Jury Matters

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

Mar. '18, Vol. 3, Issue 3

Upcoming Events

4.19 Jury Improvement Lunch; Cleveland, OH

4.26 Jury Improvement Lunch; Philadelphia, PA

4.27 "The Politics of Today's Jury;" Miami, FL

5.1 Jury Improvement Lunch; Dallas, TX

5.2 Jury Improvement Lunch; Houston, TX

Opening Statement

Dear Readers,

Welcome to another edition of the Civil Jury Project's newsletter! This month we have a historical review of some of the more popular trial innovations, an op-ed on the importance of public adjudication, and a review of Judge Thomas Marten's fantastic new article on what judges can do to better jury trials.

Over the last month, we have made amazing strides in our effort to understand the decline of civil jury trials, raise awareness of this troubling phenomenon, and study innovations to better the institution. One of the key ways we pursue our objective is by connecting with judges around the country. We have recently had the privilege of meeting with judges in Philadelphia, PA and Columbus, OH. In both cities, we presented our ideas to judges and listened to their perspectives on how we can do even better. And we are excited to note that a number of those judges have agreed to be judicial advisors to the Civil Jury Project. Moreover, we have recently scheduled a number of events around the country in May to celebrate national Jury Appreciation Week. If you would like the Civil Jury Project's support in planning your own event, please contact Kaitlin Villanueva.

Thank you for your continued support of the Civil Jury Project. As always, you can find a full and updated outline of our status of projects on our website. In addition, you can submit op-ed proposals or full drafts for inclusion in upcoming newsletters and on our website here.

Sincerely,
Stephen D. Susman

#MeToo and the need for Public Adjudication

The Civil Jury Project's Research Fellow Anna Offit documents how critical publicity has been to the success of the #MeToo movement, especially in a world of employer mandated arbitration and nondisclosure agreements.

Find out more on pg. 4

A Concise History of Jury Trial Innovations

by Richard L. Jolly

All of the jury trial innovations recommended by the Civil Jury Project have been kicking around academic and practitioner circles since the mid-1970s. Sparked by the groundbreaking empirical research of Kalven and Zeisel's "The American Jury" in 1966, and at least partly in response to the Supreme Court's flirting with a potential "complexity exception" to the Seventh Amendment in Ross v. Barnhart, 396 U.S. 531 (1970), legal thinkers started proposing ways to improve the jury as an institution. They argued that jurors were capable of deciding complex civil cases but that their abilities were unnecessarily hamstrung by outdated procedural rules. These thinkers championed a vision of the jury that actively interacted with the evidence and within the overall proceedings. They drew upon behavior-education models showing that people learn less and reach poorer decisions when they are passive recipients of information.

These innovative proposals did not gain much traction outside of law journals until the mid-1980s. During that decade, high-publicity trials focused public and media attention on the institution, and calls for jury reform greatly intensified. As a result, the American Bar Association published the first major study on increasing jury comprehension in complex cases in 1989, and the American Judicature Society revived arguments in favor of jurors taking notes and asking questions in 1991. Also, by this time, many individual state and federal trial judges were beginning to experiment with some these innovations in their own courtrooms. But it was New York and Arizona that launched organized programs: New York's efforts focused on increasing jury representativeness and conditions of service, while Arizona focused on reforming the role of the jury during trial.

The reason Arizona took such an active role in reforming the jury compared to other states is not certain, but most agree that it was the result of a handful of progressive, reform-minded judges. One judge in particular—Judge Michael Dann of the Maricopa County Superior Court—is often cited as sparking Arizona's jury reform revolution. In 1993, he published an article titled "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries in the Indiana Law Journal. Although the innovations he outlined therein had been noted for at least the past twenty years, his article was the first to collate them in one place and provide a persuasive overarching theme. The article proved a watershed in the jury innovations field, convincing judges and other thinkers that the jury as institution was worth preserving and improving.

Perhaps most importantly, Judge Dunn's article prompted the Supreme Court of Arizona to call for a comprehensive review of jury service, with special focus on the trial aspects. The court formed a Committee and requested recommendations for major changes. Judge Dann was appointed Chairman. The Committee was encouraged to be creative in their recommendations, and to not bind themselves to the traditions, superstitions, and myths that had historically defined the jury's role in the trial process. It drew on educational and psychological research, consulted with former jurors, and applied lessons from the members' own courtroom observations. In 1995, the Committee published their findings in a report titled "Jurors: The Power of 12." The report recommended 54 ways to improve the jury system, 28 of which explicitly pertained to trial procedures. These innovations related to: (1) juror summons (2) jury selection; (3) trial practices; and (4) jury deliberations. All of the innovations recommended by the Civil Jury Project were included in this report.

Some, but not all, of the Committee's recommendations were immediately put into effect by the court. And the more controversial proposals were subjected to further empirical study, with the Arizona Supreme Court issuing an administrative order authorizing academic experimentation to evaluate their overall effectiveness. This act granted certain ac-

Continued on next page...

ademics unparalleled access to real jury deliberations; the results became known as the Arizona Jury Project. Professor Shari Diamond of Northwestern Law School and her team were able to study the effects of allowing jurors to discuss evidence throughout the trial by videotaping 50 civil trials, as well as the juries' discussions and deliberations. They also administered questionnaires to jurors, the judge, and the attorneys. Professor Diamond's groundbreaking 2001 study showed that, for the most part, jurors who were allowed to discuss evidence chose to do so, but that they also followed the judge's instructions to reserve judgment on the ultimate verdict. Today, the study remains one of the few of its kind and it is still being drawn upon to better understand how jurors deliberate and consider certain types of evidence.

Arizona's example and Professor Diamond's research prompted further interest from national organizations in reforming the civil jury. In 2005, the American Jury Project of the American Bar Association published its Principles for Juries and Jury Trials. Spearheaded by leading jurists, practitioners, and social scientists, the explicit goal of the Project was to "refine and improve jury practice so the right to jury trial is preserved and juror participation enhanced." The report offered a set of 19 principles for juries and jury trials that synthesized and built on a variety of jury management standards previously adopted by the participating ABA sections. The report's principles were broadly endorsed by a number of bench and bar organizations, including the American Board of Trial Advocates and the Conference of Chief Justices. An online search does not reveal any organizations explicitly taking exception to the proposals, including the American College of Trial Lawyers. Today, the ABA's jury trial principles continue to be persuasive, but unfortunately many of the judicial members who presided over its drafting have retired. Only Judge Gregory Mize continues to be active in the field of jury innovations.

"It was the result of a handful of progressive, reform-minded judges."

Since the ABA adopted its principles in 2005, many other organizations have furthered the effort to study and innovate on jury trials, including the American Board of Trial Consultants' "Save Our Juries" program, and our very own Civil Jury Project at NYU School of Law. But despite all of the empirical support for the benefits of these jury trial innovations, the innovations and principles have not been widely adopted. In 2014, Professor Paula Hannaford-Agor in conjunction with the National Center for State Courts published a report reviewing whether the efforts of all of these scholars and organizations had had any effect on judicial adoption of these innovations. Her study compared the innovation practice rates across the country between 2007 and 2014. Although there were some increases in adopting certain practices, such as juror note-taking and allowing jurors to ask questions, the rate of adoption of other practices remained stagnant, such as those related to jury selection and early jury deliberations.

Professor Hannaford-Agor did not hypothesize why so many judges were slow to adopt the proposed innovations, but reasons are not hard to imagine. For one, some judges may have an overzealous fear of reversal that keeps them from experimenting. Alternatively, some judges, particularly those who are elected, may worry about imposing new trial practices on unwilling attorneys. Indeed, according to the Civil Jury Project's attorney survey report, most attorneys have no practical experience with many of these innovations. Perhaps the failure to adopt may be the result of a feedback loop between a mutually reluctant bench and bar. If we can determine why so many judges are reluctant, studies can be crafted to test the reasonableness of their fears. To be sure, that is precisely what motivated the development of these innovations nearly a half-century ago.

An extended and fully cited version of this article will soon be available on our website, here.

Richard L. Jolly is a California attorney and serves as Research Fellow for the Civil Jury Project at NYU Law School.

Injustice Behind Closed Doors: Civil Juries and the #MeToo Movement

by Anna Offit

Jury trials have featured prominently in NYU Law panel discussions and conferences in recent weeks. First, the law school convened a "#MeToo: Assessing a Movement in the Making" forum that put discussion of civil juries as remedies for workplace harassment front and center. The event's moderator, Prof. Melissa Murray, posed a question to the group: What is the role of law in the #MeToo revolution? A generative discussion unfolded. Though sexual harassment law has long been on the books, the social media response to alleged sexual harassers offers the something that the law does not. Men in positions of power have been punished swiftly, definitively and— most importantly— *publicly*. Citing Owen Fiss's article "Against Settlement," Murray suggested that the participation of social media users may fill a gap once occupied by jury trials. "Settlement can easily resolve things," she said. "It is less cumbersome. But something is lost in the absence of publicity. Is the shift to social media a response to the failing of law to surface a problem that is endemic?"

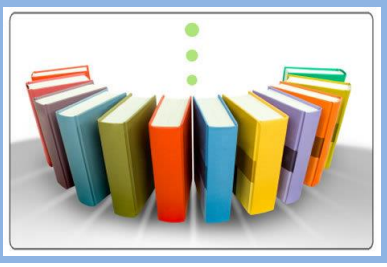
The discussion then turned to the question of whether plaintiff side employment attorneys have perpetuated the problem of closed-door dispute resolution by encouraging clients to accept settlements that include non-disclosure agreements. Marjorie Berman (Krantz & Berman) reflected on this predicament. "As someone who has participated in many of those agreements over the years I really considered the criticism and the validity of it," she said. "I do think the social media movement is a way of saying that is not the answer. People have to be held accountable." She argued, however, that jury trials are an imperfect solution. For one thing, lawsuits take time. Victims may also worry that trial publicity will adversely affect their future job prospects.

When asked whether she recommended NDAs to her clients, Linda Inscoe (Latham & Watkins) acknowledged their complexity. In order to comply with laws that permit employees to raise claims with the EEOC, for example, NDAs incorporate a number of exceptions. But employers value them. She explained that without some assurance of silence, her clients might be reluctant to pay settlements to victims. This would require them to litigate positions toward harassers "to the media" and "in the public eye." As a result, employers would be unable to keep assessments of employee conduct and their deliberative processes secret.

A second forum in February titled "Avoiding the Next Harvey Weinstein" added nuance to this discussion. Sara Ziff, Founder and Executive Director of a nonprofit that advances fair treatment, said her organization fields numerous harassment complaints from fashion industry employees. Complainants are then offered resources on how to file police reports, contact government agencies, or get attorney referrals. In her experience, however, most complainants express interest in speaking to the press by "posting to social media or speaking with a trusted reporter." Ziff, too, was then asked to consider whether the promise of public dispute resolution fails the victims she encounters. Her own observations of sexual harassment, chronicled in a documentary titled "Picture Me," reveal that media attention can fail to remedy even obvious and systematic harassment. She noted the example of photographer Terry Richardson who enjoyed years of virtual "tenure" in the fashion industry despite pervasive sexual assault and harassment allegations.

In the age of #MeToo, however, publicity has been crucial. And the movement has the benefit of not only being public— but collective. Victims can find both solace and solidarity in the universality of their experiences of harassment despite variation in their claims. To this end, #MeToo has effectively brought otherwise invisible or silenced experiences of sexual victimization to light. Terry Richardson and Harvey Weinstein are now both under investigation by law enforcement. Advocates like Ziff wonder whether this shift will lead more victims to feel they can come forward without fear of censure. The contribution of jury trials to this cultural shift will offer valuable fodder for future Civil Jury Project discussions, studies, and analysis.

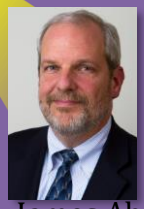
Anna Offit is a research fellow at the Civil Jury Project. She holds a PhD in Anthropology from Princeton University and JD from the Georgetown University Law Center.



How to Shorten Trials, a Reading List

California Superior Court Judge Michael Mattice recently updated his fantastic list of materials for judges and attorneys interested in more efficient trials. It is available on our website, here.

New Advisors Spotlight



Hon. James Abrams
Chief Admin. Judge,
Connecticut Superior Ct.

Hon. Jacqueline Allen
Admin. Judge, Philadelphia Ct. of Common Pleas, Trial Div.

Hon. Jeffrey Brown
Franklin County, OH Court of Common Pleas

Hon. Edmund Sargus
Chief Judge, U.S. District Court, Southern District of Ohio

Hon. Michael Watson
U.S. District Court, Southern District of Ohio

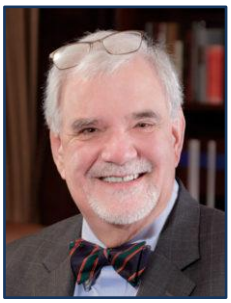
Hon. William Woods
Franklin County, OH Court of Common Pleas

Judge Marten's Recommendations

Judge Marten recently wrote a fantastic article titled, "Airing Out Jury Trials." In it, he acknowledges the substantial and historic decline in civil jury trials, noting that the most commonly given reasons for their recent dearth include: 1) jury trials are too expensive; 2) jury trials take too long; 3) jury trials are unpredictable; 4) arbitration clauses in consumer contracts foreclose the possibility of trials; and 5) business increasingly favor alternative dispute resolution. Judge Marten then goes on to argue that these factors can be remedied through, as he puts it, "some creative thinking and willingness to try some different approaches."

The responsibility for such creative thinking belongs to the judges, Judge Marten contends. He stress that the conduct of the trial is generally left to the sole discretion of the judge. Specifically, he notes that judges enjoy wide discretion in stating the facts and commenting on the evidence, and that it is within the judge's power to direct the trial in a manner reasonably thought to bring about a just result. From this, Judge Marten offers reviews of a number of trial innovations, which judges are free to implement and that can help make trials move more swiftly and produce more satisfying results for the litigants. Indeed, they address those criticisms most often lobbed against jury trials.

The innovations covered by Judge Marten touch on every aspect of trial: jury selection; opening statements; pre-instructions; juror pre-deliberation discussions; and the presentation of expert testimony. For each innovation, Judge Marten offers case and statutory support demonstrating that they are widely supported and legitimate.



Judge Thomas Marten is a Senior Judge on the United States District Court for the District of Kansas.

Finally, Judge Marten argues in support of a modified sequence of trial events, which he himself practices in civil cases. That order is:

1) Opening Statements
2) Jury Selection
3) Instructions
4) Presentation of evidence
5) Jury discussions during trial
6) Closing Arguments
7) Jury Deliberations

He explains that conducting the trial in this order benefits everyone involved in the case. The litigants are provided a more engaged jury; jurors are given a more meaningful experience; and the judiciary is able to provide greater justice.

Judge Marten concludes by recognizing that some judges may be hesitant to experiment with trial innovations or sequencing. Yet the established approach is proving ineffective. Judges should be willing to tinker with the process to ensure that jury trials do not disappear. Judge Marten reminds that the judicial system is fulfilled not "when the case is over and the verdict returned," but "when a trial is transformed from the legal equivalent of a football game to life." It is "when the jury begins to see the parties as something other than litigants and the proceeding as much more than a contest."

If you are interested in reading Judge Marten's article, a copy of "Airing Out Jury Trials" is available on the Civil Jury Project's website, here.

Status of Project: Spring 2018

The Civil Jury Project looks forward to continuing its efforts throughout 2018 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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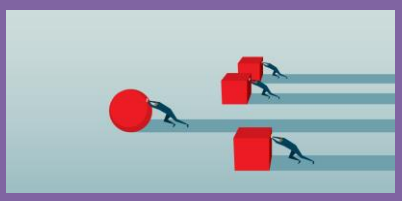
A Preview of Next Month . . .

Judy Rothschild, a Trial Consultant Advisor to the Civil Jury Project, will review techniques for witness preparation.



Judge William G. Young of the United States District Court, District of Massachusetts discusses the importance of jurors as constitutional officers.