

Jury Matters

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



September 2018, Vol. 3, Issue 9

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
- 11.1 Jury Improvement Lunch; Fort Lauderdale, FL
- 12.7 Jury Improvement Lunch; Palm Beach, FL

Opening Statement

Dear Readers,

Welcome to the September edition of the Civil Jury Project's monthly newsletter. We are gearing up for a busy September, with three Jury Improvement Lunches planned in Las Vegas, Oklahoma City, and Miami and another three scheduled for October.

We are also pleased to welcome Michael Pressman who will serve as a research fellow for the next two years. You will find a personal introduction from him in the latter half of this newsletter.

Please click [here](#) if you would like to read the presentation I recently made to the Bench Bar Conference of the 10th Circuit in Colorado Springs.

This edition includes articles by two of our Jury Consultant Advisors. Dr. Traci Feller writes about her research of the difference between evidence-driven and verdict-driven jury deliberations and suggests a jury instruction that encourages the former. Dr. Hailey Drescher writes about the usefulness of shadow jurors to making sure the lawyers are getting their points across.

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

The Word is Spreading on the CJP's Proposed Trial Innovations!

This week the Dallas Bar Association is hosting a panel on the decline of the civil jury trial. Read more on the last page of this newsletter.



Jury Deliberation Styles: Verdict-driven versus Evidence-driven

By Traci Feller, PhD



The American jury is one of the most democratic systems that currently exists in the world. No other vital legal body includes as wide a range of ordinary people and gives them the power and opportunity to make real and immediate decisions that impact fellow citizens. Although they are so central to our justice system, jurors are typically unfamiliar with the workings of a trial in general and are usually unacquainted with the process of serving on a jury — including knowing what to do or how to behave when they begin the jury deliberation. To not be too intrusive to the deliberation process, the instructions given to the jury upon the start of deliberations are intentionally vague when it comes to directing them on how to deliberate (National Center for State Courts, 1998), so it is up to the jury to set and agree upon their own communicative rules and norms. This is made especially difficult for our jurors given they are to do all this with people who are strangers at the start of the trial.

As important as the deliberations are to the essence of the jury, the communications that occur within them remain largely understudied, and especially in the recent few decades. This is mainly because the sanctity of jury deliberations and the safety of the jurors requires that they be done in private and in only a few rare exceptions has a judge allowed them to be video recorded or observed (Manzo, 1996; Sunwolf, 2010). But in addition to that, communications in the jury room are rather complex and difficult to analyze.

In the mid-eighties, Hastie, Penrod, and Pennington (1983) conducted important research on mock juries and discovered two differing approaches that juries took in their deliberations: verdict-driven or evidence-driven. A verdict-driven deliberation style generally begins with a vote, or the stating of each juror's preferred verdict; this style is characterized by a strong sense of the goal as reaching a verdict and begins with positions in conflict or disagreement. On the other hand, an evidence-driven deliberation style

typically does not require jurors to pick a side or state their preferred verdict at the start, but instead jurors spend time discussing the evidence of the case. Hastie et al. (1983) found that evidence-driven juries deliberated longer, discussed evidence and legal definitions in greater depth, agreed more on the “story” of the case, reported higher deliberation satisfaction, and rated their fellow jurors more favorably than verdict-driven juries. Furthermore, evidence-driven deliberations prevent jurors from becoming unduly committed to one side when publicly choosing a side without any discussion; this way jurors spend their time discussing other positions rather than advancing or defending their own.

According to the research of Hastie, Penrod, and Pennington (1983), juries tend to be either verdict-driven or evidence-driven at fairly similar rates. The foreperson typically decides which of the two routes the jury takes at the start of deliberations because the foreperson prioritizes either the evidence or the verdict when the discussion ensues (Devine et al., 2001, Ellison & Munro, 2010). These two styles can make a substantial difference in the deliberation, and thus possibly the verdict (Devine et al., 2001; Hastie et al., 1983; Kameda, 1991). However, results on the effects have been mixed (Davis, Stasson, Ono, & Zimmerman, 1988; Sandys & Dillehay, 1995) and no studies have taken place in the relatively recent past.

In an effort to expand on the research of Hastie, Penrod, and Pennington (1983), and to provide a more current-date analysis, I observed the deliberations of 22 mock trials, which yielded a total of 249 mock jurors, and over 50 hours of deliberation. Each deliberation was recorded and carefully analyzed, and a post-deliberation questionnaire was given to participants to measure the following four concepts: (1) satisfaction with

the deliberation; (2) ratings of the foreperson; [loh] (3) impressions of other jurors and impressions of humanity in general; and (4) self-efficacy about democracy and deliberation. The combination of the observational content analysis of the deliberations with questionnaire data afforded multiple ways to gain insight into the experiences of jurors in the deliberations. A deliberation was considered verdict-driven if there was a vote soliciting each juror's opinions before the majority of jurors had an opportunity to share their thoughts openly and without being tied to one verdict or another. The deliberation was considered evidence-driven if jurors were free to discuss their thoughts openly at the start of deliberation and without picking a side if they did not wish to do so. Some of these evidence-driven juries even had explicit conversations about withholding a group vote for the purpose of not creating two competing sides.



I found there to be slightly more verdict-driven deliberations (59.1%) than evidence-driven deliberations (40.9%), but the speaking turns of the forepersons as well as the other jurors were nearly identical in both deliberation types. The sample size in this study makes statistical inferences difficult, but (1) jurors tended to trend toward having higher satisfaction in evidence-driven deliberations than in verdict-driven deliberations. Furthermore, (2) ratings of the foreperson tended to be higher in forepersons that conducted evidence-driven deliberations than verdict-driven deliberations. Evidence-driven deliberations led jurors to have significantly more positive (3) impressions of humanity in general, however, their impressions of other jurors were only slightly more positive in evidence-driven deliberations than in verdict-driven deliberations. Lastly, and somewhat surprisingly, (4) jurors' self-efficacy about democracy and deliberation were unrelated to the deliberation type. Self-efficacy is the feeling that one can produce a desired result, so according to my research it

seemed as though jurors felt equivalent in their ability to influence democracy in general, as well as the verdict in their deliberation regardless of the type of deliberation they experienced.

In my research as well as research dating back to the mid-eighties, evidence-driven deliberations produce far more positive outcomes than verdict-driven deliberations. However, these findings are not applied to the education of jurors at any point during their service. Jury instructions from the judge might be a key time to discuss what is known about deliberation processes, and then juries can decide for themselves how to proceed. Some suggested language might be:

Research shows that taking a vote, even a preliminary one, too soon in the deliberation could lead to jurors feeling improperly committed to one side or pitted against those who vote differently. We recommend discussing the evidence openly and thoroughly before asking each other to reveal their initial leanings.

Informing jurors on a wide-scale about the basics of taking a vote too soon would be an enormous improvement to the set of tools they are given before deliberations. This work is just a starting point; as we learn more about what makes superior deliberations we can better educate jurors and implement this knowledge in our legal system. It is important to at least instruct jurors that the way they go about their deliberation matters.

Many who have served on a jury know that it is an experience unlike any other. Rarely, if ever, are people placed in a room with strangers and asked to come to a consensus about a decision affecting the lives of others. We should be using the knowledge obtained through scientific research to empower jurors with more and better information on how to conduct their deliberations.



Dr. Traci Feller is a trial consultant at Mind Matters Jury Consulting in Seattle, Washington.

The Illuminating Power of the Shadow Jury

By Hailey Drescher, PhD

One of the most powerful tools trial consultants have to combat litigation uncertainty is the shadow jury. While this research should not be characterized as predictive, it is highly informative. Best employed in high stakes cases where the trial is expected to last multiple days or weeks, shadow jurors attend court, take notes, and are interviewed by the facilitating consultant regarding their case perceptions and beliefs. Shadow jurors provide a fresh perspective, with near-real time feedback regarding the efficacy of witnesses, the persuasiveness of case facts, and evaluations of the case narrative. The data yielded through shadow jury interviews has the ability to direct and shape multiple facets of trial strategy and manage uncertainty.

The Process

Shadow juries are constructed to be as reflective of the sitting jury as possible by first using the demographics of the venue for recruitment, and then culling those recruited to reflect the jurors empaneled in the case. Shadow jurors are told they are participating in litigation research, and their thoughts and opinions are critical to others engaged in the litigation process; however, they are not working for the plaintiff or the defense, and their case selection is random. Once selected and oriented to the process, shadow jurors attend each day of trial and hear the evidence as it is presented to the empaneled jury. If the jury is removed from the court for any reason, the shadow jury is also removed. Each day, the facilitating consultant interviews the shadow jurors at

the lunch break and after trial about witness performance, persuasiveness of case facts, overall views of case themes, attorney efficacy, and other points of interest supplied by the trial team. This data is then organized and delivered to members of the trial team through written and/or oral reports. While this is our firm's process, it may vary depending on the consultants and the needs of the case.

What We Learn

While some may view shadow jury reports as a barometer as to which side is "winning", the true benefit lies in the content of the jurors' comments. For example, our team facilitated a shadow jury in a trade secret case. Days into a several week-long trial, the shadow jurors continued to report difficulty identifying the company's trade secrets and articulating what constitutes a trade secret in general. Based on the reports, and the understanding of trade secrets provided by shadow jurors, the consultants worked with counsel to sharpen examples and draw comparisons between the client's trade secrets and well-known trade secrets in popular culture. We were then able to map the efficacy of the comparison through the continued comments of shadow jurors. Several jurors brought up the comparison organically during their interviews and indicated that the association served as a good example of what our client had protected.

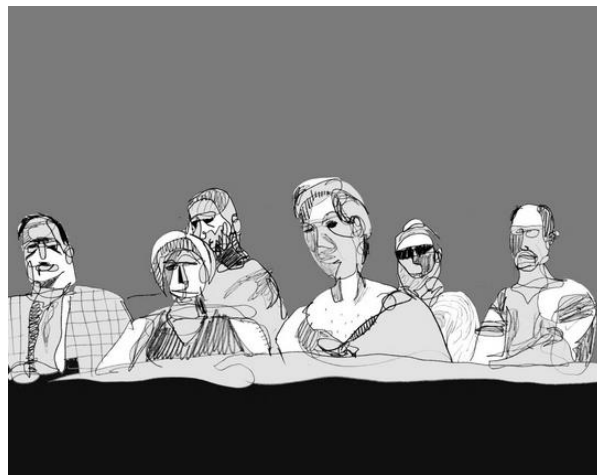
One of the greatest benefits of shadow juries is their fresh perspective on the case. Shadow jurors hear the information for the

first time as it is delivered in court without the burden of months of involvement, stacks of document review, or knowledge of events that were excluded from evidence. This has enabled shadow jurors to provide us with phrasing and soundbites which prove helpful to shape/sharpen case themes or guide closing arguments. For example, the response “well, I think this case is really about...” can evolve into rhetoric used by lead counsel.

The perspective afforded by shadow jurors also aids in alleviating uncertainty as to how key witnesses are received and evaluated. Shadow juror interviews allow consultants to inquire about the persuasive appeal of witnesses, testimonies that were unclear, or areas where jurors have remaining questions. This information allows counsel to circle back, should the witness still be on the stand, develop areas of cross-examination, or hone direct examination strategy for future witnesses.

In a previous trial where we employed a shadow jury, counsel was pleased with how key case facts were addressed by an important witness on cross examination. However, during the lunch interviews, it became apparent through the feedback of multiple shadow jurors that the points did not come through as clearly as counsel had believed. The majority of the shadow jurors failed to grasp the big “ah-ha.” As one shadow juror put it, “I could tell the attorney thought he made an important point, but I don’t know what it was supposed to be.” The witness was still on the stand after lunch,

and the shadow jurors’ feedback allowed counsel to double-back to clarify the point further. The evening report indicated that the further explanation was useful to the shadow jurors, and they were able to follow the secondary line of questioning.



Concluding Remarks

Shadow juries allow counsel to access the thoughts and opinions of residents in the venue throughout the course of trial. These individuals aid in quelling the day-to-day uncertainty as to how witnesses were received, the persuasive effects of the evidence, and even whether the brash style of opposing counsel is off-putting or endearing. They are a sounding board with which to check the trial team’s own perspectives. In cases where the stakes are high, the thoughts of additional jurors are often illuminating.



Dr. Hailey Drescher is a litigation consultant at Trask Consulting.



Hon. Indira Talwani
*US District Court for the
District of Massachusetts*



Hon. John Jarvey
*Chief U.S. District Judge for
the Southern District of Iowa*



Hon. Robert Pratt
*US District Court for the
Southern District of Iowa*



Hon. Sam Lindsay
*US District Court for the
Northern District of Texas*

Meet our new Research Fellow

Later this month, we will be joined by Michael Pressman as our new Research Fellow. Michael is a 2010 graduate of Stanford Law School and is also about to earn his PhD in philosophy from the University of Southern California. He also completed clerkships with the Honorable Robert E. Bacharach on the Tenth Circuit, and with the Honorable Nicholas G. Garaufis on the Eastern District of New York.

Michael is interested in pursuing a career in legal academia. His interests in private law remedies pose various questions about the role of the jury in connection with the jury's calculation of damages, including questions that pertain to: (1) which decisions should be in the domain of the jury (as opposed to being in the domain of the judge, or as opposed to being the subject of a regulatory framework), (2) what types of instructions should be given to the jury, and (3) what types of arguments about damages (e.g., via expert testimony) should be admissible for the purpose of aiding a jury in making its damages determinations.



Michael Pressman is a Research Fellow at the Civil Jury Project.

The Dallas Bar Association is hosting an event called "Saving the Jury Trial"

On Thursday September 6th, our Judicial Adviser and attorney colleagues in Dallas will host an event on trial innovations that can help revitalize the civil jury trial. It will be sponsored by the Dallas Chapter of ABOTA, the DBA Tort & Insurance Practice Section, the Dallas Trial Lawyers Association and the Texas Association of Defense Counsel.



Attendees will hear from speakers including the Honorable Martin Hoffman of the 68th District Court, the Honorable Amos L. Mazzant III of the United States District Court of the Eastern District of Texas, and the Honorable Tonya Parker of the 116th District Court. All interested attendees can RSVP at the link below and will receive Continuing Legal Education Credit for their participation. The Project is pleased to see such incredible momentum behind efforts to draw attention to the decline in civil jury trial numbers in Texas and beyond.

Click [HERE](#) to RSVP.

And please let us know about other relevant events we can share with the CJP community!



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 the 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



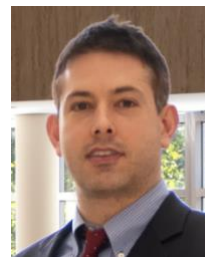
Stephen Susman
Executive Director



Samuel Issacharoff
Faculty Director



Anna Offit
Research Fellow



Michael Pressman
Research Fellow



Kaitlin Villanueva
Admin. Assistant

Preview of Future CJP Newsletter Content . . .



Hon. Elizabeth Feffer offers insight into actual prospective jurors' attitudes toward voir dire.



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