

# Jury Matters

The Official News-  
letter for the Civil  
Jury Project at NYU  
School of Law



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## Upcoming Events

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|---------|---|
| April 4 | Civil Trial Innovations Conference; Kansas City, Missouri<br><i>Susman on the Preservation of Trials and Trial Judges</i> |
| April 7 | Jury Improvement Lunch; Corpus Christi, Texas   |
| May 3   | Jury Improvement Lunch; Houston, Texas  |
| May 4   | Jury Improvement Lunch; Dallas, Texas   |

## Opening Statement

Dear Readers,

Amazing strides are being made at the Civil Jury Project here at New York University School of Law. We have launched our second website [WeThePeopleWeTheJury.com](http://WeThePeopleWeTheJury.com) for which we are using social media to direct traffic by members of the public who have completed jury service or recently been summoned to report for jury selection. We have completed and developed exciting empirical projects, and added a number of new judicial and academic advisors. And in February we held our fourth Jury Improvement Lunch, and have three more scheduled this spring.

We are in the process of conducting a large-scale survey of the public's familiarity and reaction to the decline in civil jury trials. With the help of the American Society of Trial Consultants, this project will compliment our previous study of nearly 1,000 attorneys. We are also in the beginning stages of producing a full-length documentary, which will focus on bringing attention to how few cases are being tried by most courts throughout the country. We believe that a documentary is a great way to present our message.

If you would like to review a complete and updated version of our status of project, you can find it on our website [here](http://WeThePeopleWeTheJury.com). Thank you for your continued support of the Civil Jury Project.

Sincerely,  
Stephen D. Susman

## What might a Justice Gorsuch mean for the future of civil juries?

The Supreme Court has been one short for over a year. But on February 1, 2017, President Trump nominated Tenth Circuit Judge Neil Gorsuch to take the seat of deceased Justice Antonin Scalia. Could this spell the revitalization of America's civil juries?

Find out more on pg. 4





# Innovating Civil Jury Trials

Steve Susman and the Civil Jury Project recently published a chapter in the most recent edition of ALM's Texas Business Litigation.

As you surely know, civil jury trials are declining. For instance, in 1962 federal juries decided 5.5% of the civil cases disposed of. By 2015, however, that number had fallen to a paltry 0.76%. That figure means that the average federal judge today presides over roughly two civil jury trials per year! Similar figures are found in state courts around the country.

The cause of this decline is debated. Some point to the expansion of pretrial discovery, which makes the jury's fact-finding role less necessary. Others stress the rise in managerial judges with individual dockets, who are more interested in guiding the parties to settlement than in trying cases. Finally, some blame various judicial doctrines born out of the litigation reform movement that require cases to survive the probability screens of enhanced pleading and summary judgment,

as well as the reliability screen of Daubert, before they are allowed to be decided by juries.

But while the debate rages over the causes, what can be done about it? One way is to adopt innovations that improve the quality of the jury and its ability to reach the right result. Steve Susman and the Civil Jury Project recently published a chapter in ALM's Texas Business Litigation book exploring ways to improve jury trials. It provides an overview of eight innovations, as well as a review of the legal and empirical foundation for each.

The proposed innovations include: (1) limiting the length of trials; (2) providing jurors preliminary substantive instructions; (3) allowing jurors to ask questions; (4) administering pre-voir dire questionnaires; (5) giving opening statements before

voir dire; (6) permitting interim arguments by counsel; (7) presenting expert testimony back-to-back; and (8) allowing jurors to discuss evidence before deliberation.

While the chapter specifically focuses on the use of these practices in Texas, they need not be so limited. Indeed, we encourage lawyers and judges to try them in other jurisdictions. These proposals can make civil jury trials quicker, less costly, and more accurate. They can also improve the experience of those serving on juries, thereby making citizens more likely to report to courthouses and serve on cases to completion. In this way, each proposal can help to stem the jury trial's disappearance.

You can find the CJP's chapter as well as the book's other chapters through the typical online channels.

## How Are You Innovating?

If you have any experience with the above innovations, we would love to hear from you! Did you find that they made the trial better? Would you be willing to use them again? What would you change about them?

Alternatively, if you have experience with innovations not mentioned, we would also like to know. Parties routinely enter into a wide-range of procedural agreements that alter trial in meaningful ways. Yet, because these innovations are

hidden in contracts, they are difficult for us to study without first being alerted to their existence.

You can write to us directly on our [website](#), where we host a blog for practitioners and judges to discuss issues related to civil juries.





## The CJP is continuing its public outreach efforts with new social and visual media.

Last month we alerted you to the looming launch of our new website, [WethePeopleWetheJury.com](http://WethePeopleWetheJury.com), which is designed for use by non-lawyers who have served on juries as well as those who have been summoned for jury duty and not yet served.

Over the course of this Project, we have learned that those who served on a jury almost unanimously thought it was a rewarding experience, while those who have been summoned but not yet served, are surfing the web looking for ways to avoid it. Our goal is to expose those who are trying to avoid service to the testimonials of those who have already served in order to convince them to report.

We hope to also provide a channel through which people can learn about the jury as a historically significant and constitutionally required institution. We want them to be excited about the prospect of serving on a jury with their peers, and generally to leave the website with a greater understanding and respect for what is going on in their courthouses.

Another purpose of this website is to provide an opportunity for citizens to

voice constructive criticisms of their jury service experiences and engage in a productive dialogue with each other. By collecting and reviewing this information, we hope to spark further investigations and empirical research for the Civil Jury Project to pursue.

Today, we are happy to report that the website has been live for the past three weeks and welcoming visitors.

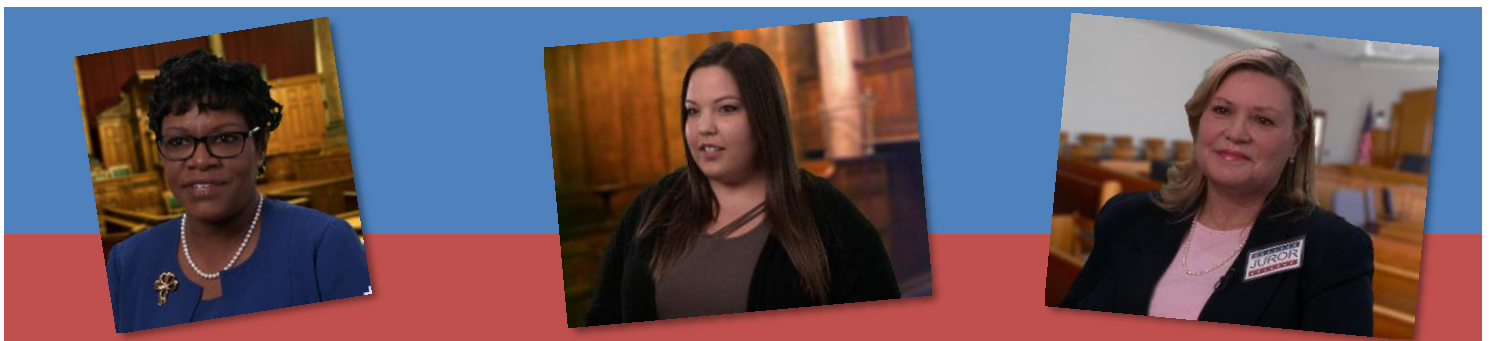
One of the things we kept hearing at our [Jury Improvement Lunches](#) around the country from those who recently served on juries was that while the presiding judge was very clear in explaining the importance of the jury as a democratic and adjudicative institution, the initial assembly room video was awfully outdated. Some people even noted that the video they were shown contained overtly sexist language.

That is unacceptable. Unfortunately, it is very difficult for a national organization like the Civil Jury Project to replace these videos, as they often incorporate local actors, insignias, and histories. Not to mention, it would be terribly inefficient for our organization to try to replace them one by one.

We decided that a better way to address this issue was to produce an online “jury assembly room video.” But instead of a bulk and boring 20-minute video like those shown in courthouses, we would divide the content into a series of short videos offering the historical and constitutional underpinnings of the jury; testimonials from citizens, judges, and celebrities; and answers to citizen’s frequently asked questions.

We have finished filming the first of these videos. It features a series of jury testimonials collected from people who recently served on juries in Dallas, Texas. Their pictures are featured at the top and bottom of this page. They speak candidly about their experiences and directly to those citizens who may be reluctant to report to jury service. We will finish post-production soon and post them on our website [here](#).

Over the coming month, we will begin work on the next video. It will feature the thoughts that judges have about the jury. If you would like to participate, please do not hesitate to [contact us](#).

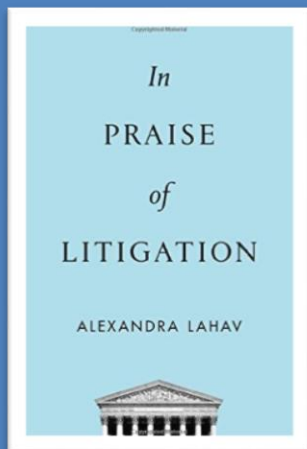






The Civil Jury Project Sponsored a Jury Improvement Lunch in Houston, Texas on Feb. 9.

You can watch a video recording of the event [here](#).



Professor Alexandra Lahav recently published a fantastic new book titled *In Praise of Litigation*

You can find out more about the book by clicking [here](#).

## What future might Neil Gorsuch bring?

It is highly likely that Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit will take the Supreme Court seat formerly occupied by deceased Justice Antonin Scalia. As such, all interested parties have been hard at work trying to pin down his various jurisprudences in order to gain insight into what may be a decades-long career.

The Civil Jury Project is no different. We have conducted an in-depth review of Judge Gorsuch's career and writings to report on what the future might hold. Our findings reveal a judge who has a deep respect for the efforts of trial attorneys and district courts, and a general reluctance to disturb jury findings.

For instance, just last year in *Cook v. Rockwell International Corp.*, Judge Gorsuch (in a 2-to-1 decision) sustained a state law nuisance jury verdict for \$919 million in favor of 13 plaintiffs injured by the negligent release of radioactive waste into ground water near Denver. Despite the amount of the verdict and the sophistication of the many arguments made by the corporate defendants to avoid it, Judge Gorsuch respected and upheld the decision of the jury even though it was pro-environment and anti-business.

This result might be unsurprising considering that in his former career Judge Gorsuch was an accomplished trial attorney. Indeed, in 2000—working at Kellogg Huber—Gorsuch helped secure a \$1.05 billion jury verdict for a client from U.S. Tobacco Co. The staggering award was upheld by the Sixth Circuit in 2002, and is believed to be the largest affirmed private antitrust damage award ever.

Judge Gorsuch has also written about how the administration of civil



justice can be bettered. He recently published an article in *Duke Judicature* titled, "Access to Affordable Justice." In it he explains how the current civil justice system is so expensive that it excludes people and consistently leaves legal rights unvindicated. He offers a number of solutions that he believes will increase the overall efficiency and fairness of civil justice administration.

In addition to this article, Judge Gorsuch has recently floated an intriguing proposal among his colleagues. The idea is simple: As is true for criminal cases, a jury trial would be the default in civil cases. That is, if a party is entitled to a jury trial on a claim (whether under the Seventh Amendment, a statute, or otherwise), that claim will be tried by a jury unless the party waives a jury, in writing, as to that claim or any subsidiary issue. He notes that this change would: (1) encourage jury trials; (2) simplify civil procedure; (3) produce greater certainty; and (4) "honor the Seventh Amendment more fully."

While we cannot be certain how precisely a "Justice Gorsuch" would alter the Supreme Court, his career and writings suggest that he would be more friend than foe to civil juries. Other organizations, like the American Board of Trial Advocates, have done research and circulated to Senators proposed questions to ask in Judge Gorsuch's confirmation hearings. We are all very excited to see what the next few months will bring.

## Status of Project: Spring 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
- Advance a large scale survey regarding public perceptions of public dispute resolution
- 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. We believe that 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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