Jury Matters

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

Nov. '17, Vol. 2, Issue 11

Upcoming Events

- 11.1 Jury Improvement Lunch, Kansas City, MO
- 11.2 Jury Improvement Lunch, Denver, CO
- 11.3 Southern District of Texas Bench/Bar, *Saving Jury Trials*, Houston, TX
- 11.9 Jury Improvement Lunch, Baltimore, MD
- 11.10 Dallas Bar Assoc.; *Susman on Trial Skills*, Dallas, TX
- 11.16 Jury Improvement Lunch, Cleveland, OH
- 11.20 Jury Improvement Lunch, Oklahoma City, OK
- 11.21 Fed. Bar Assoc. Lunch; *Death of the Jury Trial*, Oklahoma City, OK
- 12.15 ISBA Fed. Practice Seminar; *Susman on Trial Innovations*, Des Moines, IA

Opening Statement

Dear Readers,

Welcome to another issue of the Civil Jury Project's monthly newsletter. We remain the nation's only nonprofit, academic institution solely dedicated to studying the historic decline of America's civil juries and reviewing proposals for how to better the institution.

This semester we have made a huge push toward expanding our public outreach efforts by holding events around the country. In just the past month, we have held Jury Improvement Lunches in both Seattle and Boston, and have five more such lunches planned before the end of the year. In addition, we have teamed up with judicial and academic advisors to the project to deliver presentations on (1) the historical and continuing value of the civil jury, (2) proposed innovations to make jury trials faster, cheaper, and more accurate, and (3) efforts that judges can take to further the value of jury trials. You can read more about each of these events on our website. If you are planning an upcoming judicial conference or bar meeting and would like the Civil Jury Project to deliver one of these presentations, please reach out to Kaitlin Villanueva.

Thank you for your continued support of the Civil Jury Project. An updated version of our Status of Project is available on our website. Also, we would like to remind you that op-ed submissions for inclusion on our website and in upcoming newsletters is encouraged. Expanding the dialogue on issues facing the civil jury is an integral part of our Project.

Sincerely,
Stephen D. Susman

Saving the Jury By Changing the Rules?

Justice Gorsuch and Jude Graber recently proposed that the Rules Committee alter FRCP 38 from a jury-waiver default to a jury-trial default. The Civil Jury Project's Research Fellow Richard Jolly reviews the judges' proposal

Find out more on pg. 5

The Dematerialization of the Civil Jury in American Jurisprudence

Hon. Bronwyn C. Miller & Hon. Meenu Sasser

"Trial by jury is a highly valued attribute of American government. It was regarded by the founders as 'an essential bulwark of civil liberty.'" *Galloway v. United States*, 319 U.S. 372, 397, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943) (Black, J., dissenting in part, concurring in part). "The United States's allegiance to the civil jury is the product both of its early colonial history and the constitutional debates at the conclusion of the Revolutionary War." Stephan Landsman, *The Civil Jury in America*, Law and Contemporary Problems, 5 (1999). "When the initial draft of the United States Constitution failed to make a specific provision for trial by jury in civil cases, a cry of protest went up across the new nation." *Id*. Heightened tension arose between the Federalists' belief in the need for the embodiment of basic rights in the Constitution and the Anti-Federalists' belief that ratification of these rights within the Constitution would undermine the autonomy of the people and states. A compromise was reached, wherein the Seventh Amendment set forth the following clause:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Id.

In *Jacob v. New York City*, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942), Justice Murphy wrote:

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Id. at 752-53, 62 S. Ct. 854. Despite this stark warning and a plethora of opinions rendered by various preeminent legal scholars that the right to civil jury trial should apply to the states, commonwealths, and incorporated territories, the Seventh Amendment has not been universally construed by the courts as an incorporated right under the Fourteenth Amendment. Thus, the inviolable right to a civil jury trial exists only in federal court.

Although the majority of state constitutions embody the right to a civil jury trial, in contemporary times, the civil jury trial appears to be a vanishing phenomenon. Civil "[j]uries decide less than one percent of the . . . cases that are filed in court." Renee Lettow Lerner and Suja A. Thomas, *The Seventh Amendment*, Common Interpretation, Matters of Debate, https: // constitutioncenter.org / inter-

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The Civil Jury Project held its first Jury Improvement Lunch in Seattle on October 12. Nearly 80 attorneys, judges, and jurors attended.

Judge Tom Marten of the U.S. District Court for the District of Kansas recently recorded a video with us explaining why juries are important. You can watch it here.

Judge Christopher Whitten of the Superior Court of Arizona took a moment to explain why he values America's jury system. You can watch the video on our website, here.

The Civil Jury Project also held its first Jury Improvement Lunch in Boston on October 25. A video is available on our website.

active-constitution / amendments /amendment-vii. Some commentators and historians have espoused the view that civil jury trials are doomed to extinction, as part of a self-perpetuating cycle "institutionalized in the practices and expectations of judges, administrators, lawyers, and parties." Marc Galanter and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, Pound Civil Justice Institute (2011). An examination of the reasons for the decline can result in successful prevention of extinction.

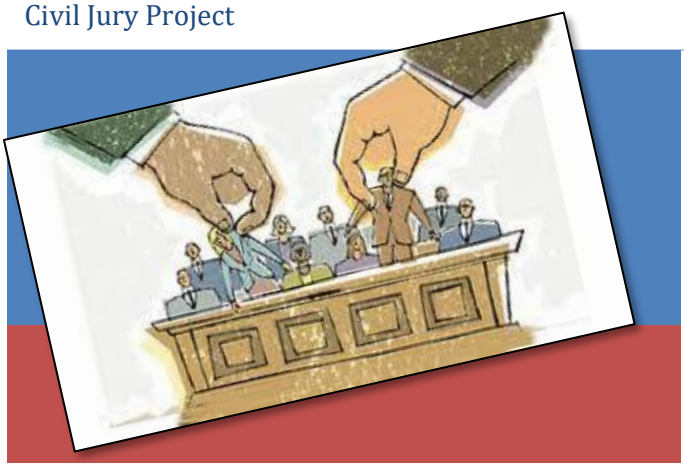
Civil jury trials necessary implicate significant risk for the participating parties. Jury trials incur great cost and can result in little or no reward. As the number of law school graduates continues to increase and legal services are increasingly computerized, outsourced, or performed by non-lawyers, stark competition may impact the ability of a firm to absorb the risk associated with civil jury trial. United States Department of Labor, Bureau of Labor Statistics. In contrast to a jury trial, a mediated or negotiated settlement agreement provides for a definitive resolution to a case. Thus, settlement is often a preferred form of risk management.

As fewer jury trials are conducted, less experienced practitioners are deprived of the opportunity to participate in or observe trials. Thus, the art of trying cases cannot be emulated by newer generation attorneys. The implementation of formalized mentoring programs could provide a viable remedy. Experienced attorneys might be paired with less experienced attorneys to provide a framework within which courtroom knowledge can be achieved.

Finally, many jurists have recognized "the oft-discussed theory that an increase in judicial case management and pre-trial adjudication of cases-most notably on summary judgment-is driving the decline of the civil jury trial." *Walker v. Yamaha Motor Co., Ltd. et al*, 2016 WL 7325518, *1 (Fla. M.D. 2016) (J. Roy B. Dalton, Jr.). The critical issue under this view is "whether . . . judges discourage the litigants' exercise of their constitutional right to trial by jury and trespass on the province of the jury by taking too active a role in judicial case management?" *Id*. at 2. Trial judges must balance the need to effectively manage dockets with the needs of the parties, commensurate with the nature and complexity of a given case. Perspectives regarding scheduling issues should remain flexible and discretion must be exercised in a case-specific manner.

The civil jury trial is a necessary mechanism for parties to test the evidence supporting a claim in those cases that cannot be resolved without the intervention of jurors. As a corollary effect, it provides jurors with a unique experience in civic involvement. Thus, the essential role of jurors should not be eliminated in the civil arena. The prevention of the decline in civil jury trials can be managed through opportunity and adaptability. It is incumbent upon the legal profession to preserve this essential right.

Judge Bronwyn C. Miller sits on the Eleventh Judicial Circuit Court of Florida. Judge Meenu Sasser sits on the Fifteenth Judicial Circuit Court of Florida. Both serve as Judicial Advisors to the CJP.



What can we do to make civil jury trials better?

The Civil Jury Project has researched a number of jury trial innovations. This month, we would like to focus on an experiment concerning one of the more controversial innovations: **Full Opening Statements Before the Entire Venire**.

If jury trials are going to once again be a preferred mode of dispute resolution, the legal community is going to need to consider innovative ways to make them cheaper, faster, and more accurate. The Civil Jury Project has written extensively on a number of these innovations. One of the more polarizing recommendations has been requiring attorneys to provide full opening statements to the entire venire before conducting voir dire.

The benefits of this innovation are twofold. First, it allows for a more comprehensive voir dire. If potential jurors understand what the attorneys are driving at with their questions, they are more capable of searching their individual experiences and biases to provide better, more complete answers. Counsel for both sides can then more cogently exercise peremptory and for-cause challenges, thus resulting in a more satisfactory decision-making body. Second, it creates a better experience for potential jurors. Studies show that those venire persons who are dismissed without any explanation feel as if their time has been wasted. By providing them a taste of what the dispute concerns, those dismissed may not harbor such negative emotions toward the judicial process.

But there are some concerns. A number of jurists have worried that allowing attorneys to give full opening statements inappropriately introduces argument into voir dire. Arguments given at such an early stage might pre-dispose the jury to reach certain conclusions. Furthermore, it breeds opportunity for wily citizens to try to opt-out or opt-in to the jury to shape the outcome. Some jurists have thus been reluctant to even experiment with this practice.

To find out if this practice was indeed so worrisome as to preclude additional study, the Civil Jury Project teamed up with Judge Thomas Marten of the U.S. District Court for the District of Kansas. On September 9, 2017, Judge Marten required the attorneys to deliver full opening statement to the entire venire in a civil case. He then administered a questionnaire to the dismissed jurors. After the trial, he administered a questionnaire to the lawyers as well. We wanted to test some of the assumptions of those who condone and condemn the practice.

The results were fascinating. First, the dismissed jurors generally did not think that the attorneys were primarily arguing their case, and felt that that information that was given to them helped them answer voir dire questions more thoroughly. The attorneys agreed, believing that earlier opening statements allowed voir dire to be more complete and effective. Some of the attorneys worried that it allowed jurors to self-select in or out, but most did not say whether this was a problem. One attorney noted that opportunities for self-selection were likely similar in the traditional context. Next, the attorneys did not think that the practice provided one side an inherent strategic advantage. With that said, one attorney repeatedly noted that she felt punished for having convinced jurors in opening statement and having them struck for cause. Finally, all of the attorneys seemed open to expanding the practice, with one openly recommending that courts do so.

Hon. Thomas Marten adminis-

It is important to highlight the many limitations with this study. First, it is very small, involving but a single trial in a single jurisdiction. Second, the questionnaire is not scientifically formulated and may have swayed responses. Nevertheless, the findings loosely conform to our expectations. Giving opening statements to the entire venire does not waste time or add unnecessary expense. It provides jurors with a more enjoyable experience, though it may sway some of them to expose or hide biases during voir dire. Overall, more study is necessary to discern whether this practice should be more widely adopted. However, the findings here suggest that testing to make this determination should not be considered problematic.

A full report of the survey's findings is on our website. If you are a judge and would like to administer the surveys, contact Richard Jolly at rlJolly@nyu.edu.

New Advisors Spotlight

Hon. Theresa Fricke
Magistrate Judge for the U.S. District for the Western District of Washington

Hon. James Robart
Senior Judge, U.S. District Court for the Western District of Washington

Hon. Benjamin Settle
U.S. District for the Western District of Washington

Revising FRCP 38: Toward a Jury-Trial Default Rule?

By Richard L. Jolly

The Federal Rules require litigants to affirmatively assert their 7th Amendment right to trial by jury. Failure to do so defaults the proceedings to trial by judge. This jury-waiver default emerged at the federal level in 1938 and has remained unaltered since. Recently, Justice Gorsuch and Judge Graber submitted a recommendation that Rule 38 be replaced with a jury-trial default, such that a litigant would receive a jury trial unless she affirmatively waived it.

The federal jury-waiver default emerged concomitantly with the merged courts of law and equity. But nothing about joint courts necessitates automatic waiver; instead, the initial advisory committee adopted the rule for two reasons. First, it offered efficient administration. It settled the mode of dispute resolution early, simplifying the process and preventing a party from asserting her jury right in such a way as to secure an advantage. Second, the jury-waiver default was adopted with the intent of limiting the overall number of jury trials. The initial advisory committee members were pro-judge, if not explicitly anti-jury. That a jury-waiver default would lead many parties to inadvertently waive jury trial was understood and intentional.

Neither of these rationales persists today, the judges say. They begin by asserting that the federal rules should be encouraging jury trials, not eradicating them, and that requiring all waiver to be deliberate could increase the number of jury trials. Furthermore, they suggest that a jury-trial default would better honor the Seventh Amendment's spirit. It would send a clear message that the jury is an integral part of the federal government. Regarding administrative efficiency, the judges contend that a jury-trial default would be more easily administered than a jury-waiver default. The current rule acts as a trap for the unwary, particularly when transferring a case from state to federal court. Ensuring their jury rights would bring greater certainty to those litigants.

Some of the judges' contentions are more persuasive than others, however. Accepting their position that more jury trials is a constitutional positive, it is unclear whether the proposed change would yield the desired result. Data on the number of jury trials inadvertently waived is unavailable, but consideration of the many other factors (such as informed settlements, managerial judging, and slackened summary judgment standards) contributing to the dearth of jury trials suggests that this rule change is unlikely to revive the enfeebled institution. The judges are correct, though, in highlighting the symbolic significance of a procedural rule reflecting the civil jury's importance as a constitutional actor. Likewise, they are likely correct in asserting that a jury-trial default will be no more difficult to administer.

Still, a jury-trial default might have some undesirable consequences. As Justice Gorsuch and Judge Graber warn, it could result in an increase in the number of pro-se litigants granted jury trials. But while pro-se litigants do impose systemic costs, many pro-se claims are disposed of through pretrial motions. Regardless, procedural rules should not be made traps for the unrepresented. Furthermore, the initial advisory committee's purported fears of strategic assertion of jury rights has little to do with the default rule, and more to do with when a mode of trial must be settled. And a near-century of experience has made determining which claims are entitled to a jury trial and which are not far more certain. Where debate persists, the issue can be resolved in pretrial conference just as easily in the shadow of a jury-trial default.

While the benefits of Justice Gorsuch and Judge Graber's proposal may be largely symbolic, this does not make their suggestion any less valuable. It is important for us—the bench, bar, and academy—to think creatively about how to best ensure a continued role for civil juries. Default rules matter to that end.

Richard L. Jolly serves as Research Fellow for the Civil Jury Project. A full-length Essay exploring this topic is forthcoming in the DePaul Law Review and is currently available on SSRN.

Status of Project: Fall 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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A Preview of Next Month . . .

Patty Kuehn, Trial Consultant Advisor to the CJP, provides a final overview of the ASTC/CJP survey of nearly 1,500 citizens regarding their views on jury service.

Patrice Truman, Trial Consultant Advisor to the CJP, reviews how post-trial interviews reveal insightful opinions about the trial process and can help to demystify deliberations.