

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report Summary

TO: Members of the Judicial Council

FROM: Mr. John A. Larson, Senior Court Services Analyst, 415-865-7589

DATE: November 28, 2006

SUBJECT: Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032, 2.1033, 2.1034, 2.1035, and 2.1036) (Action Required)¹

Issue Statement

The Judicial Council and California courts have been engaged in jury reform efforts for over 10 years. The Blue Ribbon Commission on Jury System Improvement (commission), created in 1995, and the Task Force on Jury System Improvements (task force) proposed the adoption of rules of court to institutionalize certain jury trial practices. The proposed discretionary rules clarify judicial authority and provide guidance about innovative jury trial practices.

Recommendation

Staff of the Administrative Office of the Courts² (AOC) recommends that the Judicial Council, effective January 1, 2007, adopt:

1. Rule 2.1032, to provide that a trial judge should encourage counsel to assemble notebooks for jurors in complex civil cases so that jurors can keep key documents, exhibits, and other appropriate materials such as notes available and organized;
2. Rule 2.1033, to provide that a trial judge should allow jurors to submit questions directed to witnesses;

¹ These proposals were numbered as proposed California Standards of Judicial Administration section 19.1 and proposed rules 864, 865, 866, and 867 when they were circulated for comment. However, at the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court. For the proposed rules to be consistent with the newly reorganized Rules of Court they are now numbered and referred to as rules 2.1032, 2.1033, 2.1034, 2.1035, and 2.1036, respectively.

² The task force concluded its activities in 2003 and issued its final report. In order to fulfill the mandate of the task force, staff of the Administrative Office of the Courts is recommending the rules discussed herein pursuant to rule 6.22(a) of the California Rules of Court: "A Judicial Council internal committee, advisory committee, or task force, or the Administrative Office of the Courts may recommend that the council adopt, amend, or repeal a rule or standard or adopt, approve, revise, or revoke a form." Cal. Rules of Court, rule 6.22(a). (Effective January 1, 2007, this rule will be numbered 10.22(a).)

3. Rule 2.1034, to provide that the trial judge may permit counsel to make brief opening statements to the jury panel;
4. Rule 2.1035, to provide that the trial judge may preinstruct the jury concerning the elements of the charges or claims in the case at trial, the jury's duties and its conduct, the order of proceedings, the procedures to be followed for submitting questions if questions are allowed, and legal principles that will govern the proceedings; and
5. Rule 2.1036, to provide that the trial judge may give additional instructions, clarify previous instructions, permit attorneys to make additional closing arguments, or any combination of these measures to assist a jury that has reached an impasse.

The text of proposed rules 2.1032 through 2.1036 is attached at pages 19–21.³

Rationale for Recommendation

The practices set forth in the proposed rules have thus far been implemented solely through pilot programs, individual trial court judges, and education. The commission and the task force proposed rules of court in order to embody these innovative trial court practices in a series of related rules to clarify judicial authority, assist trial court judges and litigants with recommended techniques, and encourage judges' use of the techniques.

Because the task force concluded its activities in 2003, staff is acting as the proponent of the rule proposals. Staff has been guided by a Steering Committee for Jury Rule Proposals (steering committee), which recommended modifications based on their collective expertise and comments received about the proposals. The steering committee is chaired by Justice Judith McConnell, Administrative Presiding Justice, Fourth Appellate District, and is comprised of trial court judges.⁴ In addition, the proposed rules were presented to the Criminal Law Advisory Committee (CLAC) and the Civil and Small Claims Advisory Committee (CSCAC), which provided comments and support for the rules.

Alternative Actions Considered

Proposed rule 2.1033 (providing that a trial judge should allow jurors to submit questions) was circulated as a mandatory rule that would have required judges to allow jurors to submit questions, with the ability to limit or prohibit the practice upon a finding of good cause. Comment was also solicited concerning a permissive rule alternative to the mandatory rule that would have permitted judges to allow jurors to submit questions.

³ An additional rule proposal, rule 2.1031 on juror note-taking, was developed and circulated for comment in 2005. The recommendation for adoption by the Judicial Council was tabled while the rule proposals discussed herein were developed. The recommendation for the adoption of rule 2.1031 is presented in a separate report.

⁴ The Steering Committee for Jury Rule Proposals also includes the following members: Hon. Jacqueline A. Connor, Judge of the Superior Court of California, County of Los Angeles; Hon. Robert H. Oliver, Judge of the Superior Court of California, County of Fresno; and Hon. Ronald Sabraw, Judge of the Superior Court of California, County of Alameda.

Owing to the comments received from both advisory committees and the public circulation, staff originally recommended a permissive rule providing that judges may allow jurors to submit questions.

Staff subsequently reviewed the appropriate use of “may” and “should” in all of the proposed jury-related rules and concluded that the use of “should” in proposed rule 2.1033 more accurately reflects the intent of the task force and steering committee.⁵ Therefore staff recommends the use of “should” as the operative verb in two of the rules. This revision is consistent with comments received during the public circulation of the proposal. In order to provide a cohesive set of jury practices in the rules of court staff recommends adopting proposed rule 2.1033 rather than creating a separate standard of judicial administration. Likewise, staff recommends adopting proposed rule 2.1032 to provide that trial judges should encourage the use of juror notebooks in complex civil cases, even though it circulated as a proposed standard. The steering committee concurs with these modifications.

After review, staff concluded that it would be more appropriate for three of the proposed rules to remain permissive to take into account statutes addressing the order of proceedings at trial. Two of them (rules 2.1034 and 2.1035) provide that a judge “may, in his or her discretion,” permit brief opening statements to the jury panel and preinstruct the jury immediately after the jury is sworn. A third proposed rule (rule 2.1036) likewise generally provides that, in the event of an impasse, a judge “may” advise the jury of its duty to decide the case, and adds that the judge “should” ask the jury if it has any specific concerns that, if resolved, might assist the jury in reaching a verdict. That proposed rule also provides possible additional actions that a judge “may” take to assist the jury in reaching a verdict. These three rules are not proposed as best practices that judges are encouraged to use, but rather to clarify and provide support for actions that judges have discretion to employ in the three described circumstances to improve juror comprehension and participation.

Statutes address the order of proceedings at trial in both civil and criminal cases. (Code Civ. Proc., § 607, Penal Code, § 1093.) In civil cases, section 607 states, “When the jury has been sworn, the trial must proceed in the following order, unless the court, *for special reasons* otherwise directs.” (Italics added.) In criminal cases, section 1093 states, “The jury having been impaneled and sworn, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court” and section 1094 provides, “When the state of the pleadings requires it, or in any other case, *for good reasons, and in the sound discretion of the court*, the order prescribed in the last section may be departed from.” (Italics added.)

⁵ The Introductory Statement to the California Rules of Court states the following: “Throughout the rules, ‘shall’ and ‘must’ are mandatory, ‘may’ is permissive, and ‘should’ indicates a nonbinding recommendation.” *California Rules of Court, State, 2006 Revised Edition* (Thomson/West, 2006), p. 1.

In recognition of the statutes providing judicial discretion to alter the order of proceedings for good cause, these three rules are more appropriately written to clarify the authority and provide additional support for judges to alter the order of proceedings in particular ways that have been shown to improve the jury process.

At the November 7, 2006, RUPRO meeting Judge Carolyn Kuhl of the Superior Court of Los Angeles County expressed reservations concerning the placement of best practices in the California Rules of Court. While supportive of the techniques encompassed in the proposed rules, Judge Kuhl suggested changes to the content of particular rules and reflected more generally on the purpose of rules of court with regard to judges and jury trial practice and procedure. RUPRO recommended the rules as proposed for adoption by the Judicial Council, with Judge Kuhl voting against the recommendation.

Comments From Interested Parties

Proposed California Rules of Court 2.1032, 2.1033, 2.1034, 2.1035, and 2.1036 circulated for public comment from April 24 to June 23, 2006. Forty comments were submitted concerning the rule proposals. The majority of the comments pertained to rule 2.1033. The other rule proposals received substantially fewer comments. The steering committee met with staff on July 25, 2006, to review the comments and recommend changes to staff.⁶

Rule 2.1032

Fourteen comments were submitted regarding proposed rule 2.1032, providing that trial judges should encourage counsel to assemble notebooks in complex civil cases. Nine commentators agreed with the proposal. One commentator agreed with modifications. Four disagreed. The steering committee suggested inserting the word “key” before “documents, exhibits, and other appropriate materials” in order to clarify that the rule does not intend that all materials presented at trial be included in jurors’ trial notebooks.

Although the proposal was circulated as a proposed standard, because standards of judicial administration are disfavored, staff recommends—with the concurrence of the steering committee—against the adoption of a new standard. Instead, staff recommends that the proposal be adopted as a rule of court encouraging the practice. A rule encouraging the practice places the proposal in the same series of trial-related jury rule proposals discussed herein, promoting consistency and ease of administration for courts and litigants researching and putting into practice the techniques authorized by these rules.

⁶ A comprehensive comment chart, along with responses, is attached beginning at page 22.

Rule 2.1033

Thirty-nine comments were submitted regarding proposed rule 2.1033, which would have required a trial judge to allow jurors to submit questions to witnesses subject to a limitation for good cause. Thirteen commentators disagreed with the mandatory nature of the rule proposal and recommended changing the proposal to a permissive version. Nine commentators did not agree with the mandatory nature of the rule proposal but did not propose a permissive alternative. Eleven commentators did not agree to any rule concerning juror questions or submitted no specific comment beyond disagreement to the proposal. Seven commentators agreed with the rule as circulated. One commentator agreeing with the mandatory rule proposal that was circulated suggested certain other modifications to the rule language.

Particular comments regarding the mandatory nature of the circulated rule included concerns that: the rule would erode judges' discretion and limit control over jury trials; the submission of improper questions during trial, or jurors' overuse of the ability to submit questions, would cause jurors to form opinions prematurely; and jurors would become advocates rather than fact-finders, resulting in slower and disrupted trials.

Owing to substantive concerns voiced by the commentators about the mandatory nature of the rule as proposed, staff originally recommended a permissive rule providing that judges may allow jurors to submit questions. Staff subsequently reviewed the appropriate use of "may" and "should" in all of the proposed jury-related rules and concluded that the use of "should" more accurately reflects the intent of the task force and steering committee. In addition, this modification would not make the rule inconsistent with any statute. Therefore staff recommended the use of "should" as the operative verb. This revision is consistent with comments received during the public circulation of the proposal. In order to provide a cohesive set of jury practices in the rules of court and because standards of judicial administration are disfavored, staff recommends adopting proposed rule 2.1033 rather than creating a separate standard of judicial administration. The steering committee concurred with the modification.

Rule 2.1034

Twenty-two comments were submitted regarding proposed rule 2.1034, providing that the court may permit counsel to make brief opening statements to the jury panel. Fourteen commentators agreed with the proposal and six disagreed. One commentator agreed with the proposal with modifications.

Comments on behalf of two organizations strongly disagreed with the proposal, stating that opening statements tend to be overly argumentative already and that allowing these types of "mini-opening statements" will merely introduce another round of argumentation into the process. The steering committee concurred with staff's recommendation not to modify the proposal in response to the comments. While the assertion that opening

statements are already too argumentative may be of concern, the presence of a judge and opposing counsel help ensure that opening statements remain non-argumentative.

Rule 2.1035

Twenty-one comments were submitted regarding proposed rule 2.1035, providing that the court may preinstruct the jury on various aspects of the trial. Fourteen commentators agreed with the proposal. Three disagreed. Four commentators requesting modification all suggested that language referring to preinstructing jurors about procedures for submitting questions should be deleted from the rule proposal, based on their opposition to proposed rule 2.1033 in its mandatory form as circulated. The suggested modification was not incorporated in the proposal because even if proposed rule 2.1033 is adopted in a permissive form, it would be crucial that judges preinstruct on the procedure for submitting questions if a judge were to allow the practice.

Rule 2.1036

Twenty-one comments were submitted regarding proposed rule 2.1036, providing that the court may engage in practices to assist a jury that has reached an impasse in its deliberations. Thirteen commentators agreed with the proposal. Three disagreed. Five commentators agreed with the proposal with modifications. A suggested modification to delete subparts referring to additional and clarifying instructions was not incorporated because it is squarely within the discretion of the trial judge to provide additional and clarifying instructions, and judges may also permit attorneys to provide additional closing argument to clarify issues for the deliberating jurors.

Implementation Requirements and Costs

The proposed rules and standard will be effective on January 1, 2007. The only implementation costs anticipated would be the costs to litigants of preparing trial notebooks for jurors if the parties choose to do so.

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SUBJECT: Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032, 2.1033, 2.1034, 2.1035, and 2.1036) (Action Required)⁷

Issue Statement

The Judicial Council and California courts have been engaged in jury reform efforts for over 10 years. The jury rule proposals recommended for adoption are part of that effort. The Blue Ribbon Commission on Jury System Improvement (commission), created in 1995, studied statewide and nationwide jury practices and made recommendations to assist jurors in their roles as fact finders and improve the public's perception of the integrity of the jury trial process. The Task Force on Jury System Improvements (task force) also proposed the adoption of rules of court to institutionalize the trial practices that, over the past 10 years, have met with success in many of the state's trial courts but are not consistently used by jurors, lawyers, and judges. This often results from uncertainty or lack of knowledge about the judge's authority to allow certain practices and to what degree such practices are within the court's discretion to employ. The proposed discretionary rules clarify judicial authority and provide guidance about innovative jury trial practices.

The proposed rules:

- Provide that a trial judge should encourage the use of notebooks for jurors in complex civil cases.
- Provide that a trial judge should allow jurors to submit questions directed to witnesses.

⁷ These proposals were numbered as proposed California Standards of Judicial Administration section 19.1 and proposed rules 864, 865, 866, and 867 when they were circulated for comment. However, at the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court. For the proposed rules to be consistent with the newly reorganized Rules of Court they are now numbered and referred to as rules 2.1032, 2.1033, 2.1034, 2.1035, and 2.1036, respectively.

- Provide that the trial judge may permit counsel to make brief opening statements to the jury panel.
- Provide that the trial judge may preinstruct the jury on various aspects of the trial.
- Provide that the trial judge may engage in practices to assist a jury that has reached an impasse in its deliberations.⁸

Rationale for Recommendation

Although the commission originally called for the creation of rules of court and standards of judicial administration to implement the practices represented by the rule proposals detailed herein, the practices have thus far been implemented solely through pilot programs, individual trial court judges, and education. The task force proposed rules of court in order to institute these innovative trial court practices, to assist trial court judges and litigants, and encourage judges' use of the techniques.

Because the task force concluded its activities in 2003, staff is acting as the proponent of the rule proposals. Staff has been guided by a Steering Committee for Jury Rule Proposals (steering committee). The steering committee is chaired by Justice Judith McConnell, Administrative Presiding Justice, Fourth Appellate District, and is comprised of trial court judges.⁹ In addition, the proposed rules were presented to the Criminal Law Advisory Committee (CLAC) and the Civil and Small Claims Advisory Committee (CSCAC), which provided comments and support for the rules. The steering committee has reviewed and recommended modifications to the proposals based on comments throughout the process. The resulting series of discretionary rules provide guidance to bench officers concerning their authority, promote practices that assist jurors in discharging their duties as fact-finders, and promote opportunities for counsel and the parties to a case to gain insight during trials.

In addition, the adoption of the proposed rules fulfills Objective 3.6 of the *Operational Plan for the California's Judicial Branch, Fiscal Years 2003–2004 through 2005–2006* (adopted December 5, 2003):

⁸ An additional rule proposal, rule 2.1031 on juror note-taking, was developed by the Criminal Law Advisory Committee and the Civil and Small Claims Advisory Committee and circulated for comment in 2005. The recommendation for adoption by the Judicial Council was tabled while the rule proposals discussed herein were developed. The recommendation for the adoption of rule 2.1031 is presented in a separate report.

⁹ The Steering Committee for Jury Rule Proposals also includes the following members: Hon. Jacqueline A. Connor, Judge of the Superior Court of California, County of Los Angeles; Hon. Robert H. Oliver, Judge of the Superior Court of California, County of Fresno; and Hon. Ronald Sabraw, Judge of the Superior Court of California, County of Alameda.

Improve courts' management of jurors. Implement rules and programs to enhance jury service, as proposed in the Final Report of the Task Force on Jury System Improvements.

Alternative Actions Considered

Staff, with the support of the steering committee, originally proposed rule 2.1033 as a mandatory rule that would have required judges to allow jurors to submit questions, with the ability to limit or prohibit the practice upon a finding of good cause. At the CSCAC meeting on March 3, 2006, discussion centered on the mandatory nature of the proposed rule. Resistance to a rule requiring judges to allow jurors to submit questions mainly concerned the issue of judicial discretion. Some judges on CSCAC also raised concerns that requiring a finding of good cause before limiting or prohibiting the submission of questions represented too high a threshold constraint on judicial discretion over the conduct of individual trials. The Civil and Small Claims Advisory Committee subsequently voted 11 to 10 in favor of circulating the mandatory version of the rule for comment.

Similar concerns regarding limiting judicial discretion that would result from a mandatory rule were voiced during the CLAC meeting on March 6, 2006. In addition, committee members representing the defense and prosecution bars voiced concerns that improper juror questions may be erroneously admitted at trial by inexperienced judges or, conversely, if questions that are deemed improper are not asked the unanswered question might be disproportionately highlighted in the juror's mind. Questions were also raised about juror questions posing a possible violation of a defendant's 5th Amendment rights. The Criminal Law Advisory Committee voted 12 to 1 against endorsing a mandatory rule proposal. Subsequently, the committee voted 13 to 0 in favor of circulating a permissive rule alternative, substituting the word "may" for "must" in the first sentence of the proposal.

In order to more fully gauge reaction statewide to the proposal, the mandatory version of the rule was circulated for public comment. However, comment was also solicited concerning a permissive rule alternative to the mandatory rule. Owing to the comments received from both the advisory committees and the public circulation—detailed more fully below—the steering committee concurred with the staff recommendation for the council to adopt the permissive rule alternative.

Staff subsequently reviewed the appropriate use of "may" and "should" in all of the proposed jury-related rules and concluded that the use of "should" in proposed rule 2.1033 more accurately reflects the intent of the task force and steering committee.¹⁰

¹⁰ The Introductory Statement to the California Rules of Court states the following: "Throughout the rules, 'shall' and 'must' are mandatory, 'may' is permissive, and 'should' indicates a nonbinding recommendation." *California Rules of Court, State, 2006 Revised Edition* (Thomson/West, 2006), p. 1.

Therefore staff recommends the use of “should” as the operative verb in two of the rules. This revision is consistent with comments received during the public circulation of the proposal. In order to provide a cohesive set of jury practices in the rules of court staff recommends adopting proposed rule 2.1033 rather than creating a separate standard of judicial administration. Likewise, staff recommends adopting proposed rule 2.1032 to provide that trial judges should encourage the use of juror notebooks in complex civil cases, even though it circulated as a proposed standard. The steering committee concurs with these modifications.

After review, staff concluded that it would be more appropriate for three of the proposed rules to remain permissive to take into account statutes addressing the order of proceedings at trial. Two of them (rules 2.1034 and 2.1035) provide that a judge “may, in his or her discretion,” permit brief opening statements to the jury panel and preinstruct the jury immediately after the jury is sworn. A third proposed rule (rule 2.1036) likewise generally provides that, in the event of an impasse, a judge “may” advise the jury of its duty to decide the case, and adds that the judge “should” ask the jury if it has any specific concerns that, if resolved, might assist the jury in reaching a verdict. That proposed rule also provides possible additional actions that a judge “may” take to assist the jury in reaching a verdict. These three rules are not proposed as best practices that judges are encouraged to use, but rather to clarify and provide support for actions that judges have discretion to employ in the three described circumstances to improve juror comprehension and participation.

Statutes address the order of proceedings at trial in both civil and criminal cases. (Code Civ. Proc., § 607, Penal Code, § 1093.) In civil cases, section 607 states, “When the jury has been sworn, the trial must proceed in the following order, unless the court, *for special reasons* otherwise directs.” (Italics added.) In criminal cases, section 1093 states, “The jury having been impaneled and sworn, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court” and section 1094 provides, “When the state of the pleadings requires it, or in any other case, *for good reasons, and in the sound discretion of the court*, the order prescribed in the last section may be departed from.” (Italics added.)

In recognition of the statutes providing judicial discretion to alter the order of proceedings for good cause, these three rules are more appropriately written to clarify the authority and provide additional support for judges to alter the order of proceedings in particular ways that have been shown to improve the jury process.

Having neither rules nor standards but continuing education efforts with regard to all of the proposals, was also rejected owing to the utility of having a series of jury rules setting forth judicial authority to implement innovative and effective jury trial practices.

At the November 7, 2006, RUPRO meeting Judge Carolyn Kuhl of the Superior Court of Los Angeles County expressed reservations concerning the placement of best practices in the California Rules of Court.

The Jury Rule Proposals . . . present an interesting problem: how to communicate “best practices” to our judicial colleagues. I think of these proposed rules as attempting to embody “best practices” in jury management, because (1) the rules are directed to the trial judge rather than to counsel, and (2) the topics covered are a subset of a range of jury management issues that are best resolved by the trial judge with flexibility and in light of all of the circumstances of the particular case.

While supportive of the techniques encompassed in the proposed rules, Judge Kuhl suggested changes to the content of the particular rules and reflected more generally on the purpose of rules of court with regard to judges and jury trial practice and procedure.

Collectively, the Proposed Rules attempt to deal with a hybrid area governed at the margins of discretion by case law, overlapping to some extent with CACI, and requiring significant judgment in application. I do not think that the necessarily terse directives of “rules” are the best way to address this area of “best practices,” regardless of whether “shall,” “should” or “may” is used. In my view, the California Rules of Court should primarily be used to direct attorney conduct and practice, within the areas permitted by statute. Moreover, when “best practices” are frozen in the language of a rule, evolution and experimentation in the area may be deterred.

The Jury Rule Proposals present an interesting opportunity to reflect upon the purposes of the California Rules of Court generally, and the development of better methods to effectively communicate “best practices” to colleagues.

RUPRO recommended the rules as proposed for adoption by the Judicial Council, with Judge Kuhl ultimately voting against the recommendation.

Comments From Interested Parties

Proposed California Rules of Court 2.1032, 2.1033, 2.1034, 2.1035, and 2.1036 circulated for public comment from April 24 to June 23, 2006. Forty comments were submitted concerning the rule proposals. The majority of the comments pertained to rule 2.1033. The other rule proposals received substantially fewer comments. The steering committee met with staff on July 25, 2006, to review the comments and recommend

changes to staff. The following section summarizes the comments received, and any resulting modifications made, for each rule proposal.¹¹

Rule 2.1032

Fourteen comments were submitted regarding proposed rule 2.1032, providing that trial judges should encourage counsel to assemble notebooks in complex civil cases. Nine commentators agreed with the proposal. One commentator agreed with the proposal with modifications. Four disagreed.

The commentators desiring modifications suggested that the proposal be changed so that notebooks are provided to jurors after the submission of evidence and immediately before deliberations. Three of the commentators disagreeing with the proposal thought that it was unnecessary.

The remaining commentator submitted an extensive comment in disagreement with the proposal. Judge David C. Velasquez, Supervising Judge of the Orange County Complex courts, stated that while notebooks in *non*-complex cases may be helpful and feasible, the technological advancements in the storage and presentation of documentary evidence in complex cases precludes including exhibits in notebooks for jurors. Judge Velasquez was also concerned about the sheer volume of evidence to be provided to each juror and the distractions that would result from jurors sifting through these sources of material.

. . . the typical complex case involves at least hundreds, if not thousands, of documents. It is not feasible for each juror to have his or her own set of notebooks. It is rare that *each* party in a complex case would produce less than five 4½-inch three-ringed binders. This means that each juror must have the space and ability to navigate through no less than 10 notebooks in a typical complex case in which only two parties are involved. I submit that our jury boxes are not equipped to handle this. Also, jurors with health or physical limitations may be unable to lift and handle heavy notebooks . . . Moreover, the proposed rule does not make clear who is to be responsible for maintaining and updating the notebooks. Unless exhibits are pre-marked and received into evidence before the notebooks are assembled, it is not likely the jury will initially receive a full set of exhibits. Thus, exhibits will be added to the notebooks as the trial progresses. Whose responsibility is it to make sure the copies are accurate and correct?

Revision

The steering committee noted that Judge Velasquez's concerns were important, especially his acknowledgement of the greater use of technology in the courtroom. While

¹¹ A comprehensive comment chart, along with responses, is attached beginning at page 22.

the proposal does not require all materials to be included in the notebooks—documents and exhibits are suggested as examples of “appropriate materials” to be included—the steering committee suggested inserting the word “key” before “documents, exhibits, and other appropriate materials” in order to clarify the recommendation.

The proposed rule authorizes judges to encourage counsel to develop the notebooks, the contents and scope of which can be developed and agreed to during pre-trial conferences. The court and counsel may agree that only certain documents and exhibits need to be included in individual notebooks or that there may be another medium in which to provide individual copies to jurors. These details and policies are within the scope of judicial discretion. The comment that staff recommends be published with the rule proposal also refers to *Bench Handbook: Jury Management* for guidelines on the preparation and use of notebooks.

While another commentator’s suggestion that jurors should only receive completed notebooks immediately prior to jury deliberation would provide deliberating jurors a complete set of tools, it defeats the purpose of the practice recommended in the proposed standard. Use of notebooks throughout the trial proceedings helps jurors organize materials, including not just evidence and exhibits, but also witness lists, seating charts, court information, juror notes, and schedule information, among others.

Although the proposal was circulated as a proposed standard of judicial administration, because standards of judicial administration are disfavored, staff recommends—with the concurrence of the steering committee—against the adoption of a new standard. Instead, staff recommends that the proposal be adopted as a rule of court encouraging the practice. A rule encouraging the practice places the proposal in the same series of trial-related jury rule proposals discussed herein, promoting consistency and ease of administration for courts and litigants researching and putting into practice the techniques authorized by these rules.

Rule 2.1033

Thirty-nine comments were submitted regarding proposed rule 2.1033, which would have required a trial judge to allow jurors to submit questions to witnesses subject to a limitation for good cause. In addition to commenting on rule 2.1033 as proposed, commentators were asked to provide specific comment on a permissive, non-mandatory rule alternative. Thirteen commentators disagreed with the mandatory nature of the rule proposal and recommended changing the proposal to a permissive version. Nine commentators did not agree with the mandatory nature of the rule proposal but did not propose a permissive alternative. Eleven commentators did not agree to any rule concerning juror questions or submitted no specific comment beyond disagreement to the proposal. Seven commentators agreed with the rule as circulated. One commentator agreeing with the mandatory rule proposal that was circulated suggested certain other modifications to the rule language.

Particular comments regarding the mandatory nature of the circulated rule included concerns over the removal of discretion from the trial judge, that the rule would erode judges' discretion, and limit control over jury trials. Several disagreeing commentators also observed that requiring a finding of good cause to limit or prohibit the submission of juror questions represented too high a threshold to meet in order to restrict juror questions and that judicial discretion should be paramount. Typical of the comments in this regard is the following from Judge Terry Freidman, President of the California Judges Association (CJA), commenting on behalf of the association:

CJA strongly disagrees with the mandatory language contained in proposed rule 2.1033 [circulated as proposed rule 864]. We recognize that many trial court judges currently allow jurors to submit written questions where appropriate and believe they should be allowed to exercise their discretion to do so unfettered by a formal finding of good cause. Courtroom control and trial management, including submission of questions by jurors, should be under the discretion of the judge . . . Existing authority already provides judges the ability to permit written juror questions. The Rules of Court should maintain judicial discretion as to whether to allow juror questions on a case-by-case basis. CJA strongly supports improvements to the jury system to aid juror comprehension; however, we do not agree that proposed Rule 2.1033 advances this goal.

Commentators also voiced concerns that the submission of improper questions during trial or jurors' overuse of the ability to submit questions would cause jurors to become advocates rather than fact-finders and would result in slower and disrupted trials. In addition, a concern was voiced that allowing jurors to draft and submit questions could lead to jurors' forming opinions prior to the close of evidence and that these prematurely formed opinions would endanger the due process rights of the defendant.

Commentators in support of the mandatory rule noted that giving jurors the right to submit questions would improve jurors' participation and understanding of the trial process. Citing the concerns expressed by judges that the proposed rule impinges on judicial discretion, one commentator noted that the provisions of proposed rule 2.1033 preserve judicial discretion by permitting the trial judge to prohibit or limit such questions for good cause. In addition, the commentator found that, when surveyed, jurors appreciate the opportunity to submit questions in writing, even if the questions are not ultimately asked, and the rule would also have the effect of engaging jurors more meaningfully in the decision-making process.

Revision

Owing to substantive concerns voiced by the commentators about the mandatory nature of the rule as proposed, staff originally recommended a permissive rule providing that

judges may allow jurors to submit questions. Staff subsequently reviewed the appropriate use of “may” and “should” in all of the proposed jury-related rules and concluded that the use of “should” more accurately reflects the intent of the task force and steering committee. Staff recommends that rule 2.1033 be changed to a proposed rule of court encouraging judicial officers to allow jurors to submit questions, where “should” is the operative verb.

This revision is consistent with comments received during the public circulation of the proposal. In order to provide a cohesive set of jury practices in the rules of court and because standards of judicial administration are disfavored, staff recommends adopting proposed rule 2.1033 as a rule to encourage the practice rather than creating a separate standard of judicial administration. The steering committee concurs with the modification.

Rule 2.1034

Twenty-two comments were submitted regarding proposed rule 2.1034, providing that the court may permit counsel to make brief opening statements to the jury panel. Fourteen commentators agreed with the proposal and six disagreed. One commentator agreed with the proposal with modifications.

A comment in support of the proposed rules noted that proposed rule 2.1034, like the other rule proposals, would enhance jurors’ participation and understanding of the trial process and help to achieve fair verdicts, as well as make jurors better fact-finders and assist and engage them in the process.

Comments on behalf of two organizations representing defense counsel in civil litigation, California Defense Counsel (CDC) and the Association of Defense Counsel of Northern California and Nevada (ADC), strongly disagreed with the proposal, stating that opening statements tend to be overly argumentative already and that allowing these types of “mini-opening statements” will merely introduce another round of argumentation into the process. In addition the commentators asked that if the practice allowed by the rule is designed to reduce requests for marginal hardships based on the statements of counsel, does the rule presume that certain types of cases are more intrinsically interesting than others? Thus, the concern is the rule would discourage jurors from requesting hardships in some but not all cases, and counsel may feel compelled to “sell” a case to a potential jury.

Other dissenting commentators stated that they felt the proposal was unnecessary or that it would be preferable for counsel to confer and jointly develop a statement of the case to be read by the court to the jury. The commentator requesting a modification suggested that the statements should be limited in both time and scope.

Revision

The steering committee concurred with staff's recommendation that the proposal not be modified in response to the comments. While the assertion that opening statements are already too argumentative may be of concern, the presence of a judge and opposing counsel help ensure that opening statements remain non-argumentative. Although the CDC and ADC raise an important issue concerning possible unintended effects of the practice allowed by the rule, an important purpose of the statements to the jury panel is to place voir dire questions in context and assist jurors with overall understanding of the case. If a prospective juror is influenced to refrain from claiming a marginal hardship because of what he or she hears in a statement by counsel then jury selection may be made more efficient, but it does not follow that certain case types will be more affected than any others. Diverse cases are of interest in diverse ways to different people.

In addition, the rule proposal clarifies authority and provides additional support for judges to allow the practice and it provides a more dynamic presentation of information than a statement of the case read from the bench. The suggested modification is unnecessary because it is within existing judicial discretion to limit the time and scope of such statements. In addition, time limits can be agreed to during pre-trial conferences as set forth in section 8.9 of the California Standards of Judicial Administration, Trial Management Standards.¹²

Rule 2.1035

Twenty-one comments were submitted regarding proposed rule 2.1035, providing that the court may preinstruct the jury on various aspects of the trial. Fourteen commentators agreed with the proposal. Three disagreed. Four commentators agreed with the proposal with modifications.

The three commentators disagreeing with the proposal thought that it was unnecessary. The four commentators requesting modification all suggested that language referring to preinstructing jurors about procedures for submitting questions should be deleted from the rule proposal, based on their opposition to proposed rule 2.1033 in its mandatory form as circulated.

Revision

Although preinstruction is currently practiced by judicial officers, the proposed rule is helpful by more fully detailing the content and manner of the procedure. The suggested modification is unnecessary because even if proposed rule 2.1033 is adopted in a permissive form, it would be crucial that judges preinstruct on the procedure for submitting questions if a judge were to allow the practice. The steering committee concurred with the following change proposed by staff—to modify the phrase “the procedure for submitting written questions for witnesses or to the court as set forth in rule

¹² Effective January 1, 2007, this will be standard 2.20.

2.1033” by inserting “if questions are allowed” immediately thereafter, to clarify that entertaining the submission of questions by jurors is not mandatory.

Rule 2.1036

Twenty-one comments were submitted regarding proposed rule 2.1036, providing that the court may engage in practices to assist a jury that has reached an impasse in its deliberations. Thirteen commentators agreed with the proposal. Three disagreed. Five commentators agreed with the proposal with modifications.

The three commentators disagreeing with the proposal thought that it was unnecessary. Three of the five commentators desiring modifications disagreed with allowing judges to permit attorneys to make additional closing arguments and suggested the deletion of subpart (b)(3). Another commentator, Mr. Peter O. Glaessner, President of the ADC, suggested deleting subparts (b)(1) and (b)(4) as well, retaining only the option of judges clarifying previous instructions when the jury is at impasse, stating: “Once a trial is concluded, and the case has been argued to a jury, based upon jury instructions that the trial court has agreed accurately state the law, it would be mischievous to then have the jury instructions supplemented or to allow lawyers to re-argue their case.”

The other commentator agreeing to the proposal if modified suggested additional language to clarify the proposal. Discussing subpart (b)(2) the State Bar of California, Committee on Administration of Justice (CAJ), offered that “[to] clarify an instruction sometimes really means to modify it. The original instruction may, for example, misstate or overlook something. It would therefore be more helpful for the rule to state that the court may ‘modify or clarify’ previous instructions.”

Revision

The proposed rule is desirable because it provides guidance to bench officers concerning their discretion over assisting jurors at impasse. The suggested modification to delete subparts (b)(1), (3) and (4) is undesirable because it is squarely within the discretion of the trial judge to provide additional and clarifying instructions, and judges may also permit attorneys to provide additional closing argument to clarify issues for the deliberating jurors. In discussing the CAJ suggestion to alter the language in subpart (b)(2), the steering committee advised staff that modification of instructions is included in the overall concept of clarifying instructions and recommended not making a specific change. The committee also noted that modifying instructions often necessitates allowing attorneys to make additional argument in light of the modified instructions. Subpart (b)(4) anticipates this cause and effect relationship between subparts (b)(1)–(3) by allowing any combination of giving additional instructions, clarifying instructions, and permitting attorneys to make additional closing arguments.

Implementation Requirements and Costs

The proposed rules will be effective on January 1, 2007. In order to assist in implementation of the techniques included in the rules AOC staff and judges are planning in-court meetings with bench officers to present the trial techniques and discuss their utility and benefits to the trial process. The only implementation costs anticipated would be the costs to litigants of preparing trial notebooks for jurors if the parties choose to do so.

Recommendation

Staff of the Administrative Office of the Courts¹³ (AOC) recommends that the Judicial Council, effective January 1, 2007), adopt:

1. Rule 2.1032, to provide that a trial judge should encourage counsel to assemble notebooks for jurors in complex civil cases so that jurors can keep key documents, exhibits, and other appropriate materials such as notes available and organized;
2. Rule 2.1033, to provide that a trial judge should allow jurors to submit questions directed to witnesses;
3. Rule 2.1034, to provide that the trial judge may permit counsel to make brief opening statements to the jury panel;
4. Rule 2.1035, to provide that the trial judge may preinstruct the jury concerning the elements of the charges or claims in the case at trial, the jury's duties and its conduct, the order of proceedings, the procedures to be followed for submitting questions if questions are allowed, and legal principles that will govern the proceedings; and
5. Rule 2.1036, to provide that the trial judge may give additional instructions, clarify previous instructions, permit attorneys to make additional closing arguments, or any combination of these measures to assist a jury that has reached an impasse.

The text of proposed rules 2.1032 through 2.1036 is attached at pages 19–21.

Attachment

¹³ The task force concluded its activities in 2003 and issued its final report. In order to fulfill the mandate of the task force, staff of the Administrative Office of the Courts is recommending the rules discussed herein pursuant to rule 6.22(a) of the California Rules of Court: "A Judicial Council internal committee, advisory committee, or task force, or the Administrative Office of the Courts may recommend that the council adopt, amend, or repeal a rule or standard or adopt, approve, revise, or revoke a form." Cal. Rules of Court, rule 6.22(a). (Effective January 1, 2007, this rule will be numbered 10.22(a).)

Rule 2.1032¹⁴ of the California Rules of Court is adopted, effective January 1, 2007, to read:

1 **Rule 2.1032. Juror notebooks in complex civil cases**

2
3 A trial judge should encourage counsel in complex civil cases to include key documents,
4 exhibits, and other appropriate materials in notebooks for use by jurors during trial to
5 assist them in performing their duties.

6
7 **Comment**

8
9 While this rule is intended to apply to complex civil cases, there may be other types of civil cases in
10 which notebooks may be appropriate or useful. Resources, including guidelines for use and recommended
11 notebook contents, are available in *Bench Handbook: Jury Management* (CJER, rev. 2006, p. 59).
12
13

Rule 2.1033 of the California Rules of Court is adopted, effective January 1, 2007, to read:

14 **Rule 2.1033. Jurors may submit questions**

15
16 A trial judge should allow jurors to submit written questions directed to witnesses. An
17 opportunity must be given to counsel to object to such questions out of the presence of
18 the jury.

19
20 **Comment**

21
22 See California Civil Jury Instructions number 112 and California Criminal Jury Instructions number 106.
23 Resources, including a model admonition and a sample form for jurors to use to submit questions to the
24 court, are available in *Bench Handbook: Jury Management* (CJER, rev. 2006, pp. 60–62).
25
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31

¹⁴ These proposals were numbered as proposed California Standards of Judicial Administration section 19.1 and proposed rules 864, 865, 866, and 867 when they were circulated for comment. However, at the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court. For the proposed rules to be consistent with the newly reorganized Rules of Court they are now numbered and referred to as rules 2.1032, 2.1033, 2.1034, 2.1035, and 2.1036, respectively.

Rule 2.1034 of the California Rules of Court is adopted, effective January 1, 2007, to read:

1 **Rule 2.1034. Statements to the jury panel**

2
3 Prior to the examination of prospective jurors, the trial judge may, in his or her discretion,
4 permit brief opening statements by counsel to the panel.

5
6 **Comment**

7
8 This statement is not a substitute for opening statements. Its purpose is to place voir dire questions in
9 context and to generate interest in the case so that prospective jurors will be less inclined to claim
10 marginal hardships.

11
12 Rule 2.1035 of the California Rules of Court is adopted, effective January 1, 2007, to read:

13 **Rule 2.1035. Preinstruction**

14
15 Immediately after the jury is sworn, the trial judge may, in his or her discretion,
16 preinstruct the jury concerning the elements of the charges or claims, its duties, its
17 conduct, the order of proceedings, the procedure for submitting written questions for
18 witnesses as set forth in rule 2.1033 if questions are allowed, and the legal principles that
19 will govern the proceeding.

20
21 Rule 2.1036 of the California Rules of Court is adopted, effective January 1, 2007, to read:

22 **Rule 2.1036. Assisting the jury at impasse**

23
24 **(a) Determination**

25
26 After a jury reports that it has reached an impasse in its deliberations, the trial judge
27 may, in the presence of counsel, advise the jury of its duty to decide the case based
28 on the evidence while keeping an open mind and talking about the evidence with
29 each other. The judge should ask the jury if it has specific concerns which, if
30 resolved, might assist the jury in reaching a verdict.

1 **(b) Possible further action**

2
3 If the trial judge determines that further action might assist the jury in reaching a
4 verdict, the judge may:

5
6 (1) Give additional instructions;

7
8 (2) Clarify previous instructions;

9
10 (3) Permit attorneys to make additional closing arguments; or

11
12 (4) Employ any combination of these measures.

13
14 **Comment**

15
16 See Judicial Council of California Civil Jury Instructions number 5013 and Judicial Council of California
17 Criminal Jury Instructions number 3550.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])¹³

	Commentator	Position	Comment on behalf of group?	Comment	Response
1.	Ms. Debra J. Albin-Riley Chair LA County Bar Association Litigation Section Los Angeles	AM Rule 2.1033 (circulated as proposed rule 864)	Y	Support, except for rule 2.1033 (circulated as proposed rule 864). Do not support rule 2.1033, if—as presently framed—it is mandatory. Would support rule 2.1033, but only if it is discretionary.	Agree with modification. Owing to the level of opposition and concern voiced by commentators about the mandatory nature of the rule as proposed, revise rule proposal from a mandatory to a permissive rule.
2.	Hon. Ronald L. Bauer Chair, Rules and Forms Committee Superior Court of Orange County Santa Ana	N	Y	The proposals were reviewed and discussed by the Rules and Forms Committee of the Orange County Superior Court. The proposed revision to rule 2.1033 (circulated as proposed rule 864) requires the trial judge to allow jurors to submit written questions to witnesses. We feel the mandate is improper and unnecessary. Judicial officers should be able to use their discretion on an individual case by case basis. The remaining rules are wasteful and should not be implemented.	Disagree that proposed rules 2.1033 (circulated as proposed rule 864) as revised, 2.1034 (circulated as proposed rule 865), 2.1035 (circulated as proposed rule 866), 2.1036 (circulated as proposed rule 867), and proposed rule 2.1032 (circulated as proposed section 19.1) are improper, unnecessary or wasteful. They are discretionary rules that provide guidance to

¹³ These proposals were numbered as proposed California Standards of Judicial Administration section 19.1 and proposed rules 864, 865, 866, and 867 when they were circulated for comment. However, at the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court. For the proposed rules to be consistent with the newly reorganized Rules of Court they are now numbered and referred to as rules 2.1032, 2.1033, 2.1034, 2.1035, and 2.1036, respectively. Throughout this comment chart, references to the rule numbers that circulated when the proposal went out for comment are shown in parentheses after the current proposed rule number.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
					bench officers concerning their authority, promote practices to assist jurors to discharge their duties as fact-finders, and provide opportunities to counsel and the parties to a case for insight and improvement.
3.	Hon. Roger W. Boren Administrative Presiding Justice Court of Appeal, Second Appellate District Los Angeles	AM Rule 2.1033 (circulated as proposed rule 864)	N	<i>Strike must and substitute may. Delete last sentence requiring good cause to prohibit or limit submission of questions.</i> Reason: Apart from the other concerns voiced by criminal law practitioners, in particular, with respect to a mandatory rule requiring judges to allow jurors to submit questions . . . , a mandatory rule is more likely to give rise to many complex issues on appeal, including claims of ineffective assistance of counsel if trial counsel failed to request that California Criminal Jury Instructions number 106 be given . . . , or claims of abuse of discretion on the part of the trial court in failing to find good cause to prohibit or limit such questions. California Criminal Jury Instruction number 106 ameliorates several of the concerns expressed with	Agree with proposed modification. Comment will still include references to CACI No. 112 and CALCRIM No. 106 as suggested instructions.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				respect to the mandatory rule in criminal trials. If the mandatory rule is adopted, California Criminal Jury Instructions number 106 should be given <i>sua sponte</i> rather than on request, as the use note states.	
4.	Hon. Bruce A. Clark Judge Sup. Ct. of Ventura County Ventura	A	Y		
5.	Hon. David De Alba Judge Superior Court of Sacramento County Sacramento	N Rule 2.1033 (circu- lated as propo- sed rule 864)	N	I object to the mandatory nature of the rule. A judge should not have to find “good cause” to avoid the rule. The rule would allow the trier of fact to become an advocate (investigator) and jeopardize the jury’s role as a neutral finder of fact. Interferes with the role of counsel. Potential conflicts with the defendant’s 5th and 6th Amendment rights. Moreover, the public has misperceptions about forensic (CSI) evidence which leads to jurors asking unrealistic questions about DNA, GSR, fingerprints, etc. Jurors often make comments about this in voir dire. Mandatory nature of rule is a bad idea. Changing the culture of jury trials in our state by proposed rule that initiates in the AOC leaves a negative perception of the AOC and AOC staff	Revise rule proposal from a mandatory to a permissive rule. Allowing jurors to submit questions is recognized as within the authority of the judge. Proper administration of juror questions by bench officers will avoid many of the concerns raised by the commentator. Although the proponent of the rule is AOC staff the rule proposal was initiated by the Blue Ribbon Commission on Jury System Improvement and recommended by the Task Force on Jury System Improvements.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				amongst the judiciary.	
6.	Hon. Robert Dukes Judge Superior Court of Los Angeles County Pomona	AM Rule 2.1033 (circu- lated as propo- sed rule 864)	N	As a trial court judge and former advisory member from the Judicial Council to the Task Force on Jury System Improvements, I disagree with the mandatory nature of this proposed rule. In my 19 years as a Judge I have always permitted jurors to ask questions, and encouraged my colleagues to do so. Although the proposal cites a 6 year old survey of trial court judicial officers showing great variance in allowing juror questions, I doubt its validity today. Education has been on-going, and newer judges have embraced jury innovations. Regardless, to direct through rule any judicial officer be required to allow such is offensive to the ability of trial judges to utilize their sound discretion regarding trial procedures in the matters before them. There are reasons an experienced judicial officer may wish not to do so, including simply being uncomfortable with this procedure. I note that the proposal states “. . . staff of the Administrative Office of the Courts (AOC) is proposing the rule . . .” For the AOC staff to substitute their judgment by recommending a	Agree with modification. Revise rule proposal from a mandatory to a permissive rule. The rule proposal as circulated and as revised does not require allowing all juror questions; the rule as proposed provided for a limitation or outright prohibition of the practice upon a finding of good cause on the part of the trial judge. Although the proponent of the rule is AOC staff the rule proposal was initiated by the Blue Ribbon Commission on Jury System Improvement and recommended by the Task Force on Jury System Improvements.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				mandatory rule (the avoidance of which exposes a judge to potential discipline by the CJP) is tantamount to swatting a fly with a sledge hammer. The members of the council should allow trial court judges some modicum of respect in their duties and support the presumption that all judicial officers want to see trials that are efficient, fair and just, without allowing staff to mandate everything we do in a job which is already tough. There is insufficient showing that any rule is necessary, but if the council must have a rule on everything we do let it be permissive, rather than mandatory.	
7.	Hon. Anita Dymant Judge Sup. Ct. of Los Angeles Cty. Los Angeles	N Rule 2.1033 (circulated as proposed rule 864)	N	I strongly oppose rule 2.1033 (circulated as proposed rule 864) mandatory jury questions. This should be a matter of discretion for the court. It is extremely inappropriate and invasive of the court’s decision-making to mandate such procedures. Every judge I have spoken to feels the same way.	Owing to the level of opposition and concern voiced by commentators about the mandatory nature of the rule as proposed, revise rule proposal from a mandatory to a permissive rule.
8.	Hon. Terry Friedman President	N Rule	Y	I write to you on behalf of the California Judges Association (CJA) which represents over 2,600	Revising the rule to be permissive rather than mandatory responds to

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
	California Judges Association San Francisco	2.1033 (circulated as proposed rule 864)		active and retired California judicial officers. Recently the CJA Civil Law and Procedure Committee, CJA Criminal Law and Procedure Committee, and Executive Board have all discussed the proposed language, rule 2.1033 (circulated as proposed rule 864), which states that the trial judge must allow jurors to submit written questions directed to witnesses. CJA strongly disagrees with the mandatory language contained in proposed Rule 2.1033 (circulated as proposed rule 864). We recognize that many trial court judges currently allow jurors to submit written questions where appropriate and believe they should be allowed to exercise their discretion to do so unfettered by a formal finding of good cause. Courtroom control and trial management, including submission of questions by jurors, should be under the discretion of the judge. Juror questions are not always useful or productive. The trial judge should be able to determine whether they are appropriate on a case-by-case basis because juror questions pose risks including that the juror may be encouraged to form and express an opinion about the case before the	the concerns voiced regarding recognition of judicial independence and discretion. Because judges are already permitted to employ the practice in their courtrooms and because of the positive results of the practice, the mandatory rule proposal was designed to strike the balance in favor of the juror. Through a mandatory rule the posture of the court would be to always inform jurors that questions may be submitted. However, the rule as proposed allowed the court to retain discretion to limit or prohibit the submission of questions for good cause.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				matter is submitted to them for a decision. These prematurely formed opinions endanger the due process rights of the defendant. Existing authority already provides judges the ability to permit written juror questions. The Rules of Court should maintain judicial discretion as to whether to allow juror questions on a case-by-case basis. CJA strongly supports improvements to the jury system to aid juror comprehension; however, we do not agree that proposed rule 2.1033 advances this goal.	
9.	Ms. Janice Y. Fukai Alternate Public Defender Los Angeles County Los Angeles	AM Rule 2.1033 (circulated as proposed rule 864) A Others	Y	Same comments as the Los Angeles County Public Defender’s Office. See Mr. Michael P. Judge, <i>infra</i> .	See responses to Mr. Michael P. Judge, <i>infra</i> .
10.	Ms. Janet Garcia Manager, Planning and	AM Rule	Y	As to rule 2.1033 (circulated as proposed rule 864) only, the Los Angeles Superior Court strongly	Agree with modification. Revise rule proposal from a mandatory to

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
	Research Unit <i>on behalf of</i> Superior Court of Los Angeles County Los Angeles	2.1033 (circulated as proposed rule 864)		opposes its adoption. There are many reasons to oppose this rule. This rule is unnecessary and impinges on the authority of the trial judge to manage his or her courtroom. It interferes with the discretion of trial attorneys to execute their strategies for conducting the case. Finally it presents possible additional issues on appeal. There has been no adequate reason stated for this rule. The Los Angeles Superior Court does not oppose the rule if mandatory language is removed and the permissive language found in proposed rules 2.1034 (circulated as proposed rule 865), 2.1035 (circulated as proposed rule 866), and 2.1036 (circulated as proposed rule 867) is substituted.	a permissive rule. Allowing jurors to submit questions is recognized as within the authority of the judge and the rule as circulated provided for judges to limit or prohibit the practice for good cause. Regarding concerns about issues on appeal, case law supports the practice and no case arguing violation of a defendant’s 5th or 6th Amendment rights owing to juror questions has been found, particularly in Arizona where the practice has been required by rule since 1995.
11.	Peter O. Glaessner President Association of Defense Counsel of Northern California and Nevada Sacramento	AM Rule 2.1033 (circulated as proposed rule 864)	Y	Rule 2.1033 (circulated as proposed rule 864) would require trial judges to allow jurors to submit written questions directed to witnesses. This is obviously a very controversial proposal, as noted in the historical discussion of the issue, and as reflected by the close vote when this came before the Civil and Small Claims Advisory Committee. The ADC does not support the change in its present, mandatory form, but would support it if the	Agree with modification. Revise rule proposal from a mandatory to a permissive rule. Allowing juror questions is a tool for assisting jurors in their role as fact-finders and does not entail changing any evidentiary rules—questions must conform to the rules of evidence. Counsel may object to questions

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		<p>N Rule 2.1034 (circulated as proposed rule 865)</p>		<p>rule were couched in permissive language. This is based upon the view that trials should be managed by the trial judge, and within the discretion vested in the trial judge to manage the case. Trials are not, and never have been a quest for “perfect justice”; if they were, much of the evidence excluded at trial would not be excluded. Trials are designed to resolve specific claims and defenses raised by the parties, based upon the evidence they and their counsel wish to present.</p> <p>Rule 2.1034 (circulated as proposed rule 865) would permit counsel to make brief opening statements and is intended to “generate interest in the case so that prospective jurors will be less inclined to claim marginal hardships.” <i>The ADC strongly disagrees with this proposal for many reasons.</i> The most overarching reason is that opening statements are already unnecessarily argumentative. Allowing counsel an early opportunity to preview their case would only lead to two overly argumentative statements. It is far better for the parties to agree on a statement of the</p>	<p>and it is within the judge’s authority to limit or prohibit the practice.</p> <p>Disagree with comments to proposed rule 2.1034 (circulated as proposed rule 865). Judicial officers and opposing counsel are present to ensure that opening statements remain non-argumentative. The purpose of statements to the jury panel is to place voir dire questions in context and assist jurors with overall understanding of the case. It does not follow that certain case types</p>

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		AM Rule 2.1035 (circulated as proposed rule 866) AM		<p>case and permit the judge to introduce the case to prospective jurors that way. We also seriously question if this change would have the intended result. Hardship challenges usually come because of multi-week trial estimates, not because a case is not “interesting.” Fewer jurors would claim hardship if trials were shorter. This rationale also implies that some cases are more “exciting” than others. If, for the sake of discussion, this is true, why should a rule be created to encourage jurors to decline hardship on certain cases that appear “interesting” but not others?</p> <p>Rule 2.1035 (circulated as proposed rule 866) would permit the trial court, in its discretion, to pre-instruct the jury once it is sworn and before evidence is presented. <i>The ADC agrees with this proposal if modified to delete the italicized language regarding Rule 864.</i></p> <p>Rule 2.1036 (circulated as proposed rule 867) deals</p>	<p>will be more affected than any others by jurors refraining from claiming hardships based on what they hear during the statements. Diverse cases are of interest in diverse ways to different people.</p> <p>Disagree with proposed change to rule 2.1035 (circulated as proposed rule 866); even if the rule is discretionary, preinstruction on how the court will take and administer questions—if questions are allowed—is an important element to include in preinstruction rule.</p> <p>Disagree with proposed change to</p>

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		Rule 2.1036 (circulated as proposed rule 867)		with jury impasse and contains two components. <i>The ADC agrees with subsection (a) but disagrees with subsection (b) with the possible exception of subsection (b)(2) which would allow the court to clarify previous instructions.</i> Sections (b)(1), (3), and (4) permit the court, post-impasse, to give additional instructions, permit additional closing argument, or to employ a combination of these steps. We question the need for this revision overall since these issues are adequately addressed by a combination of jury instructions on impasse and by the sound discretion of the trial judge. Once a trial is concluded, and the case has been argued to a jury, based upon jury instructions that the trial court has agreed accurately state the law, it would be mischievous to then have the jury instructions supplemented or to allow the lawyers to re-argue the case. This would also require the trial judge be present throughout jury deliberations; in other words, no trial judge could “take a verdict” for another judge because he or she would not have the knowledge of the case to act under Rule 867(b).	2.1036 (circulated as proposed rule 867) because it is squarely within the discretion of the trial judge to provide additional and clarifying instructions, and judges may also permit attorneys to provide additional closing argument to clarify issues for the deliberating jurors. The rule provides guidance to bench officers regarding their inherent authority with regard to jurors at impasse.
12.	Hon. Philip Gutierrez	AM	N	With regard to rule 2.1033 (circulated as proposed	Revise rule proposal from a

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
	Judge Sup. Ct. of Los Angeles Cty. Pomona	Rule 2.1033 (circulated as proposed rule 864)		rule 864), a permissive rule is a viable alternative to the mandatory rule.	mandatory to a permissive rule.
13.	Hon. William Kent Hamlin Judge Superior Court of Fresno County Fresno	N Rule 2.1033 (circulated as proposed rule 864)	N	The proposed language of rule 2.1033 (circulated as proposed rule 864), which provides that the trial court <i>must</i> allow jurors to submit written questions directed to witnesses, absent a showing of good cause, is simply a bad idea. Notwithstanding the experience of the Los Angeles courts during the referenced pilot study, my experience has shown that encouraging jurors to ask questions of witnesses by way of an instruction like CALCRIM No. 106 is rarely helpful and potentially disastrous. If jurors are left with unanswered questions at the end of a trial, they will submit them without specific encouragement. The problem with soliciting their questions during the trial is that it encourages them to form and express opinions	Disagree that no rule on juror questions would be beneficial. The rule provides guidance to judges concerning their authority to allow juror questions. Not all jurors will raise unanswered questions without specific permission to do so. Allowing the submission of questions assists jurors as fact-finders; the recommended implementation procedures include the admonition to jurors not to form or express opinions prior to deliberations. It has not been shown that allowing juror

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				<p>about the case before the matter is submitted to them for decision, which can pose a due process concern for a defendant, whose right to a fair trial depends upon jurors keeping an open mind until the conclusion of the case. I would like to offer a specific example of how this concern manifested itself in a trial in my courtroom, but several counts ended in a mistrial and I am concerned that my discussion of the jurors' questions might be perceived as comment on a pending matter in violation of the Canons of Judicial Ethics. The important point is that almost any question from a juror may provide insight into that juror's thought processes at the time the question is written, leaving any party aggrieved by a verdict to argue that the jurors committed misconduct in forming and expressing opinions before the case was submitted to the jury. The current state of the law permits judges to give jurors the opportunity to ask questions if they deem it appropriate. The proposed rule is unnecessary and dangerous. I am all for changes that improve the jury system and make jurors feel more involved, but his is one we could</p>	<p>questions leads to prematurely formed opinions to a greater degree than cases in which no questions are allowed.</p>

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				do without.	
14.	Hon. Steven J. Howell Presiding Judge Sup. Ct. of Butte County Oroville	N Rule 2.1033 (circulated as proposed rule 864)	N	Concerning rule 2.1033 (circulated as proposed rule 864): Rule should not be mandatory for the reasons stated in discussion of Criminal Law Advisory Committee meeting.	Revise rule proposal from a mandatory to a permissive rule.
15.	Mr. Michael P. Judge Public Defender Los Angeles County Public Defender’s Office Los Angeles	AM Rule 2.1033 (circulated as proposed rule 864)	Y	[Comment summarized herein.] Rule should be permissive not mandatory. In almost all cases [Office of the Public Defender] lawyers have tried where jurors were allowed direct questioning, serious problems did arise. The very problems claimed not to exist recurred repeatedly. Jurors submitted too many questions. Inexperienced judges were reluctant to tell jurors their questions were improper, and so asked improper questions. Jurors placed disproportionate emphasis on the content of questions they were not permitted to ask. We have polled our lawyers, many of whom have been counsel in trials where judges permitted jurors	Agree with modification. Disagree that overall judicial experience concerning juror questions gives rise to the problems cited in the comment. Proper administration of juror questions by bench officers will avoid many of the concerns raised by the commentator. Allowing the submission of questions assists jurors as fact-finders; the recommended

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		A Others		<p>to ask questions. Several dozen of our lawyers responded. There were no favorable responses. The lawyers with actual experience in participating in trials with jurors asking questions report that those questions <i>did</i> disrupt the trials, were time consuming, and did result in jurors becoming advocates. Furthermore, many improper questions were asked. One deputy public defender estimated that 90% of the questions asked by jurors were improper. Contrary to the claims that jurors were never permitted to ask improper questions, one [public defender] reported the <i>every</i> single question asked by jurors was permitted to be asked at the discretion of the judge.</p> <p>Other comments:</p> <ul style="list-style-type: none"> • Believe the permissive nature of proposed rules 2.1034 (circulated as proposed rule 865), 2.1035 (circulated as proposed rule 866), 2.1036 (circulated as proposed rule 867) is appropriate. • <i>Strongly</i> oppose the mandatory nature of proposed rule 2.1033 (circulated as proposed rule 864), noting that the Criminal Law Advisory Committee voted 12 to 1 against 	<p>implementation procedures include guidelines and procedures on how to administer juror questions. The commentator cites statistics from a minority report by a member of the Standing Jury Committee of Colorado. However, the majority of the committee recommended amending the Colorado Rules of Criminal Procedure to include a mandatory rule allowing jurors to submit questions to the court. (The Rules of Civil Procedure already contained a mandatory rule.) The rule was subsequently adopted. The commentator also states that the mandatory rule as circulated would preclude judges from terminating the procedure if problems occur. In fact, the circulated rule would allow a judge to limit or prohibit the</p>

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

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				<p>making rule mandatory.</p> <ul style="list-style-type: none"> • Dispute conclusions of 1999 pilot study in the Superior Court of Los Angeles County and states that, owing to small number of trials and jurors surveyed, pilot study cannot be seen as scientifically valid in its conclusions. • Office of the Public Defender’s experience with pilot study found there were time problems and disruptions when juror questions were asked; Judge David Wesley, one of the judge pilot study participants, reports that he found juror’s questions time consuming and disruptive. • Cites statistics from minority report to a study done by the Standing Jury Committee of Colorado supporting the majority of the committee’s recommendation to amend rules of court to allow jurors to ask questions during trial in criminal cases in Colorado: 16% of judges surveyed believed that juror questions have an unfavorable effect on trial; 3% concluded that use of the procedure was prejudicial; judges reported that the prosecution was assisted in meeting its burden of proof in 17.8% of cases, prosecutors reported that the procedure assisted them in meeting their burden 	<p>submission of questions upon a finding of good cause.</p>

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

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				<p>in 20% of cases, and defense counsel reported that the prosecution was aided in 25% of the cases; 32.9% of defense counsel reported that the procedure affected their Fifth Amendment advisement of whether a defendant should testify in his or her own behalf; 10.3% of judges and 40% of attorneys felt the procedure caused excessive delay; 50% of judges and 60% of attorneys reported that jurors asked improper questions and 56% of attorneys reported that screening procedures for such questions were only sometimes effective.</p> <ul style="list-style-type: none"> The proposal to make jury questions <i>mandatory</i> precludes judges from terminating the procedure once problems arise. 	
16.	Hon. Scott L. Kays Judge Sup. Ct. of Solano County Fairfield	AM Rule 2.1033 (circu- lated as propo- sed rule 864)	N	Rule 2.1033 (circulated as proposed rule 864) should be modified to substitute the word “may” for “must” in the first sentence. The Criminal Law Advisory Committee got it right. Juror questions should be left to the discretion of the trial judge.	Agree with modification. Revise rule proposal from a mandatory to a permissive rule.
17.	Hon. Eddie Keller	AM	N	Allowing juror questions should be discretionary	Agree with modification. Revise

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
	Judge Sup. Ct. of El Dorado County Placerville	Rule 2.1033 (circu- lated as propo- sed rule 864)		<i>not</i> mandatory. Such questions by jurors unduly prolong proceedings. Also, they may work to the prejudice of a criminal defendant—if jurors want to know information that is not admissible.	rule proposal from a mandatory to a permissive rule.
18.	Hon. Thomas W. Kelly Supervising Civil Judge Sup. Ct. of Butte County Chico	A Except Rule 2.1033 (circu- lated as propo- sed rule 864)	N	Agree with 2.1033 (circulated as proposed rule 865), 2.1035 (circulated as proposed rule 866), 2.1036 (circulated as proposed rule 867). Disagree with 2.1033 (circulated as proposed rule 864).	Revise proposed rule 2.1033 (circulated as proposed rule 864) from a mandatory to a permissive rule.
19.	Hon. Michael Kenny Judge Sup. Ct. of Sacramento Cty. Sacramento	AM Rule 2.1033 (circu- lated as propo- sed rule	N	Rule 2.1033 (circulated as proposed rule 864) should not be mandatory. Instead, it should be permissive or discretionary. Mandatory questions can compromise <i>in limine</i> motions and also be highly prejudicial to a party.	Agree with modification. Revise rule proposal from a mandatory to a permissive rule.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		864)			
20.	Hon. Barbara Kronland Judge Superior Court of San Joaquin County French Camp	N Rule 2.1033 (circu- lated as propo- sed rule 864)	N	I object to the mandatory language of 2.1033 (circulated as proposed rule 864) which creates a <i>right</i> for jurors to ask questions, and more disturbing, <i>diminishes judicial discretion</i> in a very important area of courtroom control and trial management. The last sentence of the first paragraph, “Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions”, makes the mandatory language of the first sentence meaningless. Also notable is that, of the proposed new rules, only 2.1033 has this mandatory language. Proposed rule 2.1034 (circulated as proposed rule 865) states the court “ <i>may in its discretion</i> ”, rule 2.1035 (circulated as proposed rule 866) states the court “ <i>may in its discretion</i> ”, rule 2.1036 (circulated as proposed rule 867) states the court “ <i>may in its discretion</i> ”, and rule 2.1032 (circulated as proposed Jud. Admin. Std. section 19.1) states that judges “ <i>should encourage</i> ”. The fact that only rule 2.1033 is couched in mandatory language makes me feel strongly that something is going on here that I’m	Revise rule proposal from a mandatory to a permissive rule. Because judges are already permitted to employ the practice in their courtrooms and because of the positive results of the practice, the mandatory rule proposal was designed to strike the balance in favor of the juror. Through a mandatory rule the posture of the court would be to always inform jurors that questions may be submitted. However, the rule as proposed allowed the court to retain discretion to limit or prohibit the submission of questions for good cause.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				not aware of, especially in light of the opposition this proposed rule has generated among the criminal advisory sections. I think there is an imaginary problem here that someone is trying to fix, which doesn't exist in reality. It disturbs me that there is mandatory language included in this rule, since providing this "right" to jurors, in my opinion, could cause the jurors themselves to forget their role as impartial triers of fact and slip into an <i>advocacy</i> role. CJA historically has opposed limiting judges' discretion, and I feel strongly that CJA, representing its judge members' interests, has an obligation to oppose any mandatory language in this rule, without compromise. Let judges be judges and make the call for themselves, based on the particular circumstances of the case.	
21.	Superior Court of Los Angeles County Executive Committee Los Angeles	AM Rule 2.1033 (circulated as proposed rule	Y	The Los Angeles Superior Court Executive Committee has voted unanimously to oppose the mandatory nature of proposed rule 2.1033 (circulated as proposed rule 864). Such a rule should not be mandatory. It raises unnecessary issues on appeal, interferes with the attorneys' ability to try their own cases and with trial judges'	Agree with modification. Revise rule proposal from a mandatory to a permissive rule. Regarding concerns about issues on appeal, case law supports the practice and no case arguing violation of a defendant's 5th or 6th Amendment

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		864)		authority to control the progress of the trial. The Executive Committee of the Los Angeles Superior Court suggests that such a rule should be permissive like proposed rule 2.1035 (circulated as proposed rule 866) and not mandatory as currently drafted to avoid this and other potential issues.	rights owing to juror questions has been found, particularly in Arizona where the practice has been required by rule since 1995.
22.	Mr. Nelson Lu Deputy Public Defender San Joaquin County Stockton	A	N		
23.	Mr. Wayne Maire President California Defense Counsel Sacramento	N Rule 2.1033 (circulated as proposed rule 864)	Y	While we recognize that these proposals emanate from the work of the Blue Ribbon Commission on Jury System Improvement, we disagree with several of the specific recommendations. First we strongly recommend that rule 2.1033 (circulated as proposed rule 864) <i>not</i> be amended to eliminate judicial discretion over juror questions. This is an area best left to the judgment of bench officers in individual cases.	Revise rule proposal from a mandatory to a permissive rule.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		<p>N Rule 2.1034 (circu- lated as propo- sed rule 865</p> <p>AM Rule 2.1035 (circu- lated as propo- sed rule 866)</p> <p>AM Rule</p>		<p>Second, we recommend that rule 2.1034 (circulated as proposed rule 865) <i>not</i> be amended to permit counsel to make “mini-opening statements” to prospective jurors. Opening statements tend to be overly argumentative already and this will merely introduce another round of argumentation into the process. This risk far outweighs any speculative advantage in terms of making trials more “interesting” to prospective jurors.</p> <p>Third, 2.1035 (circulated as proposed rule 866) should be redrafted to eliminate any suggestions of an automatic right for jurors to submit questions.</p> <p>Finally, while we recognize that proposed new rule 2.1036 (circulated as proposed rule 867) is</p>	<p>Disagree with comments to proposed rule 2.1034 (circulated as proposed rule 865). Judicial officers and opposing counsel ensure that opening statements remain non-argumentative. The purpose of statements to the jury panel is to place voir dire questions in context and assist jurors with overall understanding of the case.</p> <p>Disagree with proposed change to rule 2.1035 (circulated as proposed rule 866). Revised permissive version of rule 2.1033 (circulated as proposed rule 864) does not suggest an automatic right for jurors. The reference in rule 2.1035 is appropriate.</p> <p>Disagree with proposed change to rule 2.1036 (circulated as proposed</p>

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		2.1036 (circulated as proposed rule 867)		designed merely to give judges additional tools to resolve impasses, we recommend deleting the suggestion of additional closing argument by counsel. The possibility opens up a raft of procedural questions which are not addressed by the proposed rule.	rule 867) because it is squarely within the discretion of the trial judge to provide additional and clarifying instructions, and judges may also permit attorneys to provide additional closing argument to clarify issues for the deliberating jurors. The rule provides guidance to bench officers regarding their inherent authority with regard to jurors at impasse.
24.	Hon. James Marchiano Presiding Justice Court of Appeal, First Appellate District, Division One San Francisco	A	N	The proposed changes will enhance jurors’ participation and understanding of the trial process and will help to achieve fair verdicts. The proposed changes will make jurors better fact-finders and assist and engage them in the process. When I was a trial judge (1988–1998), I used most of the proposals to the satisfaction of jurors.	Agree with comments.
25.	Hon. Bruce Marrs Judge Superior Court of Los Angeles County	N	N	As to rule 2.1033 (circulated as proposed rule 864) only, one size does not fit all cases. Questions may not be appropriate for reasons that may not rise to “good cause.” We are aware of our power to accept	Disagree that proposed rules 2.1033 (circulated as proposed rule 864) as revised, 2.1034 (circulated as proposed rule 865), 2.1035

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
	Pomona			questions from the jury members. We do not need a mandate to, or a rule permitting, the questions. I don't believe the other rules are necessary, but harmless.	(circulated as proposed rule 866), 2.1036 (circulated as proposed rule 867), and proposed rule 2.1032 (circulated as proposed section 19.1) are unnecessary. They are discretionary rules that provide guidance to bench officers concerning their authority, promote practices to assist jurors to discharge their duties as fact-finders, and provide opportunities to counsel and the parties to a case for insight and improvement.
26.	Ms. Julie McCoy President Orange County Bar Association Irvine	N Rule 2.1033 (circu- lated as propo- sed rule 864) AM Others	Y	Rule 2.1033 (circulated as proposed rule 864): Do not agree with the proposed changes Rule 2.1034 (circulated as proposed rule 865) is approved in principle; however, the permitted opening statements should be limited in both time and scope.	Revise rule proposal from a mandatory to a permissive rule. Disagree that rule should state limitation on time and scope of statements to the panel. This is a matter best left to judicial discretion and discussion with counsel prior to trial.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				<p>Rule 2.1035 (circulated as proposed rule 866): Omit “. . . the procedure for written questions for witnesses set forth in Rule 864.”</p> <p>Rule 2.1036 (circulated as proposed rule 867): In paragraph (b), strike item (3) [additional argument].</p> <p>Rule 2.1032 (circulated as proposed section 19.1 of the California Standards of Judicial Administration). The use of notebooks needs to be monitored. The notebooks should be provided to</p>	<p>Disagree with proposed change to rule 2.1035 (circulated as proposed rule 866); even if the rule is discretionary, preinstruction on how the court will take and administer questions—if questions are allowed—is an important element to include in preinstruction rule.</p> <p>Disagree with proposed change to rule 2.1036 (circulated as proposed rule 867) because judges may permit attorneys to provide additional closing argument and such argument is helpful to clarify issues for the deliberating jurors, especially those at impasse.</p> <p>Disagree with proposed change to rule 2.1032 (circulated as proposed section 19.1). It defeats the purpose of the practice</p>

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				jurors after the submission of evidence and immediately before deliberations.	recommended in the proposed standard. Use of notebooks throughout the trial proceedings (rather than immediately before deliberations) helps jurors organize materials as the trial progresses.
27.	Hon. John C. Minney Judge (ret.) Superior Court of Contra Costa County Moraga	N Rule 2.1033 (circulated as proposed rule 864)	N	Rule 2.1033 (circulated as proposed rule 864). Absolutely opposed. Do not make this mandatory. Current law gives this authority. I use this tool all the time and it is very helpful but can be abused by a juror who spends too much time writing questions and not listening. We need no new rules. Not opposed to the others as now written.	Revise rule proposal from a mandatory to a permissive rule. Disagree that no rule is necessary. A discretionary rule provides guidance to bench officers concerning their authority and provides references to procedures designed to assist in administering juror questions during trial.
28.	Hon. Craig Mitchell Judge Sup. Ct. of Los Angeles Cty. Los Angeles	AM Rule 2.1033 (circulated as proposed rule	N	Permissive only.	Agree with modification. Revise rule proposal from a mandatory to a permissive rule.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		864)			
29.	Hon. Dan Oki Judge Sup. Ct. of Los Angeles Cty. Pomona	AM Rule 2.1033 (circu- lated as propo- sed rule 864)	N	I strongly oppose the mandatory language of proposed rule 2.1033 (circulated as proposed rule 864). While allowing jurors to submit written questions may be of value in some cases, individual judges need to retain the discretion to determine whether to allow it.	Agree with modification. Revise rule proposal from a mandatory to a permissive rule.
30.	Hon. Suzanne Person Judge Sup. Ct. of Los Angeles Cty. El Monte	AM Rules 2.1033 2.1035 2.1036 (circu- lated as propo- sed rules 864, 866, 867) N	N	<ul style="list-style-type: none"> As to Rule 2.1033 (circulated as proposed rule 864), recast in permissive language Oppose 2.1034 (circulated as proposed rule 865) as unnecessary Oppose 2.1035 (circulated as proposed rule 866) as to questions Oppose 2.1036 (circulated as proposed rule 867) as to giving attorneys more argument time (b)(3) 	<ul style="list-style-type: none"> Agree with modification. Disagree, for previously stated reasons. Disagree, for previously stated reasons. Disagree, for previously stated reasons.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		Rule 2.1034 (circulated as proposed rule 865)			
31.	Hon. David Edwin Power Presiding Judge Sup. Ct. of Solano County Fairfield	A	N		
32.	Ms. Tina Rasnow Senior Attorney/Coordinator Sup. Ct. of Ventura Cty. Self-Help Legal Access Ctr. Ventura	A	N	It would be nice to also include provision allowing jurors to knit, crochet, or needlepoint if it is not distracting to themselves or others. It improves concentration for many and keeps them awake!	Disagree with comment owing to court safety concerns.
33.	Mr. Mike Roddy Executive Officer Sup. Ct. of San Diego County San Diego	A	Y		

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
34.	Hon. Ronald Sabraw Judge Superior Court of Alameda County Oakland	A	N	As a current member of the Steering Committee for Jury Rule Proposals, I support all of the proposed new rules as well as the addition of rule 2.1032 (circulated as proposed section 19.1 of the Standards of Judicial Administration). Perhaps the most controversial rule change concerns proposed Rule 2.1033 (circulated as proposed rule 864) that mandates trial judges permit jurors to submit written questions to witnesses and to allow counsel to object to such questions outside the presence of the jury. Among the concerns expressed by judges is that the proposed rule impinges on judicial discretion and independence. I believe these concerns are misplaced. The provisions of proposed Rule 2.1033 preserve judicial discretion by permitting the trial judge to prohibit or limit such questions for good cause. In recent years I have made it my practice to permit jurors to submit questions to witnesses in writing. I have also followed the practice of considering the objections of counsel outside the presence of the jury. I explain to jurors that there may be instances in which their proposed questions are not asked. I also advise the jury that there may	Agree.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				<p>be instances in which no explanation is given why a particular juror question is not asked. If the proposed question is objected to and not asked, the other jurors are not told what the question was, unless the court explains the reasons for not asking the question. I have recently begun surveying jurors in my cases on their experience as jurors. Consistent with the Los Angeles pilot study on juror questions, jurors appreciate the opportunity to submit questions in writing, even if the questions are not ultimately asked. I have not found the practice burdensome or excessive and there has never been a trial where a juror has abused the opportunity to submit written questions. I support the rule change because jurors find it helpful in discharging their duties as fact finders. It also has the effect of engaging jurors more meaningfully in the decision-making process. I believe that jurors who are permitted to submit written question to witnesses feel more positively about the decision-making process and their overall jury experience.</p>	
35.	Mr. John K. Spillane Chief Deputy District	AM Rule	Y	Rule 2.1033 (circulated as proposed rule 864): <i>Support if Amended.</i> We would support this	Agree with modification. Revise rule proposal from a mandatory to

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
	Attorney Los Angeles County District Attorney’s Office Los Angeles	2.1033 (circulated as proposed rule 864) A Others		proposed rule if amended to be permissive and within the Court’s discretion rather than mandatory. While all of the other proposed rules are permissive, rule 2.1033 as proposed is mandatory. The Invitation to Comment notes indicate that the Criminal Law Advisory Committee voted 12 to 1 against making this rule mandatory, and voted 12 to 1 in favor of making it permissive. In accordance with these votes, and as no clear explanation is stated why the rule should be mandatory, we would suggest it be changed to be permissive consistent with the other proposed rules. Rule 2.1034 (circulated as proposed rule 865): <i>Support</i> Rule 2.1035 (circulated as proposed rule 866): <i>Support</i> Rule 2.1036 (circulated as proposed rule 867): <i>Support</i>	a permissive rule.
36.	State Bar of California Committee on Administration of Justice San Francisco	AM Rule 2.1033 (circulated as	Y	Rule 2.1033 (circulated as proposed rule 864): CAJ supports this proposed rule, but suggests some modifications to the proposed language. As CAJ understands the proposed rule, it would require judges to permit jurors to submit written questions	Although the proposed language may be beneficial to the rule as circulated, with the deletion of the good cause standard in the permissive version of the rule the

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		proposed rule 864)		to the court, but the court would retain the discretion (“for good cause”) to restrict the presentation of any particular question to a witness. The wording of the proposed rule may be somewhat confusing in its use of the work “submit” apparently to refer to the jurors’ presentation of questions to the judge, and its use of the similar word “submission” apparently to refer to the judge’s presentation of questions to witnesses. If “submit” and “submission” are construed to refer to the same thing—the presentation of questions to witnesses—some might construe a potential conflict between the requirement that jurors must be allowed to present questions to witnesses and the provision that court for good cause “may prohibit or limit” the presentation of questions to witnesses. Alternatively, if “submit” and “submission” are construed to refer to the presentation of questions to the court, some might construe “good cause” to “prohibit or limit” the presentation of questions to the court, but must present to the jury any questions that are presented to the court. This reading seems unlikely and incorrect, given the entire rule,	potential confusion over the construction of “submit” and “submission” is moot.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		A Rules 2.1034		<p>because the provision for objections by counsel implies that the court can sustain an objection and not present a question to a witness. In any event, CAJ recommends that the language of the rule be modified to distinguish between the presentation of proposed questions to the court, and the submission of questions to a witness. CAJ was split on whether “prohibit or” should be deleted from the last sentence of the rule, as indicated by the brackets in the following alternative for the proposed rule: “The trial judge must allow jurors to submit <u>present to the court</u> written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury, <u>and the court for good cause may refuse to submit a question to a witness.</u> Notwithstanding the foregoing, for good cause the court may [prohibit or] limit the submission <u>presentation</u> of questions <u>to the court.</u>”</p> <p>Rule 2.1034 (circulated as proposed rule 865): CAJ supports this proposal.</p>	

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		<p>2.1035 (circulated as proposed rules 865, 866)</p> <p>AM 2.1036 (circulated as proposed rule 867)</p> <p>A Rule 2.1032</p>		<p>Rule 2.1035 (circulated as proposed rule 866): CAJ supports this proposal.</p> <p>Rule 2.1036 (circulated as proposed rule 867): CAJ support his proposal, but suggests one modification to the proposed language. Proposed subdivision (b)(2) would permit the court to “[c]larify previous instructions.” To clarify an instruction sometimes really means to modify it. The original instruction may, for example, misstate or overlook something. It would therefore be more helpful for the rule to state that the court may “modify or clarify” previous instructions.</p> <p>Proposed rule 2.1032 (circulated as proposed section 19.1): CAJ supports this proposal.</p>	<p>Disagree. The notion of modifying an instruction is encompassed in the meaning of clarifying an instruction and therefore the additional language suggested is unnecessary.</p>

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		(circulated as proposed section 19.1)			
37.	Hon. David Velasquez Supervising Judge of the Orange County Complex Courts Superior Court of Orange County Santa Ana	Rule 2.1032 (circulated as proposed section 19.1)	N	I urge the council not to adopt the proposed, rule 2.1032 (circulated as proposed section 19.1 of the Standards of Judicial Administration) regarding the use of notebooks in complex cases. Although notebooks may be helpful and feasible in <i>non-complex</i> cases, the use of notebooks in complex cases is a big step backwards from the direction complex courts have been moving to improve the manner in which evidence is presented at trial. By the very nature of complex actions, as defined in California Rules of Court, rules 1800 <i>et seq.</i> , it is not uncommon for cases to involve many parties, each presenting voluminous documents. It is now standard procedure for parties in complex cases to store all documents electronically. Thus, it has been the direction of the complex courts to urge counsel to present documentary evidence at trial in	Disagree. The proposal does not require all materials to be included in the notebooks; documents and exhibits are suggested as examples of “appropriate materials” to be included in the notebook. Judges are only urged to encourage counsel to develop the notebooks, the contents and scope of which can be developed and agreed to during pre-trial conferences, in addition to any innovative use of technology that may assist jurors in organizing information. The comment to the proposal refers to <i>Bench Handbook: Jury Management</i> for guidelines on the

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				<p>electronic form rather than hard-copy. Complex courts are investing many resources to the development of electronic evidence presentation systems and procedures. Resorting to the use of notebooks takes the court back to the 20th century rather than keeping pace in the 21st century. Further, the typical complex case involves at least hundreds, if not thousands, of documents. It is not feasible for each juror to have his or her own set of notebooks. It is rare that <i>each</i> party in a complex case would produce less than five 4½-inch three-ringed binders. This means that each juror must have the space and ability to navigate through no less than 10 notebooks in a typical complex case in which only two parties are involved. I submit that our jury boxes are not equipped to handle this. Also, jurors with health or physical limitations may be unable to lift and handle heavy notebooks. The use of multiple notebooks also diminishes the amount of attention the jurors are able to devote to the witness. It is often the case that trial attorneys will refer to several documents from different notebooks at the same time. As jurors fumble back</p>	<p>preparation and use of notebooks.</p>

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
				and forth between different notebooks, it is a certainty they will not be concentrating on the testimony. Moreover, the proposed rule does not make clear who is to be responsible for maintaining and updating the notebooks. Unless exhibits are pre-marked and received into evidence before the notebooks are assembled, it is not likely the jury will initially receive a full set of exhibits. Thus, exhibits will be added to the notebooks as the trial progresses. Whose responsibility is it to make sure the copies are accurate and correct? For these reasons, I urge the council not to adopt proposed rule 2.1032.	
38.	Hon. James R. Wagoner Judge Superior Court of El Dorado County Placerville	N Rule 2.1033 (circu- lated as propo- sed rule 864) N Rule	N	Rule 2.1033 (circulated as proposed rule 864): I have tried the method of allowing juror questions and found that is severely impacts the trial process. It slows down the presentation of the evidence and the jurors get frustrated if the questions do not get an answer (even though the questions are legally unsound [call for hearsay, etc.]) Rule 2.1034 (circulated as proposed rule 865): As to the “mini-opening statement” it is often difficult	Disagree. A discretionary rule provides guidance to bench officers concerning their authority and provides references to procedures designed to assist in administering juror questions during trial. Disagree. The rule proposal informs judicial officers of their

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
		2.1034 (circulated as proposed rule 865)		enough to control the regular opening statement and make sure that counsel is not arguing the case in the opening statement. The proposed rule would lengthen the trial and give counsel two chances to “argue” the case. An alternative proposal would be a rule to have counsel meet and confer and prepare a brief “statement of the case” (much like is done in civil cases or as part of jury questionnaire in complex criminal cases) to be read to the jury by the court. In this method, the jury gets the information, but the court can review and control the content.	inherent authority to allow the practice and such statements provide a more dynamic presentation of information than a statement of the case read from the bench.
39.	Hon. Steve White Judge Superior Court of Sacramento County Sacramento	N Rule 2.1033 (circulated as proposed rule 864)	N	I permit jurors to submit questions but I oppose this pending proposal before the Judicial Council. Trial courts should be able to exercise discretion in such matters, unfettered by a new rule requiring a formal finding of good cause in order to exercise that discretion. The law is our guide and fully adequate to that purpose. Statute and precedent inform our work. Apart from suggesting practices or proposing procedures, committees (and Council) should, I think, exercise self restraint.	Revise rule proposal from a mandatory to a permissive rule.

Jury Rule Proposals (adopt Cal. Rules of Court, rules 2.1032 [circulated as proposed Cal. Stds. Jud. Admin., § 19.1], 2.1033 [circulated as proposed rule 864], 2.1034 [circulated as proposed rule 865], 2.1035 [circulated as proposed rule 866], and 2.1036 [circulated as proposed rule 867])

	Commentator	Position	Comment on behalf of group?	Comment	Response
40.	Hon. Thomas White Judge Sup. Ct. of Los Angeles Cty. Los Angeles	N	N		

**CALIFORNIA CODES
CODE OF CIVIL PROCEDURE
SECTION 607, et. seq.**

607. When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:

1. The plaintiff may state the issue and his case;
2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;
3. The plaintiff must then produce the evidence on his part;
4. The defendant may then open his defense, if he has not done so previously.
5. The defendant may then produce the evidence on his part;
6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
7. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;
8. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;
9. The court may then charge the jury.

607a. In every case which is being tried before the court with a jury, it shall be the duty of counsel for the respective parties, before the first witness is sworn, to deliver to the judge presiding at the trial and serve upon opposing counsel, all proposed instructions to the jury covering the law as disclosed by the pleadings. Thereafter, and before the commencement of the argument, counsel may deliver to such judge, and serve upon opposing counsel, additional proposed instructions to the jury upon questions of law developed by the evidence and not disclosed by the pleadings. All proposed instructions shall be typewritten, each on a separate sheet of paper. Before the commencement of the argument, the court, on request of counsel, must: (1) decide whether to give, refuse, or modify the proposed instructions; (2) decide which instructions shall be given in addition to those proposed, if any; and (3) advise counsel of all instructions to be given. However,

if, during the argument, issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof.

608. In charging the jury the Court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The Court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.

609. Where either party asks special instructions to be given to the jury, the Court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.

**CALIFORNIA CODES
PENAL CODE
SECTION 1093–1094**

1093. The jury having been impaneled and sworn, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court:

- (a) If the accusatory pleading be for a felony, the clerk shall read it, and state the plea of the defendant to the jury, and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction. In all other cases this formality may be dispensed with.
- (b) The district attorney, or other counsel for the people, may make an opening statement in support of the charge. Whether or not the district attorney, or other counsel for the people, makes an opening statement, the defendant or his or her counsel may then make an opening statement, or may reserve the making of an opening statement until after introduction of the evidence in support of the charge.
- (c) The district attorney, or other counsel for the people shall then offer the evidence in support of the charge. The defendant or his or her counsel may then offer his or her evidence in support of the defense.

- (d) The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.
- (e) When the evidence is concluded, unless the case is submitted on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury; the district attorney, or other counsel for the people, opening the argument and having the right to close.
- (f) The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; and the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case. Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

1093.5. In any criminal case which is being tried before the court with a jury, all requests for instructions on points of law must be made to the court and all proposed instructions must be delivered to the court before commencement of argument. Before the commencement of the argument, the court, on request of counsel, must: (1) decide whether to give, refuse, or modify the proposed instructions; (2) decide which instructions shall be given in addition to those proposed, if any; and (3) advise counsel of all instructions to be given. However, if, during the argument, issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof.

1094. When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the Court, the order prescribed in the last section may be departed from.

California Civil Jury Instruction 112

112. Questions From Jurors

If, during the trial, you have a question you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will share your question with the attorneys. There may be legal reasons why a suggested question is not asked of a witness. You should not try to guess the reason why a question is not asked.

Directions for Use

The decision on whether to allow jurors to ask questions is left to the discretion of the judge. The instruction may need to be modified to account for an individual judge's practice.

Sources and Authority

- “In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness.” (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)
- “[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions.” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1].)
- “The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other.” (*Maris v. H. Crummey, Inc.* (1921) 55 Cal.App. 573, 578-579 [204 P. 259].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 85

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.01-91.03
(Matthew Bender)

(New February 2005)

California Criminal Jury Instruction 106

106. Jurors Asking Questions

If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through the bailiff. I will discuss the question with the attorneys and decide whether it may be asked. Do not feel slighted or disappointed if your question is not asked. Your question may not be asked for a variety of reasons, including the reason that the question may call for an answer that is inadmissible for legal reasons. Also, do not guess the reason your question was not asked or speculate about what the answer might have been. Always remember that you are not advocates for one side or the other in this case. You are impartial judges of the facts.

BENCH NOTES

Instructional Duty

This instruction may be given on request.

AUTHORITY

- Statutory Admonitions. See generally Pen. Code, § 1122.

Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000), § 643.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 82, *Witnesses*, § 82.02[2] (Matthew Bender).

(Revised August 2006)

California Civil Jury Instruction 5013

5013. Deadlocked Jury Admonition

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict and this case is important to the parties.

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that it is wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

Sources and Authority

“The court told the jury they should reach a verdict if they reasonably could; they should not surrender their conscious convictions of the truth and the weight of the evidence; each juror must decide the case for himself and not merely acquiesce in the conclusion of his fellows; the verdict should represent the opinion of each individual juror; and in reaching a verdict each juror should not violate his individual judgment and conscience. These remarks clearly outweighed any offensive portions of the charge. The court did not err in giving the challenged instruction.” (*Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 652 [179 Cal.Rptr. 13].)

“A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other’s arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks.” (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118], internal citations omitted.)

“Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned.” (*Inouye v. Pacific Southwest Airlines, supra*, 126 Cal.App.3d at p. 651.)

“The instruction says if the jury did not reach a verdict, the case would have to be retried. It also says the jurors should listen with deference to the arguments and distrust their own judgment if they find a large majority taking a different view of the case. In a criminal case the mere

presence of these remarks in a jury instruction is error. However, civil cases are subject to different considerations; the special protections given criminal defendants are absent.” (*Inouye v. Pacific Southwest Airlines, supra*, 126 Cal.App.3d at p. 651, internal citation omitted.)

(Revised April 2004)

California Criminal Jury Instruction 3550

3550. Pre-Deliberation Instructions

When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong.

But do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other. As I told you at the beginning of the trial, do not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists. You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberations with anyone.

[During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. (These exhibits will be sent into the jury room with you when you begin to deliberate./ If you wish to see any exhibits, please request them in writing.)]

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a

written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the (question of guilt/[or] issues in this case) unless I ask you to do so.

Your verdict [on each count and any special findings] must be unanimous. This means that, to return a verdict, all of you must agree to it.

It is not my role to tell you what your verdict should be. [Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.]

You will be given [a] verdict form[s]. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the appropriate verdict form[s] and notify the bailiff. [If you are able to reach a unanimous decision on only one or only some of the (charges/ [or] defendants), fill in (that/those) verdict form[s] only, and notify the bailiff.] Return any unsigned verdict form.

BENCH NOTES

Instructional Duty

The court has a sua sponte duty to instruct that the jury's verdict must be unanimous. Although there is no sua sponte duty to instruct on the other topics relating to deliberations, there is authority approving such instructions. (See *People v. Gainer* (1977) 19 Cal.3d 835, 856 [130 Cal.Rptr. 861, 566 P.2d 997]; *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426]; *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].)

If the court automatically sends exhibits into the jury room, give the bracketed sentence that begins with "These exhibits will be sent into the jury room." If not, give the bracketed phrase that begins with "You may examine whatever exhibits you think."

Give the bracketed sentence that begins with "Do not take anything I said or did during the trial" unless the court will be commenting on the evidence. (See Pen. Code, §§ 1127, 1093(f).)

AUTHORITY

- Exhibits. Pen. Code, § 1137.
- Questions. Pen. Code, § 1138.
- Verdict Forms. Pen. Code, § 1140.

- Unanimous Verdict. Cal. Const., art. I, § 16; *People v. Howard* (1930) 211 Cal. 322, 325 [295 P. 333]; *People v. Kelso* (1945) 25 Cal.2d 848, 853–854 [155 P.2d 819]; *People v. Collins* (1976) 17 Cal.3d 687, 692 [131 Cal.Rptr. 782, 552 P.2d 742].
- Duty to Deliberate. *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997].
- Judge’s Conduct as Indication of Verdict. *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- Keep an Open Mind. *People v. Selby* (1926) 198 Cal. 426, 439 [245P. 426].

Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000), §§ 643–644.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02, 85.03[1], 85.05[1] (Matthew Bender).

RELATED ISSUES

Admonition Not to Discuss Case with Anyone

In *People v. Danks* (2004) 32 Cal.4th 269, 298–300 [8 Cal.Rptr.3d 767, 82 P.3d 1249], a capital case, two jurors violated the court’s admonition not to discuss the case with anyone by consulting with their pastors regarding the death penalty. The Supreme Court stated:

It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors instructed not to speak to anyone about the case except a fellow juror during deliberations . . . may assume such an instruction does not apply to confidential relationships, we recommend the jury be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Moreover, the jury should also be instructed that if anyone, other than a fellow juror during deliberations, tells a juror his or her view of the evidence in the case, the juror should report that conversation immediately to the court.

(*Id.* at p. 306, fn. 11.)

The court may, at its discretion, add the suggested language to the fourth paragraph of this instruction.

(*New January 2006*)