INNOVATIVE JURY TRIALS
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I. The CJP was established at NYU School of Law in the fall of 2015 as the only academic center in the nation studying why jury trials are disappearing, whether we should care and if so, what can be done about it.

A. Although a recent study we conducted shows that 80% of the public has no idea that the number of jury trials is even declining (which may be one reason why they are), I don't have to convince this audience that the average judge in this country conducted less than 3 civil jury trials last year and that the disappearance of jury trials, indeed trials of any type, is a bad thing.

B. Of course, we could spend the rest of the weekend debating why this is happening. There are many reasons and if we waited to take action until we identified and prioritized them, trials might in the meantime become extinct.

C. The CJP is engaged in a broad range of projects that you can find described on our website and in our newsletters. They include organizing conferences and debates, hosting jury improvement lunches, operating a website WeThePeopleWeTheJury where those who have served and love it can try to convince those who have been summoned not to try to avoid it, conducting empirical studies, providing financial aid and legal defense to jurors, preparing amicus briefs concerning juries on behalf of law professors, and educating young lawyers on how to try jury cases.

D. We are also trying to inform the public that public dispute resolution is being marginalized and that jury trials are disappearing.

1. We need to teach the public that the right to trial by jury in civil cases was so important to our Founders that they ratified the Constitution only on the condition that an Amendment be added that expressly protected it, and that they insisted upon this in spite of their recognition that jury trials would be more expensive, more uncertain in general and more dangerous in particular to wealthy defendants than bench trials. Our survey of the public shows that it is only after a respondent is informed that the right to a civil jury trial is protected by the Constitution, that she expresses concern that jury trials are in decline.

2. We also need to use every opportunity to remind judges of this.

    a) That's why I have been criss-crossing the country meeting with federal and state judges, recruiting them to be Judicial Advisors of the CJP (we now have 225)

    b) Why we send them a monthly newsletter with articles about civil jury trials

    c) Why we are inviting a group of them at our expenses to NYU in a few weeks to spend a day discussing the innovations we are going to be talking about today

E. Innovations we can, right now and at no expense or need for any rule change, urge courts around the country to start using to make jury trials less expensive and more reliable.

1. For 200 years, judges in this country have been shifting to themselves the ability to control the outcome of cases: from depriving the jury of its original role to decide the law as well as the facts, to depriving the jury of the right to decide cases which the judges find implausible or subject to arbitration or pending before an administrative tribunal, to depriving the jury of the tools it needs to properly decide the dispute, and, in federal court, to depriving lawyers of much of a role in selecting juries and thus of their ability to have faith in their verdicts.

2. Trial lawyers have too often been accomplices to this power grab by judges. We tend to be conservative, set in our ways, and worried about offending the judges if we speak up. We wasted

so much time arguing our cases during voir dire that the federal judges eliminated our role altogether.

3. When I first began working to save jury trials, one of the first things someone sent me was this short film entitled “Order in the Classroom” produced by the IADC in 1998 as a vivid portrayal of the problems inherent in the jury trial system.

   a) Watching that doesn’t give one a lot of faith in the jury’s ability to get it right.

   b) Fortunately I can report to you that a study we recently commissioned found that 53% of material B2B contracts filed with the SEC last year did not contain either arbitration or jury waiver clauses. We are in the process

of interviewing GC's of companies who were parties to such contracts and hopefully will be able to confirm that the omission was intentional and that the majority of American companies still have faith in juries.

F. The challenge that Judge Marten and I are going to deal with today is how do we gain the confidence of the other 43%?

G. In a nutshell, we believe that all of the pedagogical problems illustrated in Order in the Classroom can be eliminated by adopting the innovations we are going to advocate today.

II. Before we get into specifics, let me provide a little history.

A. The state courts in Arizona began experimenting with many of the innovations in the early 90s.

B. In 1998, the ABA established a Task Force that wrote Civil Trial Standards recommending the use of many of these innovations.

C. At the same time, the Arizona Supreme Court authorized the American Bar Foundation researchers to videotape 50 civil jury trials where these innovations might be used. The researchers were also allowed to videotape the deliberations of the juries with the consent of the parties and jurors.

D. In 2005 the American Jury Project of the ABA published Principles for Juries and Jury Trials. The ABA and the American College endorsed these recommendations.

E. The results of the Arizona Jury Project have been written about for the last 15 years and were the subject

of a panel discussion at the annual ABA meeting last Friday.

F. Although all studies have concluded that the innovations improve juror comprehension, recent studies show a very slow adoption rate by courts across the country. Even though virtually none of these innovations are prohibited by rules, most judges are unwilling to experiment with something new unless both counsel agree. Whether it is fear of reversal or re-election, it is difficult to teach old judicial dogs new tricks.

G. That caused me to develop both pretrial and trial agreements to reduce the expense of discovery and trial and to improve jury comprehension. If judges urged on by Bar groups wouldn't do things on their own without the consent of the parties, I sought to

secure the agreement of opposing counsel to most of the innovations we are discussing. You can find them at a website called TrialByAgreement.com. The Trial Agreements, which contain most of the innovations we will talk about today, are now the joint work product of me and Paul Saunders of Cravath who was formerly chair of the American College.

H. I am here today because of the intervention of Judge Marten whose courtroom, as best I can tell, is the test kitchen of every one of the innovations the CJP recommends. He is also among the nation's most articulate judicial advocates for saving jury trials. Today is a practice run for the workshop on jury trial innovations he is moderating for 30 of our Judicial Advisors at NYU in a few weeks. It was in preparation for that that the CJP authored a short

article on 9 of the innovations that was published in Law 360 over the summer. Those articles are in your materials. There were a number of improvements that we urge that we did not write articles on. They include:

1. Eliminating side-bars
2. Insisting on use of pattern instructions if available
3. Writing plain English instructions
4. Use of juror notebooks
5. Providing each juror a copy of the instructions and verdict form

I. I am now giving the mike to Judge Marten who will talk about the problem and describe his standing order designed to deal with it. After his introduction, we will take turns talking about each of the 9 innovations.

III. Innovations

A. **Limiting the length of trial**

1. The biggest objection to jury trials is that they are too expensive. The easiest way to reduce their expense is to set firm trial dates and to set tight limits on the length of the trial.

2. The single biggest complaint we hear from jurors is that the trial lasted too long and was too repetitive.

3. Every lawyer who has participated in a time-limited trial reports that it actually made for a better trial.

4. Shorter trials mean fewer high caliber jurors get excused for hardship. Without time limits, the most complex cases last the longest and are tried to the least qualified jurors. No wonder corporate

executives complain that juries are not composed of their peers.

5. After getting the input from the parties, the Court should set a firm trial date and the length of the trial, both at the start of discovery. Discovery should be proportional to the time allowed for trial.

6. Mock trials and all empirical studies of actual trials suggest that the outcome is not affected by the length of the trial.

7. We have found no rule or decision that limits the trial court's power to limit the length of trial. Even without agreement of the parties, the court should impose time limits

B. **Substantive questionnaires to venire before voir dire**

1. To save time at trial and to provide more information on prospective jurors to counsel, the court should suggest to counsel that they agree on a two-page questionnaire to be completed by prospective jurors before they arrive at the courthouse. The Court should have a standard questionnaire it uses in the event one party wants one but both parties fail to agree to something else.

2. The completed questionnaires should be made available to counsel for long enough to be able to study them and use them to conduct internet research subject to ethical prohibitions being adopted in various jurisdictions.

3. The only objections I have heard to the questionnaire come from judges who express

concerns for jury privacy. In a criminal case, where a juror might be subject to physical threats, I can understand the concern. But not in the usual civil case. After all, jurors become judicial officers and public figures during the brief time they serve. Their privacy can be protected by ordering counsel not to disclose their identities or their questionnaire answers to others.

C. **Jury-posed questions**

1. We have listened to the suggestions of hundreds of jurors voiced on our website WeThePeopleWeTheJury, or at Jury Improvement Lunches or in response to post-service questionnaire administered by trial judges. The single most popular innovation is to allow them to ask questions of witnesses.

2. This practice is nowhere prohibited and increasingly authorized. The most common method is for each juror to be given a blank piece of paper on which she may write questions. The papers are collected at the end of a witness' testimony before the witness leaves the stand. If any contain a question, the judge shows it to the lawyers at the bench and, if there is no objection, asks the lawyer who called the witness to ask the questions. Opposing counsel may cross.

3. In my experience, the questions are rarely objectionable and usually quite insightful. Little time is wasted. Jurors report that it keeps them engaged and awake.

4. I have heard some judges suggest that it may provide the lawyers too much information on

how the jury is leaning. My response is what's wrong with that?

D. **Interim statements by counsel**

1. In a trial where each side is given 15 hours, the court could allow each side to use up to 5% of its time or 45 minutes to offer explanations to the jury immediately before or after examining any witness. No such explanation could last more than 5 minutes.

2. This allows the lawyers to keep the jurors awake, engaged and more informed. Jurors we have asked, suggest it would be helpful.

3. I have never been able to get the other side to agree to this, perhaps because whenever I suggest it, they suspect that I have some special experience or expertise at doing it. If this

practice is to gain traction, it's because judges have the courage to experiment with it.