

Colorado Supreme Court Adopts Further Jury Reform Measures

by Cecil E. Morris, Jr.

On February 19, 2003, the Colorado Supreme Court adopted further amendments to the Colorado Rules of Civil and Criminal Procedure as part of its ongoing efforts at jury reform that began in 1996. The specific changes in the Rules are discussed below, along with a discussion of the Court's work in the area of jury reform.

I. Background

The process of jury reform in Colorado began in 1996, when then-Chief Justice Volland appointed the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries ("Jury Reform Committee"). In February 1997, after a year of study, meetings, and community outreach, the Jury Reform Committee published its report, entitled "With Respect to the Jury."¹ In its Report, the Jury Reform Committee addressed several areas of concern, including improving communications with the jury.² One of the recommendations of the Committee in this area was to permit jurors to submit written questions which the court may pose to witnesses in civil cases and, upon agreement or in a pilot courtroom, in criminal cases.³

Shortly thereafter, on May 7, 1997, the Chief Justice appointed a Jury Reform Implementation Committee ("Implementation Committee") to develop specific proposals to implement the various recommendations in the Report of the Jury Reform Committee. On March 12, 1998, the Implementation Committee issued its Plan.⁴ In the Plan, the Implementation Committee recommended changes in seven areas: Civil/Criminal Rules revisions, jury instruction revisions, statutory revisions, Chief Justice directives, administrative changers, training issues, and pilot projects.⁵ Among the revisions to the Civil and Criminal Rules recommended in the Plan were amendments to Civil Rule 47 and Criminal Rule 24 to allow juror questions.⁶

On June 25, 1998, following the issuance of the Plan, the Supreme Court accepted some of the recommendations and adopted amendments to some of the Civil and Criminal Rules, effective January 1, 1999.⁷ Among these were amendments to Civil Rules 16 and 47 regarding juror orientation, items taken to deliberation, and juror notebooks.⁸ Similarly, the Court amended Criminal Rule 24 regarding juror orientation and examination and sequestration of jurors.⁹ In contrast, however, the Court did not amend the Rules to permit juror questioning. Instead, that issue would be studied further.

In September 2000, Chief Justice Mullarkey authorized a statewide pilot study to evaluate the effects of permitting jurors to submit written questions during criminal trials. The first phase of the study collected data from criminal trials in District and County Courts for Class 4, 5 and 6 felonies and misdemeanors. In September 2001, the study was expanded to include trials in Class 2 and 3 felonies.

In the Fall of 2002, the results of the pilot study were released in a report to the Supreme Court's Standing Jury Committee.¹⁰ The report was prepared by Professor Mary Dodge of the Graduate School of Public Affairs of the University of Colorado at Denver. This report, called

the “Dodge Report,” collected and reported the empirical data from 239 criminal trials in District and County Court as a part of the Colorado Jury Reform Pilot Project. In general, the Dodge Report supported the idea of allowing juror questions in criminal cases. The major results from the pilot study as set forth in the Dodge Report are as follows:

- Actual experience with juror questions increases support from judges and attorneys on the benefits of the procedure;
- Juror questions do not overly influence verdicts;
- Juror questions do not cause excessive or unreasonable delays;
- Juror questions do not influence a defendant’s decision to testify;
- Juror questions do not appear to create prejudice to either party;
- Jurors will submit improper questions, but screening procedures employed by judges generally are effective in eliminating troublesome inquiries;
- Jurors do not react negatively when their questions are declined;
- Jurors appear to be more engaged when allowed to ask questions at trial; and
- Attorneys become more aware of confusion surrounding the evidence and, in some cases, are alerted to missing information.¹¹

However, the concept of allowing juror questions in criminal trials was not without its critics. In particular, one member of the Standing Jury Committee, Carrie Lynn Thompson of the Colorado Public Defender’s Office, authored a dissenting or minority report.¹² That minority or dissenting report questioned the conclusions in the Dodge Report and objected to juror questions in criminal cases for several reasons. Among these reasons were the following:

- Jury questioning shifts the burden of proof from the prosecution;
- Jury questioning affects a defendant’s right to testify;
- Excessive delay affects courts, trial lawyers, and jurors with heavy case loads and busy schedules;
- The recommended procedures do not adequately screen out improper questions; and
- Juror questioning will negatively affect trials.¹³

Ultimately, however, a majority of the members of the Supreme Court’s Standing Jury Committee concluded that the Dodge Report supported the Jury Reform Committee’s recommendations that the Criminal Rules be amended to allow juror questions in criminal trials and recommended that the Court adopt the changes.

On February 12, 2003, the Supreme Court held a hearing on the proposed amendments to the Civil and Criminal Rules in this respect.

II. Rules of Civil Procedure

On February 19, 2003, the Supreme Court unanimously adopted amendments to Rule of Civil Procedure 47(b) regarding alternate jurors and adding a new Rule 47(u) allowing juror questions.¹⁴ These changes are effective July 1, 2003.¹⁵

New Colorado Rule of Civil Procedure 47(u) allows jurors to submit written questions to the

court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court.¹⁶ Further, new Rule 47(u) provides that the trial court has discretion to prohibit or limit questioning in a particular trial “for good cause.”¹⁷

The revisions to Rule of Civil Procedure 47(b) relate to discharging alternate jurors, allowing alternate jurors to deliberate and participate in the verdict, and using peremptory challenges.¹⁸ First, the amendment changes the presumption in the Rule about when alternate jurors are discharged. Specifically, the revised Rule provides that an alternate juror who does not replace a principal juror shall not be discharged until the jury renders its verdict or such time as the court determines. In contrast, the prior Rule provided that an alternate juror who does replace a principal juror shall be discharged after the jury retires to consider its verdict.

Second, revised Rule 47(b) adds a new sentence that allows alternate jurors to deliberate and participate fully with the principal jurors in considering and returning a verdict if the court and the parties agree.¹⁹

Third, the amendment to Rule 47(b) changes the use of peremptory challenges with regard to alternate jurors.²⁰ The amended Rule provides that the additional one peremptory challenge allowed if one or two alternate jurors are called may be exercised as to any prospective juror.²¹ Previously, Rule 47(b) allowed the one additional peremptory challenge if one or two alternate jurors are called to be used only against an alternate juror, and it prohibited the other peremptory challenges from being used against the alternates.

III. Rules of Criminal Procedure

Also on February 19, 2003, the Supreme Court adopted an amendment to Colorado Rule of Criminal Procedure 24(g), allowing juror questions in criminal cases.²² Unlike the companion change to Rule of Civil Procedure 47, the amendment to Criminal Rule 24 does not become effective until July 1, 2004.²³

The first part of new Criminal Rule 24(g) is identical to the first part of new Civil Rule 47(u) and allows jurors to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. Also like Civil Rule 47(u), Criminal Rule 24(g) gives the trial court discretion to prohibit or limit questioning in a particular trial. However, unlike Civil Rule 47(u), Criminal Rule 24(g) is broader as to the grounds on which the court may exercise its discretion. Criminal Rule 24(g) allows the trial court to prohibit or limit questioning in a particular trial “for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause.”²⁴

Unlike the amendment to Civil Rule 47 allowing juror questions in civil trials, the amendment to Criminal Rule 24 allowing juror questions in criminal trials was much more controversial. While the Court was unanimous in amending the Civil Rule, it was split as to the Criminal Rule, with Justices Martinez and Rice voting against.²⁵

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Endnotes

¹ *With Respect to the Jury: A Proposal for Jury Reform*, Report of the Supreme Court Committee on the Effective and Efficient Use of Juries in Colorado (Feb. 1997).

² *Id.* at 36-38.

³ *Id.*

⁴ Implementation Plan, Jury Reform in Colorado (Mar. 12, 1998).

⁵ *Id.* at 1-4 & Apps. A-G.

⁶ *Id.* at 2 & Apps. A and B.

⁷ Colo. Sup. Ct., Rule Changes 1998 (7) - (9).

⁸ C.R.C.P. 47(a), (m), (t) and cmt.

⁹ C.R.Crim.P. 24(a), (f)(1).

¹⁰ Mary Dodge, *Should Jurors Ask Questions in Criminal Cases?* A Report Submitted to the Colorado Supreme Court's Jury System Committee (Fall 2002).

¹¹ *Id.* at ii, pp. 15-60.

¹² Carrie Lynn Thompson, *Should Jurors Ask Questions in Criminal Cases?* Minority Report.

¹³ *Id.* at 1.

¹⁴ Colo. Sup. Ct., Rule Change 2003(1) (Feb. 19, 2003). *See* C.R.C.P. 47(b) and (u).

¹⁵ Colo. Sup. Ct., Rule Change 2003(1).

¹⁶ C.R.C.P. 47(u).

¹⁷ *Id.*

¹⁸ Colo. Sup. Ct., Rule Change 2003(1); C.R.C.P. 47(b).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Colo. Sup. Ct., Rule Change 2003(2) (Feb. 19, 2003). *See* C.R.Crim.P. 24(g).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*