

Saturday, February 13, 2010

Lawyers Weekly, Inc.

Try 3 Free | [Subscribe](#) | [Our Newspapers](#) | [Other Products](#) | [Advertise](#) | [Help](#)

SUBSCRIBE

And Get Web Benefits

REGISTER

For Website Benefits

[Lost Password](#)[My Account](#)[Student Offer](#)

Order a **REPRINT**
of this Story

from the February 15, 2010 Michigan Lawyers Weekly.

[Subscribers Only](#)**RESOURCES**[Archives](#)[Daily Alert](#)[Practice Area Alert](#)[Judicial Profiles](#)[Important Docs](#)[Mich. Compiled Laws](#)[Mich. Law Firms](#)[Atty. Discipline Bd.](#)[Today's Calendar](#)[Technology](#)[Other Resources](#)**LEGAL CLASSIFIEDS**[Jobs](#)[Experts](#)[Lawyer to Lawyer](#)[Real Estate](#)[ADR](#)[Legal Products &](#)[Services](#)**ABOUT MICHIGAN
LAWYERS WEEKLY**[Editorial Staff](#)[Editorial Board](#)[Press Room](#)[Contact Us](#)[Submit Letters](#)[Submit Verdicts](#)**News Story**

Juries given more control; experiment working well

By Douglas J. Levy

Courtroom Procedure

In a recent personal injury trial in Muskegon County Circuit Court, the plaintiff was asked why she didn't make an effort to lose some of the weight she gained following her accident.

The question didn't come from either the plaintiff's or defense attorney. Rather, it was written on a note by a juror.

"The lawyers were afraid to go there," said Judge Timothy G. Hicks, "but the jurors weren't."

He's one of the 12 judges (five district and seven circuit) participating in the Michigan Supreme Court's jury reform pilot project, which is giving jurors a stronger means of participating in the judicial process.

And, since its launch following the Aug. 5, 2008, order, a sampling of judges are liking what they're seeing, such as allowing jurors to take notes during trials, deliberate on the case throughout the trial, and ask questions of the witnesses.

The program will be reviewed after the end of the year and could possibly lead to permanent implementation of the jury practices in some or all of the state's courts.

But, the judges also are vocal about most slippery of slopes within the order's instructions and suggestions: their commenting on evidence.

Following along

Giving the juror the power and responsibility to understand a case is one thing, but Judge Thomas P. Boyd of Ingham County 55th District Court said that it only happens if the jury knows the court procedure.

As such, the project allows for the jury to be given its instructions at the beginning of the trial as opposed to the end.

"I'm kind of embarrassed that I didn't do it before, because to me, it's just a simple courtesy," Boyd said.

Plaintiff's attorney Albert J. Dib agreed, citing a recent medical-malpractice case in Bay County Circuit Court, before pilot program participant Judge William J. Carpathe.

"To just hear, for the first time in your life, 20 minutes of instructions and expect you to know -- this is not realistic or practical," said Dib, of Royal Oak-based Dib, Fagan and Brault, P.C.

Dib and the defense counsel also put together an exhibit book for the jury, filled with medical records and expenses, funeral expenses, expert witnesses' curriculum vitae, affidavits of merit, and a timeline. The more important exhibits mentioned in the case were tabbed.

"It worked fairly for both sides, and played to the advantage of both sides," Dib said. "Both sides could make reference to their exhibits when they presented their case, so it was even-handed."

St. Joseph Circuit Court Judge Paul E. Stutesman said that once his court entered into the program, he heard complaints from attorneys that they have to do more work in getting jury materials together.

That astonished him.

"In the end," Stutesman said, "what it makes them do, so they know they have to provide them, is think about their case far more, as to how it's going to be presented to the jurors and makes them hone it far more than they would otherwise."

Questions, answers, discussion

Besides allowing jurors to take notes -- a practice that's historically been an informal thing depending on the judge and court -- the project lets them question witnesses.

"It [infuses] them into the process, and that they're just not sitting here listening to a dispute between two people," Dib reasoned.

It also can raise points that the attorneys may not have thought of themselves.

For example, a neurosurgeon was asked by Dib's jury how many patients he sees a week, to which he testified that he sees between 150-200. It made an immediate impact on the case.

"This is not a physician who's taking care of wheezers and sneezers," Dib said. "This is someone who does brain surgery and sophisticated spinal surgery."

Stutesman said this keeps attorneys on their game, adding that "some may complain, 'I thought I covered it,' to which my response is, 'Well, if you covered it, they didn't catch it because they're still asking about it.'"

Jurors talking about the case as it goes along, before they must deliberate, is another of the project's strong points, said Muskegon's Hicks.

"They are able to identify, almost immediately, points of disagreement they may have or different points of view," he said. "Then they pay more attention to that testimony with subsequent witnesses, rather than wait three weeks and try to re-create that."

Hicks did note that one of his concerns was how discussing a case early on could lead to jurors' snap judgments, some of which could carry through to the end.

But that's not always true. He recalled a commercial dispute and was told by the jurors that they changed their minds during closing arguments

"They're keeping their minds open," Hicks said.

Ingham's Boyd said he has not seen any negative ramification of jurors discussing evidence prior to decision and informally deciding the case before it's in.

"We had a string of eight not-guilty verdicts in a row," he said. "I don't see any evidence that allowing them to talk about any facts prior to deliberation has affected the outcome of short misdemeanor trials."

Don't touch

But if there's one thing the judges agreed upon, it's to keep their hands -- or rather, their voices -- off the evidence.

The project states that judges "may fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence," though it also notes that "The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury."

Yet, there's enough of a concern that any judge's comment can be misconstrued.

"That's not my job as a judge; I'm calling balls and strikes, making evidentiary ruling and determining what comes in front a jury," said Judge David F. Viviano of Macomb County Circuit Court. "And it's up to [the jury] to decide what the facts are and who they do and don't believe."

Boyd doesn't know of any judge who has done or will do it because "we don't know *how* to do it," and added that one judge accepted participation in the jury reform project under the condition that he *never* have to do it.

Boyd did once make an attempt, though, taking copious notes throughout the trial. But when the time came, he called the attorneys to his chambers and said that there was no way he could do it and be impartial.

"Any verb, any adjective, any choice of word is going to color one side of the evidence as opposed to the other. So I tore up my notes and told the Supreme Court I wasn't going to try it anymore because I don't see how to do it."

Viviano said it possibly could be done, but it would be a logistical nightmare.

"If I had a two-week trial, I'd have to review all my notes, then put them in an organized, sensible way -- and then review everything again to be sure it's being presented in the most fair and impartial way possible," he said. "It's not fair to adjourn a case for three days for that."

If you would like to comment on this story, please contact Douglas J. Levy at (248) 865-3107 or douglas.levy@mi.lawyersweekly.com.

What the jury's saying

Judges, attorneys and jurors who participate in trials that utilize the jury reform pilot project are being surveyed about the project's effectiveness. The results will be assessed once the project ends Dec. 31, said Anne Boomer, administrative counsel for the Michigan Supreme Court.

Boomer provided some comments from among the juror questionnaires received:

- One juror wished that the court had used the interim attorney comment principle -- where "each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial" -- because he would have found it helpful.
- Another juror thought that allowing interim comment in the case in which the juror was serving was simply an opportunity for the attorneys to put on a show, and added nothing of substance to the trial.
- Several jurors indicated specifically that they liked being able to discuss the case before deliberation, and ask questions to clarify the issues.
- Another juror indicated that being able to take notes and ask questions and discuss the issues before deliberating is very important, adding, "I would not want to do jury duty any other way."

Order a **REPRINT**
of this Story

[User Agreement For Subscriber-Only Online Benefits](#) | [Help](#) | [Our Privacy Policy](#)

Send any questions or comments to comments@lawyersweekly.com

Subscriber Services: 1-800-451-9998 Technical Support: 1-800-451-9998

© Copyright 2010 Lawyers Weekly, Inc. All Rights Reserved



Lawyers Weekly does not use spyware; however, we link to a number of other sites and do not take responsibility for any spyware they may use.

209.254.24.178/5.93