

Jury Matters

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



November 2018, Vol. 3, Issue 11

Upcoming Events

- 11.1 Jury Improvement Lunch;
Fort Lauderdale, FL
- 11.9 Innovating on Jury Trial;
National Board of Trial
Advocacy, All Star
Conference; New Orleans,
LA
- 12.7 Jury Improvement Lunch;
Palm Beach, FL
- 2.7 Speech: Airing Out Jury
Trials; DRI- Products
Conference; Austin, TX
- 3.1 Jury Improvement Lunch;
Oakland, CA
- 3.12 Jury Improvement Lunch;
Des Moines, IA
- 3.14 Jury Improvement Lunch;
Chicago, IL
- 8.6 How to Save Civil Jury
Trials; Annual Conference of
Florida Circuit Court Judges;
Naples, FL



Opening Statement

Dear Readers,

Welcome to the November edition of the Civil Jury Project's monthly newsletter. Fall semester here at NYU Law is now up and running. Over the past month alone we successfully hosted Jury Improvement Lunches in Los Angeles, Tucson, Boise and—most recently— here at the law school. We also had the opportunity to welcome state and federal judges to NYU for an exhilarating set of Jury Innovation Workshops. As part of this program, NYU law students interested in federal clerkships had the opportunity to meet a group of our federal Judicial Advisers during a co-sponsored event in Furman Hall.

This edition of the newsletter includes articles by two of our Judicial Advisers. The first examines former civil jurors' first-hand impressions of civil trials. The second offers a note of caution about empaneling jurors based on stereotypes and shares practical *voir dire* advice—including on how to graciously and anonymously excuse jurors.

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

Congratulations to Judicial Adviser, Hon. Meenu Sasser!

This year the Civil Jury Project has chosen to honor Judge Sasser as Jury Innovator of the Year (2018-2019). Read more on Page 6!

What Jurors Say After a Trial

By Hon. Elizabeth R. Feffer



When presiding over jury trials, judges have the obligation to follow the law and to ensure that the proceedings are fair. We want our evidentiary rulings to be correct, and the jury instructions to be clear and accurate. Judges must also ensure that the verdict forms that are sent to the jury are not confusing, misleading, or prejudicial; and that the verdict forms accurately reflect the law.

When a trial is over, win or lose, trial lawyers want to speak with jurors for feedback. In addition, many judges also want post-trial feedback from jurors. Some, but not all judges, speak to jurors directly after the verdict, and others send post-trial “thank you” letters to jurors, with questionnaires for jurors to complete and return. Here are some insights and common themes reflected in comments from jurors to judges after a trial.

The judge-juror relationship

First, jurors love judges. This may be unscientific and a result of non-response bias, as it is unlikely that jurors who are dissatisfied with judges will write a letter to the judge (particularly when there are so many online forums where people can and do anonymously post criticism of judges). But, this is something to keep in mind if you are tempted to treat a judge as an enemy of justice, or to display sarcasm or other disrespect. Jurors have a natural positive relationship with judges, and may see judges as their protectors who can cut off redundant questioning (“Counsel, 352, move on”), call breaks (jurors do need to use the restroom just like everyone else) and ultimately recess for the day.

For example, after a trial, one presiding juror responded to a post-verdict questionnaire as follows, “It [the trial] was occasionally boring, but only occasionally. And for the most part, I felt Your Honor did an admirable job of insulating us from some of the most tedious aspects.” Other jurors

expressed similar appreciation to the judge for cutting off what the jurors perceived as repetitive questioning from counsel.

One colleague visits the jurors in the jury room to thank them for their service, after the jury has delivered its verdict, and without the lawyers being present. The judge reports that the jurors often spontaneously break out into applause the moment the judge enters the jury room. Other colleagues bring the jurors into chambers to thank them. Jurors in turn thank the judges for the experience, and many voice the opinion that the lawyers took too long to try the case.

Another colleague provided the author with a “thank you” card from jurors after the conclusion of a trial. The card was signed, “The Jurors,” and thanked the judge for “educating us, being so gracious,” for “being funny, being kind,” for “giving us a positive experience,” and for “being the best judge ever.” Individual jurors also wrote comments such as, “It has been a pleasure serving on a jury in our court. Your affection for the process is contagious,” “Thank you for caring about us,” and “I am so blessed to be a part of the team under a wonderful, very patient and awesome judge like you!”

It has been a pleasure serving on a jury? Blessed to be part of the team? When do we ever hear such strong, pro-jury duty comments mentioned in popular culture?

Juror investment

Another insight from jurors is that, although many may be reluctant (or outright hostile) to the idea of serving on a jury, once jurors are actually sworn in to serve, they are invested in the process, and want to do a good job. They take to heart the direction given at the beginning of the case, that “jurors must make important decisions that have consequences for the parties.” (CACI 116.)

As an example, one former juror with an online blog wrote about her experience serving on a jury. She admitted that her attitude at the beginning of the case was poor, but that serving caused her to adjust her attitude, and she ultimately concluded that “jury duty was unexpectedly cool.” She wrote that part of jury service was to make America a better place, and urged others to serve: “You have the opportunity to devote your time to help other people make important decisions.” She concluded:

What you should do is *not be attempting to avoid jury duty*. A significant number of people in California do not respond to jury summons. It seems to be something close to a judicial apathy epidemic. The consistent jury dodging of citizens has resulted in courts stepping up their penalty game for no-show jurors. But punishment isn’t why you should go.

Juror responses about attorneys

Some negative themes revealed by jurors towards lawyers also emerged from juror feedback, in written questionnaire responses. One commonly expressed theme was repetitiveness. Lawyers ask the same questions over and over again, particularly in voir dire. Examples include:

“I think the process could have been quicker if maybe the attorneys asked more questions to the group at the same time and had the jurors raise hands, rather than question all individually.”

Another juror described voir dire as “a very slow process.”

No juror, however, expressed the view that voir dire was in any way unfair.

Another theme is that case presentation is disorganized. The lawyers should be better prepared. Lawyers take too long to present a case, or to make their point. Some examples include:

The trial “was interesting for the first 3-4 days, but after that witnesses and counsel repeated themselves too much. Why must the jury hear substantially the same answers to substantially the same questions more than once?”

“The premise of this case was really extremely simple. It was made overly complicated and unnecessarily long through repetitive questioning and testimony. Counsel on both sides asked the same question or questions with just slightly different phrasing too many times to count.”

“Being a juror is not boring. It can become boring during long, repetitious [sic] questioning by counsel and during long, silent lapses by counsel when it can be perceived they are not prepared, forgetful or disorganized.”

“I felt that I was listening to and looking at the same questions over & over. That was boring,” but that overall the juror had a great time, and learned from the experience.

Jurors also commented on the conduct of counsel. Lawyers speak too loudly. Lawyers question witnesses too aggressively. Lawyers are too aggressive against each other. Direct quotes from jurors include:

“I tried very hard not to let myself or the other jurors be affected by anything other than the evidence presented. That said, it was almost a relief afterwards to express some of my disgust for plaintiff’s counsel’s histrionics.”

“The counsel should have refrained from comments on the others’ professional conduct. It was meant to distract us, but it wasted time and annoyed us.”

The overall experience

As the quotes from the “thank you” card demonstrate, however, jurors also express positive comments after serving on a trial. Here are some examples:

Serving as a juror was a “very interesting and educational experience.” “Not that I wish to be called to be a juror regularly, but I am really glad I have experienced this trial. Thank you so much, your Honor!”

Civil Jury Project

Multiple jurors on many different types of cases wrote that they had a great experience, and looked forward to serving again. One noted that, while it was inconvenient at the beginning to report, the juror ended up learning so much (such as court procedure and the law) that the juror would encourage friends and family to participate, and not try to get out of jury duty.

Several jurors, from multiple cases, said that the jury selection process (while repetitive) was fair.

Many jurors, from many types of cases, commented that the instructions given by the court were very clear, thorough, and helpful; and that the verdict forms were also clear. Several jurors noted that it was helpful to have the written instructions with them in the jury room during deliberation. Another juror learned a lot from listening to the testimony from the “best doctors in the country.” The same juror also stated, “I really admired the judge and all the lawyers.”

“I don’t think the process should be designed to be interesting or satisfying, at least not to the jurors. It is someone’s day in court & the process is what the process is. We all understand this.” The same juror expressed frustration with jurors who were not on time, causing delay.

“Court and counsel were extremely fair, friendly & courteous.”

Finally, the theme emerged that jurors are paying careful attention and notice everything.

The jury “especially liked the visual aids. It stuck in our memories.”

“Everyone in the jury box gets to spend an exceptional amount of time staring at the people involved in the case. It’s like watching a TV show for six hours a day that only has five people on it – the judge, two lawyers and the two [parties]. Minor characters come and go. You quickly become attuned to people’s peculiar facial expressions and habits. For example, the plaintiff’s lawyer looked near tears or fury on a constant basis.”

In sum, while some former jurors expressed frustration or criticism of the trial lasting too long, or of lawyers not acting in a civil fashion, not one juror ever criticized our system of trial by jury, or questioned the fairness thereof. The blogging juror ultimately noted:

Trial by jury is intended to protect individuals from the power of the government. It also gives people the opportunity to have a decision made by some average people. Judges do not exactly qualify as average people – in terms of income, education, or experience. You get to be in a group of average people – hopefully with a limited amount of bias but a wide variety of experience.

The very first instruction we give jurors at the beginning of each civil jury trial, CACI 100, is that we “want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented.” Juror feedback reflects that, despite some criticism, jurors do recognize the seriousness and importance of serving on a jury, acknowledge that the system is fair, and that the Constitutional right to a jury that we the people gave ourselves does work.

[This Article recently appeared in *Advocate Magazine*]



Hon. Elizabeth R. Feffer is a judge for the Superior Court of Los Angeles County in California.

A Peer may be your client's worst juror: Do you want your peers judging you?

By Hon. Mark A. Drummond

When I first started trying cases, the selection of the jury was the part that made me the most nervous. I could plan for opening, direct, cross, and closing. With jury selection, I felt I was working without a net. So, I started reading everything I could find on the topic.

Some of the books and articles on jury selection from the 1950s were absolutely hilarious. One book-I have forgotten the title-advised that if you were doing insurance defense work, to pick Norwegians because they were conservative. So, I found myself in the cornfields of Illinois, looking for guys named Olaf to be on my jury.

From high school civics and on, we have heard the phrase "a jury of your peers." The phrase does not actually appear in the U.S. Constitution. The Magna Carta appears to be the source of the concept of being judged by your peers or equals. The concept back then, however, was that you would be judged by persons of your same social standing, status, or peerage as opposed to the crown.

As a young attorney, I took a rather simplistic approach. I wanted jurors who were like my client. After years of trying cases, my question now is: Do you really want a jury of your peers?

Anecdotal Experiences with Peers

Several anecdotes from real life bring the question into focus. Early in my career, I defended a young, female teenage driver. So, I picked as many young, female

teenage drivers as I could find in the venire. I truly tried to get a jury of her peers. On what I thought was an open-and- shut case, the jury was out for hours. Eventually, they found in our favor. When I interviewed the jurors who were willing to stick around, they told me that I had made a mistake by picking her peers. When I asked why, they said they were willing to give her the benefit of the doubt, but that her peers judged her much more harshly.

I usually tell this story in my one-day advocacy seminar. After I do, attorneys often come up to me and share their own "jury of peers" stories.

A prosecutor told me he was preparing to try his first case of sex with a minor. His supervisor asked his jury selection strategy. He told her that he was going to pick as many females who had daughters the same age as the victim.

His supervisor, who was a veteran of these cases, told him to pick as many men as he could find as close to age of the defendant. He was dumbfounded and asked "Why?" She said that the men will be disgusted by this guy, look down on him, and view themselves as the young victim's protectors. He won

the case and was shocked when five of the male jurors showed up for the defendant's sentencing. This had never happened before.

On the defense side, a black public defender shared this story. She said when she started practicing, she tried to get as many blacks as possible on the jury if her defendant was black. She said she lost many cases. So, she decided to switch her strategy and packed

the jury with as many white jurors as possible. She started winning cases and hanging juries. She believed that the black jurors in her community judged the black defendant more harshly than the white jurors did.



Resist the urge to stereotype

A jury of my peers would be a group of overweight, balding, white male judges. Would I really want a jury made up of people like me? Wouldn't they tend to judge me more harshly than perhaps persons different from me? So why do we do it? Why do we stereotype people when in our hearts we know that human behavior is so complex? Why do we stereotype when we know that even if we had a day to question each juror, we could only touch the surface of their life experience?

"Do not overestimate the significance of demographics," says Theodore O. Prosis, Ph.D., Seattle, Tsongas Litigation Consulting, Inc. "Characteristics such as race, gender, or class can be useful, but they are extremely error-prone and can be highly misleading. The attractiveness of data that is

easy to collect and stereotype is hard to overcome."

"Experiences and attitudes are far more important," continues Prosis. "A lot of times people look at the surface and judge poorly or misinterpret just because they are only looking at the demographics."

"My admonition is usually the juror you think you want is not the one you want, or the easy way to say it is that stereotypes never hold true," advises Anthony N. Upshaw, Miami, codirector of the Section's Division IV-Procedural. "For example, I may be defending and the plaintiff may be a well-off, Caucasian female bringing a wrongful death action for the death of her husband." "On first impression, you might think that you wouldn't want jurors that are also well-off, older, white females," Upshaw continues. "Yet they may feel entirely different due to their own life experiences. Knowing their beliefs on a topic is much more important than any stereotype or superficial evaluation of a particular juror," he concludes.

Be Wary of Putting Experts on the Jury

"We take the approach of jury de-selection or eliminating those people that, because of bias or prejudice, are going to be potentially more critical of a party than they should be," advises Prosis. "When we are on the defense side of an employment case, one of the highest risk jurors are ones with HR (human resources) experience. While they may be a peer of the person who made the decision for the defendant, you risk having them become a non-testifying expert in the jury room

where the rest of the jury looks to them as an opinion leader."

So, do you really want a doctor or a nurse on the jury in a medical malpractice case? Do you really want an accountant on the jury in an accounting malpractice case? If you are defending, that juror may be your client's peer but may also be your client's worst nightmare in the jury room. They may bring in their own life experiences, advice, and standards, and apply them to your client.

"Another concern is where a juror may contradict the law as the judge would give it, based upon their personal experience," cautions Prosize. "In construction defect cases where we would be representing the general contractor, the legal instruction is that the general has a right to rely on the expertise of the subcontractor. We've had plenty of instances in mock trials with a subcontractor on the jury who says, 'Oh that's not the case at all. The general contractor is responsible for anything, and if I make a mistake, it is their fault.'"

In terms of strategy, it seems clear from our experts on the topic that attitudes and experiences clearly trump basic demographics. Simply stated, I guess we have arrived at the old saying "You can't judge a book by its cover."

How to remove the juror gracefully

So let's say that you are able to probe attitudes and experiences. You find out that a potential juror who, on the surface, looks like a peer of

your client, is not good for you. You don't want him or her on your jury. What message do you send to the rest of the venire when you kick the nurse off a medical malpractice case or an ironworker off a construction case? How do you avoid sending a message that you don't want people who may know the most about the topic on the jury?

Well, if you have to exercise your challenges in front of the entire venire, you are kind of stuck. You can try to question whether they can set their experiences in the field aside and base their decision on the evidence presented so as to sensitize the entire panel and them of your concern. Then, if they try to dominate the deliberations, the other 11 jurors will remind that juror of his promise to you to leave his experiences at the door and base the verdict only on the evidence at trial.

A better approach is to have the judge excuse the juror. All challenges are made outside the presence of the venire. If this procedure is agreed to at the start, neither side is disadvantaged. The venire does not know who excused which potential juror or for what reason, thus eliminating one aspect of gamesmanship for both sides. As anecdotally noted above, both sides may have very good reasons why their clients' peers would not be the best judges of them.

[This Article recently appeared in the American Bar Association's *Litigation News*]



Hon. Mark A. Drummond
is a judge of the Eighth
Circuit Court in Illinois.

A Conversation with Meenu Sasser, the Civil Jury Project's Jury Innovator of the Year

New Advisors Spotlight



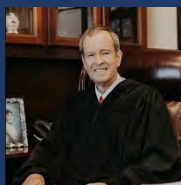
Hon. Robert Chatigny
*Senior Judge, US District
Court for the District of
Connecticut*



Hon. Shannon Frison
*Associate Judge,
Massachusetts Superior
Court*



Hon. Gregg Pasquale
*Associate Judge,
Massachusetts Superior
Court*



Hon. Eric Johnson
*Eighth Judicial District
Court for the State of
Nevada*

Could you describe a favorite jury innovation that you have successfully implemented during civil trials?

One of the most successful jury innovations is the modified trial schedule I use in cases longer than 5 days. In those cases, I start trials at 8:30 to 2:30 pm, with two 20 minute breaks. During the breaks, I provide the jurors snacks, coffee and water and they do not leave the jury room. With the attorneys knowing that the jurors are in the jury room, they tend to be much more efficient. The jurors then go home at 2:30 and I stay and work with the attorneys on any legal issues for the next day. I also handle my other cases in the afternoon and draft orders. The jurors are very appreciative of this schedule as they can get home to pick up children from school or go back to their jobs for a few hours each day. (I announce this schedule during voir dire and it is so much easier to get a jury—I simply do not have as many hardship issues raised by potential jurors). The attorneys also appreciate it as they can go back to their offices and work to prepare for trial the next day. I shared this innovation with one of my colleagues who said it was the “most effective thing he had done in 30 years of service on the bench.”

What aspect of the civil jury system, or jury *service* specifically, do you think most urgently requires reform?

In this day and age the biggest concern from jurors is financial hardship. I would strongly support paying juror additional sums for jury service. Currently, in Florida jurors receive \$15 per day for the first 3 days then \$30 per day thereafter. This is barely enough to cover the costs of gas and lunch. As a result I often provide lunch for the jurors to know how much I appreciate them.

Did you learn anything at the Civil Jury Project Innovations workshop that you hope to bring home to your trials?

The Civil Jury Project Innovations workshop was incredible. In particular, I am very interested in the Young Lawyers in the Courtroom program and I intend to immediately implement it. I am currently working on a standing order with our local bar and hope to get support from the major law firms for this project.

Anything else?

I now have homemade cookies and a personal thank you note to each juror as well at the end of each trial. They really appreciate it.



Hon. Meenu Sasser is a Palm Beach County Circuit Court Judge and recipient of the Civil Jury Project's 2018-2019 Jury Innovator of the Year Award

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.

Contact Information

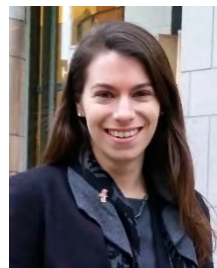
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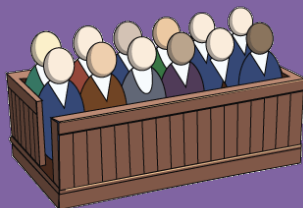


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Preview of Future CJP Newsletter Content . . .



Reflections by jurors who have participated in civil trials.



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