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Judges, Jurors Deliver Insights at Lunch Discussion

Civil Jury Project presents panel on progressive trial practices

Houston-based trial lawyer and Civil Jury Project director Stephen Susman (far right) moderated the Thursday panel, which consisted of jurors and state and federal judges. / **DOUG CHARTIER, LAW WEEK**

BY **DOUG CHARTIER**
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Judges and jurors have different ideas on how to improve jury trials, and a group of them shared those thoughts as part of a nationwide info-gathering project last week.

The New York University School of Law's Civil Jury Project held a lunch panel of Colorado judges and jurors, getting their take on progressive trial practices before an audience of lawyers and jurists.

Headed by Houston-based plaintiffs' attorney Stephen Susman, the Civil Jury Project is hosting "Jury Improvement Luncheons" in various cities. The sessions are part of the Civil Jury Project's stated goal of finding ways to improve the trial process in an era where juries are seeing a diminishing role in the civil justice system.

U.S. District Court judges Christine Arguello and R. Brooke Jackson, along with 2nd Judicial District Court judges David Goldberg, A. Bruce Jones and Bob McGahey, were joined on the panel by three jurors discharged from a recent case. The luncheon took place Thursday at the Ritz-Carlton, Denver.

Today there are fewer civil trials — both jury and bench — than at any point in U.S. history, according to Susman. In 1962, roughly 6 percent of civil federal cases were resolved by jury trial. Last year, that number was 0.7 percent, meaning judges on average tried about three jury trials a year. Susman noted that Colorado's federal judges, however, are trying twice that national average per authorized judgeship.

In state courts, 8.8 percent of cases were resolved by jury trials in 2001, but that number is now down to 0.3 percent, according to Civil Jury Project research.

"Why is this treasured institution

in such disuse today?" Susman asked. "We know it's happening. Is it worth complaining about? Should we be concerned?"

The Civil Jury Project is studying the use of various "trial innovations," such as allowing back-to-back expert testimony and imposing trial length limits, which are aimed at improving juror comprehension and making trials less time-consuming.

Susman asked what the judges thought of setting time limits for trials. They generally weren't keen on it.

"My rule is, if you're going to go longer than a week on a case, and I look through it and I don't think it should be, you have to come before me and justify it," Arguello said.

McGahey said he was also reluctant to set time limits. Instead he advises counsel to plan the trial length based on the worst-case scenario. "If we get the case done sooner than we told the jury, they think we're all geniuses," McGahey said, adding that the onus is on the lawyers. "But if it takes longer than we told them on the first day, they get really mad, but they won't be getting mad at me."

Jackson said he doesn't set time limits because he doesn't like to "micromanage the lawyers' trial of the case."

Susman said courts sometimes handicap jurors by not telling them what the law is at the beginning of a civil case. He asked the judges if they had "experimented with" giving juries preliminary substantive instruction to help their comprehension of the case.

Jackson supports that practice in particularly complex cases. He is currently presiding over a two-week trade secrets trial, and he said in that case he instructed the jurors on general instructions, elements, damages — "the works" — right after they were selected.

McGahey said the practice was common among Colorado judges.

Goldberg said he was hesitant, however, at the outset of cases to go beyond general instructions regarding credibility and burden of proof; it's uncertain what claims are going to survive a Rule 50 motion and ultimately make it to the jury or whether or not there's a factual basis for an affirmative defense.

"I'm concerned … about charging the jury with those instructions before (those developments) because I think it may prejudice or impact the trial for one of the sides," he said.

Juror Susan Frederickson said those substantive preliminary instructions would be helpful, at least to know what the plaintiff must prove prior to hearing the evidence.

"You're sitting in this trial, you're getting all this information thrown at you," Frederickson said. "You should know what you should pay attention to instead of trying to sift through everything at the end."

Susman asked if the judges allowed jurors to submit questions to the witnesses, a practice that gets "rave reviews" from jurors across the country, he said.

Arguello said she'd done it once "in a trial that was particularly complicated" and thought it worked very well. She expects pushback from lawyers, however, whom she said don't generally want jurors to ask the witnesses questions.

McGahey said that allowing written questions to witnesses is "the default position in Colorado."

Another innovative trial practice is allowing jurors to discuss the evidence when they're together in the jury room prior to final deliberations. Susman polled the judges on whether they had ever done that.

"That's also the default position in Colorado," McGahey replied.

"We're a very progressive state," Jones told the Texas-based moderator, which he added, to laughter, "We have marijuana." Jones said that by allowing jurors to talk to each other about the case throughout the trial — and provided they keep an open mind as it proceeds — the final deliberations don't last for days.

Jackson wasn't inclined to allow pre-deliberation discussion of evidence, as he said "there's a potential for unfairness to the defendant" because jurors tend to talk only about the plaintiff's case.

Susman asked juror B.A. Kane whether the jury she served on was able to discuss evidence as it was presented, but without deciding the case early. Kane said yes: The case "was very confusing" and discussions helped the jury keep up with all of the unfolding details, she said.

Another growing trial practice, Susman said, is allowing lawyers to explain for the jury the purpose of their upcoming witness, or once the testimony concludes, pointing out for the jury what was important about what the witness said. Susman asked the jurors what they thought of that practice.

"Some attorneys just talk too much already," Frederickson said.

Kane said that might be "interesting" to have those summaries because at her trial, some witnesses' testimony didn't add much to the case, she thought, and perhaps the attorneys could have explained why they were called. Susman said he hoped these luncheons could become a regular function where each month lawyers and judges can gather to hear discussion among judges and jurors. But there aren't enough jurors being discharged from cases to easily hold the luncheons that often, he said.

In addition to conducting the luncheons, the Civil Jury Project is continuing to gather empirical data to help explain the decline of jury trials.

"The point is that juries are a constitutional actor that is not being used to the degree that they were initially viewed to be, and we need to understand why," Richard Jolly, research fellow for the Civil Jury Project, told Law Week.

Jolly said many factors — both current and historical — have contributed to the dearth of civil jury trials. Adoption of the Federal Rules of Civil Procedure "absolutely precipitated a decline in the number of jury trials" and empowered judges to make certain determinations that they couldn't previously in different cases, he said.

The '70s onward saw a swell of federal litigation stemming from civil rights and other new protections. To control the growing dockets, courts encouraged judges to guide more and more cases to settlement.

Today, with more than a hundred federal court vacancies, and no new permanent federal judgeships created since the early 2000's, individual judges are overwhelmed and face more pressure to encourage settlements, Jolly said.•

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