Jury Matters

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

Jan. '18, Vol. 3, Issue 1

Upcoming Events

1.31	Federal Judicial Lunch; Columbus, OH
3.8	Jury Improvement Lunch; San Francisco, CA
4.16	Jury Improvement Lunch; Cleveland, OH
TBD	Jury Improvement Lunch; New York, NY
TBD	Jury Improvement Lunch; Oklahoma City, OK
TBD	Jury Improvement Lunch; Baltimore, MD

Opening Statement

Dear Readers,

Welcome to a new year of the Civil Jury Project at New York University School of Law. We have accomplished much since founding just over two years ago—both in our empirical efforts to understand the causes of the civil jury's decline, as well as our social outreach efforts to learn how the institution can be bettered—and we are very excited for 2018.

In the coming year we aim to expand our network of judges, academics, and trial consultants. Currently we have over 300 advisors to the Project, and a subscribing network of over one thousand practitioners. With their considerable help, we are expanding awareness and the professional dialogue over the loss of America's civil juries. Op-eds like those included in this month's newsletter from Judges Mark A. Drummond and Berle M. Schiller are incredibly valuable to advancing this goal. In addition, we will continue to engage with the public through social media and www.WethePeopleWetheJury.com, as well as through hosting Jury Improvement Lunches around the country. To accomplish all of this, we have expanded our team by adding a new Research Fellow, Anna Offit, whose extensive research on juries will surely prove invaluable.

Thank you for your continued support of the Civil Jury Project. An updated version of our Status of Project is available on our website. And, as always, we welcome op-ed submissions for inclusion on our website and in upcoming newsletters.

Sincerely,
Stephen D. Susman

Oral Argument Recap: Oil States Energy v. Greene's Energy Group

On November 27, 2017, the Supreme Court heard oral arguments in the case of *Oil States Energy Services v. Greene's Energy Group*. We offer our review of this potentially significant case.

Find out more on pg. 5

How About a Free Shadow Jury? Inside the Juror's Mind

By Judge Mark A. Drummond

How would you like to know what the jury is thinking? How would you like a shadow jury without having to pay for one? What if this shadow jury were your real jurors? "It is like having a free shadow jury out in the audience because you could tell what was happening going through the trial," said Russell "Rusty" Hardin Jr., Houston, a member of the ABA Section of Litigation's Trial Attorney Advisory Board during a panel discussion entitled "Baseball, A Governor & Successful Trial Strategies in High Profile Cases," presented on September 29, 2012, at the Section's fall leadership meeting in St. Louis. Hardin, who secured an acquittal on all charges for Roger Clemens, and Sam Adam Jr., Chicago, who defended Illinois Governor Rod Blagojevich in his first trial, were panelists on the program moderated by Hilarie Bass, Miami, former chair of the Section.

"Allowing jurors to submit written questions during the evidence phase of the trial gives the lawyers and the judge a window into the juror's thinking," agrees Hon. James F. Holderman, Chicago, co-chair of the Section's Special Committee on Jury Innovations. "It allows the lawyers and judges to dispel any misconceptions the jurors otherwise may have."

In 2004, then ABA President Robert Grey established the American Jury Project, which was chaired by former chair of the Section, Patricia Lee Refo, Phoenix. One of the innovations was to allow jurors to submit questions, to be asked by the judge, after sorting out any objections or modifications from counsel.

Mandating Jury Questions

Several states, such as Indiana, Colorado, and Arizona, have mandated that courts allow jury questions for all jury trials. Effective July 1, 2012, the Illinois Supreme Court implemented a new rule allowing juror questions—but for only civil cases. States vary widely on procedures in this area. One such area is whether the judge or counsel asks the questions and when they ask the questions. Counsel should check with the trial judge on how he or she handles questions in the courtroom.

"I was opposed to it originally. I had reservations, but I loved it," said Hardin. "The judge in our case did not allow re-cross. The government was putting on their case. It was direct, cross, redirect then, 'No, Mr. Hardin, nothing further, stop. Any of the jurors have any questions?'"

When the primary agent in the Clemens trial testified, the jurors had 29 questions for him. "One of the questions was 'Do you think you have perhaps overstepped in this case?'" reports Hardin. "That question was not asked, but it sure was nice to know. When the government put their physical evidence in, there were 32 questions . . . and they were very, very good questions. They were most attentive."

"The jurors appreciate the opportunity to inquire, and are more engaged and attentive to the evidence presented by the lawyers," confirms Judge Holderman. As authority for the concept's use in the Seventh Circuit, the project manual gives this succinct quote on the benefits of jury questions from *United States v. Sutton*, "Juror-inspired questions may serve to advance the truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Further, it is at least arguable that a question-asking juror will be a more attentive juror."

Hardin told the audience that his favorite question which, again, was not asked, was for the main accuser. It was "In light of all the lies you've told, why should we believe you?" Questions like these, although not asked, give counsel the inside track on what is going on in at least one juror's mind. This insight can help with trial strategy, questioning of other witnesses, and thoughts for closing argument.

"She [the clerk] would take the questions to the bench," continued Hardin. "We would approach the bench, he [the judge] would put on the white noise, the jurors couldn't hear and he would read the questions, we would object or not object and he would read the [approved] questions."

"My experience in the seven-month test was that most of the jurors' questions sought information to clarify evidence that had been presented during the lawyers' questioning of the witness," says Judge Holderman. "Rarely did the jurors' questions seek testimo-

Continued on next page...

ny on a subject that was inadmissible, and when such questions were submitted, I explained to the jury why the question could not be asked."

Procedures Used

The procedure under most systems is for the court to make the questions part of the record and disclose the questions to the parties outside the hearing of the jury. Counsel may then interpose objections or suggest modifications to the question. The court may then decide when the question should be asked, and whether counsel should ask the question or the court should ask the question.

The Seventh Circuit's manual includes a preliminary instruction to the jury, advising them of their right to ask questions, that the judge will determine whether a question should be asked or asked in a modified form, and that they are to make no inferences if a question is not asked and not put any greater weight to a question that was asked. Likewise, there is a suggested jury instruction for use at the end of the trial.

Most states that use this procedure give the courts flexibility. The Committee Comments to Illinois Supreme Court Rule 243 state, in part, "The trial judge may discuss with the parties' attorneys whether the procedure will be helpful in the case, but the decision whether to use the procedure rests entirely with the trial judge. The rule specifies some of the procedures the trial judge must follow, but it leaves other details to the trial judge's discretion."

Critics of the system raise issues such as delay of the trial process, whether the system favors less-competent lawyers, promotes premature deliberations, promotes more questions during deliberations, or causes jurors to try to shape the evidence one way or the other.

"I would recommend this procedure to all of you," counters Hardin. "The jury would write out their questions . . . and, believe it or not, this did not take long at all. It really did not stretch this trial out."

An ancient Chinese proverb says "Tell me and I'll forget; show me and I may remember; involve me and I'll understand."

"My procedure was to instruct the jurors that if they had a question, they should write it down and then raise a hand, holding the folded paper aloft," says Judge Holderman. "My clerk then would unobtrusively retrieve, photocopy, and distribute the jurors' questions to counsel while witness testimony proceeded. Which took no time away from the testimony."

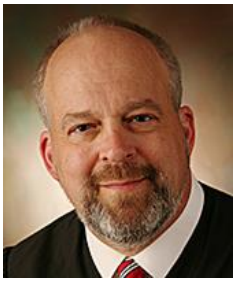
"I did not observe jurors filling in evidentiary gaps for lawyers, premature deliberations, nor more questions during deliberations; if anything, I had fewer," says Judge Holderman. "I saw no juror become an advocate, shift the burden of proof, or try to shape the evidence one way or the other through juror questions. The jurors I observed during the test period acted with the same conscientious resolve to do the right thing that I observed throughout my career in the legal profession."

Historical Perspective

Perhaps the reluctance to involve jurors in the questioning is one of the last vestiges of the original jury system of hundreds of years ago. Then it was a system that primarily decided issues regarding property and inheritances, and the jurors selected were those from the community who knew the most about the subject. We now have come full circle and want jurors who do not know anything about the subject matter or the people involved. If they do, they are challenged for cause.

Given that we are usually dealing with blank slates when it comes to our jurors, doesn't it just make sense that we make sure that the most important people in the court, other than the parties, have their questions answered? Given the safeguards utilized in most courts coupled with our opportunity to modify the questions posed, don't we want jurors who are attentive and listening, and might have a question?

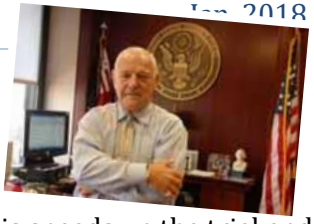
An ancient Chinese proverb says "Tell me and I'll forget; show me and I may remember; involve me and I'll understand." Is there any downside to your jurors getting more involved in your case? Trial lawyers are always looking for ways to keep the jurors' attention when it is four o'clock in the afternoon, the sun is streaming in, the courtroom is warm, and an accountant is on the stand. Maybe if jurors know they have a chance to question or clarify, they just may stay awake.



Judge Mark A. Drummond has been on the bench in west-central Illinois' 8th Judicial Circuit since 1999.

A version of this piece first appeared on the ABA's Practice Points website. It is available here.

Streamlining Civil Jury Trials



By Judge Berle M. Schiller, *United States District Court for the Eastern District of Pennsylvania*

Steve Susman recently interviewed Judge Mark W. Bennett to learn about his perspective on the importance of jury service. A series of videos will soon be available here.

Last month, Steve Susman gave a presentation to the Iowa State Bar Association regarding America's disappearing civil jury. The event was well attended and positively received.

The jury trial is a bedrock constitutional protection for litigants and essential feature of American democracy. In reaffirming this principle, the Supreme Court has also recognized the importance of jury service for the jurors themselves: Justice Kennedy wrote, "jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life."[2] Indeed, studies suggest that serving on a jury can have a positive impact on jurors, including a greater sense of civil identity[3] and even an increased likelihood of voting in upcoming elections.[4]

But over my tenure as a judge, I have observed the number of trials (and attorneys with trial experience) decrease dramatically. Although there are surely many factors that have contributed to the decline, common complaints about civil jury trials relate to speed and cost.[5]

I have found that these issues can be mitigated by a judge's firm control over the schedule and length of a trial. At the initial pretrial conference, I require the parties to submit a reasonable estimate of the time necessary to try their case and I set a date certain for trial. In my experience, setting a fixed trial date from the outset avoids delays and encourages counsel to prepare for trial, even if the parties ultimately decide to settle. As I (jokingly) warn counsel in these conferences, "The only thing that will change the trial date is death—mine, not yours."

As the trial nears, I am mindful of the burden that jury duty and a trial can impose on potential jurors. Although I permit counsel to submit proposed voir dire questions, I conduct voir dire myself. In my experience, a tightly controlled voir dire is more efficient and can be less invasive for members of the venire, while still providing the parties with enough information to inform their peremptory challenges.

Once trial has begun, I keep the parties on schedule by reminding counsel of time constraints and cutting off irrelevant lines of questioning. This speeds up the trial and forces lawyers to sharpen their strategy and questioning of witnesses, which, I think, results in a more engaged jury panel. I have also, on occasion, asked questions of witnesses in an effort to move the trial along expeditiously.

As I (jokingly) warn counsel in these conferences, "The only thing that will change the trial date is death—mine, not yours."

Finally, where appropriate, I seek to introduce levity. Jury service is not just an important duty for every citizen; it should also be a rewarding and enjoyable lesson in the judicial process. This is borne out in my post-verdict debriefing with jurors, in which I answer their questions about he process and strategy involved at trial. Jurors tend to report that, despite any preconceived notions their experience was rewarding.

These steps alone may not reverse the decline in the number of civil jury trials, but they can increase the likelihood of an efficient resolution and a productive jury.

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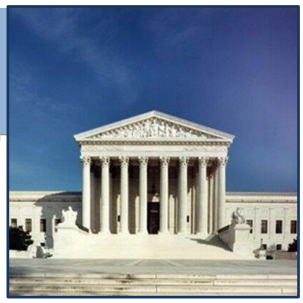
1. *See Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic element of the law, as it guards the right of the parties and ensures continued acceptance of the laws by all of the people."); Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. Davis L. Rev. 1105 (2014) (describing the constitutional role of the juror).
2. *Powers*, 499 U.S. at 402.
3. John Gastil et al., *From Group Member to Democratic Citizen: How Deliberating with Fellow Jurors Reshapes Civic Attitudes*, 34 Human Commc'n Research 137, 139, 145 (2008).
4. Valerie P. Hans et al., *Deliberative Democracy and the American Civil Jury*, 11 J. of Empirical Legal Stud. 697-717 (Dec. 2014) (finding that jurors in civil trials who have the chance to deliberate are more likely to vote, particularly if the verdict must be unanimous and the defendant is an organization); Gastil, J. et al, *Jury Service and Electoral participation: A Test of the Participation Hypothesis*, 70 J. of Pol. 351-67 (2008) (finding positive relationship between jury service in a criminal trial and voting rates with previously infrequent voters).
5. *See Summarized Resuts of Attorney Survey, 2016 Attorney Survey: Declining Civil Jury Trials* 49 (Dec. 2016), http://civiljuryproject.law.nyu.edu/wp-content/uploads/2017/01/ASTC-CJP-Attorney-Survey-Report-2016.pdf.

New Advisors Spotlight

Hon. Margaret Mirabal Form. Justice on the Texas First Court of Appeals

Oil States Energy Services v. Greene's Energy Group: Oral Argument Recap



On November 27, 2017, the Supreme Court heard oral arguments in the case of *Oil States Energy Services v. Greene's Energy Group*. The case concerns whether the Patent Trial and Appeal Board, an administrative law body, may extinguish patent rights in an *inter partes* review proceeding, or if the patent owner is entitled to a jury trial before an Article III court. The case has the potential to not only undo a central component of the America Invents Act, but also reform the too often fuzzy line between Article III courts and administrative tribunals more generally.

Because of its potential significance, the Civil Jury Project teamed up with academic advisors Professor Erwin Chemerinsky and Professor Alexandra Lahav to draft an amicus brief. We made two arguments. First, we contended that the Seventh Amendment restricts legislative prerogative to redefine common law actions and direct disputes to juryless tribunals. It was precisely such action by the Crown that in part motivated the Declaration of Independence and later the Bill of Rights. Second we argued that the Seventh Amendment's reach is not limited to Article III courts, and criticized functionalist restrictions on the jury right and the uncritical expansion of the so-called "public rights" exception. We concluded by urging the court to issue a narrow opinion limited to this specific area of administrative law. The full amicus brief is available here.

A close review of the oral arguments transcript does not unequivocally reveal the case's likely outcome. While there was some discussion about eighteenth century patent issuance practice, much of the questioning centered on whether *inter partes* review constituted a form of reexamination as opposed to adjudication. The importance of this distinction being that examination falls more clearly within Article I, whereas adjudication requires more thorough Article III participation. Some Justices were concerned with the level of process the PTAB provided patent holders.

However, Justice Sotomayor and Gorsuch seemed to push back against the importance of this distinction. Their questioning suggested their thoughts that if a patent is a private right, than only an Article III court may decide its fate. What followed was a lively debate about whether a patent is a private or a public right, with much discussion focusing on patent holders' substantial reliance in maintaining their patent and the long history of considering patents to be private property. Further, Chief Justice Roberts reprised his argument from past opinions, noting the problematic and amorphous nature of the court's current approach to delineating between the two types of rights.

None of the Justices specifically addressed the need for jury participation in determining patent validity, suggesting the Court is likely to continue to regard Article III and the Seventh Amendment's strictures as coterminous. However, drawing upon the Court's concern over the PTAB's procedural deficiency, counsel for petitioner reminded the Justices that "[T]he existence of panel stacking shows precisely the danger . . . of decision-makers, who are subject to executive political influence." To be sure, jury participation is a critical check on the fair administration of justice.

It will likely be a few more months before the opinion is issued. And currently there is little reason to suspect one outcome over the other. Though rest assured, the Civil Jury Project will offer its take as soon as the opinion becomes available.

Status of Project: Winter 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.

Contact Information

Civil Jury Project
NYU School of Law
Vanderbilt Hall
40 Washington Square
New York, NY 10012
Civiljuryproject@law.nyu.edu

Stephen Susman
Executive Director

Samuel Issacharoff
Faculty Director

Anna Offit
Research Fellow

Richard Jolly
Research Fellow

Kaitlin Villanueva
Admin. Assistant

A Preview of Next

Jill Holmquist will continue our series of contributions from CJP trial consultant advisors. Her piece concerns the importance of various voir dire practices.

The CJP's new Research Fellow, Anna Offit, draws upon her interviews with over 100 AUSA's to discuss the need to strengthen the jury system.

We will launch a new Point-Counterpoint section, in which our advisors debate some of the more controversial proposals for how to reform the jury. If you would like to draft one, please email rljolly@nyu.edu.