



## STATUS OF PROJECTS

As of 5/9/17

- a. Enlisting the help of additional Judicial Advisors. *Since the Project got underway, we have added 200 Judicial Advisors. We have done this through meeting with Judges, state and federal, in New York, DC, Chicago, New Brunswick, Los Angeles, San Francisco, New Haven, Boston, Philadelphia, Miami, Houston, Dallas, Phoenix, Austin, Denver, Seattle, Madison, Baltimore and Cleveland. We are trying to schedule meetings with judges in other areas.*
- b. Determining which courts are spending the most time trying jury cases so we can identify anything they do that could have the same effect elsewhere.
  - (1) Obtaining statistics, by judge, on days jurors are paid to serve in civil cases and the number of trials they are paid to serve in. *We understand that Senator Whitehouse is requesting this information for federal courts. We will be requesting it from each state court system.*

- (2) What should we make of the fact that bench trials are vanishing faster rate than jury trials?
- (3) What is the pattern in state courts?
- (4) What can we learn from the variability among forums and case types?

c. Empirical Research

- (1) Encourage videotaping of jury trials where suggested innovations are used. *Some state courts allow cameras and we are teaming with Courtroom View Network to videotape trials where judges use many of the suggested innovations. This way other judges and lawyers can learn about whether these practices make sense and how to use them.*
- (2) Replicate Lemley 2000-2011 study of 624 patent trials, 75% of which were jury trials, to determine whether time limits change either judge/jury agreement or favor plaintiffs or defendants in these truly complex civil cases *Prof. Lemley has completed the update and described the results at our Jury Trials of Patent Cases program on 9/30*
- (3) Replicate Eisenberg/Miller study of B2B contracts filed attached to 8-Ks filed with SEC during first 6 months of 2002, to determine whether usage of jury waiver (20%) or arbitration (9%) clauses has increased since 2002 and to identify companies who may still believe that a jury trial is the better way to resolve disputes.

Then ask the GC's whether that belief in fact explains the absence of a trial waiver clause. *Professors Wren and Fraley at Baylor Law School have updated this study by analyzing contracts filed during the first 6 months of 2016. They have determined that usage of jury waiver clauses has increased to 30% and arbitration clauses, to 13%. They are providing us the names of companies that have elected, in 57% of the contracts, not to avoid jury trials, so that we can talk to their GC's and find out why.*

- (4) Determine the extent to which trial judges are currently using or willing to use various innovations to improve jury trials, including time limited trials, substantive preliminary instructions, juror note taking, juror questions, interim discussion of evidence by jury, interim argument by counsel, back-to-back expert testimony. *We have asked our Judicial Advisors to complete a brief questionnaire to determine which of these innovations they have tried or use regularly. See [Exhibit 1](#). We have written an article on the innovations and where they are used. See [Exhibit 2](#).*
- (5) Replicate Kalven & Ziesel study of 4000 civil jury trials during the 50s, published in 1966, on judge/jury agreement and whether it is impacted by any of the suggested innovations. *We have developed a protocol for determining judge/jury agreement that we will ask our Judicial Advisors*

*to follow. It includes asking the judge to fill out a verdict form as a 13<sup>th</sup> juror when submitting the case to the jury and a follow-up questionnaire to be completed by the judge and jury post-verdict.*

- (6) Ask judges to share with us any questionnaires they have administered to or comments they have received from jurors whom they have discharged. *In talking to former jurors about how they would improve trials, they have suggested that they could have easily provided this had they been asked during or right after the trial. So we have prepared a questionnaire, see [Exhibit 3](#), that judges can give jurors when the trial begins and collect from them anonymously when the trial is over and provide to us.*
- (7) Why after nearly a century of continuous decline is the percent of filed disputes disposed of by bench and juries remained constant over the last decade. *We are beginning to look at district level data to identify factors that might be hidden by the national statistics.*
- (8) Statistics show that criminal jury service influences rates of civil engagement. Does civil jury service have a similar effect? *Traci Feller, John Gastil, and Valerie Hans have a great write-up on this issue and was featured in our May Newsletter.*
- (9) Survey parties and attorneys as they complete trials and arbitrations as to whether they think

they were treated fairly, whether in retrospect they would have preferred another form of dispute resolution, and if so, why?

(10) Is there a relationship between time to disposition and the number of jury trials? *Thus far, our empirical research shows that the courts that try the most case usually have the shortest times to disposition.*

(11) Survey trial attorneys as to reasons for decline in jury trial? *With the help of our Jury Consultant Advisors, we have surveyed over 1000 trial lawyers from many of the major trial attorney groups. The results are posted on our website.*

(12) Survey mock jurors as to whether they believe trials are vanishing. *The ASTC has prepared a survey to be administered to the mock jurors used by their members. The survey is in the process of being administered and should be completed at end of April 2017.*

d. Encourage public discussion and debates about the pros and cons of private vs public dispute resolution and judge vs jury fact-finding. *On February 8<sup>th</sup>, 2016 Justice Sotomayor, the only member of the Court to have tried a jury case as a lawyer and presided over one as a trial judge, appeared before a full auditorium of 800 guests, to discuss numerous issues about civil jury trials. The program was sponsored by the CJP and can be seen at <http://bit.ly/200Ptth>. On September 30<sup>th</sup>, we co-sponsored a program at NYU*

*on the Jury Trial of Patent Cases. Over 110 attendees participated in the program. It can be seen at <http://civiljuryproject.law.nyu.edu/events/fall-conference-2016/>. On November 2, we presented a discussion of Professor Suja Thomas' new book "The Missing American Jury." That too is on our website.*

- e. Establish WeThePeopleWeTheJury website where former jurors can anonymously discuss their experiences. *The website is complete and will be live the first full week of February. The next steps are (1) to reach out to former jurors re social media, including our #jurymatters tweets, and (2) to ask judges to inform the jurors whom they discharge about the existence of the site.*
- f. Organize quarterly Jury Improvement lunches to serve as CLE programs for young trial lawyers. Jurors discharged within last month are invited. *We have now held seven such lunches in Houston, Dallas, and Corpus Christi. Additional lunches are being planned for Boston, Philadelphia, Chicago, San Francisco, and Denver.*
- g. We are launching an outreach through social media to former jurors to determine how jury trials, including jury selection, can be improved. *We have been working with social media experts to overhaul our social media presence. Our new Twitter, Facebook, and Instagrams have more than tripled in traffic since the new year.*

- h. Organize CLE program for new Judges with Federal Judicial Center. *The Executive Director has met with Judge Fogel to review our projects and how we can work with the Center on the substantive content of a program.*
- i. Encourage Judicial Conferences and Bench/Bar Conferences to include on their programs subjects related to jury trials.
- j. Encourage courts to post on their websites pro bono opportunities to try pro se cases that are “trial ready.”
- k. Initiate a blog on our CJP website where Advisors and trial lawyers can discuss jury trials. *We recently launched a commentary section on the CJP website. As advisors begin to contribute content, we will collate their posts into subject matter. We have also been including these in our monthly newsletter.*
- l. Maintain a national calendar of significant civil trials nearing verdict and interview jurors for testimonials. *We are asking our Judicial Advisors to set up a point person in each courthouse to notify us when a significant civil case is about to go to the jury.*
- m. Produce a series of Jury Assembly Room-like videos that is national in scope for our website. *We have reviewed many videos used around the country and tried to identify what makes for something jurors might actually enjoy and engage with. You can find all of our juror testimonial videos at <https://www.youtube.com/watch?v=L4288AsZeuM>*

- n. Can prospective jurors be given the choice of reporting to jury duty as usual for in person *voir dire* or completing a questionnaire over the internet and allowing the lawyers to conduct web research on them and exercise their pre-emptory and cause challenges without seeing or hearing the jurors? *We have a student paper on how this might work. We are revising it and will provide it to our Judicial Advisors for their reaction.*
- o. Prepare pattern jury instruction on how to conduct deliberations and rewrite all pattern instructions in plain English. *We are developing a program to get Judge Posner, one of our Judicial Advisors, involved in this project.*
- p. Why have courts been so slow to adopt innovations suggested by the ABA and many state court task forces more than ten years ago? *Some judges on the New York state trial bench have expressed an interest in exploring this issue with our help*
- q. What tools can judges use to increase the number of trials beyond improving the trial experience itself?
  - (1) Publicize pro se cases that are trial ready and seek lawyers to try them on pro bono basis
  - (2) Encourage trial by magistrate judges
  - (3) Provide incentives to use summary or expedited jury trials



- (4) Provide incentives to have young lawyers try cases
  - (5) Initiate Second Chair Mentor Program as per the attached. See [Exhibit 5](#).
  - (6) Encourage judges to require the submission of a 2-page letter before filing a dispositive motion. *The Advisory Committee recommends that judges require such letter as a condition to filing a discovery motion. A few judges around the country have extended the practice to dispositive motions. Some who have tried it, have abandoned it. Does it really reduce the costs of getting to trial?*
- r. Encourage employers to compensate employees for time spent serving on juries and establish a Juror Hardship Fund to assist jurors who need financial help and provide mechanism for parties to supplement juror compensation.
  - s. Distribute monthly newsletter to our Advisors and those who have attended any of our programs. *As of February 1, 2017 we will have sent out three newsletters to our mailing list of advisors. You can find these on our website as well.*

Exhibit 1

CONFIDENTIAL QUESTIONNAIRE  
ON USE OF JURY INNOVATIONS

In civil jury trials, as to each of the following proposed innovations, please check which applies:

1. Pretrial allocation of fixed number of hours to each side.

Never Used\_\_\_ Have Used\_\_\_ Regularly Use\_\_\_

2. Preliminary substantive jury instructions on elements of claims and defenses at start of the case.

Never Used\_\_\_ Have Used\_\_\_ Regularly Use\_\_\_

3. Allowing counsel to make opening statement to entire venire before voir dire.

Never Used\_\_\_ Have Used\_\_\_ Regularly Use\_\_\_

4. Allowing jurors to submit written questions to witnesses.

Never Used\_\_\_ Have Used\_\_\_ Regularly Use\_\_\_

5. Juror note taking.

Never Used\_\_\_ Have Used\_\_\_ Regularly Use\_\_\_

6. Juror discussion of evidence when together, prior to final deliberations.

Never Used\_\_\_\_\_ Have Used\_\_\_\_\_ Regularly Use\_\_\_\_\_

- 7. Interim statements by counsel as to what a witness will prove or has proved or failed to prove.

Never Used\_\_\_\_\_ Have Used\_\_\_\_\_ Regularly Use\_\_\_\_\_

- 8. Providing each juror with a copy of the instructions and verdict form.

Never Used\_\_\_\_\_ Have Used\_\_\_\_\_ Regularly Use\_\_\_\_\_

- 9. Instructing the jury before counsel argues.

Never Used\_\_\_\_\_ Have Used\_\_\_\_\_ Regularly Use\_\_\_\_\_

- 10. Back-to-back testimony by opposing experts.

Never Used\_\_\_\_\_ Have Used\_\_\_\_\_ Regularly Use\_\_\_\_\_

- 11. Judicial interviewing of jurors after they are discharged.

Never Used\_\_\_\_\_ Have Used\_\_\_\_\_ Regularly Use\_\_\_\_\_

_____	_____	_____
Name	Court	Date

Please scan and email your response to the CJP’s Executive Director, Prof. Steve Susman at [ssusman@susmangodfrey.com](mailto:ssusman@susmangodfrey.com)

## Responses: Judicial Jury Innovations Questionnaire

as of 5/17/2016 12:44pm

		Never Used	Have Used	Regularly Use	Response Tally:
1	Pretrial allocation of fixed number of hours to each side.	14	10	6	29
2	Preliminary jury instructions at start of the case.	6	11	14	31
3	Allowing counsel to make opening statement to entire venire before voir dire.	27	4		31
4	Written jury questions to witnesses.	11	6	13	30
5	Juror note-taking.			31	31
6	Juror discussion of evidence when together, prior to final deliberations.	28	1	2	31
7	Interim statements by counsel as to what a witness will prove or has proved or failed to prove.	24	6	1	31
8*	Providing jury with one written copy of the instructions [and verdict forms].	8	4	12	24
9	Providing each jury with a copy of the instructions and verdict form.	10	3	18	31
10	Instructing the jury before counsel argues.	7	3	18	28
11*	Back-to-back testimony by opposing experts.	22	8	1	31
12	Talking to jurors after they are discharged to get their feedback on their experience.	3	4	24	31

Confidential Note: Judge K.V. Desmond, Jr. did not answer for innovation 1, 9 or 12.  
 Note: Non-advisor Judge Judith Fabricant submitted a questionnaire.  
 Note: Judge Douglas Gerlach has offered innovation 3 before, but no lawyer has accepted.  
 Note: Judge Janet C. Hall did not answer for innovation 4 or 8. She found the last one redundant or confusing with the proceeding innovation.  
 Note: Judge Shira Scheindlin has used innovation 4, 6 and 11 "once or twice." She edited innovation 2 to become "Substantive" preliminary jury instructions. She edited innovation 8 to read "Providing each juror with a written copy of the instructions."

Note: \*8. Question deleted from some Questionnaires  
 Timestamped 4/11/2016; another form combined questions 8 and 9, having "and verdict form" added after "instructions."

\*11. Question deleted from returned 4/26/16 Questionnaire

Last question: On returned 4/26/2016 Questionnaire: "Judicial interviewing of jurors after they are discharged."

**Exhibit 2**

**JUROR EVALUATION FORM**

*Please refrain from providing identifying details about you, your fellow jurors, or specifics about the deliberations that might undermine the verdict.*

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**JUROR SERVICE**

Many citizens are unfamiliar with the experience of serving on a jury. Having now experienced the process, would you be willing to share a lesson, a feeling, a story, or an attitude about jury service that might serve to educate or inspire others?

If yes, please do so here: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Have your feelings about the court, the legal system, or the jury system changed after having now served as a juror?     yes     no

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The “voice” of the juror is generally silent throughout the legal process. What would you like to say to the public or the court about the experience or meaning of being a juror?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Would you be willing to share your thoughts about jury service with researchers from the Civil Jury Project at NYU School of Law?

If yes, please provide your name and how they can contact you:

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Please answer the following specific questions:

1. In the trial in which you served as a juror, did you think that the questioning of witnesses was sufficiently thorough in getting at the important issues? (circle one)  
Definitely yes 1 2 3 4 5 6 7 Definitely no
2. Do you agree or disagree that all the relevant evidence was brought out in the trial?  
Completely agree 1 2 3 4 5 6 7 Completely disagree
3. Overall, how easy or difficult was the evidence to understand in the trial?  
Very easy 1 2 3 4 5 6 7 Very difficult
4. How complex was this case?  
Not complex at all 1 2 3 4 5 6 7 Very complex
5. Did any expert witnesses testify in the trial? (check one)  
 Yes  No  Don't know
6. If one or more expert witnesses testified in the trial, how easy or difficult was it to understand the expert testimony?  
Very easy 1 2 3 4 5 6 7 Very difficult
7. How easy or difficult was it to understand the judge's instructions about the law in this case?  
Very easy 1 2 3 4 5 6 7 Very difficult
8. How interesting or boring did you find the plaintiff's presentation of the evidence?  
Very interesting 1 2 3 4 5 6 7 Very boring
9. How interesting or boring did you find the defendant's presentation of the evidence?  
Very interesting 1 2 3 4 5 6 7 Very boring
10. Were you allowed to submit questions to the witnesses during the trial?
11. Did you find this helpful or distracting?

Very helpful 1 2 3 4 5 6 7 Very distracting

12. Was there something about your views or background that you think might have been relevant to whether the parties would want you to be a juror in this case that was never inquired about by the judge or the lawyers before you were selected to be a juror?

Yes No

13. Did the lawyers in this case not just present arguments to you at the opening and closing stages of the trial, but also during the trial, before or after witnesses took the stand? (If no, skip to question 15.)

Yes No

14. Did you find these interim arguments helpful in understanding each side's case?

Very helpful 1 2 3 4 5 6 7 Not helpful

15. Did the judge in this case give you instructions about the law in this case before the trial began? (If no, skip to question 17)

Yes No

16. Do you think that the judge providing you with information about the law before you heard any witness testimony helped keep you focused on the evidence?

Very helpful 1 2 3 4 5 6 7 Not helpful

17. Were you told whether the judge set a time limit on the trial? (If no, skip to question 19)

Yes No

18. Did you find that having a time limit helped the lawyers in this case move through their arguments more quickly?

Very helpful moving argument along 1 2 3 4 5 6 7 Not helpful

### Exhibit 3



#### SECOND-CHAIR MENTORING OF YOUNG TRIAL LAWYERS

A common complaint voiced by trial judges across the country is that lawyers don't want to participate in civil jury trials because they lack the experience to try such a case. Many judges blame the demise of jury trials on this apprehension.

Suppose, however, in every major city there was a pool of senior, seasoned trial lawyers who were willing to step in, on a pro bono basis at the last minute, to assist younger colleagues, who practice solo or at small firms, with their first significant jury trials?

The pro bono second chair mentor would need to clear conflicts, be allowed to make an appearance a week or two before trial, and obtain from the client a release of liability approved by the court. Judges would be informed of the "Second-Chair Mentoring" program, asked to inform young lawyers of the availability of a pro bono mentor and then enter a motion in limine prohibiting the other side from referring to second chair pro bono volunteer .

This could be a joint program of the local ABOTA Chapter, local Inns of Court and the local young lawyers' bar association.