

Jury Matters

The Newsletter for the
Civil Jury Project
at NYU School of Law



Dec. '17, Vol. 2, Issue 12

Upcoming Events

- 12.15 ISBA Fed. Practice Seminar; *Susman on Trial Innovations*, Des Moines, IA
- 1.16 Jury Improvement Lunch, New York, NY
- 3.8 Jury Improvement Lunch, San Francisco, CA
- 4.16 Jury Improvement Lunch, Cleveland, OH
- TBD Jury Improvement Lunch, Oklahoma City, OK
- TBD Jury Improvement Lunch, Baltimore, MD

Opening Statement

Dear Readers,

Welcome to the Civil Jury Project's final newsletter of 2017—it has proved a very productive year! We launched a new public-facing website; increased our presence on social media; produced a wide array of online interactive content; and held countless events around the country, to name but a few of our accomplishments.

In addition to these outreach efforts, we have also made strides in studying the causes of the civil jury's decline, and efforts to better the institution. Most recently, the Civil Jury Project worked in conjunction with the American Society of Trial Consultants to determine whether members of the general public are aware of the jury's decline, and if they have any opinion on the matter. An analysis of the results is presented below, and a full report is available [here](#).

Next year, we have even more planned! We will continue to study trial innovations and their use; meet with judges to determine practices that increase jury trial rates; and work with our academic community to develop empirical studies that will advance our understanding of the juries' current state. It is already gearing up to be another fantastic year.

Thank you for your continued support of the Civil Jury Project. An updated outline of our status of projects is on our [website](#). Also, we continue to invite op-ed proposals or full drafts for inclusion in upcoming newsletters and on our website.

Sincerely,
Stephen D. Susman



How would a juror fix the jury system?

The Civil Jury Project believes that one of the best ways to fix the jury system is to listen to those who have recently served. This week, we offer ten suggestions straight from a woman who recently served as a juror on a two-week patent trial.

[Find out more on pg. 6](#)



What does the general public think about the decline in Civil Jury Trials? The American Society of Trial Consultants and the Civil Jury Project teamed up to find out. Patty Kuehn, of the ASTC, reviews the findings. . .

Despite a well-documented decline in civil jury trials over the last 50 years, a Pew Research Center survey in April 2017 reveals two-thirds of U.S. adults consider serving on a jury part of what it means to be a good citizen (Gramlich, J., Pew Research Center, August 2017). Pew’s findings beg the question of whether the American people understand what is happening.

In its quest to preserve American’s rights to trial by civil jury, the American Society of Trial Consultants (ASTC) in conjunction with the Civil Jury Project studied lay public opinion about civil jury trials. As trial attorneys and consultants alike know, understanding someone’s pre-set attitudes, opinions and frame of reference facilitate effective communication and persuasion. The public survey was designed to identify and assess a few basic assumptions of public perception of civil jury trials as a step in this revitalization.

The ASTC/CJP’s Public Survey addressed two central questions: whether the public is aware of the decline in civil jury trials, and whether they are upset about the decline? Other inquiries included how important the right to a civil jury trial is, who is most appropriate to decide civil disputes, and whether prior jury service influences those opinions.

The study surveyed nearly 1,500 US Citizens from two-thirds of the country. This report includes data on six primary questions, but also information about relationships among these questions and demographic/background information. Select background and demographic information collected included: age, race, education, political affiliation and political orientation. Thank you to Fieldwork Inc for administering the study and to all who generously offered their time and energy to this study.

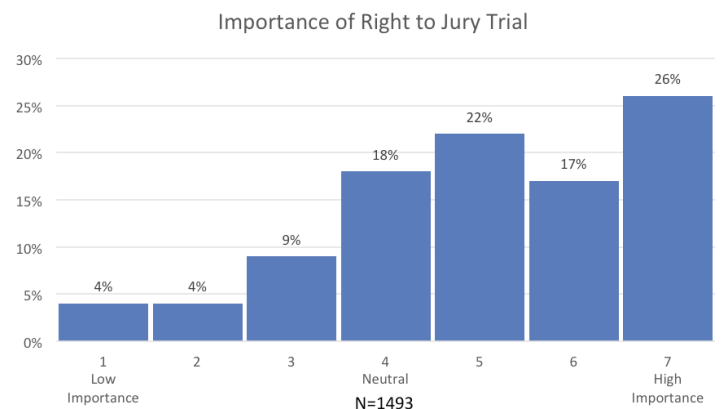
The most crucial and pertinent findings from the Public Survey were as follows:

1. Is the right to a civil jury trial important? Yes.

The majority of the respondents believed the right to a civil jury trial was important. Two-thirds of this sample believed the right to a civil jury trial was somewhat to very important.

2. Are people aware there is a decline in civil jury trials? No.

The majority of the respondents were unaware the number of jury trials has declined. Over three-quarters of the sample thought civil jury trials had either stayed the same or gone up.



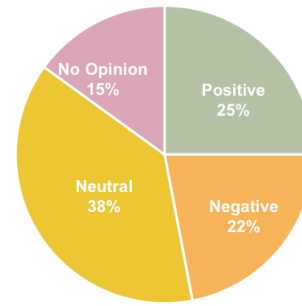
3. Are people upset by a decline in civil jury trials? No.

When informed there has been a sharp decline in civil jury trials over the last ten years, more than half of the sample expressed either no opinion or a neutral opinion about the decline. Less than half of the respondents expressed an opinion about the decline; less than a quarter viewed the decline as negative.

4. Are opinions related to prior jury service? Generally, no.

Prior jury service did not appear to drive opinions about the awareness of the decline, a respondent's opinion of the decline, or a belief in importance of the right to a jury trial. Please note the phrase "served on a jury" was left undefined. Some respondents likely considered responding to a jury summons as "serving on a jury".

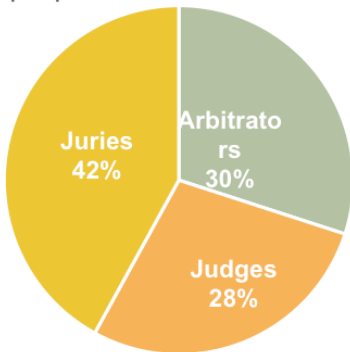
In the past 10 years, there has been a sharp decline nationwide in the number of jury trials taking place. What is your opinion about the decline?



5. Who is most appropriate to decide civil disputes? Slight preference for juries.

The sample was split on who was most appropriate to decide civil cases, with slightly more (42%) respondents believing juries are most appropriate compared to arbitrators or judges. Beliefs about who is most appropriate to decide civil suits may be affected by prior jury service, but perhaps not in the way previously anticipated. While prior jury service exhibited no relationship with the belief that jurors are the most appropriate decision-makers; respondents who had participated in jury service were more likely to believe arbitrators were the most appropriate and less likely to believe judges were the most appropriate, compared to those who hadn't served on a jury. This runs counter to what was expected and warrants further research with well defined "jury service."

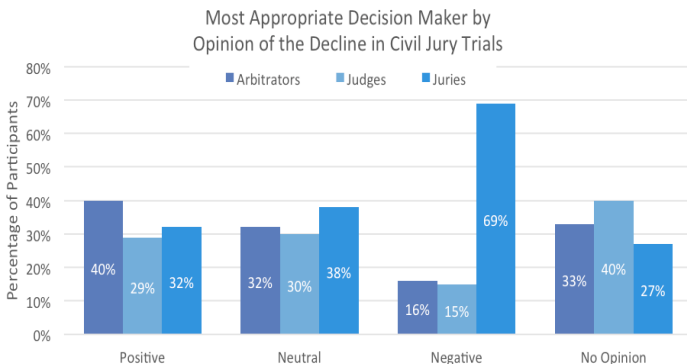
Who do you think is most appropriate to decide civil disputes?



6. Are opinions of the decline related to other test questions or background? Yes, some.

Opinions of the decline aligned with beliefs about who was most appropriate to decide cases. As one would expect, those who viewed the decline negatively were more likely to believe jurors were the most appropriate to decide the case. Those who viewed the decline positively were more likely to think either an arbitrator or judge should decide the case.

Opinions of the decline were related to a few demographic factors, including age, region of residence, and type of residence. This data indicated that older people, suburban respondents, and/or those living outside the Midwest were more likely to view the decline as a *positive* development.



7. Are there any relationships between how important the right to a civil jury is and demographic or background information? **A couple—residence and age.**

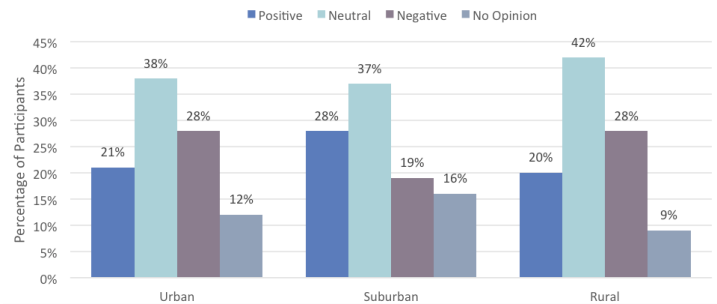
Importance of the right to a civil jury trial was related to residence and to age. Urban residents viewed the right to a civil jury trial as more important than suburban residents viewed the right. Men viewed the right to a civil jury trial as more important than women viewed the right.

8. Are political affiliation or political orientation related to respondents' views about the civil jury trial? **Surprisingly, no.**

No significant relationships were identified in this study with political affiliation or political orientation and awareness, opinions of the decline, or importance of the right. At a minimum, political characteristics were expected to relate to views of the decline. These unexpected findings warrant further research to determine whether political characteristics and views on civil jury trials may be a non-partisan issue. As unexpected as the finding may be, other consistent findings exist. The Attorney Survey conducted in 2016 by the ASTC/CJP found the decline of the civil jury trial to be of concern to both plaintiff and defense lawyers suggesting possible bipartisan opinions. Determining whether it is a non-partisan issue could guide the approach taken by the Civil Jury Project in its quest to preserve the right.

An understanding of any lay public opinion is invaluable in the quest for greater interest in the decline of the civil jury trial. This survey identified many of the respondents held a neutral opinion or no opinion about the decline. Awareness of this apathy benefits those who seek to protect the civil jury

Opinion of the Decline in Civil Jury Trials by Residence



trial. Apathy about an issue can prove a greater challenge than addressing those in opposition. Getting someone to care requires a different approach than shifting someone's opinion.

Even though many people did not express having an opinion about the decline, many of our respondents considered the right to a civil jury trial quite important. Therefore, an important opportunity exists for public education and development of interest. Framing the decline as threatening a fundamental right, so important it was included in the Bill of Rights in the US Constitution, may aid in eliciting increased interest and encourage people to take a position against the decline. The cure for apathy may be educating citizens about the Constitutional context of the issue, or at least it could be a beneficial first step.



Patty Kuehn is a trial consultant, served as president of the ASTC, and was instrumental in the completion of this study.



Judge Young of the U.S. District Court for the District of Massachusetts recently recorded two videos for our website. You can find them [here](#) and [here](#).

The CJP recently held Jury Improvement Lunches in both Kansas City and Denver. You can find the videos of them [here](#) and [here](#).



Post Trial Interviews Reveal Insightful Opinions About The Trial Process And Demystify Deliberations

Patrice Truman, Esq.



Gaining A Glimpse At Deliberations

Whether counsel wins or loses their case, post trial interviews provide insight and critical feedback about how jurors absorb and analyze the evidence presented at trial. After an informative interview, counsel can understand how jurors selectively interpret the evidence and judge the witnesses, which evidence they discard as incredulous, who advocates what position during deliberations, and how counsel's trial presentation and personal style influences jurors. Moreover, an interview confirms or disproves counsel's judgments made during voir dire about a juror's personality and reasoning abilities.

Deliberations are characteristically a mystery. What is going on in there? What are they laughing about? What is the yelling about that echoes from inside the deliberation room? By applying the knowledge learned from post trial interviews, counsel is better able to craft strategy and develop themes for future cases with similar issues. A focused and cogent witness preparation can be a byproduct of post trial interviews after learning jurors' expectations of a credible testifying witness.

A Positive Purging Experience

Jurors who agree to an interview (meaning not as they run to get out of the courthouse), or seek out an interview (wait for counsel outside of the courtroom at the conclusion of trial) often reveal after an interview that purging their thoughts, deliberative arguments, and impressions of the entire trial process presents a welcome decompression. It does not matter if they vote with the winning side or not to feel cathartic. Thus, with a difficult case to process and deliberate to verdict, a post trial interview confirms to the juror that

their contributions to the deliberations and subsequent votes were "right."

Sometimes, a juror will telephone the interviewer back with additional comments as they continue to process certain aspects of the trial. This happens most often when the interviewer strikes up a good rapport with the juror and the juror trusts the interviewer's purpose in asking the probing questions.

Revelations Revealed

For those jurors who choose not to talk or who will relent to giving a brief interview to be polite, the case may have been too complex for them to respond to inquiries about the evidence and how they analyzed it. More often than not, this type of juror can be labeled a *participant*, and not a *persuader* within the deliberative dynamic. Or, it may be that a juror suspects the motive to conduct post-trial interviews is for appealable information, including jury misconduct. It is not that this juror is particularly savvy with appellate issues, rather they are voicing what they have read or heard from the media that a large damage award or unpopular result "will be appealed." There is also the juror who hesitates giving an interview stemming from some personality conflicts in the deliberation room. Whereas they hesitate revealing what actually ensued as though they may be tattling, they will hint at who may have been the obstinate juror, or why the minority faction seemed so reticent to negotiate a different damage award. A juror may unload some resentment aimed at the presiding juror for their manner of controlling the deliberations overall. A specific example would be the heavy-handed presiding juror who limits discussion when it does not conform to a certain viewpoint. On the other hand, the presiding juror

often seems to feel a certain ownership over the deliberations and resulting verdict. Consequently, this juror may be less forthcoming or refuse an interview if they suspect that the requesting (albeit, losing) counsel aims to disrupt the result in any way.

It is heartening for counsel during trial, and especially on the deliberation days, to observe a cohesive jury interacting together on the breaks, lunching together as a group, and generally happy to be with each other. This could culminate with an impenetrable verdict. For jurors, their unity generates a positive recollection years later when they recall the impressive highlights of the trial. In the end, civility and respect displayed by all in the courtroom extends into the deliberative process when jurors approach their task with thoughtful analysis.

Conclusion About An Invaluable Resource

Post trial interviews prove that jury decision-making thrives within the dynamic of the blended psychology of a small group of strangers who listen closely and try to comprehend an often complex combination of legal jargon and evidence, and then make a group decision that will have far reaching ramifications affecting others' lives. Post trial interviews confirm that jurors respond to their summons because in some way they believe in the legal system, despite its flaws. Overall, it is gratifying to jurors that in giving their time at trial, and yet again with a post trial interview, that they are making a difference and supporting the ideals of justice.

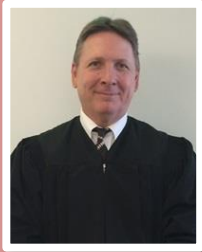
For more information about guidelines in conducting ethical post trial interviews, refer to The American Society of Trial Consultants, Code of Professional Standards, Practice Area E, at astcweb.org



**New
Advisors
Spotlight**



Hon. David Goldberg
Colorado Second Judicial
District



Hon. A. Bruce Jones
Colorado Second Judicial
District

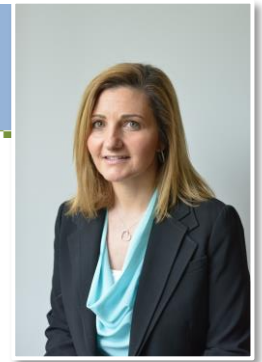


Hon. Robert McGahey
Colorado Second Judicial
District



Hon. Patti Saris
US District Court for the
District of Massachusetts

10 Recommendations from a Recently Dismissed Juror -- Sophia Elefther



Sophia Elefther recently served as a juror on a two-week long civil trial in Massachusetts. It concerned the purchase and sale of patents and technology. We asked her to offer her feedback on the experience, and she offered these ten helpful suggestions:

1. Knowing what the charge or law being challenged BEFORE hearing testimonies, would have been helpful. We didn't know what the lawsuit was about until the very end. All of my notes and my point of view would have been better shaped and structured if I knew what was the issue. For example, we were asked if the plaintiff proved that the defendant more likely than not, failed to negotiate in good faith towards a final agreement. I would have better evaluated each witness with that question in mind while the witness was testifying.

2. Having a timeline would have been helpful and made the lawyers' presentations easier to follow.

3. Having the exhibits numbered in chronological order and having a table of contents of the exhibits with brief descriptions and titles would have made it easier to find during deliberations.

4. Having the judge's instructions written out for the jury during the entire trial and in deliberations would have helped keep us focused as we listened to testimony and as we deliberated. We had to ask the judge to repeat for us and then finally we asked for a copy on the third day of deliberations.

5. Having the judge come and talk to us after the verdict was so wonderful. It was helpful in relieving our stress.

6. The judge allowed us to ask her written questions during deliberations. That was helpful. I would have liked to have been able to ask questions during the whole trial after each witness was presented by both attorneys so that anything not covered I could ask as well. This would have been helpful to ask the expert witnesses, in our case, the patent attorneys, further explanations.

7. Not being allowed to ask questions, or do research online or read books was debilitating. I wanted to read more about the definition of a "letter of intent". I took a class on business law and wanted to review my books on the definition of a contract and when a contract is binding. I wanted to educate myself on what is a patent and how are patents used. I don't understand why a juror is not allowed to ask these questions or do this type of research. I think being educated and informed would make us a better jury.

8. This civil case lasted two weeks. Not being able to talk to anyone about it was difficult. I understand that talking about it may influence a person. But if we could talk to the other jurors only during the breaks - would we have been better able to dialogue and address issues if we were able to discuss during breaks and not just at deliberations? I think hearing others' points of view may have been helpful so that I could keep myself open or more closely challenge myself while listening to the testimonies.

9. I would have preferred a set schedule ahead of time so that I could make better arrangements with my job. Starting earlier at 8:30 and on time, and ending at a set time at 1 would have allowed us to avoid the horrible traffic and attend to work matters as well. Not knowing our schedule was stressful. The lawyers could have made better use of our time by having time limits set on them and not repeating same questions.

10. We had several union employees in our jury. Union employees are only paid for 3 days of jury duty. I was fully paid by my office. I was required to submit the per diem I received to my employer. Maybe my per diem should have been used to pay the union employees instead of being returned to my employer. Either the union needs to change policy so that employees on jury duty are paid. Or the budget policy in reimbursing jurors can be reallocated so that the per diem will be used to cover those employees who are not covered by their employer.

Status of Project: Winter 2017



The Civil Jury Project looks forward to continuing its efforts throughout 2017 with the following objectives:

- Continue our efforts to enlist and involve judicial, academic, and practitioner advisors around the country
- Identify and study those judges who are trying the most jury cases, endeavoring to understand their techniques
- Develop plain language pattern jury instructions
- Encourage public discussion and debates about the pros and cons of public dispute resolution, particularly through the use of social and traditional media

This is but a sampling of our objectives for the coming year. A comprehensive list is available on our website, [here](#).

Thank you for your involvement in this important project. By working together we can reach a better understanding of how America's juries work and how they can be improved.

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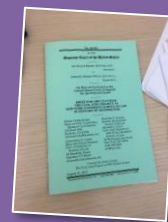


Kaitlin Villanueva
Admin. Assistant

A Preview of Next Month . . .



We are excited to feature a new point-counter-point series. Next month's will focus on the benefits and detriments of jury unanimity in civil cases.



We will offer a review of oral arguments in *Oil States Energy Services v. Greene's Energy Group*, for which the CJP filed an [amicus brief](#).