

Jury Matters

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



August 2018, Vol. 3, Issue 8

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; Tuscon, AZ
- 10.23 Jury Improvement Lunch; New York, NY
- 12.7 Jury Improvement Lunch; Palm Beach, FL



Opening Statement

Dear Readers,

Welcome to the August edition of the Civil Jury Project's monthly newsletter. We have been hard at work planning a full calendar of Jury Improvement Lunches and Jury Innovations Workshops for the fall and winter. As always, we look forward to seeing many of our Judicial Advisers in attendance at these events and are indebted to their assistance and enthusiastic support.

I am pleased to report that after completing his tenure at NYU this summer, Richard Jolly will join the Los Angeles office of Susman Godfrey as an associate. He has served as a Research Fellow for the past two years and I look forward to his continuing contributions to the Project from this new position.

Thank you for your 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

"A Clear Policy Preference Has Emerged for Denying Citizens Their Day in Court"

Senator Sheldon Whitehouse (D-RI) authored an amicus brief that makes an impassioned case for the civil jury in the wake of pro-arbitration Supreme Court decisions. Read it here: →

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What Judges Can Do To Preserve Jury Trials

By Stephen Susman



As someone who has tried cases for 50 years and has most recently served as the executive director of the Civil Jury Project at New York University School of Law, I have become convinced that trial judges hold the keys to preserving a viable public dispute resolution system in general and jury trials in particular. Here are some things they can do now, without any change in the laws or rules, to reduce the expense and increase the reliability of public trials:

I. At the first scheduling conference, set a definite, nonmovable trial date, or alternatively a fixed and short window within which discovery must be completed. One of the reasons that private dispute resolution is replacing public trials is that the parties who hire arbitrators can agree upon the exact date for the hearing with no chance of postponements. Courts make the mistake of not setting trial dates until the cases are trial ready and once they do, 90 percent of motions to continue are granted. Starting and stopping are expensive. So is having a long time to engage in discovery. If the court cannot set a trial date in advance, it most certainly can set a short window within which discovery must be completed.



II. At the same conference, after inquiring of counsel, set a fixed amount of time for the trial and how that time will be divided among the parties.

The biggest complaint of jurors is that the trials last too long and are too repetitive. The biggest reason that judges excuse otherwise great jurors is that the length or hours of the trials impose hardship on those who are highly educated or employed. If the lawyers knew at the beginning how much time they would have to try their cases, the judge might encourage them to take fewer non-discovery-type depositions that will never be shown to the jury. Most lawyers who have participated in a time-limited trial say that it improved their presentations.

III. Require that the lawyers bring their clients to the first conference and meet and confer at the courthouse on which Pretrial and Trial Agreements listed at TrialByAgreement.com they can agree to and explain to the court why they cannot agree to others. The judge can reduce the cost of discovery by either imposing limits or getting the parties to agree upon limits. No deposition should last more than three hours; no expert who has provided a report needs to be deposed. The Pretrial Agreements are now being used by some courts to get the parties to make their own rules for expediting discovery.

IV. Abide by the Juror's Bill of Rights developed by Judge Mark W. Bennett of the Northern District of Iowa. Judge Bennett focuses on improving the experience of jurors. His suggestions- which include no sidebars; starting/stopping/breaking on time; plain English instructions; the right to take notes and ask questions; and limits on the length of trial, openings, and closings and the numbers of exhibits and witnesses--can be found at Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: A Federal Trial Judge's View, 48

ARIZ. ST. L. J. 481 (2016), available at http://arizonastatelawjournal.org/wp-content/uploads/2017/01/Bennett_Final.pdf.

V. Entertain oral argument, in person or by phone, on every motion. The disappearing

trial judge needs to come out of chambers and hear from the lawyers. It's fine for the judge to give each side only 10 or 5 minutes. And if the judge can rule from the bench after she does so, so much the better. Do not routinely require mediation before dispositive motions are ruled upon or as a condition to going to trial. While the court should encourage mediation by inquiring whether the parties would consider it, no one should be pressured to waste the time and money in mediation when they really need a decision by a judge or jury.

VI. Eliminate the need for a pretrial order: Require will-call witness and will-show exhibit lists and preliminary substantive instructions but no pretrial deposition designations, stipulations, or issues of fact and law. Many courts are doing away with the requirement of a traditional pretrial order. The biggest waste of time is the need to designate deposition testimony "just in case" rather than "just in time." Most of the testimony designated in advance never is played to the jury. That will be even more true if the court sets time limits. Forty-eight hours is ample notice for counter-designations, objections, and rulings. Give jurors the same tools judges use in bench trials and arbitrators use in arbitrations. Judges and arbitrators can ask questions of witnesses, keep notes, get real-time transcripts, discuss the case with their law clerks or other members of the tribunal, and know what the law is before they hear the evidence. Denying the same tools to jurors adds to the perception that their verdict is likely to be defective. In civil cases, without any rule changes, judges have the ability to allow jurors to ask questions, take notes, discuss the evidence with other jurors before final deliberations, be given individual copies of instructions on the law and the verdict form at the start of the case, and hear interim arguments of counsel. None of these changes would delay the trial and all would improve jury comprehension.

VII. Adopt Young Lawyer rules that encourage parties to assign young lawyers stand-up roles in

court. Many courts are promising oral arguments if they are informed in advance that a young lawyer will be doing it. They also could promise preferential trial settings for those cases where a young lawyer will be making the opening and closing and cross-examining witnesses.

VIII. Encourage discharged jurors to share their reaction to their experience with the court and the lawyers so that we can together improve future trials. Judges should not assume that jurors want to avoid talking about their experiences. They should encourage jurors to provide feedback to the court and the lawyers. They can do this by telling the jurors they may go to the website WeThePeopleWeTheJury.com and blog about their experience. Today, the average judge around the country, state or federal, is probably trying less than five civil cases, jury or bench, per year. The above suggestions may not reverse this trend, but they will likely prevent public dispute resolution in general and jury trials in particular from vanishing altogether. They all can be adopted without the need for any rule change and without the consent of counsel. If judges assume there is nothing they can do to prevent trials from vanishing, they will indeed vanish. Instead, I urge them to experiment with some of the above ideas. The preservation of many of our other constitutional rights may depend on preserving public trials as a trusted and affordable means of dispute resolution.

[This article excerpts a piece originally printed in the American Bar Association's Judges' Journal Spring 2018 Volume 57, No. 2., a Quarterly Publication of the Judicial Division]



Stephen Susman is the Executive Director of New York Law School's Civil Jury Project

Do you disagree? Please share your reactions, additions, and counterpoints in this newsletter by emailing them to anna.offit@nyu.edu

A National Treasure Worth Saving: The Civil Jury Trial

By Michael K. Hurst

The rule of law may be the most important benefit of living in this great Country. But the right to trial by jury in civil matters is close behind, and serves as a safeguard to our rights. The Founders of the United States contemplated that our clients' important disputes were not to be decided by kings. In fact, in 1789, James Madison said

“Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”

Now, so few civil cases go to trial that lawyers in “trial sections” of firms make partner or even section head without ever having tried a jury trial. Statistically, according to Richard Jolly with the Civil Jury Project – a program championed by renowned trial lawyer Steve Susman - juries today determine fewer cases than at any other point in the nation's history. For instance, in 1962, the year when most federal judicial statistics became available, federal juries decided 5.5% of civil cases, whereas today that number hovers around 0.76%. Most state courts have experienced a similar decline.

Why do civil jury trials matter, and why should we care? As Jolly points out: “Juries allow lay citizens to check judges' work for corruption, state aggrandizement, and application of grounded normative standards. Moreover, jury service offers one of the few opportunities for citizens to be directly involved in the administration of law. As Alexander de Tocqueville described, it is ‘a free school’ that ‘instill[s] some of the habits of the judicial mind into every citizen.’ Perhaps unsurprisingly then, trial by jury is the only right to appear by name in all three of the nation's founding documents: the Declaration of Independence, the Constitution, and the Bill of Rights.”

What can we do? Not to be a downer, but saving the civil jury will be difficult. The future of the civil jury trial may depend upon trial and appellate courts constricting their reading of the Arbitration Acts, the summary judgment standards and recent Texas rules TCRP 91a and TCPA. The Civil Jury Project has taken a different approach. It is trying to bring attention to the decline and develop innovative strategies to make jury trials a preferable mode of dispute resolution. This means adopting techniques that make jury trials cheaper, quicker, and more accurate.



The Dallas Bar Association, in partnership with the Dallas Chapter of the American Board of Trial Advocates, the Dallas Trial Lawyers Association and the Texas Association of Defense Counsel, is doing what it can to tackle this disturbing trend. To address the vanishing civil jury trial, Judge Martin Hoffman and Aaron Tobin have led our creation of 4 modules.

The first module was held on March 23, when Judge Jim Jordan provided an anecdotal history of the civil jury system, followed by Shonn Brown and Judge Ken Molberg speaking to the continuing threats to the civil jury trial and what is going to

happen if the trend is not reversed. In the words of Judge Molberg: “The right to trial by jury has a constitutional identity. And the trial lawyer is essential to its promise. Over the last few decades we have seen a piecemeal destruction of this right. And with that has come an attenuation of the trial bar.”

On May 1, for Module 2, during *juror appreciation week*, the DBA again hosted the juror appreciation program with Mr. Jolly and Steve Susman himself. Judges Hoffman, Craig Smith, and Sam Lindsay participated. Each judge invited jurors who served in their courts to participate. The module focused on how to improve the jury process. A client even provided remarks about how thankful she was to have had her day in court. Judge Bonnie Goldstein, Presiding Judge of the George Allen Central Jury Room, continues to help in this effort, along with Judge Dominique Collins and Lori Ann Bodino, including by ensuring that jurors are greeted, served breakfast and shown the renovations to the central jury room.

Module 3, which will be held in September 2018 with a panel of trial lawyers along with federal and state judges moderated by Judge Hoffman, will address innovations to improve and perhaps save the civil jury system. Module 4 in November 2018 will showcase a debate about why the modern civil jury trial should or should not be preserved.

Now, when this trend hopefully reverses, and young “trial lawyers” have opportunities to try jury trials, how will they be prepared? Inspired by Judge Reed O’Connor, and with prodigious efforts from DAYL President Jennifer Ryback and Executive Director Cherie Harris, the DBA and DAYL have created *The Second Chair Program*, where young civil litigators get opportunities to try

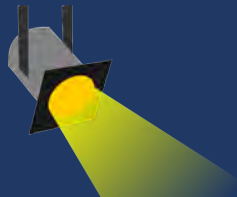
jury trials with seasoned criminal defense lawyers. In the first month of the Program, three young civil litigators had the opportunity to sit second chair with seasoned criminal defense lawyers.

John Gioffredi took Zirwa Sheikh to a DWI trial in late February. Zirwa said “I learned more in two days than I could have ever imagined. John made the experience so easy to follow and was really committed to helping me understand everything. I intend to participate again because what I’ve heard is so valuable.” John said “Zirwa and I both benefitted from this experience.” Russell Wilson took Matt Jaynes to a capital murder trial. Matt said, “Watching the development of voir dire, and the opening statements, having talked to Russell beforehand about the trial strategy and watching those phases weave together has been a tremendous learning experience.”

The civil jury trial is indeed a national treasure. Our profession, our clients and our society need this right as a check and balance so that disputes are decided in the most just way possible – as contemplated by our Founders. Writing and presenting modules about saving the civil jury trial is not going to cause arbitration, summary judgment standards and escalating billable hour rates to suddenly reverse course, but, as lawyers and as leaders, we can perpetuate the discussion before it’s too late.



Michael K. Hurst is president of the Dallas Bar Association and a partner at Lynn Pinker Cox & Hurst



New Advisors Spotlight



Hon. Patti Henning
*Circuit Court of the 17th
Judicial Circuit of Florida*



Hon. Karen Scholer
*U.S. District Court for the
Northern District of Texas*



Hon. Virginia Norton
*Circuit Court of the 4th
Judicial Circuit of Florida*



Hon. C.J. Williams
*Chief Magistrate, U.S.
District Court for the
Northern District of Iowa*

Toledo Thanks Jurors: Reflections on a Successful Juror Appreciation Luncheon

By **Hon. Jack Zouhary**

On May 30, 2018, the Toledo Bar Association hosted its first annual Jury Appreciation Luncheon in collaboration with the NYU Civil Jury Project, the United States District Court for the Northern District of Ohio, the Federal Bar Association, and other local sponsors. Invitations went out to federal court jurors who served in 2017, as well as members of the local Bar and Federal Bench.

The attendees were clearly touched to be recognized for their service. Although they acknowledged initial disappointment in receiving a jury summons, they also universally described their experience as positive and fulfilling. Over the course of the luncheon, the jurors shared what they liked, what they didn't like, and how the experience might be improved. Topics ranged from the jury selection process, to the lawyers' performances, to possible physical changes to the jury room and courtroom. Judge Jack Zouhary of the Northern District of Ohio delivered the opening remarks, inspired by the book "Why Jury Duty Matters" by Andrew Ferguson:

It all begins with an e-mail or letter. "Dear Citizens" -- an invitation. Sure, it uses the word "summons" and is probably not the kind of invitation you look forward to receiving. Yet, it is still an invitation to participate in the American experiment of self-government. Your community needs you. It's only polite to accept, and it's even better to think about how you might enjoy the experience.

It may well be the closest you ever come to the Constitution. In a country formed from a single founding document, it is amazing how disconnected many of us are from its meaning and purpose. Jury duty changes that reality -- it is a day of Constitutional connection.

A jury summons is an invitation to participate -- jurors are asked to involve themselves in some of the most personal, perhaps sensational, and sometimes terrifying events in a community. Participation teaches the skills required

for democratic self-government. As a juror, you are asked to vote based on contested facts. You must debate issues framed by contesting parties. This involves listening to others and tolerating dissenting views as well as expressing your own opinions.

Throughout jury service, you are known by a number -- a juror number. Whether you are a soccer mom or a senator, or both, you are simply a number to the jury system. The number is not meant to insult, but to equalize.

You know your presidential vote counts as much as anyone else's does. But you also know that lobbyists, interest groups, and activists have more influence in the political process than your single vote. In the jury room, those differences become irrelevant. Whether you are a rocket scientist or rock guitarist, a linguist or laborer, jurors are given the same facts -- see the same witnesses, hear the same arguments -- and get an equal voice in the decision. In short, jury service is an example of how democracy is supposed to work.

Jury service connects people across class, national origin, religion, and race. It exists as one of the remaining connecting threads in a wonderfully diverse United States. It links us to our founding principles and challenges us to live up to them.

Congratulations to our jurors here today who completed their service with our Court. Your service reflects our Constitutional spirit. Please know your service is appreciated. You help strengthen our Constitutional character. You exemplify both the importance and the joy of jury duty.

The luncheon was a positive experience for all involved. It presented a unique opportunity to thank the jurors personally for the time and energy they sacrificed for their community. Jury service created a special bond between the attendees, and is an experience they will not soon forget.



Hon. Jack Zouhary is a U.S. District Court Judge in the Northern District of Ohio.

Status of Project: Spring 2018



The Civil Jury Project looks forward to continuing its efforts throughout 2018 with the following objectives:

- Continue with 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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Preview of Future CJP Newsletter Content . . .



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



Traci Feller, Ph.D., discusses findings from her doctoral research on jury deliberations.