Jury Matters

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

Sept. '17, Vol. 2, Issue 9

Upcoming Events

10. 5	Jury Improvement Lunch, Baltimore, MD
10.12	Jury Improvement Lunch, Seattle, WA
10.18	Jury Improvement Lunch, San Francisco, CA
10.22	Eastern District of Pennsylvania Annual Judicial Retreat; *Susman addresses judges re: CJP*, Sussex, NJ
10.24	Jury Improvement Lunch, Boston MA
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
11.16	Jury Improvement Lunch, Cleveland, OH
11.20	Jury Improvement Lunch, Oklahoma City, OK
11.21	Federal Bar Assoc. Lunch; *Death of the Jury Trial*, Oklahoma City, OK

Opening Statement

Dear Readers,

This September marks the third academic year of the Civil Jury Project, and we could not be more excited. While we have accomplished very much in the past two years, in many ways, we are just getting started.

We will start the fall off with a bang, planning a dozen Jury Improvement Lunches around the country. These events have proved very popular with both local attorneys and judges, but even more so with jurors. Citizens love to share stories of their jury service experiences and offer improvements. If legal professionals take the time to listen, together we can reform the jury system and make it a more preferred mode of dispute resolution. Judge Bennett makes a not dissimilar point in his op-ed featured herein. Treating jurors with respect empowers them to become goodwill ambassadors for the court. Furthermore, Judge Zouhary reminds in his op-ed, that jury duty is a founding principle of our democracy. Judge Marten offers his thoughts on innovations that can make the jury trial a more accurate mode of dispute resolution. We must all work together to preserve and improve the jury.

In addition, we are also excited to launch new research endeavors, including empirical studies, historical legal analyses, and surveys. As you know, jury trials at the federal level have declined remarkably overall, but there are distinctions between the districts. We would like to identify what factors are contributing to this disparity. Furthermore, we will begin to look more closely at the state courts. Although the decline in jury trials is still occurring at this level, it is not to same degree as at the federal level. We would like to better explain this disparity as well.

We thank you for your support of the Civil Jury Project. You can find an updated version of our Status of Project on our website. And, as always, we welcome op-ed submissions for inclusion on our website and in upcoming newsletters.

Sincerely,
Stephen D. Susman

Everyone in the Hot Tub?

Sydney barrister and US attorney, Adam E. Butt, has undertaken research on the efficiency gains realized through presenting evidence concurrently, also known as "Hot Tubbing." He offers us a taste of his upcoming article.

Find out more on pg. 5

Jury Duty: A Founding Principle of American Democracy

By Judge Jack Zouhary, U.S. District Judge, Northern District of Ohio

As federal judges, my colleagues and I are privileged to host naturalization ceremonies. We are always encouraged to see the eagerness of civically educated, new American citizens. The steps they take to become citizens serve as a reminder of the importance of civics education. For it is through education that we recognize the importance of participation in governance.

Our naturalization ceremonies provide an opportunity for the public to see and participate in civic life. Over the last several years, we have taken ceremonies out of the federal courthouse and held them at a variety of locations throughout northwest Ohio, including outdoors at the Civic Center Mall, Fifth Third Field, and Sauder Village. We have also visited numerous libraries, colleges, universities, high schools and elementary schools. At schools, students often have a part in the ceremony, reading *The New Colossus*, playing in the band, singing in the choir, and giving short speeches about their own families and immigration experiences. The ceremony itself is a lesson in geography and languages. It is our hope that by participating in these ceremonies, our students come to understand and appreciate their birthright as deeply as our new citizens.

While naturalization ceremonies are a great way to showcase democracy in action, they are not enough. The truth is that many Americans do not have a decent civics education. David Labaree, professor of education at Stanford University, explores this problem in his book *Someone has to Fail: The Zero-Sum Game of Public Schooling*. Labaree explains that in the last century and a half, the focus of public schools has shifted from promoting civic virtue to supporting social mobility. This shift, already detrimental to civics teaching, is amplified by funding cuts that force school districts to focus limited resources on frequently tested core subjects, like math and reading.

The results are well documented. In 2010, only 24% of high school seniors scored "proficient" on the National Assessment of Educational Progress (NAEP) civics test. 2014 was no better. Citing funding, the test was only administered to eighth graders that year -- only 23% of whom scored proficient. In 2015, the Newseum Institute's annual survey revealed that one-third of Americans could not identify any rights guaranteed by the First Amendment of the Constitution, and in a 2016 survey by the University of Pennsylvania Annenberg Public Policy Center, 74% of respondents could not name all three branches of government. These results reflect a failing grade.

As a judge, I encounter a direct consequence of this lack of understanding in the form of jury avoidance. When I read the flimsy excuses giv-

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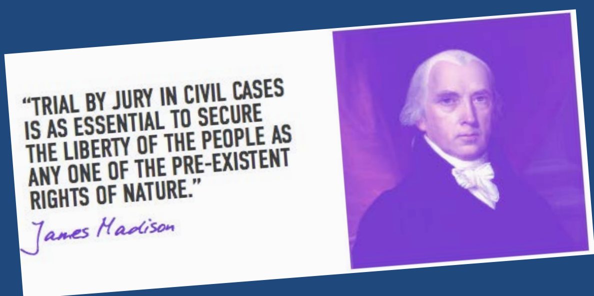


We are continuing our public outreach efforts on www.WethePeopleWetheJury.com, and have recently produced a new shareable infographic.

We have a dozen Jury Improvement Lunches planned for this fall. If you would like to host your own, you can find instructions for doing so here.

en by some notified of jury service, I cringe. That is why, at the beginning of a trial, I give a short history lesson and explain why jury trials are one of our great civic responsibilities. After years of widespread abuse by courts stacked with King George's cronies, our Founders established the right to a jury trial. The colonists wanted to ensure that members of their community would be responsible for safeguarding their liberty and rights. Indeed, juries were so important to our country's founding that King George's attempt to deprive the colonies of a trial by jury was listed as an abuse of power in the Declaration of Independence. The right to a jury trial was also codified in our Fifth, Sixth, and Seventh Amendments to the Constitution. As John Adams wrote, "representative government and trial by jury are the heart and lungs of liberty. Without them we have no fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hogs."

Juries are a topic of great interest when judges from foreign countries -- countries where there is no jury system, and where the courts are not an independent branch of government -- visit our federal courts. In *The Evolution of the American Jury*, Hans and Vidmar note that the United States holds 80% of all jury trials in the world. The power of the American jury is by design. As Thomas Jefferson wrote to Thomas Paine, "I consider the trial by jury as the only anchor ever yet imagined by man by which a government can be held to the principles of its constitution." This is especially true of the United States whose Constitution, the oldest written one, begins, "We the People."

While many jurors are not pleased when they receive a summons to report for jury duty, our exit questionnaires reveal that they, almost unanimously, find the experience a positive one. We ask jurors to take that positive experience and share it with their families, neighbors and friends. At federal court, our citizens leave with the kind of civic engagement our forefathers found to be so pivotal.

Understanding our government, and our place in ensuring its viability, is essential to the democracy of tomorrow. Jefferson also wisely observed that "whenever the people are well informed they can be trusted with their own government; that whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights." Education is where it starts. How can we expect the next generation to preserve and protect our institutions if they do not understand our American history?

Fortunately, a number of organizations have emerged to promote civics education. For example, in 2009, Justice Sandra Day O'Connor founded iCivics.org, which offers free resources and learning tools for students and teachers, including interactive tutorials. Justice O'Connor maintains that "[t]he practice of democracy is not passed down through the gene pool. It must be taught and learned anew by each generation of citizens." Following Justice O'Connor's example, I often offer to speak to junior high and high school students about the great American experiment in democracy. And my colleagues and I encourage and welcome students to visit the courthouse to experience how our justice system really works -- not the fiction of TV series or movies.

The Joe Foss Institute (joefossinstitute.org), another valuable resource, promotes civic education in schools and advocates requiring high school students to pass the U.S. citizenship test as a requirement for graduation. The website lists 100 questions every American should be able to answer. This gives parents an opportunity to learn with their children about the meaning and value of citizenship and democracy.

The United States is the longest running experiment in self-government. We have survived tough times, including a civil war, with institutions designed to share power and protect individual rights. As John Adams wrote to his wife, Abigail, "we cannot insure success [in the Revolutionary War], but we can deserve it." Let us renew our efforts to promote civics education and encourage public service, sharing the story behind our common Constitution which bonds all Americans, past, present, and future. And let's deserve it!

Empowering Jurors as Good Will Ambassadors

By Judge Mark Bennett, Sr. U.S. District Judge, Northern District of Iowa

Since my first day as a federal district judge twenty-three years ago, one of my most important goals in jury trials has been to empower jurors and to court (pardon the pun) them as good will ambassadors for our court when they go back to their local communities. I want them to sing the praises of the civil and criminal justice systems based on their unexpectedly positive experiences in the courtrooms where I am so privileged to ply my craft. I will not repeat everything I wrote in a law review last year, *Reinvigorating and Enhancing Jury Trial Through an Overdue Juror Bill of Rights: A Federal Trial Judge's View*, 48 Ariz. St. L.J. 481 (2016). But here are just a few highlights and a few new ideas.

It is important for trial judges to impart to each potential juror how importantly we value their contribution as constitutional actors in our justice system. As I remind each new law clerk: "Remember, we volunteered for our jobs, they did not." I greet every potential juror when they walk into the courtroom with a handshake and individual welcoming comment. Of course, I don't have my robe on when I do this, so they think I am the Walmart greeter for the federal courts. I then walk down a hallway, quickly put on my robe, and walk on the bench to formally greet the prospective jurors as their trial judge. I immediately put them at ease by asking how many were so excited to serve when they got their summons? This line always draws smiles. I then introduce everyone in the courtroom and explain their functions – because coming to the majestic and historical federal courtroom I use can be intimidating for first timers.

I always rise, and so does everyone in the courtroom, when the jurors enter or leave. I was watching a jury trial a few years back in federal court in D.C. to critique a lawyer friend of mine. I noticed that the judge, lawyers, and litigants did not rise when the jurors entered or left the courtroom. It was if the jurors were some necessary but rather inconvenient appendage, not participants with an elevated constitutional status. If we expect jurors to respect our system of justice, judges and lawyers need to show unyielding respect for them. That's one of the reasons why, years ago, I installed cup-holders in the jury box, and we provide free bottled water for the jurors. It's also why I went to great lengths, when we remodeled the courtroom, to ensure extremely comfortable seating for the jurors both in the jury box and in the jury deliberation room. I personally check their restrooms before every trial to ensure our cleaning staff has them spotless. Poorly cleaned restrooms demonstrate a lack of consideration for jurors.

Without discussing them, here is a list of other things I do to enhance the jurors' experience:

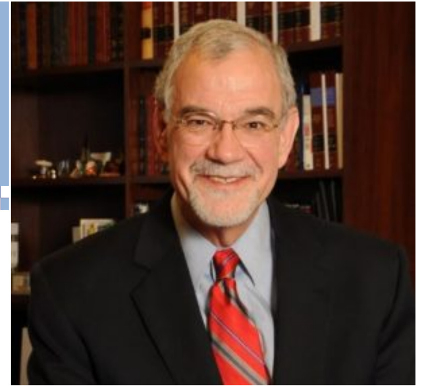
1. Holding no side bars—ever (well almost never, unless I ask for one which is rare – I have had fewer than 5 in the past decade)!
2. Always starting and ending on time
3. Imposing time limits in all civil cases so I can tell the jurors in selection exactly when the case will be submitted (if not earlier because, in my experience, no lawyers have used all their time)—so they can plan their lives.
4. Eliminating redundant, cumulative, and excessive witnesses and exhibits during the final pre-trial conference.
5. Using a jury- (and lawyer-) friendly trial schedule of 8:30-2:30.
6. Giving frequent stretch breaks every 40-45 minutes.
7. Giving each juror a complete set of final instructions BEFORE opening statements with a table of contents.
8. Encouraging jurors to take notes on either their personal set of instructions or a notebook with a provided pen.
9. Allowing jurors to ask questions in civil cases, which dramatically increases their attention to the evidence. Their questions are almost always as good as or better than the lawyers'!
10. Telling jurors in jury selection that, after their verdict, I will "debrief" them and answer any questions I can. I also tell them that I will also hand then a letter expressing my appreciation for their service and an evaluation form in which they can evaluate the entire jury trial process, me as their trial judge, and all the lawyers in the case, as well as the jury instructions, courtroom technology, quality of snacks, etc. They are to take this home and return it, if they like, in a stamped self-addressed envelope.

Before they leave the jury deliberation room, I shake their hands again and ask, if they had a good experience, would they please tell 5 friends about how positive their experience has been. And I almost forgot, in trials of more than 3 days, I personally bake cookies or brownies for jurors. Food bribes work well!

One final thought: My colleagues on my court are discussing giving each juror a personalized and framed Certificate of Service and Appreciation signed by their trial judge.

Some Additional Thoughts on Juror Discussions During Trial and Juror Questions

By Judge Thomas Marten, Sr. U.S. District Judge, District of Kansas



Those lawyers who bring significant civil trial experience to the bench are frequently surprised by the difference in perspective the change in position makes. As lawyers, our goal is to get the best possible result for our clients. It means there are times we will be pushing the rules to the breaking point, falling back always on providing vigorous representation for a client. It often means trying to persuade a judge to adopt a position the judge may not feel comfortable taking, but being hopeful nonetheless.

On the other hand, as judges, the result of a case is of little consequence. We are much more interested in the process. If lawyers on all sides try a good case, the appropriate result obtains most of the time. There will be the occasional outlier, but given what information juries get, I have never disagreed with a jury. A close look will reveal a failure in the process. One party or another did not have the evidence appropriately organized for persuasion, or the jury selection process was ineffective, the arguments did not hold together, the judge fell down on his or her job, be it too restrictive or too loose, or bad instructions; somewhere or another something broke down.

Our focus should be on how to provide a jury with the most accurate and understandable set of facts possible, and to allow the jury to seek clarification when the presentations are not. Nothing else even comes close when it comes to trials.

Any judge who has presided over a bench trial knows there is an ebb and flow to the judge's thinking during the trial. The one great advantage a judge has is the ability to say to the witness, "Wait a minute – how do you reconcile X with Y?" Surely jurors have the same experience, which is why juror questions make a great deal of sense. Yet there are times when questions are not immediately apparent, arising during jury deliberations. And when the court receives the question and discusses it with counsel, the only option typically available is to send a message back to the jury that it must use its collective memory to resolve the matter itself, however complex it may be.

What if the jury could discuss the evidence at any time during the trial when all jurors were together, as allowed in Arizona? And what if the jury could provide questions that arose from those discussions to the court, to share with counsel? The questions would signal to counsel areas of jury concern, perhaps of confusion, and allow the parties to make immediate adjustments to their trial strategy and presentations to address those matters.

The one great advantage a judge has is the ability to say to the witness, "Wait a minute—how do you reconcile X with Y?"

In one complex bench trial many years ago, about four days into the trial, I began meeting with counsel at the end of the day to give them an overview as to how I saw the case at that moment. I made it clear to the lawyers that I was well aware that one witness could turn the case in an entirely different direction, while suggesting that it would be helpful to hear the best evidence plaintiff had in support of its claim for punitive damages. It put on that evidence the next day, and I told them at the end of the following day that it was not sufficient to support a claim for punitive damages. The course of the trial changed and resulted in an appropriate resolution.

If we are concerned about the disappearing civil jury trial, as much jury involvement as possible is one of the aspects of the trial we should be nurturing. Allowing jurors to not only ask questions before a witness is excused from the stand, but allowing jurors to submit questions which arise during their discussions over the course of the trial bodes well for more meaningful trial presentations and for well-informed, better-reasoned verdicts.

Concurrent Expert Evidence in the United States – Is there a role for "Hot Tubbing"?

Adam E. Butt is a Sydney barrister and US attorney.

"Hot tubbing" is the colloquial name for a process of adducing and testing expert evidence which is more formally known as concurrent expert evidence. The method has been championed in Australia and is now used in other common law jurisdictions and in international arbitrations.

Australia's version often involves two interrelated processes. First, there is a pre-trial joint expert conferencing phase, during which the parties' experts meet to clarify the areas of agreement and/or disagreement between them, in order to produce a joint report. The second phase, if any, is the giving of concurrent evidence at trial in the "hot tub." This part is moderated by the judge (usually the fact-finder), who can ask questions of the experts in order to enhance the fact-finding process for him or herself. The experts may also interact if they see a need to correct each other's view, and cross-examination by counsel can still occur.

This model generally helps to yield benefits across a broad range of subject areas in Australia, through enhancing settlement prospects or improving the efficiency, quality and/or collegiality of the expert evidence process. In certain Australian jurisdictions, concurrent evidence is the default rule. In the Federal Court it is a case management technique which is used in "appropriate circumstances."

In so far as US judges are using the method, they tend to focus on the trial phase, but the pre-trial part can also produce significant benefits. In Australia's largest ever class action, *Matthews v SPI Electricity Pty Ltd & Ors*, which concerned bushfires in Victoria, one of the joint expert reports enabled the summarising of some 2000 pages of expert reports into about 40 or 50 pages. This sort of efficiency is invaluable. Similarly, in the native title case *Graham on behalf of the Ngadju People v Western Australia,* the pre-trial expert conclave enabled the reaching of agreement on 21 out of 23 issues in dispute, which meant that cross-examination at the hearing was conducted in just 2 days during a 15 day hearing. By contrast, hearings in similar cases before the concurrent evidence method have taken over 100 hearing days.

This model generally helps yield benefits across a broad range of subject areas.

In the United States, judges have their own methods for enhancing the efficiency and accuracy of the evidence taking process. This includes requiring experts to present evidence "back to back," holding "science days" in MDL litigation and appointing "expert panels" in pretrial hearings. But now United States judges are using hot tubbing too. Judge Woodlock (D. Mass) started using it after learning about the method from Australia's Justice Heerey. Judge Zouhary (N.D. Ohio) started using it independently, only to later find out about the Australian method. Judge Weinstein (E.D. NY) started using hot tubbing after we first discussed the subject approximately 18 months ago.

Concurrent evidence has been used in toxics cases (e.g. *Daubert* hearing), a claims construction hearing, a class certification hearing and other civil matters. In general the method has not been seen as problematic in non-jury contexts; conversely, the judges and academics consulted or considered have endorsed the approach.

The jury setting, however, has elicited some different reactions. Judge Jones (D. Oregon) would avoid using hot tubbing in jury trials, believing it to be inappropriate for judges to inquire into or comment on expert evidence in front of jurors. Alternatively, Judges Hellerstein (S.D. NY), Weinstein, Woodock and Zouhary do not consider that the jury is off limits but they have their certain qualifications. For example, Judge Woodock would need to be comfortable with who the experts were in order to use hot tubbing before a jury. Judge Zouhary would support using hot tubbing in jury cases where the expert evidence was complicated (it helps to comprehend such evidence), but would avoid using it in simpler matters. Judge Weinstein has actually now used hot tubbing in one jury trial, in a birthing case. Nevertheless, he states that he would intervene less in such settings, because his intervention may be demeaning to attorneys, the jury may give greater reliance to questions put forward by the judge, and the concurrent presentation of evidence (*cf.* sequential presentation) may create complications in relation to burdens of proof and allowing attorneys to present their case.

Ultimately, hot tubbing appears to have a useful role to play in United States cases for the same reasons that the method is used in Australia and has gained traction elsewhere. It will be interesting to see the extent to which the method finds a place in the American context.

A version of this piece was featured on Law360, and full-length article is forthcoming in 40 Houston J. Int'l L. 1 (2017)

New Advisors Spotlight

Judge Beatrice Butchko
Eleventh Judicial Circuit Court of Florida

Judge Jeffrey Levenson
Seventeenth Judicial Circuit Court of Florida

Judge Bronwyn Miller
Eleventh Judicial Circuit Court of Florida

Kacy Miller
Courtroom Logic Consulting, LLC
Dallas, Texas

Of What Value is a Jury Today?

A review of the CJP/Baylor Law 8-K Study

The Civil Jury Project, in conjunction with Professors Elizabeth Fraley and Jim Wren of Baylor Law School, recently completed a study of Form 8-K filings to determine when parties contract for the use of juries. This study is an update of the 2002 study by Theodore Eisenberg and Geoffrey Miller. Our goal in updating it was to see if there have been any changes over the past decade and a half, and to try to better understand why large companies may choose to submit their disputes to juries, rather than arbiters or judges. The results are fascinating.

The number of contracts containing either a jury-waiver or arbitration clause has increased since 2002, though the numbers are still lower than we anticipated. Of those contracts sampled in the current study, about 30% included an explicit jury-waiver, as compared to about 20% in 2002; and about 13% of the sampled contracts included arbitration agreements, as compared to about 9% in the former study. Note, this means that about 57% of the agreements left disposition in the hands of juries.

Digging into those base figures reveals more. For instance, just as with the previous study, there remains a strong correlation between contract standardization and the presence of these clauses. One hypothesis for this result is that parties are more likely to value or seek recourse to a jury determination when problems of contract interpretation are less likely to be mechanical in nature, or at least, when the parties perceive a potential benefit from a juror's perspective on the anticipated dispute. Another is that once a drafter includes a jury waiver in a standardized contract form, inertia keeps it from being removed in future contracts.

Another takeaway is that the typology of the contract is one of the most determinative indicators of its propensity to include or exclude the relevant clauses. Contracts for securities purchases, for instance, were most likely to contain an arbitration (5.59%) or jury-waiver clause (48.8%). Mergers contracts, by comparison, contained arbitration agreements in only 8.6% jury-waiver agreements in 20%. These types of disparities are expected, as the type of contract shapes the contours of the legal relationship between the parties, and thus their preferred mode of resolution.

One of the biggest changes from the earlier study is the rate at which employment contracts contained one of the relevant clauses. In 2002, only about 5% of the studied employment contracts contained one of the clauses, compared to roughly 13% in the current study. This may be an area in which we see traditional arguments against juries having force. Drafters may view juries as more likely than not to identify with and support the employee over the employer.

While these figures allow us to draw a number of insights, it is important to remember the limitations. The majority of contracts entered into by corporations are not filed with the SEC. That includes those with customers and consumers when an arbitration clause is motivated more by the desire to avoid a class action than resolution by a jury. Nevertheless, it is remarkable that some of the most sophisticated legal actors might, under certain circumstances, recognize the value of juries today.

A full Article reporting on the study's findings is currently being completed and will be published in the coming months.

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 . . .

Kacy Miller of Courtroom Logic Consulting addresses the public perception problem that continues to plague America's jury system.

Charli Morris of the American Society of Trial Consultants offers a review of our Attorney Survey and what it can teach us about addressing trial uncertainty.

Richard Jolly offers a review of Justice Gorsuch and Judge Graber's proposal to shift the Federal Rules of Civil Procedure to a jury-default.