Fall 1993

Communicating with Juries

Fred H. Cate  
*Indiana University School of Law,* fcate@indiana.edu

Newton N. Minow  
*Sidley & Austin*

Follow this and additional works at: [https://www.repository.law.indiana.edu/ilj](https://www.repository.law.indiana.edu/ilj)

Part of the *Courts Commons*

**Recommended Citation**

Available at: [https://www.repository.law.indiana.edu/ilj/vol68/iss4/6](https://www.repository.law.indiana.edu/ilj/vol68/iss4/6)

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvbaughan@indiana.edu.
Communicating with Juries†

FRED H. CATE*  
NEWTON N. MINOW**

INTRODUCTION

Communications failures plague the central component of the United States judicial system: the jury. Prior to jury selection, the press—vigorously exercising its First Amendment rights—often saturates the public with news and opinions about every facet of a case involving issues, events, or people of public interest. Because of this communication outside the courtroom, potential jurors may arrive at the courthouse on the first day of the trial with extensive knowledge about the victim, the crime, and the defendant, including possibly inaccurate or highly influential information that, for evidentiary or strategic purposes, may never be introduced in court. As a result, courts face great difficulty in guaranteeing criminal defendants’ Sixth Amendment right to be tried by “an impartial jury of the State and district wherein the crime shall have been committed.”1

Unfortunately, the forces that inhibit jury impartiality are not limited to outside the courtroom. Once empaneled, jurors routinely report not understanding judges’ instructions or even the basic facts of a complex case, while judges and attorneys feel limited by precedent and the dictates of reviewing courts to depart from traditional, even though ineffective, methods of communicating with juries. “[A] jury trial is very often much like watching a foreign movie without subtitles,” observes Wall Street Journal legal editor Steven Adler. “If there’s a lot of action, you have a general idea what’s going on. If there isn’t a lot of action, you’re in trouble.”2

† © Copyright 1993 by Fred H. Cate and Newton N. Minow. All rights reserved.

* Associate Professor of Law, Indiana University School of Law—Bloomington; Director of Research and Projects and Senior Fellow, The Annenberg Washington Program in Communications Policy Studies of Northwestern University. A.B., 1984, Stanford University; J.D., 1987, Stanford Law School.

** Counsel, Sidley & Austin; Director, The Annenberg Washington Program; Annenberg University Professor, Northwestern University; former Chairman, Federal Communications Commission. B.S., 1949, J.D., 1950, Northwestern University.

Together with Professor Cate, Mr. Minow convened The Annenberg Washington Program’s first jury forum, Selecting Impartial Juries: Must Ignorance Be a Virtue in Our Search for Justice?, in Washington, D.C., in 1990.

1. U.S. CONST. amend. VI.

The failure of the United States judicial system to remedy the communications gap between the jury and other trial participants (the judge, attorneys, and witnesses) is as damaging to that jury's ability to do justice as the failure to seat an impartial, representative jury in the first place.

Communications outside and inside the American courtroom have been the subjects of two forums sponsored by The Annenberg Washington Program in Communications Policy Studies of Northwestern University. The Program acts as a bridge between policymakers, academics, practitioners, the press, and the public on important policy issues involving communications. In its first jury forum—Selecting Impartial Juries: Must Ignorance Be a Virtue in Our Search for Justice?—the Program invited judges, defense attorneys, prosecutors, social scientists, and members of the press to consider the importance of communications outside the courtroom, particularly the impact of the press on jury selection in notorious trials and of the frequent practice of excusing media-literate citizens from jury service. The proceedings of that forum, together with related articles by forum participants, were published in a special issue of The American University Law Review in 1991.3

In May, 1992, the Program sponsored a second jury forum—Communicating with Juries—focusing specifically on communications within the courtroom. The forum examined problems with judge-jury and attorney-jury communications, current methods for improving those communications (for example, written instructions, simplified instructions, and instructions given before and after the cases are presented), and what social science and practice indicate about the effectiveness of each. The second Annenberg jury forum also addressed technological innovations for improving judge-jury communications (for example, computer graphics, video copies of instructions, and video excerpts from testimony). This issue of the Indiana Law Journal contains the proceedings from the Communicating with Juries forum, as well as related articles and commentaries by distinguished judges, social scientists, academics, and attorneys.4

4. The Annenberg Washington Program is grateful to each of the participants in its jury forums, many of whom are also contributors to this special edition. They have shared generously of their time, experience, and scholarship to address the vexing communications issues confronting the modern courtroom. The Program especially acknowledges the contributions of the forum convener, Peter David Blanck, Professor of Law at the University of Iowa College of Law and a Senior Fellow of The Annenberg Washington Program. Finally, the Program thanks the editors and staff of the Indiana Law Journal, and particularly Editor-in-Chief Patrick S. Cross and Executive Articles Editor Katherine B. Lieber, whose energy and diligent efforts have made this unique volume possible.
I. COMMUNICATIONS OUTSIDE THE COURTROOM

In 1871 Mark Twain described the system by which jurors are selected as putting "a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury." Twain wrote that when juries were first used, news could not travel fast, and hence [the king] could easily find a jury of honest, intelligent men who had not heard of the case they were called to try, but in our day of telegraph and newspapers his plan compels us to swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains.

Twain’s concern was that judges were responding to the expansion of the media—in 1871, telegraph and newspapers—and news reports about people and events that later were the subject of a trial by banning informed citizens from juries. More than a century later, The Daily Telegraph (London) wrote about jury selection in U.S. courts for another trial, that of Lt. Colonel Oliver North: "[I]gnorance is the path to enlightenment. The slightest taint of interest in the world beyond home and work is enough to win dismissal."

The impact on trials of communications outside the courtroom demand more attention today than ever before. Satellites, mobile equipment, broadcast and cable television, and other new technologies, combined with an insatiable public curiosity, have led to an explosion in news coverage and dramatic reenactments of criminal activities. Mass media proliferates in American life in ways never even dreamed of by Twain. It is impossible for any responsible citizen to be unaware of alleged major crimes in the local community. Even on the national level, Oliver North, Marion Barry, Joseph Hazelwood, Manuel Noriega, William Kennedy Smith, and Mike Tyson are household names.

Justice Felix Frankfurter wrote in a 1961 concurrence that "[n]ot a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts."

But the frequency of such claims—driven by technological expansion, greater institutional prerogative on the part of the media, and heightened public expectations—has led to an explosion of claims by criminal defendants and their counsel of juries biased by press reports. The public is inundated with

6. Id. at 256.
courthouse steps claims by defense lawyers that "my client can’t get a fair trial because of pretrial publicity" 9

Despite the potential threat of news coverage about the issues, events, or people involved in a notorious trial, the Supreme Court has repeatedly held that judges may not prohibit the press from publishing truthful, lawfully obtained information relating to the trial. 10 Judges may seek to limit the release of information to the press, particularly by prosecutors, police, and court officers, 11 but the First Amendment provides an extraordinarily high obstacle to restrictions on the press itself. Moreover, it is often impossible for a judge to control the publication of prejudicial information because increasingly the most dramatic revelations in the press occur at the time of the crime itself, long before there is a trial, much less a judge selected to oversee the trial. Photographs of the victim or of the defendant being led away in handcuffs by police, details about the crime, and reports of community outrage are highly inflammatory, even though they first appear well in advance of any trial.

As a result, in cases where control of the media is impossible, as well as in the vast majority of other cases where control of the media is not constitutionally permitted, the judicial system must focus its attention on identifying and either remediying or avoiding, rather than preventing, partiality among potential jurors. Courts are not without a variety of options, including change of venue, continuance, jury instructions, and voir dire. Judges rely on these techniques to help fulfill their constitutional duty to impanel impartial juries. Yet many social scientists participating in the first Annenberg jury forum questioned the effectiveness of these techniques, particularly in light of the time and money they consume. Other critics charge that the use of these methods impinges on important rights, such as the Sixth Amendment right to be tried before a jury chosen from "the State and district wherein the crime shall have been committed." 12

Moreover, these measures, especially voir dire, frequently focus the court’s attention on the mere fact of exposure to press reports, rather than on the

9. During the 1980s, national newspapers and wire services alone reported over 3,100 such claims. This figure is based on searches in the NEXIS newspaper and wire service databases and may confidently be assumed to underestimate the actual number of reports, because not all national newspapers and services were covered by these databases during the early 1980s. Moreover, it is reasonable to assume that far more claims would be reported by regional and local press—most of which are not included in these databases—because of the greater number of regional and local papers and the greater number of trials that are highly publicized only in the local or regional press.


12. U.S. CONST. amend. VI.
existence and degree of any bias or prejudice that may have been engendered by such exposure. As a result, some courts mistake “unaware” for “impartial,” and so search unnecessarily for jurors who know nothing about the case to be heard. This process, particularly in notorious cases, is often time-consuming and expensive. If the defendant is unusually well-known, it may be impossible to impanel a jury wholly ignorant of his or her activities. Such a quest excludes qualified citizens from the jury, resulting in panels composed of citizens who are less representative of their surrounding community. At minimum, the search for “unaware” jurors diverts the court’s attention from its constitutional obligation to seat an “impartial” jury.

In the special issue of The American University Law Review containing the proceedings from the first Annenberg jury forum, we argued that courts need neither ignore the impact of media coverage on the selection of an impartial jury, nor become hopelessly enmeshed in examining the amount and type of media coverage through extended and far-reaching voir dire. The language of the Sixth Amendment, the dictates of the Supreme Court, and the realities of modern society require that courts impanel juries that are impartial, but not without knowledge and opinions. In the words of the Supreme Court: “It is not required, however, that the jurors be totally ignorant of the facts and issues involved. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.”

II. COMMUNICATIONS INSIDE THE COURTROOM

A. The Breadth of the Problem

1. Inadequate Communications

The impact of communications on the judicial system is not limited to communications outside the courtroom and to the influence of media on jury selection. Communications failures often occur within the modern courtroom. According to the American Bar Association Litigation Section’s recent study, Jury Comprehension in Complex Cases, the typical juror in complex federal cases “is bored and confused. What’s more, he misunderstands key legal concepts and struggles to reach a just decision. And, the juror’s task is made

---

15. SPECIAL COMM. ON JURY COMPREHENSION, AM. BAR ASS’N, JURY COMPREHENSION IN COMPLEX CASES (1990).
more difficult by the way lawyers and judges present evidence and explain legal concepts."\textsuperscript{16}

Professor Robert F Forston, reporting the results of a wide variety of jury comprehension studies in the mid-1970s, concluded that "a condition of pervasive confusion does in fact exist among jurors in the present jury system" and that this pervasive confusion "is largely a result of poor communication."\textsuperscript{17}

Jurors often improperly find the facts because the concept of legal evidence is seldom adequately communicated to them. They often improperly apply the law because they are unable to comprehend the jury instructions. They often fail to rationally consider legal arguments because they have difficulty understanding legal jargon. Also, time is often wasted in the deliberation room because the jury does not fully understand its function.\textsuperscript{18}

Forston's analysis identifies four of the major impediments to effective communications with juries: (1) confusion over the concept of legal evidence; (2) unclear and ill-timed jury instructions; (3) the use of excessive and repetitive legal jargon; and (4) a lack of consensus over the function of the modern jury. To these might be added: (5) the complexity inherent in much of the law that jurors are required to apply; and (6) the ill-conceived, outdated, and counterproductive nature of many of the rules that govern the trial process (for example, prohibitions on jurors taking notes and discussing the case with each other). For example, jurors routinely report not understanding what is happening during a trial and the law that they are instructed to apply "[Y]ou have this intractable problem," according to Steven Adler, "of trying to translate what is often very complex law and very legalistic language for an audience that is in no way equipped to deal with it."\textsuperscript{19}

This was not always the case. Prior to the judicial "reforms" of the late nineteenth century, judges "told the jury about the law in frank, natural language. But," writes noted legal historian Lawrence Friedman, "this practice died out—or was driven out."\textsuperscript{20} Instead,

\begin{itemize}
\item The instructions became solemn written documents, drafted by the lawyers. Each side drew up statements of law; the judge merely picked out those that were (in his judgment) legally "correct." In any event, the instructions were technical, legalistic, utterly opaque. They were almost
\end{itemize}

\textsuperscript{18} Id.
\textsuperscript{19} Panel One, supra note 2, at 1039 (statement of Steven Adler).
\textsuperscript{20} LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 399 (2d ed. 1985).
useless as a way to communicate with juries; the medium conveyed no message.\textsuperscript{21}

This is still true today Washington, D.C., defense attorney Jamie S. Gorelick has noted: “the worst part [of courtroom communications] is the instruction. The instructions are meaningless even to lawyers who are following them and reading them and who presumably understand the law.”\textsuperscript{22} Consider the following passage from the \textit{eighty-page} instruction given to the jury in a recent antitrust case in North Carolina between Liggett & Myers and Brown & Williamson:

“The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of supply and demand between the product itself and substitutes for it.” All of these factors must be examined in determining whether a well-defined submarket exists in a broader market. However, the existence of a submarket or its lack of existence does not require the presence or absence of all of the factors. The submarket test is not merely whether one product can be substituted for the use of another product, but whether products may be reasonably interchanged for the purposes for which they are produced.\textsuperscript{23}

Steven Adler reported at the second Annenberg jury forum that the “typical” juror to whom this instruction was given was a textile worker with a high school education, people who found Greensboro, North Carolina, to be “a very difficult city to get around because they were mostly from the surrounding countryside.” One of the jurors, according to Adler, had never before used a parking meter. But “he could have been a Ph.D. and it would not have mattered.” “I had to read [the instruction] seven or eight times to even have the vaguest sense of what it meant.”\textsuperscript{24}

These concerns echoed those expressed at the first Annenberg jury forum by former United States Attorney Joseph E. diGenova: “instructions are basically useless, particularly in complex cases where judges will not give jurors copies of instructions, so that the jurors, after hearing half a day of instructions, are supposed to remember what the law is, as well as the facts, when the lawyers themselves will, in most cases, find the instructions

\textsuperscript{21} Id. (citation omitted).
\textsuperscript{24} \textit{Panel One, supra} note 2, at 1038 (statement of Steven Adler).
This conclusion is also supported by a number of studies, including two experiments by Amiram Elwork, Bruce Sales, and James Alfini:

If a jury is to successfully apply the law to a case, the judge's instructions must be written in language that is understandable to the average juror and they must be delivered at times when they can be most effective. There is little doubt that present procedures do not meet these criteria. Unless the situation is corrected, juries will continue to reach decisions arbitrarily, and countless litigants will be denied their constitutional right to a fair trial.

Not only are the instructions often opaque to jurors, trials themselves are often conducted in a language that is wholly and needlessly foreign to the jury. According to Adler, who has been observing trials and talking with jurors for a forthcoming book on juries, jurors often have difficulty with words such as "ambiguously," "representation," "conversion," "tacitly," "nucleus," "executing," "artifice," and "immaterial"; words that lawyers are comfortable with and use regularly during the trial and in jury instructions. "Sometimes [jurors] ask for dictionaries, and usually the judge does not permit them to have a dictionary. They are simply seeking a definition of the word that they can understand so they can make use of it."

2. Prejudicial Communications

Of course, some communications problems arise precisely because jurors do understand certain courtroom communications all too well. Judges may engage in prejudicial communications regarding the credibility of a witness or the guilt or innocence of the defendant. Law professor Peter Blanck, convener of Communicating with Juries, reports:

In many cases from around the country, a trial judge's biased communication directed toward the jury has constituted, by itself, a violation of defendants' due process rights in the criminal trial, resulting

26. Amiram Elwork et al., Juridic Decisions: In Ignorance of the Law or in Light of It?, 1 Law & Hum. Behav. 163, 178 (1977); see also Robert P. Charrow & Veda R. Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 Colum. L. Rev. 1306, 1359 (1979) ("The results of this study—in conjunction with the results of other studies of jury instruction comprehension—underscore the fact that jury instructions are not written for their major intended audience. The inability of jurors to comprehend the charge adequately has obvious implications concerning the soundness of the jury system: if many jurors do not properly understand the laws that they are required to use in reaching their verdicts, it is possible that many verdicts are reached either without regard to the law or by using improper law.").
27. Panel One, supra note 2, at 1039 (statement of Steven Adler).
in the reversal of the conviction. In one often cited case, for example, a Missouri judge hearing the defendant's brother testify that the defendant was at home when the alleged burglary occurred, placed his hands to the side of his head, shook his head negatively, leaned back, and swivelled his chair 180 degrees from the jury, without uttering a word. Needless to say, that jury received a not-so-subtle message from that judge.28

According to Harvard social psychology professor Robert Rosenthal, one study has shown that if a judge believed a particular defendant to be guilty, sixty-four percent of the jurors returned a verdict of guilty. If the judge believed the defendant to be innocent, however, only forty-nine percent of the jurors returned a guilty verdict.29 “[T]here was a fifteen percent difference (between sixty-four percent and forty-nine percent) that was, in a sense, in the mind and expectation of the judge.”30

B. Efforts at Solutions

Judges are not without measures to better involve jurors in the trial process and facilitate their understanding. Arizona Superior Court Judge B. Michael Dann believes that little has actually changed in the way trials are conducted in the United States. But he notes that social scientists have recommended—and some trial judges are experimenting with—“some innovative techniques to make the trial more of a learning experience for jurors. By introducing two-way interactive communication into the courtroom, a principle that underlies effective teaching in the classroom, jurors will become more actively involved in the process.”31

For example, Judge Dann and other participants suggested the following improvements: giving case-specific juror orientation; making opening statements before jury selection; giving preliminary jury instructions; providing juror notebooks (containing copies of opening statements, instructions, and other key documents); permitting jurors to take notes; maintaining better document control (so that attorneys and judges can indicate which documents they think are important and facilitate the easy retrieval of the documents); permitting jurors to question witnesses; permitting interim

30. Id.
summaries by attorneys; simplifying the content and style of instructions; changing the timing of instructions (for example, allowing the judge to give the instructions before closing arguments); giving the jurors written copies of the instructions; asking the jurors before they retire whether they have any questions; allowing jurors, within limits and in a structured way, to talk to each other about the evidence as it comes in, so long as they do not prematurely make up their minds about the ultimate issues; and responding meaningfully to questions submitted by the jury during deliberations.\textsuperscript{32}

Communication, according to Judge Dann, can be the key to comprehension within the jury box itself. "Jurors have a natural desire to talk to someone about the case as it is unfolding in front of them. There is a suggestion, which needs to be documented through studies, that comprehension will improve if they can talk to each other during the trial."\textsuperscript{33} The traditional rule, however, forbids discussions by jurors; judges constantly remind them throughout the trial at every break and before each evening recess, "now don't talk to each other or anyone else until you begin your deliberations." This is unnatural and counterproductive.

The same principle should apply, according to Judge Dann, when the jury is at an impasse:

We are familiar with the contents of the first note we receive from a jury when they do not think they can reach a verdict in the case. Sometimes they ask for help and sometimes they do not. One of the problems is that they do not even know that they can ask for help. But how do we respond to those first notes? Typically we bring the jury in and read them this ritual: "Hold to your conviction but share, be willing to listen, change your position if you are convinced but only if you are convinced. It is important that you reach a verdict, but I do not mean to force a verdict. Go back and deliberate."

My suggestion is that we should have an interactive communication process at that point. We should instruct the jurors, in writing, orally, or both, that if they are having a problem reaching a verdict, they should write down the issues dividing them, which could be further addressed by the judge or the lawyers.\textsuperscript{34}

Why are these and other sensible suggestions not at least tried? The answer, from Judge Dann's perspective, may lie in legal education, "the common denominator shared by lawyers and judges."\textsuperscript{35}

Their legal education inhibits them, I believe, from being more open-minded to the findings of social scientists. It ties them to the past, to the

\textsuperscript{32} Panel Two, supra note 31, at 1064 (statement of Judge B. Michael Dann).
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 1064-65.
\textsuperscript{35} Id. at 1062.
model of the jury we inherited from England, and invests them in the current adversarial model for trial. Lawyers and judges are very hesitant to modify that current model—the game theory that prevails at many trials. They are unwilling to modify it substantially to take into account the needs of jurors. So much of what we have talked about this morning, and maybe for the rest of the day, will have some implications for legal education as well. Legal education does sharpen the mind, no question about it, but it does so by narrowing the mind in many respects. In addition, judges have expressed reluctance to break from past practice for fear of being reversed. At the first Annenberg jury forum, an audience member asked Judge Stanley Sporkin of the United States District Court for the District of Columbia, “Judge Sporkin, you could let jurors take notes, and you could let jurors ask questions, and you could do all these things. You have tremendous freedom as a federal judge to do those things. Why does it not happen more often?” Judge Sporkin responded, “I am a coward. I guess I could do it, but the system says, do not do it. I think that, before I become a pioneer, I would need a consensus of the judges to do it.”

“Besides,” Judge Sporkin added, pointing to Chief Judge Abner Mikva of the United States Court of Appeals for the District of Columbia, “Ab would overturn me.” This was echoed at the second forum by law professor Michael Saks: “[J]udges are really speaking to the appellate court, not to the jurors. You have at least two audiences, and the audience that is taken more seriously is the appellate court. You want to keep them happy You want to make sure the appellate court likes the jury charges.”

Judicial reluctance to depart with pattern instructions may also reflect a recognition that jury instructions have a far wider, and perhaps more important, audience than the jury or even the appellate court. According to Professor Saks:

My speculation is that the real audience for instructions from the bench is the entire legal community. It is a chance to restate the instructions for the legal community— not just the appellate courts, but the lawyers and the other judges who read them. It is not usually the jurors who will be reading

36. Id.
38. Id. (statement of Judge Stanley Sporkin).
these instructions, it will be lawyers and trial judges in other cases. So the real, important audience for the law is the legal community. They are the ones who have to get it right.\textsuperscript{41}

According to Judge Patricia McGowan Wald of the United States Court of Appeals for the District of Columbia, the American Bar Association is currently revising its model criminal justice standards. Judge Wald, who sits on the committee supervising the revision, reported that four innovations are included in the draft revisions: (1) "that jurors be allowed to take notes and to carry those notes into the jury room with them", (2) "that at the very beginning of the trial, first the judge should explain to the jurors all the rules of the game, what is going to happen, and who can communicate with whom", (3) "that the instructions should come before the closing argument", and (4) "that the jurors should be allowed to take into the jury room, if they so desire, not just a copy of the charges, indictment, and instructions, but any exhibits or writings, unless there is something inherently dangerous about letting them do that."\textsuperscript{42}

"That is glacial movement," concluded Judge Wald, "in the eyes of some of the more interesting experiments that are coming along here, but I do think it at least indicates that some of this information is getting out there to the great unwashed. It is also an invitation for the social science researchers doing some of the more interesting research to get some input before these standards are finished."\textsuperscript{43}

\textbf{C. The Role of Communications Technology}

Innovative communications technologies may enhance the understanding of juries far more dramatically than merely simplifying written jury instructions or allowing jurors to take notes. Computer and video technologies are currently being used both for illustrative or explanatory purposes and for legal research and document or case management.\textsuperscript{44} Examples of the illustrative or explanatory use of communications advances include the use of computer animation, interactive video, flat visual representations, and three-dimensional models to explain complicated engineering or design concepts, to re-create the scene of a crime or accident, to simulate the simultaneous movement of numerous people or objects, to illustrate magnitude or quantity, to take the

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 1072 (statement of Judge Patricia Wald).

\textsuperscript{43} Id. at 1073.

jury to a location to which it would be impossible or inconvenient to travel physically, and to allow the jury to witness events it could not otherwise see.  

Computers are also used for legal research and document or case management, often increasing both efficiency and impact. LEXIS and WESTLAW, for example, have dramatically increased the speed and efficiency (as well as perhaps the cost) of legal research. These and other databases allow attorneys, irrespective of location, instant access to a wide variety of resources. Expert computer systems help attorneys create and structure arguments, make decisions, organize documents, and manage complex cases. An attorney armed with a laser disc can have instant access to a witness’s deposition or to a document entered into evidence. Prior statements can be indexed, cross-referenced, and even played for the court and the jury in the deponent’s own voice. Similarly, attorneys practicing before courts using real-time video transcription can instantly recall and replay for the jury a statement uttered only moments earlier. Both the jury and reviewing courts can not only read a witness’s printed words, but also watch his or her demeanor, hear tone and inflection, and see facial expressions, hand gestures, or other body language that accompanied the statement.

The impact of these technologies is obvious, as illustrated by a recent case before Judge Stanley Sporkin, Alpo Petfoods, Inc. v. Ralston Purina Co., in which the plaintiff employed a laser disc system to organize and present more than 1,000 exhibits and depositions and trial testimony from seventy-nine witnesses and nineteen expert witnesses. Defense counsel stood up to make his closing argument and, in an effort to regain the momentum, told


Judge Sporkin he was going to present his argument in "the old-fashioned way, with paper and voice." Judge Sporkin retorted, "Don't knock the new way I am telling you it is sensational. I must tell you I think that's going to be the way of the future. It is very impressive." 49

The reason is simple, as Theodore D. Ciccone, President of Litigation Communications, Inc., explains:

> The majority of our learning comes to us through our sight. From childhood, we first begin observing our parents and peers as models of behavior. The enormous amounts of information presented in our education process are absorbed primarily through sight. Our reasoning and imagination are fueled by information gathered with our sense of sight.

Is it any wonder that today visual aids are considered to be the most effective way of communicating abstract or complex technical data? Visual input is a vital portion of the human ability to process and remember facts. Research has shown that the use of visual aids with an oral presentation can aid comprehension, minimize misunderstanding, and increase retention level by as much as sixty-five percent.

[A] witness's oral testimony can be absolutely boring and by this time a juror has stopped paying full attention. It should come as no surprise that as much as ninety percent of verbal testimony is misunderstood or forgotten completely Visual aids allow you to logically convey your client's story to the jury. You may hone in on pertinent facts relative to your case in ways that will dramatically increase understanding and retention during deliberation—days, weeks, or months later. 50

Despite the impact of these visual technologies, they are still the exception rather than the rule in most American courthouses. Moreover, these innovations pose issues concerning their admissibility, evidentiary value, and potential for unduly prejudicing the jury, as well as the extent to which their underlying components are subject to disclosure and discovery 51. Finally, these futuristic technologies exacerbate existing inequalities in the judicial system. Parties with the resources to hire attorneys and to take full advantage of the judicial process are also more likely to be able to afford often extremely expensive computer and video technologies. Litigants without such resources, defendants who appear before courts pro se or with the assistance

50. Panel Three, supra note 39, at 1082 (statement of Theodore D. Ciccone).
of pro bono or court-appointed counsel, perhaps even the government itself, are unlikely to have equal access to these powerful tools.

More significantly, while computers and video may better hold jurors' attention or even increase their retention, technology alone will not bridge the widespread communications gaps between jurors and other participants in the trial process. Rather, the answer lies in a clearer understanding of the jury's role in the judicial system and the type of information and understanding that is necessary if the jury is to fulfill that role.

III. THE ROLE OF THE JURY

Juries fill a variety of roles in modern society. According to the United States Supreme Court, the jury's functions include protecting citizens against "arbitrary law enforcement,"\textsuperscript{52} "the corrupt or overzealous prosecutor,"\textsuperscript{53} and "the compliant, biased, or eccentric judge."\textsuperscript{54} The Court has written that juries "interpos[e] between the accused and his accuser the commonsense judgment of a group of laymen."\textsuperscript{55} One of the normative functions of trials is to symbolically "reinforce aspects of prevailing ideology," writes law professor Alexander Tanford.\textsuperscript{56} "The prominence of the jury is often said to symbolize democratic ideals. Trials also serve to reinforce social and moral norms concerning appropriate behavior and to define the boundaries of acceptable conduct."\textsuperscript{57}

Juries also play an important role in preserving social order. Professor Tanford writes that some trials, especially criminal trials, also:

\begin{quote}
provide an apparently neutral way to legitimate the state's exercise of power over its citizens and its claim of a monopoly over physical violence. To serve these functions, trials must appear to be a viable method for resolving conflicts so that citizens will bring their disputes to the legal system rather than settle them in the streets.\textsuperscript{58}
\end{quote}

None of these roles involves discerning the truth and, in fact, objective truth may not be a goal of the judicial system. Despite the Supreme Court's

\begin{footnotesize}
\begin{enumerate}
\item Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
\item Id.
\item Williams, 399 U.S. at 100; see Elizabeth F. Loftus & Edith Greene, Twelve Angry People: The Collective Mind of the Jury, 84 COLUM. L. REV. 1425, 1433 (1984) (reviewing Reid Hastie et al., Inside the Jury (1983)).
\item Id. at 164-65 (citations omitted).
\item Id. at 165.
\end{enumerate}
\end{footnotesize}
rhetoric on the importance of juries in determining truth, courts look to juries for "legally accurate verdicts" rather than factually accurate ones. Determining the guilt or innocence of the accused is the practical task that juries across the country perform every day, but the simple fact is that we do not rely on juries because they are most accurate or most efficient at this task. In fact, accuracy and efficiency are plainly not the highest priorities of the judicial system, because a host of legal rules run directly contrary to those goals.

Juries are neither neutral decision makers, nor blank slates that will make rational decisions based only on what they hear or see in court. On the contrary,

jurors come to their task with a wide range of accurate and inaccurate perceptions about trials and conflicts between parties, which can influence how they assess evidence and make their decisions. In other contexts, the legal system recognizes, and in fact values, the personal experiences and common knowledge that the jurors bring to their task.

It is because they are supposed to represent the interests and the breadth of their communities' moral sense that juries, rather than a judge or one or two individual jurors, are used.

If the jury is to perform the many functions assigned to it—to safeguard liberty, to protect against the government, to represent the community, to preserve social order, and to determine guilt or innocence—the jury must be composed of informed citizens who are representative of the community and it must play an informed role in the trial process. As Jay B. Stephens, the United States Attorney for the District of Columbia, stated at the first Annenberg jury forum:

[F]rom the perspective of the government, it is generally to our advantage to have intelligent jurors who listen to the evidence, who


60. Tanford, supra note 56, at 163.

61. For example, the law requires a presumption of innocence or that guilt in criminal matters be proved beyond a reasonable doubt. Or, as Professor Tanford writes, the trial system "in fact encourages lawyers to conceal and suppress damaging information, to exaggerate the significance of favorable evidence, and to try to deceive the jury about the importance of facts or the way the law works." Id. at 160 (citation omitted).

evaluate the evidence, and who do not go off on extraneous kinds of issues. That purpose is served, I think, by informed jurors, by jurors who are an integral part of the community, who participate in the community, who are aware of what is going on in the community and who stay informed.63

This understanding of the jury—an informed, engaged participant in the trial process, not merely a blank slate—is the basic guarantee of fairness given to every criminal defendant. Because the informed, active jury plays such an important constitutional role in the United States judicial system, this understanding argues forcefully for addressing those communications gaps that presently distance many juries from the very cases they are supposed to decide. And, as we have argued elsewhere, it is the reason why potential jurors should not be excluded from jury service just because they have been exposed to information about the people or events involved in a trial.

While the very techniques that courts employ to remedy the problems created by media saturation outside the courtroom may skew the jury’s representativeness and interaction—the diversity and breadth of experiences and views that are the defendant’s fundamental guarantee of fairness—so too do poor communications between the jury and other trial participants.

CONCLUSION

In the case of communications failures outside the courtroom—particularly escalating media coverage of people and events that subsequently become embroiled in trials—the all too frequent search for jurors wholly unacquainted with the facts of a notorious case is a waste of the judicial system’s time and money. Moreover, it threatens the diversity of views and experiences that jurors bring to the jury box, the very foundation of the Sixth Amendment’s guarantee of an impartial jury.

Communications failures within the modern courtroom, however, raise equally important constitutional issues. Pervasive communications gaps that render jurors “bored and confused” and lead them to “misunderstand[] key legal concepts”65 protect neither the defendant’s constitutional rights nor the public’s legitimate interest in justice. Whether the judge or attorneys fail to communicate effectively with the jury, or whether there is prejudicial, even if inadvertent, nonverbal communication, the issue is not simply that the jury may be diverted from reaching the “right” decision. The more fundamental concern is that the informed interaction among the individual members of the

64. Minow & Cate, supra note 13.
65. Marcotte, supra note 16, at 32.
jury and between the jury and other trial participants is frustrated. As Professor Forston wrote almost two decades ago:

> It is self-evident that if the communications process is not effective—if jurors are unsure about the evidence, unclear on the meaning of the law, confused by legal jargon, bewildered by trial procedure, or uncertain of the role they are to play—the jury cannot be expected to perform its function intelligently.66

The century-old failure of the judicial system to remedy the communications chasm between the jury and the judge and attorneys is as damaging to the jury’s ability to do justice as the failure to seat a diverse, representative jury in the first place.

Important initiatives to bridge those gaps are being tried in many courtrooms: better juror orientation; more frequent direct communication between the judge and the jury and between attorneys and the jury; asking the jurors if they have any questions about the evidence, the trial process, or their role; giving jury instructions both before and after the evidence is presented; allowing jurors to take notes and to have copies of testimony, instructions, and key documentary evidence; simplifying and clarifying instructions; permitting jurors to question witnesses; allowing jurors to talk to each other about the case; and responding meaningfully to questions submitted by the jury during deliberations. Each of these initiatives offers the opportunity for real improvement in jury communication and understanding.

New technologies offer hope as well. Computers and interactive video, by appealing to jurors visually, can stimulate their interest, improve their understanding, and increase their ability to retain and recall evidence that has been presented during trial. Complex facts and points of law can be explained more clearly and effectively. And burdensome exhibits, transcripts, and other documents can be managed efficiently. These technological innovations, while raising their own important issues, bode well for increasing the clarity of courtroom communications.

But the meaningful experimentation with, and effective deployment of, these innovations depends on the frank recognition of the constitutional importance of an informed, comprehending jury. The communications failures that plague the modern courtroom must be solved not as a favor to future generations of jurors, but because to do less undermines defendants’ Sixth Amendment rights and the capacity of courts to do justice.

---

66. Forston, supra note 17, at 606.