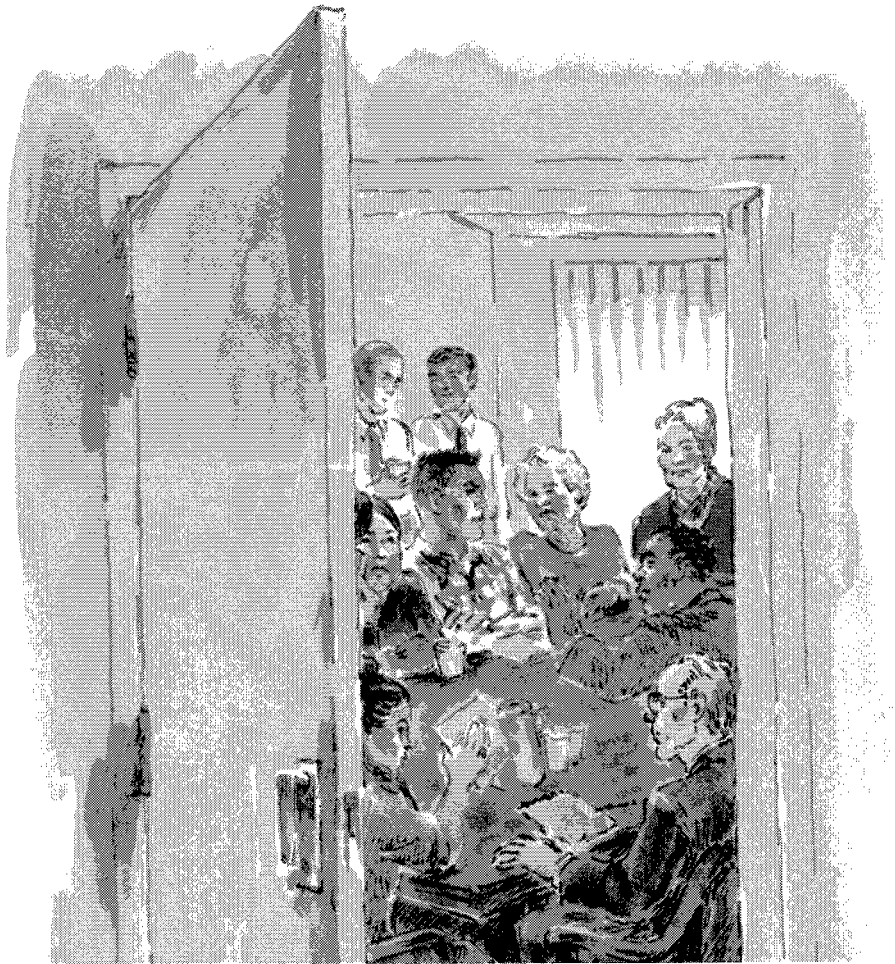


Inside the jury room **Evaluating juror discussions during trial**

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Arizona's rule permitting juror discussions during civil trials promised multiple benefits and raised multiple concerns, but a novel study involving videotaping actual discussions and deliberations showed modest effects.

Innovation is a hallmark of jury trials in Arizona.¹ It was the first state in the nation to instruct civil trial jurors that they were permitted to discuss the evidence among themselves during breaks in the trial. That instruction replaced the traditional admonition to delay any case discussion until the end of the trial. Along with the discussion innovation, the Pima County Superior Court in Arizona took another unprecedented step. The court decided to permit an evaluation of the innovation in which the researchers were able to examine what jurors actually do when they are permitted to discuss the case during trial.²

The Pima County Superior Court, with the endorsement and support of the Arizona Supreme Court, approved a novel method of evaluation. The Arizona Filming Project was an experiment that included the videotaping of jury discussions and deliberations. The analysis from the experiment reveals that juror discussions have some of the anticipated benefits, but also have some drawbacks. This article will discuss several recom-

mended changes to enhance the positive outcomes of discussions and minimize the negative ones.

A controversial rule

Acting on a recommendation issued by a committee of the Arizona State Supreme Court in 1994,³ Arizona amended its Rules of Civil Procedure by adopting Rule 39(f). Under

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1. The range of innovations proposed and enacted by Arizona is described in Dann and Logan, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996).

2. The full report of the project research is described in greater detail in Diamond, Vidmar, Rose, Ellis and Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZONA L. REV. 1 (2003); see also, Diamond and Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VIRGINIA L. REV. 1857 (2001).

that rule, jurors in civil cases are instructed that they may discuss the evidence among themselves. Discussions, however, must occur only in the jury room and only when all jurors are present. In addition, the jurors are instructed that they must reserve judgment about the outcome of the case until deliberations commence.

Rule 39(f) was controversial and generated considerable debate. The Arizona Filming Project was designed to test empirically the opposing views of proponents and opponents of the juror discussion innovation. Among the potential benefits cited by those who advocate juror discussions:

- Juror comprehension may improve when jurors as a group sift through and organize evidence during the course of a trial.

- Juror recollection of evidence and testimony may be enhanced when important points are emphasized or clarified.

- Jurors can admonish each other about reaching premature conclusions.

- Jurors may be less likely to discuss the case outside the jury room because they have an outlet for discussion in the jury room.

Opponents of Rule 39(f) raised a number of concerns about the innovation. Among them are:

- Discussions may promote the formation of premature judgments about pivotal issues in the case.

- Discussions may advantage the plaintiff because the plaintiff presents first and the primacy of this evidence will color the evidence in the plaintiff's favor before the defense has an opportunity to present its case.

- Allowing jurors to discuss evidence may encourage discussion about the case even when it is not permitted (e.g., with nonjurors or with jurors when not all of them are present).

- Jurors may be subjected to more stress when conflicts arise during the discussions.

The filming project

A prior study of Rule 39(f) yielded some important insights,⁴ but was limited by its reliance on data collected by means of post-trial questionnaires. The Arizona Filming Project addressed that limitation by providing a direct window on the processes of discussion and deliberation; that is, by videotaping the actual discussions and deliberations of 50 civil juries.

The original plan was to randomly assign three-fifths of the cases to receive the standard "Discuss" instructions, and the remaining two-fifths to receive "No Discuss" instructions.⁵ The trials in the study were held in the Pima County Superior Court in Tucson. The project required an elaborate set of permissions and security procedures.⁶ In each case, we obtained permission from the judge, jurors, litigants, and attorneys.

For each case, the entire trial was videotaped from opening statements to closing arguments and jury instructions. In the jury rooms two unobtrusive cameras and microphones were mounted at ceiling level. An on-site technician taped the conversations in the jury room whenever at least two jurors were present. We drew on the trial videotapes to develop a detailed "roadmap" for each trial. Quasi-transcripts, which were created for all juror discussion and deliberation periods, allowed detailed analyses of the content of juror discussions.

The sample of 50 cases consisted of 26 (52 percent) motor vehicle cases, 17 (34 percent) non-motor vehicle tort cases, 4 (8 percent) medical malpractice cases, and 3 (6 percent) contract cases, a distribution that is nearly identical to the breakdown for civil jury trials for the Pima County Superior Court for the 1996-97 fiscal year. The tort cases varied from the common rear-end collision with a claim of soft tissue injury to cases involving severe and permanent injury or death. Plaintiffs received an award in 65 percent of the cases. Awards ranged from \$1,000 to \$2.8 million with a median award of \$25,500.

The small sample of cases makes it difficult to draw strong conclusions attributing differences in outcome between the two sets of cases to the opportunity to discuss the case during the trial. Nonetheless, random assignment generally succeeded in producing two sets of cases (30 Discuss cases and 12 No Discuss cases) with similar characteristics (e.g., number of witnesses, length of trial) that were rated similarly by the judges in the study on measures of complexity and balance.⁷ As a result, we were able to use the No Discuss cases to assist in evaluating how the opportunity to discuss the case during the trial affected the behavior of the jurors in the Discuss cases.

An additional seven longer and more complex cases,⁸ including all four medical malpractice cases, were assigned to the Discuss instruction. These cases permitted us to examine jury behavior in a subsample of cases that proponents of the innovation expected would profit most from the discussion innovation. In the results described below, we focus primarily on the 42 cases randomly assigned to the Discuss and No Discuss conditions. For some additional analyses, we also describe results from the seven complex Discuss cases that were not subjected to random assignment.

Discussing the evidence

The jurors in the Discuss cases clearly availed themselves of the chance to talk about the case. Of

3 Ariz. Supreme Court Comm. On More Effective Use of Juries, *Jurors: The Power of Twelve* (1994) (Recommendation #37).

4. Hannaford, Hans, and Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW AND HUM. BEHAV. 359 (2000); Hans, Hannaford, and Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The View of Trial Participants, Judges and Jurors*, 32 U. MICH. J.L. REFORM 349 (1999); Hannaford-Agor, Hans, and Munsterman, "Speaking rights" *Evaluating juror discussions during civil trials*, 85 JUDICATURE 237 (2002).

5. More cases were assigned to the Discuss instruction because we anticipated that not all juries permitted to discuss the case during breaks would choose to do so, and because a very short trial might leave jurors with no opportunity to discuss the case during the trial with all jurors in the room.

6. For a description of these procedures, see Diamond et al., *supra* n. 2, at 17.

7. For a detailed description of the random assignment process, see Diamond et al., *supra* n. 2, at 20-21.

8. The jury in one other complex case received the No Discuss instruction.

these Discuss juries, 89 percent included at least one juror who mentioned the evidence at least once, and in many instances discussion of the evidence consumed the whole period.⁹

How did this activity compare with the behavior of juries instructed not to discuss the evidence? Among the No Discuss juries, 67 percent included at least one juror who made some comment about the case during the course of the trial. Many of these, however, were single comments that elicited no reaction from the other jurors. If single comment cases are excluded, discussion still occurred in 89 percent of Discuss cases but dropped to 42 percent in the No Discuss cases. Moreover, the discussion was much more limited in the No Discuss cases.¹⁰

We coded juror discussion behavior during the trial by breaking down discussion opportunities into 10-minute periods when at least two jurors were in the jury room. Rule 39(f) specifies that jurors may discuss the case only when all jurors are present in the jury room, but this provision was not strictly observed. Across all Discuss juries, discussions actually took place, on average, in 28 percent of the 10-minute periods when some jurors were missing.

While some juries were scrupulous in adhering to the rules, others appeared to violate the rule more frequently. In one very lengthy case in which there were 67 periods, discussion occurred in 26 periods when not all of the jurors were present. Overall, the conversations ranged from possibly innocuous to more problematic. In some instances, a subset of jurors discussed substantive issues, such as the parties' credibility and the conflicting opinions of expert witnesses.

The jurors who were allowed to discuss the case did often mention the rule requiring all jurors to be present for discussions; 80 percent of all the Discuss cases included at least one reference to the rules. The reference to the rule generally served to prevent or cease conversation (e.g., "You can't talk about it now after I

leave," or "I guess we shouldn't talk about it because not everybody is here.")

In the post-trial questionnaires jurors were asked whether they discussed the case outside the jury room. There is no evidence from the jurors' reports that the Rule 39(f) innovation reduced or increased outside discussion. Those permitted to discuss the case in the jury room reported discussing it no less often outside the jury room than those instructed not to discuss the case at all during the trial. Overall, only a small minority of jurors reported discussing the case with family or friends.

Substance of discussions

Although the cases varied widely, some broad categories of topics were commonly observed across many of the cases. Among them are:

- Questions about the trial process, the rules, and the substance of the case.
- Attempts to clarify the temporal sequence of events or facts from witnesses (e.g., "When did the prior injuries occur?").
- Discussions of missing evidence, discrepancies in testimony, credibility of witnesses, and insurance.
- Attitude and behavior of witnesses, lawyers, and the judge.

These categories show that one objective of Rule 39(f) was fulfilled: When given the opportunity to discuss the case during the trial, the jurors actively reviewed and evaluated what they had heard, made interpretations and inferences from the evidence, and speculated about what they had yet to hear (or would not hear). They also frequently used their fellow jurors as resources for their questions and uncertainties, seeking information from one another and offering different views about what the evidence was or what it meant.¹¹

Another benefit proponents of Rule 39(f) predicted was that discussion would allow jurors to clear up points of confusion and test their recall and impressions against one another in longer and more com-

plex cases. To see if this occurred among the videotaped jurors, we analyzed in detail five lengthy Discuss trials that had relatively difficult, contradictory, or potentially confusing testimony from lay and expert witnesses. We compared the conclusions the jury arrived at with the actual trial evidence. In all of these cases, when jurors sought information or had differences of recall about testimony or exhibits at trial, the exchange that followed while the trial was in progress resulted in a more accurate picture of the evidence.

Early verdict statements

Rule 39(f) directs jurors to reserve judgment about the outcome of the case until deliberations begin. To determine the extent to which jurors followed this injunction, we examined how often jurors made statements about what a verdict should be during the discussion periods, the types of opinions expressed, the point in the trial at which verdict statements were voiced, and the response of other jurors to early verdict statements during trial.

No verdict statements were made by members of the No Discuss juries. Among the full set of Discuss juries, however, a majority, 63 percent, had at least one juror who made an early verdict statement while 37 percent had none. Across all the Discuss cases, 201 verdict statements were made, an overall average of 5.74 per case. The verdict-related opinions expressed by individual jurors were assigned to categories. Some 15 percent of the statements represent what we termed "technical" violations, typically instances in which jurors attempted (not always successfully) to elicit verdict preferences from others. Two-thirds of all violations were liability assessments. Of these, 25 percent indicated that the plaintiff should prevail on liability, 66 percent favored the defense, and

9. In addition, multiple discussions occurred in all seven of the complex Discuss cases.

10. For further detail, see Diamond et al., *supra* n. 2 at 25-27.

11. See Diamond et al., *supra* n. 2, at Table 5.1.

9 percent indicated that both parties were at fault. Finally, 17 percent of all statements expressed preferences about damage awards, with most, some 86 percent, favoring the defense (e.g., “I don’t think the plaintiff should get what her lawyer is asking for”). Although we identified a total of 201 early verdict statements, they were rare occurrences: Only 11 percent of the discussion periods contained even a single verdict statement.¹²

A particular concern expressed by Rule 39(f)’s critics was that jurors may settle on a verdict before the defense presents its case. Contrary to these concerns, verdict statements were far more likely to appear *after* the defense had presented its first witness than before; 79 percent of the verdict statements were made in discussion periods that took place after at least one defense witness had testified. Moreover, statements occurring prior to the defendant’s case did not necessarily favor the plaintiff. Indeed, they tended to center on perceived weaknesses in the plaintiff’s claims and evidence.

Although some may have hoped that juries would self-monitor to eliminate these early statements of preferences, verdict statements did not often evoke a response from other jurors. In all the cases with verdict statements, there were a total of 31 comments (ranging from 0 to 6 per case) reminding jurors explicitly that they have not heard all the evidence and should wait to make a decision. Most often, these reminders were presented gently, although on rare occasions jurors were confrontational about rule violations.

Thus, consistent with some concerns about Rule 39(f), jurors permitted to discuss the evidence during trial did occasionally offer comments on preferred verdict outcomes and these comments were not well policed by the group. Nonetheless, the verdict statements were

infrequent. Significantly, no jury voted or otherwise arrived at a group decision on a verdict during their discussions. It is also important to note that the meaning and effects of these early verdict statements are somewhat ambiguous. When a juror utters a statement that reflects a position on a verdict, the speaker may not hold or intend to communicate a firm position. Moreover, the group may not perceive the position as either fixed or suggestive of how they should feel. Thus, expressions should not be confused with the underlying thought processes that give rise to them.

Impact on deliberations

To assess the significance of early verdict statements and other effects of discussion, we studied the jury’s behavior during deliberations. We examined how the Discuss and No Discuss juries arrived at their verdicts.

Proponents of Rule 39(f) predicted that discussions would make deliberations more efficient. The expectation was that jurors who had already reviewed some of the evidence as a group would be able to resolve remaining issues during deliberations more swiftly. In fact, the randomly assigned Discuss and No Discuss juries showed few differences in the timing of the first vote. The first vote occurred, on average, 21 minutes after deliberations began in the Discuss cases and 20 minutes after the start of deliberations in the No Discuss cases. However, what might be called “immediate” votes appeared to be more common in the Discuss cases. In those cases, 39 percent of the votes occurred in the first 10 minutes of deliberations; in the No Discuss cases just 17 percent took place in the initial 10 minutes, although this difference was not statistically significant.

Generally speaking, in longer trials, juries deliberated longer before taking a vote. Jurors in the seven lengthy and more complex cases averaged 75 minutes of deliberation before they took a vote. Across all cases, the longer the trial, the longer were the pre-vote deliberations. This

suggests that jurors, even when permitted to discuss the case during the trial, respond to more evidence by giving it more processing time before taking a first vote.

With respect to overall deliberation length, Discuss juries did in fact take less time to reach a verdict during deliberations. We note, however, that the deliberation times were highly variable, ranging from 10 minutes to 7 hours, and the sample of cases small. Thus, the average difference of 26 minutes was not statistically significant, although it was in the expected direction.

Supporters of jury discussions during trial predicted that discussions would increase juror comprehension, particularly comprehension of complex testimony. While jurors rated the Discuss and No Discuss cases similarly on ease of comprehending the evidence and the instructions, they found expert testimony easier to understand when they were permitted to discuss the case. The judges hearing these same cases did not make this distinction. They rated the Discuss and No Discuss cases similarly on the complexity of the expert testimony as well as on the evidence and instructions. This pattern of results adds support to the notion that discussions are likely to be most helpful to jurors when they are evaluating complex expert testimony.

Jury verdicts

A fundamental concern about allowing jurors to discuss the case during the course of a trial is that a primacy effect will predispose jurors to favor the plaintiff, whose case is presented first. But our comparison of the verdicts revealed that plaintiff win rates were not higher in the Discuss cases than in the No Discuss cases. A further analysis compared the Discuss juries’ verdicts with those rendered by the presiding judges who reviewed the evidence and indicated how they would have decided the case if it had been a bench trial. The judge and the jury agreed that the plaintiff should receive an award in 68 percent of the cases, and agreed

12. For a complete description of the rate in each case, see Diamond et al, *supra* n. 2, at Tables 6.1 and 6.2.

on a defense verdict in an additional 20 percent, for a total agreement rate of 88 percent. While the number of cases is too small to draw any firm conclusions, the verdict pattern provides no suggestion that the opportunity to discuss the case during the trial leads the jurors to be more favorable to the plaintiff.

In light of the evidence that jurors in the Discuss cases occasionally made early verdict statements during discussions, we traced the positions reflected in those statements through deliberations to the final vote of the jury. This analysis allowed us to see whether the early statements predicted how those same jurors would later vote. If such statements always predicted final positions, that would raise concerns about whether discussions precluded movement in position, the very prejudice about which critics worried.

Focusing on the 20 cases in which verdict preferences on liability were expressed, the analysis indicated that jurors in 11 of the 20 cases changed the position they expressed during trial by the time the jury took its final vote. Although it was not possible to determine whether more or less movement would have taken place in the absence of discussion, these figures provide some evidence of movement that is inconsistent with a picture of unwavering commitment to early verdict preferences expressed during discussions.

Modest effects

Rule 39(f) promised multiple benefits and raised multiple concerns. In policy terms, it would be simple if our data showed that the consequences of the reform were either all bad or all good. Instead, our analysis reveals evidence for some of the positive features and a few of the negative characteristics reflected in predictions about the effect of the innovation.

Jurors did use the opportunity to engage in substantial discussions about the trial. The interactions helped to fill gaps in their knowledge, clarify misunderstandings,

and improve the accuracy of their recall of evidence. But not all behavior was consistent with an idealized version of the discussion innovation. Jurors frequently ignored the admonition to discuss the case only when all jurors were present. Some jurors expressed early verdict positions during discussions. Although we found no clear indication that those statements were more than tentative suggestions, that the other jurors accepted them, or that the statements were responsible for altering case outcomes, they were violations of the prohibition against taking final verdict positions during the discussion.

Overall, most of the weaknesses associated with the discussion innovation could probably be reduced or eliminated with a number of relatively small changes in procedures. First, jurors in these cases typically received a single brief verbal instruction at the beginning of the trial about the conditions under which jurors are permitted to discuss the case. This was insufficient. To ensure that the instruction is salient throughout the trial, each juror should be given a written copy of the rule; it should also be prominently posted in the jury room, and the judge should remind jurors of the specific instruction throughout the course of the trial. To further promote adherence to instructions, jurors could select an interim presiding juror for the discussion periods at the beginning of the trial. In this way, rules would be more likely to be monitored because there would be one juror with that responsibility.

The modest effects associated with the discussion innovation should allay the fears of critics, but offer somewhat tempered support for the enthusiasm of supporters. The findings could lead policy makers in different directions. Evidence that jurors use the discussion occasions to clarify their recall and understanding of the evidence, particularly expert testimony, may convince some decision makers that the innovation should be supported. Evidence that some jurors made

early verdict statements during discussions, even in the absence of clear evidence that they affected trial outcomes, may persuade others that the innovation should not be implemented.

Yet the choice is also not simply to allow discussions or prohibit them. Juror recall of the evidence is strong in short cases, decreasing the potential benefits associated with the opportunity to discuss the case during these trials. In long, complex cases, however, jurors may substantially benefit from the opportunity for discussion. Judges might be given the discretion to permit discussions in these longer, more complex cases, or allowing discussion might be automatic in the minority of trials expected to last more than a week. The findings from the Arizona Filming Project suggest the value of considering these alternatives. ☞

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