

# Jury Matters

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



Oct. '17, Vol. 2, Issue 10

## Upcoming Events

- 10.12 Jury Improvement Lunch, Seattle, WA
- 10.18 Jury Improvement Lunch, San Francisco, CA
- 10.25 Jury Improvement Lunch, Boston, MA
- 10.22 Eastern District of Pennsylvania Annual Judicial Retreat; *Susman addresses judges re: CJP*, Sussex, NJ
- 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,

The Civil Jury Project has been hard at work over the past month. We have been connecting with our judicial, academic, and trial consultant advisors to devise plans on how to best expand our research and message. We also filed an [amicus brief](#) in the Supreme Court for *Oil States Energy Services v. Greene's Energy Group*, reviewing the Seventh Amendment's application beyond Article III courts. And through planning nearly a dozen Jury Improvement Lunches in the next two months, we have been dramatically expanding our network across the country. We have been very busy, indeed.

In this month's newsletter, three of our distinguished jury consultant advisors offer pieces on how to make jury trials more appealing by changing the public and bar's perception of them. Kacy Miller reminds us that America's jury is facing a publicity crisis, with only 50% of millennials viewing jury service as a sign of good citizenship. Charli Morris reviews the American Society of Trial Consultant/Civil Jury Project attorney [survey](#) results showing that uncertainty is a major contributing factor to the decline in jury trials, and argues that small group research proves that jury trials are often no less unpredictable than bench trials. Finally, Richard Gabriel reviews methods that can ensure informed decisions on cause and peremptory challenges, more likely ensuring a fair and impartial jury.

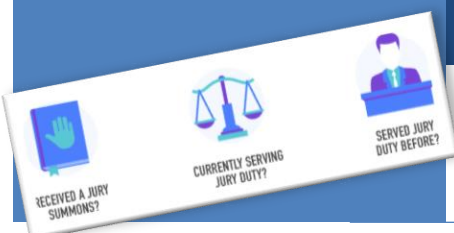
Thank you for your continued support of the Civil Jury Project. An updated version of our [Status of Project](#) is available on our website. Also, we welcome op-ed [submissions](#) for inclusion on our website and in upcoming newsletters. Expanding the dialogue on issues facing the civil jury is an integral part of our Project.

Sincerely,  
Stephen D. Susman

[www.WethePeopleWetheJury.com](http://www.WethePeopleWetheJury.com)

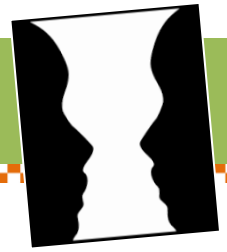
The Civil Jury Project's public outreach website continues to be a fantastic resource, offering a space for recently dismissed and summoned jurors to communicate and learn about jury service.

Find out more on pg. 5



# Is There a Perception Problem with the American Jury System?

By Kacy Miller



If you search for “jury duty” on social media, you’re likely to find more than a few posts of people whining about it. The litany goes like this: it’s boring, the pay is terrible, the room smells like feet and old cheese – it never ends. Still, while some folks aren’t too keen on the disruption to their daily routine, the majority of jurors are committed to fulfilling their duty to serve, and are interested in learning about the judicial process.

[The Pew Research Center](#) conducted a study in April and asked respondents how they felt about jury duty. A vast majority — 67% — chose the most civic-minded response: “**Serving on a jury is part of what it means to be a good citizen.**” Clearly, this bodes well for those of us who value the jury system and want to preserve it. But if the majority of Americans are supportive of jury duty, why do courts have such a difficult time getting folks to actually show up? Aside from the obvious reasons such as inaccurate address information, scheduling conflicts, and [ridiculously low juror pay](#), the study does suggest some concerning trends.

## Here are a few highlights:

- Only half of surveyed **Millennials** viewed jury service as a sign of good citizenship compared to 70% of all other age groups. The reality is almost one-third of Millennials are still living in their parents’ homes, and many are still finding their way in the world of work. Millennials are on target to be the largest generation in the prospective jury pool by 2020. So the group with the least propensity to view jury service as an important part of being a good citizen is poised to make up the biggest piece of our jury pool.
- There is also disparity by ethnicity: **71% of surveyed Caucasians had a positive perception**, while **61% of Hispanics and 58% of African Americans**. More than half, but certainly not what we jury advocates would like to see. Population projections suggest that the racial and ethnic makeup of the country is growing increasingly more diverse, and by 2045, less than 50% of Americans will be Caucasian. We’ve got some work to do on improving the public’s perception of jury service.
- **59% of Americans with a high school diploma (or less) viewed jury duty favorably**, as compared to **72% for those with post-secondary education**.

Couple these trends with the fact that the percentage of criminal and civil cases actually making it to a jury are around 4% and less than 1%, respectively, and one has to wonder: **Is the American jury on the path to extinction?** With plea bargains, summary judgment, required arbitrations, and the high cost of litigation, maybe.

## So what’s the solution?

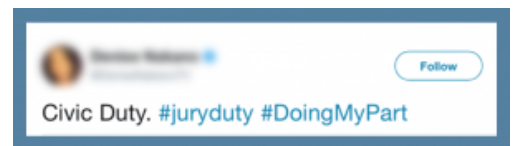
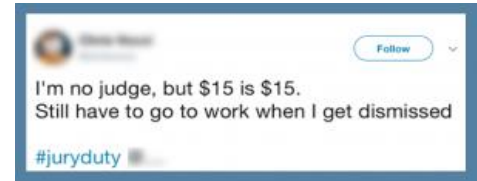
Educating the public about the importance of juries, the Constitutional and historical basis for juries, and improving the jury experience for everyone involved will certainly help. The Civil Jury Project has made excellent efforts in this area by connecting with the bench and bar for public outreach events around the country.

More organizations must also get involved. Indeed, it’s clear there’s a public perception problem related to jury service and trial by jury, so let’s do our part by promoting pro-jury sentiment, educating the public about the importance of juries, and — on some level — becoming part of the solution.

Trial by jury is a foundation of our justice system. It warrants preservation. It may not be easy, but few things worth having are.



*Kacy Miller is president of CourtroomLogic Consulting, a jury and trial consulting firm. She has collaborated with law firms, lawyers and companies in a variety of industries for more than 20 years, and has worked in the field of social sciences for more than three decades. Reach her at [kacy.miller@courtroomlogic.com](mailto:kacy.miller@courtroomlogic.com). A version of this article was originally published on the [Persuasion Matters](#) blog, published by [CourtroomLogic Consulting LLC](#).*



# We Hold These Jury Decision-Making Truths to be Self-Evident

By Charlotte A. Morris, M.A.



The Civil Jury Project's 2016 survey of more than 900 civil attorneys nationwide reveals that nearly one-third (30%) of those surveyed believe their cases never make it to a jury trial because of uncertainty about jury-decision-making and nearly half (46%) cite the uncertainty of their clients.

With all this uncertainty about jury decision making on liability, causation and damages – which combined is greater than any other single reason – it's no wonder clients settle their cases instead of going to trial. After all, uncertainty is a risk so risk management practically demands it. But jury decision-making is no more arbitrary or capricious than any other human decision making task. In fact, the social science community has studied it closely and there is a lot we know about how juries reach their verdicts.

In addition to an enormous body of empirical research (type "jury decision making" in any database of peer-reviewed academic journals if you are curious), trial consultants have been conducting small group research for decades to help our attorney-clients learn about jury decision making in their own cases, so that together we can go to trial with greater confidence.

## ***Small group research does not predict trial outcomes . . . absolute certainty is not the goal.***

After 25 years of conducting focus groups and mock trials on a wide variety of cases for plaintiffs and defendants – in venues across the country – I offer here a sample of just five basic truths that we hold to be self-evident about jury decision-making in civil trials:

1. None of the most common or ordinary legal words and phrases are common or ordinary to most jurors. We hear "beyond a preponderance of the evidence" and "approximate cause" in a lot of mock jury deliberations. We cannot take any of the teaching for granted when preparing for jury trial, particularly when answers to the verdict form depend greatly on juror comprehension of legal instructions that are often repetitive, sound contradictory, and are riddled with terms of art.
2. Apportionment is an easier decision-making task than simple yes or no questions on liability. We are all taught from the earliest ages to share. In states like North Carolina – where contributory negligence means a plaintiff cannot prevail if he or she has even 1% responsibility for causing or contributing to an injury – a defendant doesn't have to do much to encour-

age the jury to share, and plaintiffs have everything to lose if they cannot explain why sharing is the *wrong* thing to do in some circumstances.

3. The party that does the best job of meeting jurors' earliest expectations for evidence is more likely to be ahead going into deliberations. Those early expectations form in response to even the most basic contentions and defenses described by a judge at the outset of a trial. This is the most important reason to pair case-specific and strategic voir dire questions with our plan for the opening statement, which occur when jurors' attention is heightened.
4. Speaking of opening statements: we know jurors will fill the gaps in any story we tell. Not because they are consciously ignoring legal instructions to base their decision on only the evidence presented, but because we all use stories to make sense of the world. In every case, there will be information that is not admitted into evidence; small group research allows us to discover the impact that will have on decision-making, so that we build explanations into our best narrative for the case to close those gaps.
5. The more we talk specifically about damages and why (or why not) to award them, the more comfortable jurors are with making decisions about money. This is equally true for plaintiffs and defendants, and there are proven strategies on both sides for persuasive communication on a topic that is otherwise taboo talk among strangers.

Small group research does not predict trial outcomes so absolute certainty is not the goal. But there are predictable *patterns* in jury decision-making that we observe in our research. For every truth listed briefly above there are countless more, specific to each civil case type. Putting that knowledge and insight to work helps minimize uncertainty for attorneys and their clients, and it gives us greater confidence that the choice to go to trial (or not) is based on something other than our worst fears about jury decision-making.

<http://civiljuryproject.law.nyu.edu/wp-content/uploads/2017/01/ASTC-CJP-Attorney-Survey-Report-2016.pdf>

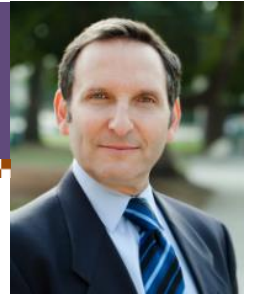
<sup>2</sup> Members of the ASTC conform to its Code of Professional Standards, Practice Guidelines and Ethical Principles for Small Group Research (SGR), which can be found at: <http://astcweb.org/astc-bylaws>.

*Charlotte A. (Charli) Morris, M.A. lives in Raleigh, NC and works as a trial consultant everywhere lawsuits are filed. Since 1993 she has applied her knowledge of jury decision-making to civil and criminal litigation; you can learn more about her practices by visiting [www.trial-prep.com](http://www.trial-prep.com).*



# Understanding Bias: Preserving Peremptory Challenges, Preventing their Discriminatory Use, and Providing Fairer and More Impartial Juries

By Richard Gabriel



There are a number of methods to ensure that the Court and counsel have a fuller picture of a prospective juror in order to make more informed decisions on cause and peremptory challenges as well as discriminatory intent. The following five recommendations can be remarkably efficient and even time saving as long as the

judge and litigants agree that the purpose of jury selection is to understand if and how a prospective juror's experiences, attitudes, and temperament may affect how they listen to and ultimately decide a case.

1. Before the trial starts, each side articulates all the issues in their case that they believe may give rise to a bias or negative impression of their case or client. In a pre-trial conference, the judge and attorneys discuss how to best explore these issues, whether through a supplemental jury questionnaire and/or voir dire. They then establish a procedure around the agreed goal of identifying potential biases that may affect a juror's impartiality.
2. Attorneys formulate open-ended questions about these identified biases or impressions. These include questions like, "How do you feel about...?" or "How do you think about...?" or "What's your opinion about...?" For example, which question would yield better information about whether a juror could be fair and impartial in a criminal case? "Will you agree to treat a police officer's testimony the same as any other witness?" or "How do you feel about law enforcement?" There is a world of difference in the quality of responses to these questions, and only one of these questions may truly reveal a potential bias. This is counterintuitive to attorney training as sometimes vague or ambiguous questions are the best voir dire. They invite the jurors to impose their interpretation of the question, giving the attorneys and the judge more of a juror's genuine feelings and beliefs. Please note that asking *whether* they have an opinion provides an excuse for jurors who are reluctant in a social setting not to speak, even if they have opinions on the subject matter.
3. Judges should then allow attorneys to ask follow-up questions. Given the intimidating environment of a courtroom, jurors are naturally reluctant to speak candidly about their opinions on difficult subjects. Their first responses don't always express their true feelings. By making follow-up questions like "What else?" or "Tell me more about that", a juror is prompted to reveal more meaningful attitudes he or she may have on specific case issues.
4. Attorneys need to be willing to ask hard questions. Cases involve tough issues and jurors have to make tough decisions. Jurors don't always have quick responses to questions about the death penalty or antitrust laws. While some jurors don't believe in the death penalty or in anticompetitive business conduct, many jurors do not know how they themselves feel about these complex and difficult issues. So, in an employment case, a question like, "How do you feel about race relations in this country?" may bring a considered pause as the juror reaches inside to look at how he or she really feels and to figure out the best (and most socially desirable) response. Leave room for their silence. The struggle, by itself, can tell the attorneys and judge a great deal about the juror.
5. Judges and attorneys should be open-minded and curious. In the legal profession, lawyers and judges are used to controlling and judging information. As soon as a juror utters an opinion that may be detrimental to either side, the attorneys or the Judge typically react negatively to the juror response. This can telegraph to the juror that they just gave an undesirable response, prompting them to backtrack or shut down. It is much more useful in jury selection to forego judging a juror's response and just follow their train of thought. In fact, if a juror discloses an impression, experience, opinion, belief, or bias, it is important to actually encourage them to disclose more about their feelings on the issue. This will tell you the full extent of their attitudes and whether their response is a fleeting impression or a full-blown bias. If the attorney (and the judge) is open minded, curious and non-judgmental, jurors will be more candid in their responses. This non-judgmental attitude will also help to create an environment conducive to disclosure. With good questioning, jurors should spend 80% of voir dire speaking, while the attorneys or judge should only spend 20%.

In jury selection, the overall goal should be to improve the quality of information that attorneys and judges use to exercise cause and peremptory challenges. Instead of implementing punitive rule changes or eliminating peremptory challenges altogether, it would be wiser to ensure this important procedure is used properly to secure a fair and impartial jury. Education should always precede elimination or punishment.

Richard Gabriel is President of Decision Analysis, a former President of the American Society of Trial Consultants and co-author of *Jury Selection: Strategy and Science* as well as author of *Acquittal: An Insider Reveals the Stories and Strategies Behind Today's Most Infamous Verdicts*. He served as a committee member on the ABA Achieving an Impartial Jury Advisory Group and currently serves as an advisor for the Civil Jury Project at NYU School of Law.

This article is based on one published earlier in The Jury Expert. <http://www.thejuryexpert.com/>

## New Advisors Spotlight



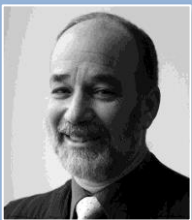
Hon. David Keenan  
King County, Washington Superior Court



Hon. Peter Lauriat  
Massachusetts Superior Court



Hon. Colleen McMahon  
U.S. District Court for the Southern District of New York



Hon. David Suntag  
Form. Superior Court of Windham County, Vermont



Hon. Paul Wilson  
Massachusetts Superior Court

## WethePeopleWetheJury: Providing a Space for Jurors

The Civil Jury Project's website [www.WethePeopleWetheJury.com](http://www.WethePeopleWetheJury.com) is a resource for the general public. It offers a host of information, traditional and interactive media, and opportunities for jurors to share testimonials about their jury service experiences. It is popular, too. The site enjoys roughly 500 visitors weekly, coming from all fifty states. We ask that you to check it out for yourself and encourage those in your network to do so as well.

You will find that the website is organized into three main parts aimed at the visitor's current stage of interaction with the jury system: (1) [Received a Jury Summons?](#); (2) [Currently Serving Jury Duty?](#); and (3) [Served Jury Duty Before?](#) Clicking on the first option directs the visitor to a page outlining the importance of jury service and encouraging them to report. The second option acts as a reminder to those currently serving that they should not be doing any outside research, and invites them to return once the judge dismisses them. The final option allows those who have already served to complete an online questionnaire and submit testimonials about their experience.

The core goals of the website are two. First, we would like to connect those people who have already served on a jury with those who may be reluctant to serve. A quick Google search for "jury duty" turns up hundreds of pages and videos of people offering advice for how to get out of serving. We hope to attract these people and introduce them to the notion that jury service is not only important but can also be fun. We do so by accomplishing our second goal, which is to provide a space for jurors to share stories about their jury service experiences. Overwhelming evidence suggests that those people who serve on a jury and issue a final verdict absolutely love the experience. Giving

them an outlet to express their perspectives, and connecting them with those who may be reluctant to serve, can help to change the online and social dialogue over the importance of jury service.

Roughly 100 people who have previously served on a jury have visited and completed the online questionnaire. Nearly two dozen of these visitors offered testimonials to be featured on the website. We attract visitors through Google search optimization and our social media pages, including [Twitter](#) and [Facebook](#).

In addition, we have begun printing business cards inviting previous jurors to visit the website. We mailed these cards to our judicial advisors, asking them to be distributed as jurors were dismissed. The back of the business cards look exactly like this:

### Make Your Voice Heard

By sitting on a jury, you have provided a tremendous service to your community and country. We here at the Civil Jury Project of the New York University School of Law sincerely thank you. Our Project is committed to studying and bettering the jury system.

We invite you to visit [www.WethePeopleWetheJury.com](http://www.WethePeopleWetheJury.com) to discuss and critique your recent experience. Your responses will not be shared, and will be used only to help us study and improve America's juries.

You can also contact us at [CivilJuryProject@law.nyu.edu](mailto:CivilJuryProject@law.nyu.edu) if you have any concerns. Again, we thank you for your service.

The cards have been very effective, with a near 30% increase in website traffic and number of questionnaires completed since we first issued them.

Considering these results, we would like to expand card distribution. If you are a judge and would be willing to distribute these cards to jurors you discharge, please reach out to [Kaitlin Villanueva, kv20@nyu.edu](mailto:Kaitlin.Villanueva, kv20@nyu.edu), who will make all the arrangements. It is a positive feedback loop: The more jurors who visit, the more impact we can make in this important area of our project.

# JURY MATTERS

## 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.*

### Contact Information

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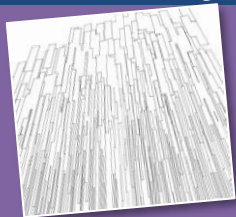


Richard Jolly  
Research Fellow



Kaitlin Villanueva  
Admin. Assistant

### A Preview of Next Month . . .



Judges Bronwyn C. Miller and Meenu Sasser discuss what they call the dematerialization of the civil jury trial in American jurisprudence.



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.



A review of one of the more controversial jury trial innovations recommended by the CJP: Allowing attorneys to give full opening statements before the entire venire.