

## ARIZONA

# Preliminary Instructions Can Boost Participation

**FOR DECADES, ARIZONA'S STATE COURTS HAVE SPEARHEADED REFORMING AND IMPROVING JURY TRIALS.** Thirty years ago, the Arizona Supreme Court noted that juries and jury trials had come under increased scrutiny, study, and criticism about representativeness, preparation for jury service, jury selection, juror comprehension, use of technology in jury trials, and general responsiveness to the needs of jurors.<sup>1</sup> In 1993, these concerns prompted the creation of “The Arizona Supreme Court Committee on More Effective Use of Juries.”

Chaired by then-Maricopa County Superior Court Judge B. Michael Dann, the committee did an extraordinary amount of work in crafting its groundbreaking November 1994 final report *Jurors: The Power of 12*.<sup>2</sup> Running more than 200 pages, *The Power of 12* provided unique perspective and insight for jury improvement, with enormous resulting impact. Noting the right to trial by jury is one of our most valued liberties, *The Power of 12* recommended a literal “Bill of Rights” for jurors. And noting that jury trial procedures had not changed substantially for more than two centuries, *The Power of 12* recommended major reforms in the use of jurors.<sup>3</sup>

*The Power of 12* recommended specific changes in the conduct of trials to make juror participation more meaningful. These included (1) informing jurors of the trial process and expanding the use of preliminary jury instructions; (2) providing notebooks for use by jurors and continuing to allow jurors to take notes during trial; (3) allowing jurors to ask questions of



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witnesses; (4) allowing jurors to discuss the evidence amongst themselves during the trial; (5) providing jurors final instructions orally and in writing; (6) reading final instructions to the jury before, not after, closing arguments; (7) authorizing courts to set and enforce time limits for trial; and (8) soliciting juror feedback to improve the process.<sup>4</sup>

In addressing preliminary jury instructions, the committee did not work on a blank slate; Arizona had authorized and used preliminary jury instructions for many years before *The Power of 12*.<sup>5</sup> The report, however, recommended a written copy ►

of the preliminary jury instructions be given to each juror, in both criminal and jury trials, and also be read aloud by the court. These preliminary jury instructions were to be case-specific, including definitions of technical terms and the elements of the charge or claim and any known defenses. And preliminary jury instructions should be written in plain English and should be given before opening statements and the presentation of any evidence. *The Power of 12* noted research showing “that telling the juror more, rather than less, in advance of the evidence assists the jurors in understanding and organizing the evidence as they hear it, improves their recall of evidence, reduces the chances that the jurors will apply the wrong rules to the evidence and increases juror satisfaction.”<sup>6</sup>

The Arizona Supreme Court adopted rule changes implementing many of *The Power of 12* recommendations. As a result, beginning in 1996 — and continuously for more than 25 years since — in criminal and civil jury trials in Arizona state courts, jurors have (1) been given preliminary and final jury instructions, orally and in writing, that address specifics of the case; (2) been able to take notes throughout the trial; (3) been allowed to submit written questions of witnesses that the court reviews and asks (if it deems the question appropriate); (4) heard and received final jury instructions before, not after, closing arguments and (5) often been able to discuss their experience with the court right after their jury service has continued.<sup>7</sup>

Currently, Arizona’s criminal procedural rules provide that,

After the jury is sworn, the court must instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for

submitting written questions to witnesses or the court . . . and legal principles that will govern the proceeding. Instructions should be as readily understandable as possible by individuals unfamiliar with the legal system.<sup>8</sup>

And in Arizona civil cases, the rules provide that:

After the jury is sworn, the court should instruct the jury on: (A) its duties and conduct; (B) the order of proceedings; (C) the procedure for submitting written questions to witnesses or to the court; (D) the procedure for note-taking; (E) the nature of the evidence and its evaluation; (F) any issues to be addressed; (G) the legal principles that will govern the trial; and (H) the procedures to be followed if the jury experiences any problem or difficulty during trial.<sup>9</sup>

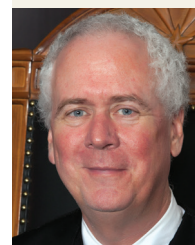
Arizona’s effort to improve jury trials and the experience of jurors continues. During COVID, to ensure social distancing and address hardship and scheduling issues, Arizona’s courts expanded the use of electronic surveys before courtroom voir dire. Given the success of this process, it likely will continue post-COVID. And in 2022, Arizona’s judiciary secured from the legislature additional reimbursement for jury service, to reduce the financial hardship for those who participate in jury service and to help ensure that potential jurors reflect the community more broadly.

Innovations implemented as a result of *The Power of 12* a generation ago have been so successful for so long that Arizonans no longer think of them as innovations — it’s just the way things work. Jury trials are the cornerstone

of the American justice system, and Arizona continues to look for creative ways to continue to improve them.



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<sup>1</sup> Arizona Judicial Council Committee on More Effective Use of Juries, Ariz. Admin. Order No. 93-20 (1993) <https://www.azcourts.gov/portals/22/admorder/orders94/pdf93/9320.pdf>.  
<sup>2</sup> See ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, 19-28 (1994) [hereinafter THE POWER OF 12 - PART 1]; ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 - PART 2, 1-16 (1998) [hereinafter THE POWER OF 12 - PART 2]. See also B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 282 (1996); see generally B. Michael Dann, “Learning Lessons” and “Speaking Rights”: Creating Educated and Democratic Juries, 68 IND. L.J. 1229 (1993).  
<sup>3</sup> See generally THE POWER OF 12 - PART 1, *supra* note 2, at 1-4.  
<sup>4</sup> *Id.* at 19-28.  
<sup>5</sup> For many years before *The Power of 12*, in criminal trials, “Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings and the elementary legal principles that will govern the proceeding.” Ariz. R. Crim. P. 18.6(c); see also *State v. Marquez*, 135 Ariz. 316, 322 (Ariz. Ct. App. 1983) (“we hold that the preliminary instruction of the jury, authorized by Rule 18.6(c), Rules of Criminal Procedure, is for the purpose of preparing the jury for the trial and constitutes an orientation process by which the jury is made to understand its duties and responsibilities.”); *State v. Sanchez*, 25 Ariz. App. 228, 230-31 (1975) (stating similar).  
<sup>6</sup> THE POWER OF 12 - PART 1, *supra* note 2, at 81 (citation omitted).  
<sup>7</sup> Ariz. R. Crim. P. 18.6; Ariz. R. Civ. P. 51.  
<sup>8</sup> Ariz. R. Crim. P. 18.6(c).  
<sup>9</sup> Ariz. R. Civ. P. 51(b)(2).