Jury Matters

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

July '18, Vol. 3, Issue 7

Upcoming Events

9.5	Jury Improvement Lunch; Las Vegas, NV
9.6	Jury Improvement Lunch; Oklahoma City, OK
9.7	Jury Improvement Lunch; Miami, FL
10.3	Jury Improvement Lunch; Los Angeles, CA
10.4	Jury Improvement Lunch; Tucson, AZ
10.23	Jury Improvement Lunch; New York, NY
12.7	Jury Improvement Lunch; Palm Beach, FL

Opening Statement

Dear Readers,

Welcome to the July edition of the Civil Jury Project's monthly newsletter. In the beginning of June I had the privilege of delivering a speech on civil juries at the Commercial Bar Association Meeting in Vienna, Austria. The Civil Jury Project then organized a successful Jury Improvement Lunch in Seattle after organizing an inaugural event last summer. A panel of three judges and four former jurors shared reflections on jury service, contributing to a fruitful discussion.

We were also delighted to co-sponsor a Jury Appreciation Luncheon in Toledo, featuring ten former jurors who shared a uniformly positive impression of the jury system based on their experience. Our colleagues in Toledo are already planning a second event for the coming year.

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. In addition, we welcome op-ed proposals or full article drafts for inclusion in upcoming newsletters and on our website either by email or here.

Sincerely,
Stephen D. Susman

"Nothing gets missed when the case is well-tried"

Hon. J. Thomas Marten (Senior USDJ, D KS) answers questions on the steady decline of civil jury trials on his watch and why—as lawyers and citizens—we should care about this.

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What Juries *Really* Think: Practical Guidance for Trial Lawyers

By Gretchen Scavo and Hon. Amy J. St. Eve

At the conclusion of trials, I typically meet with jurors to thank them for their service and to discuss their experience. In my fifteen years on the bench, I have found that jurors are eager to talk about the trial and especially about the lawyers after returning their verdict. Realizing the value their insight would provide to the trial bar, I decided to design and conduct an informal study to capture that information and then package it in a practical and useful format for attorneys. The goal was to capture, in the jurors' own words, their likes and dislikes about attorneys' behavior and performance during trial.

To that end, I surveyed over 500 jurors who served in federal district court criminal and civil trials—almost exclusively in those I presided over—from 2011 to 2017. I asked jurors what lawyers did that the jurors liked and disliked, what they would have liked to see the lawyers do differently, and for any other comments they had about the trial. All questions were open-ended by design. Participation in the survey was voluntary, and the response rates were high. Despite their differences, the responses indicate that jurors hold common beliefs about what they expect to see and hear from attorneys in the courtroom. Below is a summary of the most common survey response themes.

1. Organization, Preparation, and Efficiency. Almost half of the jurors commented—either positively or negatively—on this topic, and it was the most common suggestion on how lawyers could improve. Jurors pay attention and can tell when attorneys are "winging it" versus when they are prepared. They expect attorneys to have a plan, know where the relevant materials are, organize evidence with opposing counsel, and proceed efficiently. Jurors commented, for example, that they wished the attorneys would have "prepare[d] more thoroughly so that their evidence isn't missing or that they can't think of the next question without long pauses," and that they did not like the attorneys' "lack of preparedness— [they] seemed to wing it." Another juror wanted to see attorneys "be more concise," and noted that "brevity and clarity are so important."

None of this is surprising in light of what jurors must do—apply the law to the facts and decide the case that is presented to them—and given that serving on a jury takes jurors away from their daily lives. It is undoubtedly much easier and more efficient (not to mention more pleasant) for jurors to sort through complicated evidence, argument, and legal theories when they are neatly packaged and the trial proceeds efficiently.

2. Presentation Style and Delivery. This topic was the second-most popular amongst the jurors, with more than a third commenting on it. Jurors want attorneys to make a connection with the jury. A great place for attorneys to start is to mind basic manners—including introducing yourself at the outset of a case, speaking to jurors directly, and making appropriate eye contact.

Attorneys should remember the importance of speaking slowly and loudly enough for the jury to hear and process the information. This cannot be overstated. In fact, one juror commented that she was "not able hear one of the plaintiff's attorneys most of the time." An attorney could have stellar evidence and a winning argument, but if the jury cannot hear or understand the presentation, it is all for naught.

Despite what is depicted on TV and in the movies, jurors do not like extravagant and dramatic displays during trial. Jurors cautioned attorneys not to "put on a show" and to "calm down and [don't] let emotions get in the way." Conversely, some of the jurors liked when attorneys "did not get overly emotional" and when they were "not overly dramatic/theatrical."

3. Attorney Behavior and Professionalism. This topic, not surprisingly, ranked among the top themes in the survey responses. The key takeway from the responses is this: jurors do not like unprofessional lawyers, and they pay close attention to how lawyers treat opposing counsel, witnesses (including parties), the judge, courtroom staff, members of the jury, and even their own co-counsel.

Again, despite what is often depicted in the movies, survey responses indicated that jurors like when opposing counsel get along and treat each other with respect during the trial. Bickering with and interrupting one another distracts from the substance of the case and makes the trial personal to the attorneys rather than to the parties. As one juror put it, attorneys' negative "attitudes toward each other, while entertaining, took away from the case." Jurors also pay attention to and dislike attorneys' negative non-verbal communications, including rolling eyes and giving dirty looks.

Jurors' expectations of professionalism extend beyond co-counsel to literally everyone else in the courtroom, including the other side's witnesses. Some jurors commented that they did not like when attorneys "belittled witnesses," "attacked the character of a defendant in a respectable office," "got personal—just need the facts," "picked on witnesses that were not pivotal and then took it too far," and "us[ed] a tone of voice and an approach to intimidate witnesses."

2. Evidence Presentation. Jurors commented on the order of the evidence presented, how often it was repeated, the clarity (or lack thereof) of the evidence, and preferences about the type of evidence presented. A prevalent theme was jurors' disdain for repetition: they strongly dislike when attorneys repeat questions or concepts over and over. More than one-third of surveyed jurors commented (almost exclusively negatively) on repetition, making it the third most common response topic. As one juror put it, "If we do not get the point the first or second time, then we are unlikely to ever get it. All that is accomplished by excessive repetition is the annoyance of the jurors."

Another lesson from the surveys is to avoid lengthy, compound, and irrelevant questions, and instead ask clear, succinct, and relevant questions. Jurors like when there is a method to the order in which evidence is presented, with timelines and summaries connecting key evidence to relevant dates. The responses also show that jurors expect attorneys to use closing arguments effectively to help tie together all of the evidence presented in a clear and meaningful way.

And just as technology has become a mainstay in almost every aspect of American life, it has also become a mainstay in the courtroom. Jurors want attorneys to use technology and visual aids to tell their story, and they expect that attorneys will know how to use that technology. This relates back to preparation and organization—jurors do not want to sit through technological snafus.

1. Jurors Feel a Sense of Pride in Serving. Nearly one in five jurors commented—unprompted—on the sense of pride/enjoyment in serving on a federal jury and their respect for the American judicial system. Despite the colloquial and often cynical commentary from many about the inconvenience and annoyance of having to serve jury duty, the juror comments tell a different story. As one juror noted, "It was an experience that everyone should have as an American citizen. It has changed my view of how our justice [system] works in the most positive way."

[This piece is adapted from the authors' article "What Juries *Really* Think: Practical Guidance for Trial Lawyers," recently published in Cornell Law Review Online. Full article here: http://cornelllawreview.org/files/2018/04/St.EveEssay-1.pdf.]

Gretchen Scavo is the Learning & Development Lead for Winston & Strawn LLP's litigation department. She is a former law clerk for Judge St. Eve.

Hon. Amy J. St. Eve was appointed as a United State Circuit Court Judge for the Seventh Circuit in 2018. Prior to her appointment, St. Eve served as a United States District Court Judge for the Northern District of Illinois from 2002-18.

A Trial Judge's Perspective on Saving Jury Trials

By Hon. J. Thomas Marten

1. When did you first realize that civil jury trials were beginning to disappear from your courtroom?

It was not so much a sudden realization, as it was looking at our District's numbers over a period of years. Those numbers are broken out by each judge and totaled. There were years I had several (4 or more) civil trials, some years where I had none or one. Because criminal trials are part of our docket, until one really looked at the numbers separately, the civil trial decline was not so obvious. Additionally, we seem to go through cycles where we have more trials and some less. But 4-5 years ago, it was obvious that the decline was not a mini-trend; it was steadily downward over an extended period of years and continuing.

2. When did you decide that the decline of the civil jury trial might be a problem?

Having taught trial advocacy for well over three decades in a variety of settings, about five years ago, I started thinking about why we are teaching trial ad when fewer and fewer cases are getting tried. Going through the steps, the next thought was, while fewer cases might be going to trial, those that do go need lawyers who are both comfortable and capable in the courtroom. So that answered the first question. The second question became, why are we having trials? The Constitution of the United States guarantees the right to a jury trial to resolve disputes, but that right, as is the case with many others, may be waived. So what do jury trials give us that other dispute resolution processes do not? Among the most important benefits is community input on the matters at issue. Where will parties find 12 persons (I have gone back to using 12-person juries in civil cases) with no stake in the outcome of a dispute to hear both sides, to receive instructions on the law governing the case, and to decide who has the better side of the issue(s)? Finally, if the plaintiff prevails, the jury decides what the case is worth. There may be scientific ways of polling citizens about value, but the results will be suspect because those polled will not have the benefit of seeing and hearing all sides of a case presented in a most comprehensive and persuasive way. How is a company persuaded that one or more of its practices or products violates the law or is dangerous? What provides the economic incentive to make changes? From a defense perspective, to avoid a series of nuisance settlements, what better vehicle than several defense verdicts which will deter future suits? These are all serious issues that are exacerbated without verdicts to provide benchmarks and boundaries.

3. Why did you decide to take action?

When I became a judge, one of the first things I noticed was that the outcome of the case, which is pretty much the bottom line for a trial lawyer, became of no consequence, so long as the process was good. To my way of thinking, that meant in any trial, we should direct our efforts toward giving the jury the clearest, most accurate, understandable and comprehensive view of the evidence possible. If we could accomplish that at trial, the verdicts would be better, meaning we would achieve something closer to justice. I had been having the lawyers do complete opening statements before jury selection in every civil trial since 1998. I had instructed the jury after jury selection but before the lawyers started presenting evidence in a few instances. In two cases, and with an appropriate instruction, I allowed jurors to discuss the evidence they had heard that day before they went home for the day. Several other tools we now use in all my civil trials are things I have thought about for some time. I decided to go all in a year ago.

4. What are the main culprits/causes for the decline of the civil jury trial?

There are plenty of culprits. A few include mandatory arbitration clauses, ADR (and the perception that ADR, in nearly every iteration, is less costly than taking a case through trial), mandatory mediation, clients who are nervous about going to trial, lawyers who are nervous about going to trial, and judges who push settlement. Some judges have legitimate concerns about managing their dockets. Some came to the bench with little or no trial experience and are wary of trying even a simple case (that is another matter for another day, but judicial appointments and elections do not always result in qualified judges). Litigation expense is always cited as a factor. Judges who are willing to make the effort can properly assist in controlling expense with proportionality rules and frank discussions with the parties about the case as it moves forward. From my perspective, the largest single economic factor is the parties' lack of trust in the good faith of the opposing party or parties. There are suspicions of hidden agendas on one side or the other when a party suggests stipulating to certain facts or procedures. That is, lawyers frequently do not know each other well enough to develop trust. Certainly, they do not talk directly to each other nearly enough.

5. What are the solutions to stopping the decline?

Some are obvious -- lawyers need to work together to agree on some fundamental facts and issues to pare a case down to where it can be tried with a reasonable number of witnesses, a reasonable number of exhibits, in a reasonable period of time. As an example, I agreed to try what was supposed to be a 6-8 week FLSA case in Central California. While the parties ultimately agreed to a bench trial, which they said would cut the case to a four-week trial, we actually finished it in less than three trial days, just by encouraging the parties to agree on the admissibility of exhibits (they had agreed to the admissibility of 1 out of roughly 500 exhibits; they finally agreed to all but 7, none of which they used in the trial). This was an extreme case, but it demonstrates the importance of actually agreeing to facts and the resolution of certain issues that are not or should not be contested. Some other issues which should be on the table for discussion are improving the quality and confidence of the advocates and judges, some novel approaches to trials, such as high-low agreements (there are both a floor and a ceiling on recoveries), agreements to truncated trials, imposing time limits on the parties both in getting to trial and during trial, and increasing the confidence of the parties in the jury system. Finally, and this is a tough one, the lawyers and the court need to recognize that the purpose of a trial is to determine the truth. A lawyer must always seek the best possible result for the client, but not at the expense of the truth. If the parties understand that rigorous representation has always included the notion that it must be within the bounds of the law, and not overstepping them, I think more cases would be placed in the hands of community members, As I mentioned previously, some of the procedural changes a handful of courts have adopted are concerned with giving juries the best information available to reach the best decision possible. There are always legitimate disputes. It may involve what the parties' respective beliefs are, whether it is contractual language or where fault lies in a personal injury or death case. And the damages are frequently subject to a good faith disagreement. Those cases should be tried to benefit those with similar disputes that follow.

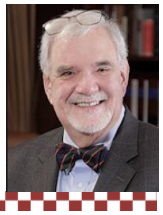
6. What are ways that the average lawyer can help in stopping the decline?

All lawyers can begin communicating personally, having breakfast or lunch together, meeting at either lawyer's office for face-to-face discussions, relying less on email and text messages. They can jointly formulate well-thought-out plans for discovery, and limit discovery to those matters truly in issue. In most instances, lawyers could stipulate to about half of the facts brought out through testimony. And they could work with the courts to try presenting evidence in novel but meritorious ways. These include time-limits for trial, opening statements before voir dire, focused lawyer-conducted voir dire, providing proposed instructions to the court well ahead of trial to assist the court in giving full sets of instructions to jurors before presenting evidence, not fearing jurors discussing the case during trial (with appropriate instructions), dealing with alternative trial schedules, short explanations to jurors about what the lawyer hopes to prove/disprove with the witness taking the stand if the testimony is somewhat complex, and finishing earlier than expected. These things and much more go into a decision about whether to take a case to trial, but I do believe that the cleaner the case, the better the verdict. There are likely to be fewer outlier verdicts. The parties, whether they agree with the verdict or not, may develop more confidence in the system, and be willing to take more cases to trial.

7. Anything you want the average lawyer to know about the decline of the civil jury trial?

To me, the "average lawyer" is the one who is out there doing her or his best on behalf of a client every day,

whether it is in litigation or some other legal area. Our decreasing numbers of civil trials leads me to hope that everyone who has access to the courts, extending well beyond only those in the legal profession, recognizes that having a group of persons from one's community decide disputes between neighbors has been a part of western civilization for nearly 1,000 years. Our Founding Fathers held jurors in such high esteem that they wrote jurors into the Constitution itself. And the right to a jury trial in civil cases is enshrined in the Seventh Amendment to the Bill of Rights. A civil jury trial should not be lightly waived, nor should it be discarded for economic reasons without carefully considering what the dollars and cents really will be if one looks at cost-effectiveness in shaping the case and conforming discovery to the true issues. What of the impact of a jury verdict beyond the case at issue? And what is the perspective of twelve community members looking at the evidence worth? Nothing gets missed when the case is well-tried. And while the jury will attach a value to the case, how does one measure the worth of that decision? As the famous series of television advertisements put it, "Priceless."

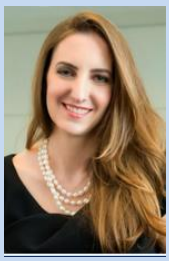


J. Thomas Marten is a Senior United States District Judge of the United States District Court for the District of Kansas.

New Advisors Spotlight

Hon. David Counts
US District for the Western District of Texas

Hon. Nicholas Garaufis
US District Court for the Eastern District of New York



Hon. Kristen Hawkins
Texas 11th District Court

Hon. Sandra Perlman
Circuit Court of the 17th Judicial Circuit of Florida

Overview of CJP Research Presented at 2018 Law & Society Meeting in Toronto

The Civil Jury Project's Research Fellows, Anna Offit and Richard Jolly, presented papers at this year's Law & Society Association Annual Meeting.

As part of a panel of the role bias plays in jury decisions, Richard Jolly presented his new paper "The New Impartial Jury Mandate" which is forthcoming in the Michigan Law Review. He recognizes that courts have historically treated jury impartiality as procedural in nature, meaning that the Constitution requires certain prophylactic procedures which secure a jury that is more likely to reach verdicts impartiality. But in *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), the Supreme Court recognized for the first time an enforceable, substantive component to the mandate. There, the Court held that criminal litigants have a Sixth Amendment right to jury decisions made without reliance on extreme bias, specifically on the basis of race or national origin. The Court did not provide a standard for determining when evidence of partiality is sufficient to set aside a verdict, but made clear that an otherwise procedurally adequate decision may fall to substantive deficiencies.

Richard's article goes on to advance a structural theory of the Constitution's Impartial Jury Mandate, focusing on the interplay between its ex-ante procedural and ex-post substantive components. He argues that the mandate has traditionally taken shape as a collection of procedural guarantees because of a common law prohibition on reviewing the substance of jury deliberations. *Pena-Rodriguez* tosses this constraint, allowing judges for the first time to review the rationales upon which jurors base their verdicts. Richard then offers a novel approach for applying substantive impartiality more broadly by looking to the Equal Protection Clause's tiers of scrutiny. He concludes that ex-ante procedural rules and ex-post substantive review can operate in conjunction to tease out undesirable, impermissible forms of jury bias, while still allowing for desirable, permissible forms of jury bias.

As part of a panel on comparative jury scholarship, Anna Offit presented twelve months of empirical research on Norway's jury system. After years of anticipation, Norwegian politicians reached an agreement last year that mixed courts of lay and professional judges would replace the all-layperson juries that presided over criminal appellate cases. Anna argues that this shift reflects confidence on the part of Norwegian citizens that laypeople and professional lawyers can deliberate as equals.

Anna argues that skepticism toward all-layperson juries becomes particularly visible in the context of sex crimes. Focusing on a high profile trial (called Hemsedal) as a case study, she contends that criticism of rape prosecutions has fueled broader critiques of lay participation in the legal system. In the District Court, which heard the Hemsedal case first, a mixed panel of one professional judge and two lay judges convicted three defendants of rape. On appeal, however, a jury of ten laypeople acquitted them of all charges. Although professional judges set this second verdict aside and remanded the case, three lay judges acquitted the defendants again. Coverage of this case reveals the vulnerability of different types of lay decision-makers to criticism that they are ill-equipped to evaluate evidence.

Anna's research on the Norwegian jury system is forthcoming in the Political and Legal Anthropology Review, and an Oxford University Press volume titled Juries, Lay Judges, and Mixed Courts: A Global Perspective, edited by Shari Seidman Diamond, Valerie Hans, Sanja Kutnjak Ivkovic, and Nancy Marder.

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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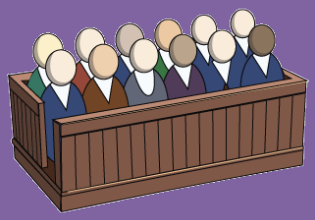
A Preview of Future CJP Newsletters . . .

Professor Janet Randall of Northeastern University describes research showing the effect of Plain English instructions on juror comprehension



President of the Dallas Bar Association, Michael K. Hurst, discusses the urgent need to halt the decline of jury trials.