-18.

61. See Diamond et al., *supra* note 55, at 1925.

62. Holderman, *supra* note 24, at 10; accord Lucci, *supra* note 60, at 17.

63. Holderman, *supra* note 24, at 10; accord Lucci, *supra* note 60, at 19.

64. Holderman, *supra* note 24, at 10; accord Lucci, *supra* note 60, at 17.

vant; (3) jurors may become angry if their questions are not answered; and (4) allowing jurors to ask questions delays the trial process.<sup>65</sup>

In my experience, I have never observed a juror assume the role of advocate when submitting a question.<sup>66</sup> Allowing jurors to submit questions does not change our adversary system; trial lawyers remain as the advocates for their clients and the presenters of evidence.<sup>67</sup> Jurors, through their questions, merely attempt to better understand evidence already presented at a time in the trial process when the evidence can be clarified.<sup>68</sup>

I was also careful in my administration of this procedure to ensure that, when jurors asked inadmissible questions, the jury understood why the questions could not be presented. After collecting jurors' questions, I discussed each question with the lawyers outside the jury's presence.<sup>69</sup> Typically, my conferences with the lawyers resulted in counsel agreeing to ask the questions or otherwise address the requested material when appropriate during the presentation of evidence. I then informed the jurors of how the questions would be answered—e.g., by counsel asking the current witness or by counsel asking another witness scheduled for later in the trial.<sup>70</sup> Rarely did a juror's question "seek testimony on a subject that was inadmissible, and when such questions were submitted, I explained to the jury why the question could not be asked and brought the jurors' focus back to the pertinent evidence."<sup>71</sup> This procedure assured that jurors' questions were answered appropriately, that jurors did not have to speculate about why a question was not asked, and that the questions were always a part of the record.<sup>72</sup>

Finally, allowing jurors to ask questions of witnesses does add time to the trial process, but it is time well spent given the jurors' positive response to the procedure.<sup>73</sup> To facilitate jurors' questions, I arranged for my clerk to retrieve, photocopy, and distribute to counsel the ju-

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65. See JURY TRIAL INNOVATIONS 129 (G. Thomas Munsterman et al. eds., 2d ed. 2006); see also Holderman, *supra* note 24, at 10–11 (discussing these concerns as well as additional criticisms of allowing jurors to ask questions of witnesses during trial).

66. Holderman, *supra* note 24, at 10.

67. *Id.*

68. *Id.* at 11 ("Frankly, I was thankful that the jurors asked their questions about the evidence during the evidentiary phase of the trial because clarifying evidence could still be presented. If the jurors had to wait to request a clarification until all evidence was presented and both sides had rested their cases, clarifying evidence could not have been presented.").

69. *Id.* at 9.

70. *Id.* at 10.

71. *Id.*

72. Holderman, *supra* note 24, at 10.

73. *Id.* at 11.

rors' questions during witness testimony. Consequently, the collection and distribution of jurors' questions took no time away from the lawyers' presentation of evidence.<sup>74</sup> I also kept conferences with the lawyers about the questions short, conducting the conferences at a sidebar or during a natural break in the proceedings.<sup>75</sup> Any small amount of time these procedures added to the length of the trial was a minute burden in comparison to what I saw as the jurors' increased involvement in the trial process and understanding of the evidence.

### B. *Interim Statements*

Allowing attorneys to present interim statements to the jury during the evidentiary phase of the trial, in my experience, encourages the newest and future generations of jurors to be more engaged and attentive during the evidentiary phase of trials. As with allowing jurors to submit questions to witnesses during trial, the ABA's American Jury Project proposed, and the Seventh Circuit Commission implemented, interim statements in order to assist jurors in their comprehension of the facts and the law.<sup>76</sup> Proponents of interim statements contend that the statements: (1) increase juror comprehension by allowing jurors to immediately evaluate the evidence in the context of the theory of the case; (2) buttress limiting instructions by the judge regarding the purpose of the evidence; (3) permit the trial attorneys to "organize, clarify, emphasize, contextualize, and explain the evidence";<sup>77</sup> and (4) keep jurors focused on the evidence.<sup>78</sup>

Since the commencement of the Seventh Circuit Commission's testing in October 2005, I have allowed attorneys to make interim statements during trials in my courtroom. To facilitate this procedure, I allowed the trial attorneys to make interim statements between witnesses during the evidentiary phase of the trial. I restricted the attorneys' overall use of interim statements to ten minutes per side, per day and limited the length of each interim statement to three minutes. I further restricted the subject matter of the three-minute interim statements to introductions of upcoming witnesses or summaries of previously admitted testimony and evidence.

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74. *Id.* at 10.

75. *Id.* at 11.

76. AM. BAR ASS'N, *supra* note 22, princ. 13(G), at 20 (discussing advantages of allowing attorneys to make interim statements to jury); SEVENTH CIRCUIT BAR ASS'N, *supra* note 20, at VI-1.

77. SEVENTH CIRCUIT BAR ASS'N, *supra* note 20, at VI-1.

78. *Id.*; JURY TRIAL INNOVATIONS, *supra* note 65, at 135.

Although interim statements add some time to the trial process, based on my observations, the benefits of allowing interim statements substantially outweigh the burden of the additional time jurors spend in the courtroom. The use of interim statements created clear paths from the testimony of one witness to the next. By allowing attorneys to introduce witnesses or summarize a witness's testimony, the interim statements broke the trial into small, digestible bites of information that replicated the manner in which jurors in Generations X and Y (and eventually Generation Z) receive information in their daily lives. Additionally, interim statements allowed the trial attorneys to focus the jury's attention on the way their evidence related to their theory of the case.<sup>79</sup>

Opponents of interim statements argue that attorney statements during trial may cause jurors to "focus on the attorneys' commentary rather than the evidence" and that "[j]urors may pay less attention to the evidence, relying on the trial attorneys to explain it to them."<sup>80</sup> I disagree. The trial judge's immediate admonishing instructions to the jury to consider only the evidence should minimize any undue reliance by the jury on the attorneys' interpretation of the evidence. Moreover, the interim statements actually allow instant juror evaluation of the trial lawyers' factual theories. Because Generation X and Y jurors are accustomed to immediately evaluating information presented to them, interim statements allow them to replicate in the courtroom their experiences gathering and assessing information in their everyday lives.

### *C. Preliminary Jury Instructions on the Substantive Law of the Case*

As a third trial tool, judges should provide preliminary substantive instructions on the law to the jury in plain, understandable language. The ABA's American Jury Project proposed this procedure to further the goal of educating jurors about the essential aspects of a jury trial.<sup>81</sup> This procedure includes several instructions prior to opening statements: (1) the jury's role in the trial process; (2) the procedures to be used during trial, including note-taking and how a juror may submit questions for witnesses; and (3) the nature of the evidence and how the jury is to evaluate the evidence, the primary issues to be presented

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79. JURY TRIAL INNOVATIONS, *supra* note 65, at 135.

80. *Id.*

81. AM. BAR ASS'N, *supra* note 22, princ. 6(C)(1), at 7-8 (discussing advantages of preliminary instructions).

at trial, and the basic legal principles governing the trial.<sup>82</sup> Proponents of preliminary instructions contend that instructions of this type “facilitate better decision making by jurors as well as their greater understanding of their duty in the decision-making process.”<sup>83</sup>

I have received substantial favorable feedback when I have used preliminary substantive jury instructions in trials over the past three years. The preliminary instructions I provided to jurors included, in addition to an introduction of the parties and their claims and a brief summary of the procedures to be used during trial, substantive instructions as to the black-letter-law elements of the claims and defenses in the case, along with the burdens of proof. In each case, I instructed the jury verbally, but I am considering using a technique other judges have employed of projecting the instructions onto video monitors or a projection screen. Generation X and Y jurors are increasingly used to and adept at learning information from visual media,<sup>84</sup> and on-screen projection therefore duplicates the real-world experience of their learning. Moreover, based on my use of preliminary substantive instructions in my courtroom, I have found that preliminary instructions helped to orient the jurors to the case and allowed the jurors to start making connections between the evidence and the disputed issues in the case more quickly.<sup>85</sup>

Critics of preliminary substantive instructions contend that “[p]reinstruction compels the judge to expend greater time at an early stage [of the litigation] when he or she may be less than fully informed about the disputed issues that will arise at trial.”<sup>86</sup> I agree that judges are less informed at the outset of the trial about the precise factual issues than judges are at the conclusion of the evidence, but the lawyers and the parties are as well. To short change the jurors by keeping them in the dark about the substantive law until the trial’s end so that the lawyers and the parties can dot the “i’s” and cross the “t’s” on the particulars of the factual disputes is short-sighted. The substantive le-

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82. SEVENTH CIRCUIT BAR ASS’N, *supra* note 20, at III-1.

83. AM. BAR ASS’N, *supra* note 22, princ. 6(C)(1), at 7-8.

84. See DeGross & McKee, *supra* note 37, at 506 (explaining that there is an “increased prevalence of visual learners” in today’s classrooms); see also Grider, *supra* note 48, at 567 (“Studies have shown that jurors retain only 20 percent of information presented orally, but when information is presented visually through graphs, pictures, or enlargements of documents, their retention levels can jump as high as 80 percent.”).

85. Commentators also have observed that preliminary instructions (1) help jurors “identify, recall, and evaluate the pertinent evidence”; (2) “enhance[ ] jurors’ ability to remember information presented at trial”; (3) “help[ ] jurors identify personal prejudices that must be put aside”; and (4) “help[ ] jurors assess the credibility of or reasonable inferences from the evidence at the time the evidence is received.” JURY TRIAL INNOVATIONS, *supra* note 65, at 133.

86. *Id.*

gal framework of the case is not going to change significantly. Consequently, there is no good reason to withhold from the jurors information about the substantive law that they will be asked to apply to the facts of the case. Moreover, the judge can and will always explain that the preliminary substantive instructions on the law are just that—preliminary.

Opponents of preliminary instructions also argue that “[p]reparation of preinstructions is a contentious process given that trial counsel generally prefer instructions that anticipate all possible contingencies that might arise during trial.”<sup>87</sup> Again my response is that, even if the preliminary substantive instructions are incomplete, the instructions will provide a substantial legal basis for the jurors to use when evaluating the evidence and will provide an appropriate framework for jurors’ analysis.

## V. CONCLUSION

Trial judges must remain attuned to trends in our society as they occur in the daily, common experiences of the future generations of jurors. Judges then need, to the extent possible and consistent with proper courtroom procedures and the Rules of Evidence, to ensure that jurors receive information during trial in ways that mirror the jurors’ information-gathering and decision-making processes outside the courtroom.<sup>88</sup> In that way, judges will be able to assure the litigants and lawyers who appear before them that they are fulfilling their role as a neutral guide to the jury. Moreover, judges will be able to assure the litigants, their lawyers, and society in general that future generations of jurors will fully understand their role at trial, remain engaged with the evidence presented by the lawyers, and return a verdict that provides justice under the facts and the law.

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87. *Id.*

88. There are additional trial procedures not tested by the Seventh Circuit Commission, and therefore not discussed in this Article, which trial judges may consider implementing to assist future generations of jurors in gathering and processing information received during trials: allowing jurors to discuss the evidence with one another before deliberations, projecting real-time transcriptions of trial testimony, and videotaping trials for absent jurors. See JURY TRIAL INNOVATIONS, *supra* note 65, at 116–25.