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Embracing change in the jury system

By Mark E. McNabola

Lawyers practicing today have lived through tumultuous times; yet, as much as times have changed, the clock is at a virtual standstill in the courtroom. This is exemplified by the fact that when faxes are being rendered obsolete by scanned documents e-mailed or stored in the Cloud, many judges still do not even accept faxes or e-mails. Although technological advances as well as studies about how we learn have produced valuable tools and insights, the courts have done little to implement these tools in the search for truth. Rather courts continue to cling to archaic routines to keep tight reins on the flow of information inside the courtroom.

When I selected a jury in DuPage County last December, I briefly met a panel of individuals who I knew would have to sit stone-faced taking in information the system deemed worthy of doling out to them, with little context, no discourse — and zero input. Most of us are not lucky enough to have Charlie Sheen sitting beside us projecting a "win" message subliminally to the jury. Today's multitasking generation is more educated, diverse and accustomed to having immediate access to information. Most courts are impervious to this — just gauge the sheriff's reaction when a juror pulls out an iPhone. As products of the digital age, jurors learn differently because these new forms of media have affected the way their brains accept and process information. In a recent New York Times series on the brain, technology reporter Matt Richtel described how multitasking on computers and digital gadgets affects the way people process information and how quickly they become distracted.

The result is that juries are bored and confused while the process is repetitive, tedious and costly. As Steve Martin suggested in "Planes, Trains and Automobiles": "And by the way, you know, when you're telling these little stories? Here's a good idea — have a point." The irony is that the tools and research we have at our fingertips should be streamlining and refining the system to achieve the best, most accurate results. Our court system needs to leapfrog a few decades and embrace these innovations. After all, isn't the ultimate objective to uncover the truth in a careful, expeditious fashion?

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Putting the evidence in context

For the most part, jurors are not adequately prepared to master the material necessary to render a verdict that could have enormous impact on a fellow citizen. Today, there are only two pieces of information in place that attempt to prepare a juror for service. Most prospective jurors view a video giving general information regarding their service. There is no notepad or printed material provided and, in many cases, jurors watch the video weeks before they deliberate on important issues. At best, this gives jurors a cursory overview of the court system and trial process tantamount to a less-titillating episode of "Law & Order," but it does nothing to put the law into the context of a specific trial.

Before the testimony begins, the only opportunity the jury has to prepare for the upcoming days, weeks or months of evidence is to listen to some cursory remarks from the judge and the attorneys' opening statements. But without understanding the basic laws or rules to be applied to the testimony, the opening statements can have little effect on educating the jury on its role.

Preliminary instruction

To be properly prepared, the jury should at least be given preliminary general instructions by the judge before the opening statements. For example, the jurors should be told that it is unlikely they will be able to review any transcripts and testimony during their deliberations, so they should listen carefully and take detailed notes. Under the current system, jurors are instructed on the law at the close of all the evidence. Until relatively recently, many juries were not even allowed to have the written jury instructions in the jury room as a reference. Jurors had to rely on their memories after a single reading of the instructions by the judge. The practice of providing instructions at the beginning of the trial should be mandatory so the jury may review the legal standards and better do their job. See e.g. *Avery v. State Farm Mut. Auto Ins. Co.,* 216 Ill.2d 100, 117 (Ill 2005) (at the start of the trial the court gave preliminary jury instructions that were essentially mirrored by the instructions at the close of the evidence).

Even this is not nearly enough. Other states and many federal courts allow preliminary substantive jury instructions to be read or shown on a PowerPoint. In addition to the educational value of demonstrative evidence and repetition, the early instructions give jurors a legal framework and context within which to absorb and analyze the evidence. For instance, until the jury instructions are read at the close of the trial, a juror does not even know the legal elements of the plaintiff's cause of action. So, when evidence is being adduced on the medical negligence of a physician, the jury cannot discern the physician's duty, let alone what

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constitutes a breach of that duty. The attorney is not allowed to outline the case according to the legal elements as the evidence comes in. If jurors know that duty, breach of duty, proximate cause and damages are the elements that make up a claim for professional negligence and how those terms are defined they can recognize evidence that proves or disproves the elements as it is offered.

The Seventh Circuit American Jury Project (the Project) published in September 2008 conducted a study of the courts of the 7th U.S. Circuit Court of Appeals from October 2005 to April 2008. An overwhelming majority of jurors, judges and lawyers participating believed that the goal of enhancing juror understanding was accomplished through preliminary substantive jury instructions. The commission strongly recommended this and I agree.

Addressing how jurors learn

A study comparing the learning and communication styles of attorneys with that of the general public indicates that attorneys prefer to talk about the evidence while jurors prefer to see the evidence. (Kenneth J. Lopez, "The Animators at Law Attorney Communication Style Study," 2007.) According to the Visual Teaching Alliance, about 65 percent of the population are visual learners. Visual learners remember information more accurately when they see it. Auditory learners remember information more accurately when they hear it. So about eight out of 12 jurors learn visually, yet the court system caters to auditory learners. Consequently, we are not adequately conveying our message to most jurors. To compensate for this void, jurors should be exposed to more visual demonstrative evidence. To address all learning styles, jurors should also be encouraged to take notes since the act of writing information down has been proven to enhance learning and is a tool to refresh recollection. Allowing review of certain exhibits that are in evidence or of properly redacted transcripts of witness testimony upon request should be the rule, not the exception.

Clear and full communication, free of unnecessary repetition, is the key to ensuring an efficient system. To that end, juror information cards provided to the court and counsel should require the juror's e-mail address to enable and promote post-trial contact upon jurors' consent. This would provide feedback so the process and presentation can continue to improve. In this age of communication when information exchanged through digital media is integral, the American jury system should join the conversation — or at least be willing to shoot me an e-mail.