

COLORADO

Pre-Deliberation Discussion Makes Sense

AT EVERY JURY TRIAL over which I preside, I tell prospective jurors that jury trials are a fundamental part of our judicial system and our system of government. I remind them that in the *Federalist Papers*, Alexander Hamilton described the right to a jury trial “as a valuable safeguard to liberty” and “as the very palladium of free government.”¹ Indeed, Hamilton went further, explaining that he “cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases.”²

Colorado takes Hamilton’s words to heart: It’s among a handful of states that allows jurors in all cases to ask questions of witnesses and, in civil cases in district courts, to engage in pre-deliberation discussions.

Arizona paved the way to allow pre-deliberation discussions in civil cases. Responding to criticism that the trial process was not responsive to jurors’ needs and that the jury decision-making process lacked integrity, in 1995, Arizona implemented the option for civil juries to discuss the evidence amongst themselves prior to beginning formal deliberations.

Colorado soon followed suit. In 1997, the Colorado Supreme Court adopted a recommendation from the Committee on the Effective and Efficient Use of Juries in Colorado to create a model instruction that district judges could give to civil juries that permitted pre-deliberation discussions. The recommendation emphasized that “upon stipulation of counsel, courts should experiment in civil trials with permitting juror pre-deliberation discussions, particularly in lengthy or complex cases.”³

In 2010, the model instruction was enshrined in the Colorado Rules of



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Civil Procedure, where it still exists today.⁴ However, a district judge retains discretion to limit or prohibit such discussions in a particular trial if good cause supports it. The practice is limited to civil district-court trials; it is not permitted in county-court cases.

The Colorado Supreme Court’s directive dramatically changed civil jury trials. Before its implementation, jurors were prohibited from talking among themselves about the case until the judge directed them to deliberate.⁵ Yet, as the committee noted in its report, prohibiting jurors from talking about the case as a trial progresses is contrary to human psychological needs and the adult learning process.⁶ Furthermore, the committee noted, pre-deliberation discussion happened despite prohibitions. Thus, the committee found, the interests of justice would be better served if pre-deliber-

ation discussions were allowed with guidance and parameters.

Juror pre-deliberation discussions are part of the fabric of civil district court trials in Colorado. When adjudicating civil jury trials, I always give the pre-deliberation discussion instruction to jurors. Then at the end of every trial, my law clerk and I meet with the jurors. During these discussions, I ask jurors about pre-deliberation discussions. Invariably, they report that pre-deliberation discussions were very helpful because it allowed them to talk through the evidence as it was presented, which assisted in their comprehension and cleared up confusion nearly in real-time. This tends to be especially useful in complex cases, such as medical malpractice, construction defect, commercial disputes, and other cases that involve experts or niche issues. Pre-deliberation discussions, thus, decrease the likelihood that jurors will remain confused as to particular evidence, especially as other evidence is presented that may build upon prior testimony. Lastly, jurors favor the practice because it helps them build rapport with each other and create a collaborative atmosphere conducive to respectful and honest conversation. As a result of the pre-deliberation discussions, jurors develop relationships and trust, which facilitates productive discourse during formal deliberations.

Pre-deliberation discussions occur in tandem with Colorado’s practice of allowing jurors to pose written questions to witnesses during trial.⁷ In theory, that practice allows a juror whose question was asked to a witness to discuss with his or her colleagues, as part of their pre-deliberation discussions, why that question was ►

important to him and whether the witness' answer proved helpful.

Common sense tells us that jurors, who are a group of well-intentioned adults brought together to pass judgment on matters of importance to the parties, will have an urge to discuss evidence as it is presented. Allowing jurors to have those discussions with well-defined parameters, and to proceed with this basic human behavior, proves beneficial to the parties and to the administration of justice. It also enhances trust in the judiciary and in the judicial process.



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¹ THE FEDERALIST, No. 83 (Alexander Hamilton).
² *Id.*
³ Colorado Supreme Court Committee on the Effective and Efficient Use of Juries, With Respect to the Jury: A Proposal For Jury Reform 7 (1997), https://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Jury_System_Standing_Committee/juryref_1.pdf [hereinafter Committee Report].
⁴ Colo. R. Civ. P. 47(a)(5).
⁵ Colo. Jury Inst., Civ. 3d § 1:4 (1995).
⁶ Committee Report, *supra* note 3 at 48 (citing B. Michael Dann, “Learning Lessons” and “Speaking Rights”: Creating Educated and Democratic Juries, 68 IND. L.J. 1229 (1993)).
⁷ Colo. R. Civ. P. 47(u). The practice is allowed in every jury trial in Colorado, whether civil or criminal.