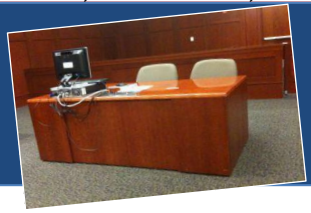
Jury Matters

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

April '18, Vol. 3, Issue 4

Upcoming Events

4.16	Jury Improvement Lunch; Baltimore, MD
4.19	Jury Improvement Lunch; Cleveland, OH
4.20	Jury Improvement Lunch; Columbus, OH
4.27	"The Politics of Today's Jury"; Miami, FL
5.1	Jury Improvement Lunch; Dallas, TX
5.2	Jury Improvement Lunch; Houston, TX
5.11	"The Death of the Civil Jury Trial"; Cleveland, OH
6.22	Jury Improvement Lunch; Seattle, WA
8.23	Tenth Circuit Bench Bar Conference; Colorado Springs, CO
9.6	Jury Improvement Lunch; Oklahoma City, OK
9.14	Idaho Bench Bar Conference; Fort Hall, ID
10.3	Jury Improvement Lunch; Los Angeles, CA
10.4	Jury Improvement Lunch; Tucson, AZ
10.26	Idaho Bench Bar Conference; Boise, ID
11.9	National Board of Trial Advocacy All Star Conference; New Orleans, LA



Opening Statement

Dear Readers,

Welcome to the April edition of the Civil Jury Project's monthly newsletter. We are well underway with our efforts to study and better civil jury trials, as well as raise awareness of their historic decline.

To that end, we have been planning and holding a number of events. This past month was particularly exciting. We were able to invite a small subset of our nearly 250 judicial advisors to NYU Law School for a conference on how we might improve the civil jury through trial innovations. The highly productive and confidential discussion will help guide the Civil Jury Project's research over the next six months. In addition, as you can see by the list of upcoming events, we have are planning eight Jury Improvement Lunches. These events offer an opportunity for judges, practitioners, and jurors to come together in recognition of the importance of the jury system and discuss ways to make service better. If you are interested in holding an event in your city, please contact Kaitlin Villanueva.

In this month's newsletter, we are delighted to have op-eds from U.S. District Court Judge William G. Young and famed jury consultant Judy Rothschild, Ph.D. Judge Young argues for a broader understanding of jurors as a constitutional officers, and Dr. Rothschild provides helpful techniques for prepping witnesses for jury trial. Finally, we have an overview of a new program in Houston, TX designed to help young attorneys gain trial experience. We hope you enjoy!

Thank you for your continued support of the Civil Jury Project. You can find a full and updated outline of our status of projects on our website.

Sincerely,
Stephen D. Susman

Young Lawyers Need More Trial Experience

If young lawyers are not given the opportunity to learn valuable trial skills, then jury trials will disappear. Some judges in Houston, Texas are implementing a new program to help prevent that from happening. Find out more on pg. 6

Jurors as Constitutional Officers

By Judge William Young

I want you, I ask you, I beg you to think of these jurors as Constitutional officers, because in the courts of the nation, it is unmistakable that they are. They are Constitutional officers.

Only six types of Constitutional officers are named in the original United States Constitution. Each branch gets two. It is remarkably symmetrical. (These are not original insights, but think about it.) We have three branches of government. Our Congress, our legislature makes the laws, and there are two types of Constitutional officers there: representatives and senators. Our executive branch enforces the laws and defends the nation. Under the Constitution, it is designed that we have a very strong chief executive, the President of the United States. Given the frailties of the human condition, we also have a Vice President of the United States.

The third branch of government is where the laws are applied to discrete disputes. I can quote the first sentence of Article III. I cannot go much beyond that. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." And then there is a sentence that talks about judges: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." I am humbly proud to be a judge. I am a trial judge, a judge of the United States. Now we are up to five Constitutional officers.

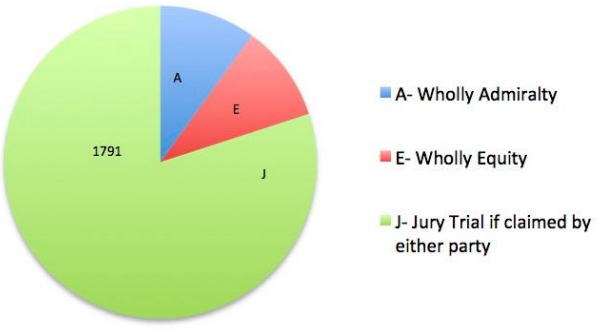
And then, in Section 2 of Article III, one more type of Constitutional officer is identified. It says this: "The trial of all Crimes, except in Cases of impeachment, shall be by jury . . . ." And the interesting thing, of course, is that people would not leave it at that. They would not accept the Constitution of the United States until it had the first ten Amendments.

I am going to talk about the Seventh Amendment, on the right to jury trial in civil cases. Interestingly, it is in the one right in the Bill of Rights that the Supreme Court has not incorporated into the Due Process Clause of the 14th Amendment, and it does not apply to your several states, so you are on your own.

But, just as an example, I do want to give you a Constitutional overview of the 7th Amendment. Now, the 7th Amendment is very interesting because by its very language, it is originalist. It is one place in the Constitution where, by the language itself, it is originalist. I am being very glib here, but I am accurate. The 7th Amendment says, in essence: "You know these cases that we try to juries in 1791? We will always try them to juries as long as the Republic stands."

Let me give the Constitutional underpinnings, then and now, of the 7th Amendment, as illustrated by two diagrams.

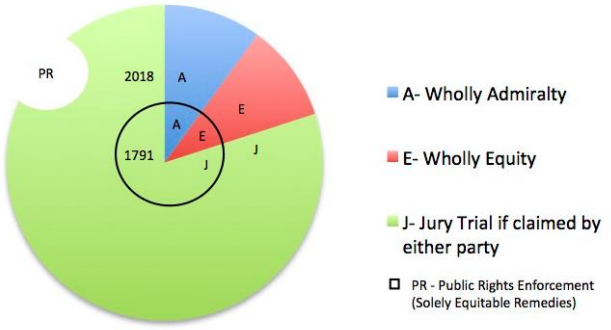
Figure 1



As we can see in the first diagram, not all cases, even in 1791, were tried to jurors. They were admiralty cases, which are shown in red. There was admiralty law well before we were a country. There were equity cases, tried in courts of equity. Equity cases never had a jury trial. Everything else was tried to jurors.

Some scholars today say, "That is not informative for us today, because our modern cases are so *complex*—our cases are so *difference*." Well, that is an elitist, modernist fallacy. Daniel Coquillette, the great Massachusetts author, scholar, and former dean of Boston College Law School, could tell you about this in much more detail than I can. We did not invent credit swaps in order to have the crash of 2008. When ships took the better part of a month to get across the Atlantic, they had credit swaps dealing with seed tobacco and the pledging of tobacco crops, years before the seed was even in the ground. How do you think the mercantile system worked? And when there were disputes, they were tried to juries.

Figure 2



What is different now is *not* the complexity of the case. It is the fact that your state courts have been influenced by the Federal Rules of Civil Procedure. The federal rules really are a great contribution. When the original federal rules were written, they collapsed law and equity into one form of civil action. The rights were separate, but they joined their provisions into one form of action. That's why the cases are different. No one suggests that these cases should not go to jury trials.

Now, logically, all of the new causes of action, which are not admiralty actions or equity actions should be jury actions--all of them. That is the position I urge on you. This is, I would urge, argue, beg, the appropriate analysis of our 7th Amendment. But the Supreme Court is not clear on this.

Let's look at the next diagram, which shows the current situation. Notice that little bite out of the pie.

As the administrative state arose around the time of the Great Depression, with the creation of numerous administrative agencies, they had the power to enforce their regulations. If you were trading stock, and the Securities and Exchange Commission was after you, you did not get a jury trial. The SEC could simply stop you from trading stock. Of course they could. No problem with that. But of course there is administrative creep. They also have the power to fine you, and they do fine you. They make awards of cash money against you. I am not just singling out the SEC. I am talking about all the vast government agencies. Those ought to be jury cases. There is a very real question whether they have exceeded the bounds of that little cutout of the diagram, and have gone into an area that is rightly reserved for the jury.

This piece is a modified portion of a speech Judge William Young gave to a gathering of state court judges in 2017.

Judge William G. Young, Judge of the United States District Court, District of Massachusetts, has been an active trial judge for more than 25 years.

Successful Witness Prep: Unlocking the Door

by Judy Rothschild, PH.D.

Dr. Judy Rothschild has more than thirty years of experience as a jury consultant, and serves as an advisor to the Civil Jury Project.

When someone arrives at your office, before they can enter the door has to be unlocked. Successful witness preparation requires an unlocking of the door so that you can learn as much as you can about the witnesses that are about to enter your life and the role they are going to play in the case that has brought them to your door, or you to theirs. It is important to be conscious of your first impressions of a witness for many reasons. At this initial contact, you are closer than you will ever be to how others, including potential jurors will respond to when the witness is called to testify at trial (aside from any positive changes related to your witness preparation). Studies show how first impressions often frame subsequently learned information. Positive initial impressions can have a "halo" effect leading additional information to be viewed in a positive light, while negative first impressions can have the opposite "horn" effect. How a witness is perceived and comes across during a trial, and earlier in their depositions, can have a profound effect on the outcome of a trial and how a case is resolved. As the saying goes, *"You never get a second chance to make a good first impression."*

Witnesses are people, and just like people in other settings, witnesses come in all shapes and sizes, and every witness' communication style and personality on and off the stand is infused by their own unique biography. Understanding a witness' personal biography is central to witness prep because who they are personally, socially, economically, and culturally shapes how they will come across in depositions and at trial. Counsel needs to draw from this biography to enable witnesses to testify effectively. This requires identifying the strengths and weaknesses each witness brings to your case. For example, personality characteristics play a major role in witness preparation. Is the witness an extrovert or an introvert? Are they good at "teaching", are they good at "telling a story"? Or are they shy? Do they get flustered? Do they wander? Are they process oriented? Or do they focus on concrete concepts? Are they patient or impatient, etc.?

In addition, in witness preparation the type of case matters. Is it a contract dispute, an IP dispute, a products case, a construction case, an antitrust case, a labor and employment case, a whistleblower case – the list spans the range of matters that can be litigated. Each type of case has certain unique issues which you must be conscious of, and themes you need to develop to succeed in witness preparation. Don't be mistaken by thinking that contract disputes are only about the words on paper. Not so, contract disputes are human stories. The words on paper are based on agreements between people. In preparing and putting on your case, you need to identify the role each witness will play – those supporting your case and those opposed. Most importantly you need to help your witnesses prepare to effectively testify in ways that convey their story to the judge, and the decider of the facts – the jury. Each witness provides a part of the overall story. Who are the actors in this drama, how and why they came together, how did they communicate with each other, what happened, what worked, and what went wrong that caused the problems that have led the parties into the messy, sometimes crazy world of litigation.

For most witnesses (unless they have testified before) the rules governing depositions and courtroom testimony are unknown. The courtroom is a unique setting for anyone who does not regularly participate in this highly structured environment. Most people don't know the actual rules that govern courtroom procedures, but many are aware and fascinated with the activities that unfold in the courtroom setting. The drama of courtroom procedures and trials play a significant role in American media, and entertainment especially television shows and movies. There is even an Emmy award for Outstanding Legal/Courtroom Program. Thus, when people find themselves faced with the possibility of being a witness in an actual trial, while they may have some awareness about the physical structure of a courtroom – the elevated judge's bench, the special tables for counsel and the court clerk, the witness box, the jury box, and the gallery where prospective jurors and observers sit – unless they have been involved in a trial before, they are unlikely to have any firsthand experience with what it is to be a witness at trial or when being deposed. This lack of knowledge or firsthand experience means that most witnesses enter the world of litigation, nervous, anxious, and uncertain about what to do and how to testify in ways that support their side of the case. Some are angry, few are happy. Even experienced witnesses have emotional responses. Emotions are a critical dynamic to be sensitive to in preparing witnesses.

Helping a witness navigate the unfamiliar waters of deposition testimony or testifying during trial re-

quires counsel to recognize the many factors that can be obstacles to a witness succeeding in telling his or her story. For example, most novice witness are unfamiliar with differences between direct and cross examination, let alone re-direct, and re-cross, or how many times are allowed for a re-direct or re-cross exam. Similarly, a frequent focus of witness preparation involves educating witnesses to avoid being swept into arguing the merits of their testimony with opposing counsel, and to leave this task to their attorney.

A multitude books and articles offer insights about witness preparation. Written by attorneys, social scientists, persons with communication, drama and other backgrounds, there is a fair amount of consistency about the importance of witness preparation and techniques to use to help with witness preparation. In addition to insights about techniques, counsel should be aware of different legal considerations involved in the preparation of lay and expert witnesses, in civil and criminal proceedings, and the key legal decision regarding the confidentiality of trial consultant work product in witness preparation.

Strategic planning is fundamental to successful witness preparation. This includes designing a plan for counsel to use to help ground their witnesses so that their witnesses will be able to testify effectively. Before in-depth work with a witness can begin – counsel needs to identify: a) what is needed from the witness; b) what are problem areas for this witness and the case, c) what are strong points for the witness and the case, and d) how can the witness testify in a way that diffuses the weak points and leads the jury to focus on the strong points.

Often, an initial witness prep session begins with an attorney, a trial/jury consultant, or other members of the trial team providing the witness with a road map of what to expect. Discussion focuses on how the trial process unfolds; depos v. trial testimony; direct v. cross exam; your role and that f opposing counsel; the role of the judge and the jury, and of course, of the witness. It is important to convey to the witness that there is a safety-net – the witness is not flying alone – that his/her counsel is there to guide them and protect them, including protecting them from what can be a vicious opposing counsel.

Early in witness preparation, it is important to help the witness feel "safe enough" to convey their concerns to counsel so that these concerns can be diffused before depos and trial, and to establish a way to address these concerns if they come up during trial. Witnesses often worry about what they did, or didn't do; about how they look, how they sound, how to best respond to questions; and about whether you as their attorney think they are stupid or smart.

Videotaping and Role Playing are well-established techniques used in witness preparation. Videotaping of direct exam questions allows witnesses to learn about how they communicate verbally and nonverbally and see how other people may view them. This helps identify in advance the danger zones, the pitfalls, and strategies to avoid these dangers. Role playing also helps witnesses learn how to effectively testify -- hit the home run, make the basket, and tell the story.

When role playing turns to practicing cross-examination, it is essential for the witness' counsel to realize, witnesses are always concerned about what you think of them. It can be confusing and upsetting for you to morph into an aggressive opposing counsel. For this reason, it is better to have another attorney take on the role of opposing counsel.

Reverse Role Playing – here the attorney assumes the role of the witness and the witness assumes the role of the attorney. This can be extremely useful in helping witnesses and attorneys overcome hurdles. Witness see in real time how counsel, in the role of the witness, responds to tough questions. And, when a witness assumes the role of opposing counsel, they quickly learn there are limits to what and how opposing counsel can ask questions. These experiential insights educate the witness that they are often more in control than they thought they would be, how opposing counsel's task is harder than the witness thought, and effective ways to answer tough questions.

Fundamentally, successful witness preparation requires establishing a relationship with each witness that is supportive and respectful. There are various ways to do this. Styles of approach and techniques depend on the case, personality of the witness, and of trial counsel.

Contextualizing *Peña-Rodriguez v. Colorado*

Richard L. Jolly, a research fellow for the Civil Jury Project, will publish a new article titled "The Impartial Jury Mandate" in a forthcoming edition of the Michigan Law Review. It is available now on SSRN.

New Advisors Spotlight

Hon. Sheila Woods-Skipper
President Judge of the Ct. of Common Pleas, Philadelphia Court

Young Lawyers in the Courtroom

One of the reasons often given for why jury trials are disappearing is because lawyers no longer know how to try cases to juries. There is a feedback loop in which fewer trials mean fewer lawyers with experience, which leads to fewer trials. Moreover, trial advocacy is not a required class at many law schools. As a result, young lawyers have very limited experience, or opportunity to gain experience, in the courtroom.

Judge Caroline Hurley of Harris County, Texas, is trying to change this. With the instrumental help of the Houston Bar Association and the Houston Young Lawyers Association, the county has developed and will soon launch a "Young Lawyers in the Courtroom Program." The explicit purpose of this is stated as: "This Court is aware of a trend today in which fewer cases go to trial, and in which there are generally fewer speaking or 'stand-up' opportunities in court, particularly for young lawyers." The program defines young lawyers as those "licensed to practice law for less than seven years."

The program works like this: "In those instances where a party notifies the Court that a young lawyer will argue a motion, the Court will hold an oral hearing on the motion. If the motion has been set on the submission docket, counsel should notify the Court per the procedures described below that the motion will be argued by a young lawyer and the Court will set that motion for oral hearing, subject to the Court's schedule and provided that holding an oral hearing will not adversely impact any of the other parties to the case."

The most critical part of the program is that "[w]hen the Court is informed that a young lawyer will serve as lead counsel at trial, the Court will schedule trial for the *earliest possible available date on the Court's docket*, subject to the discretion of the judge and court coordinator, as well as the availability of the parties, and provided that the trial setting will not adversely impact any of the other parties to the case. Serving as 'lead counsel' shall mean that the young lawyer: (a) makes the opening statement and/or closing argument; and (b) conducts the direct or cross-examination of ten percent (10%) or more of the witnesses to be called at trial."

The program announcement assures attorneys that the Court will not hold any litigant or counsel accountable for the fact that a more senior lawyer handles a hearing or trial. But it affirms the Court's belief that it is important to provide substantive speaking opportunities to young lawyers, and that the benefits of doing so will accrue to young lawyers, to clients, and to the profession generally.

The Houston Young Lawyers Association will be rolling out the program at the annual Law Day Luncheon on April 24. The program does not have an end date at this point, but the Civil Jury Project will be sure to update you with information on its successes and shortcomings after a few months of experimentation. If you would like to read the full announcement, it is available on our 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 . . .

United States District Court Judge Richard G. Stearns and Stanford Law Professor Nora F. Engstrom offer competing op-eds concerning the benefits and detriments of setting and keeping trial time limits.