Civil Jury Project December 2018

Jury Matters

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

December 2018, Vol. 3, Issue 12

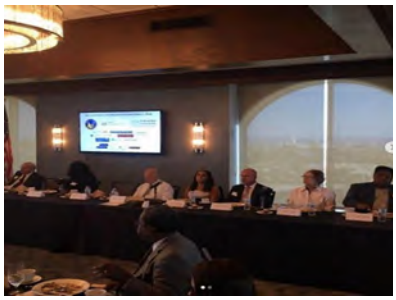
Upcoming Events

12.7 Jury Improvement Lunch; Palm Beach, FL

3.1 Jury Improvement Lunch; Oakland, CA

3.12 Jury Improvement Lunch; Des Moines, IA

3.14 Jury Improvement Lunch; Chicago, IL



Opening Statement

Dear Readers,

Welcome to the December edition of the Civil Jury Project's monthly newsletter. In the past month we successfully hosted a Jury Improvement Lunch in Fort Lauderdale that had an impressive turnout of judges and jurors. The Civil Jury Project has been hard at work planning new programming for the Spring semester. This includes Jury Improvement Lunches that have been scheduled in Palm Beach, Oakland, Des Moines, and Chicago.

This edition of the newsletter includes pieces by two of our Judicial Advisers. The first article discusses the perils of researching prospective jurors using social media without first reviewing local ethics rules. The second piece is an excerpt from a judicial order that questions the wisdom of filing summary judgment motions by default—often at great expense—without first considering the implications of the jury-free civil justice system these motions promote.

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

This Spring the CJP will host its first

Civil Jury Academic Roundtable at NYU Law!

Stay tuned for an overview of this event in the January newsletter!

Internet Research & Jury Selection

By Ashley Smith, Allison Wieder, and Hon. Christopher Whitten,

Would you stand up and announce your most significant flaws to a room full of strangers?

Prior to a trial, fifty or more people from the community are crammed into the back of a courtroom. Most of them wish they were someplace else. A dozen or so of them will soon become the jury. This jury will be charged with making one of the most important decisions in each of the parties' lives—the verdict.

How can attorneys be confident that none of the potential jurors harbors an unfair bias that makes it impossible for them to be fair and impartial? How do attorneys ensure they have the information they need to intelligently exercise their peremptory strikes or for-cause removal?

Traditionally, attorneys ask potential jurors questions about themselves and take whatever they say at face value. The flaw in that system seems obvious.

Maybe the attorneys judge body language or make broad, generalized assumptions about a potential juror's values and beliefs based upon their occupation, the books they say they read, or the bumper stickers they say are on their car. After all, what could go wrong with this approach? If attorneys are lucky, they might also use information potential jurors provide privately in response to juror questionnaires. Potential jurors tend to be more forthcoming in these private, written responses, but they still naturally filter what they divulge about themselves.

Unless it's a big case—maybe Gene Hackman is acting as a jury consultant, but John Cusack still snuck onto the jury without revealing his bias—and the court has the time, attorneys likely cannot undertake any independent investigation of potential jurors by manually tracking down property tax records, court records, or other publicly available information.

Until recently, the vast majority of information available about potential jurors came from a source that might not be totally reliable—what a juror chose to attorneys about themselves in front of a courtroom full of strangers.

Then came the Internet.

Potential jurors are among the millions of Americans who make an incredible amount of information about themselves publicly available on the Internet, particularly through social media. In April 2018, Facebook, YouTube, Instagram, and Twitter had 2.2 billion, 1.5 billion, 813 million, and 330 million active users, respectively, and the average person spends 116 minutes per day on social media. Depending on privacy settings, the public may be able to view a user's posts, photos, videos, friend and follow lists, accepted event invitations, liked posts and pages, political preferences, family and personal relationships, and much more.

This information is invaluable to attorneys looking to identify possible juror biases. Social media provides information attorneys usually do not receive from a juror questionnaire and may reveal information that contradicts jurors' responses during voir dire. After all, returning to our initial question, what personal information might you withhold when questioned in front of a courtroom of fifty or more of your peers? Given the influx of information now available at attorneys' fingertips, some commentators have argued that an attorney fails to act competently if he or she does not conduct a basic search of potential jurors' social media accounts. While social media is easily accessible, attorneys must consider the ethical limitations in their jurisdictions and restrictions judges may impose in their courtrooms concerning using social media to research potential jurors.

Ethical rules vary from state to state, and none specifically address communicating with jurors through social media; rather, the rules address communicating with jurors generally. For example, ABA Rule 3.5 prohibits ex parte communication with jurors, California Rule 5-320 prohibits direct and indirect communication with jurors, and New York Rule 3.5 prohibits communication with jurors. Content-wise, these rules clearly prohibit communication with jurors. However, what actually constitutes a communication with a juror on social media is interpreted differently from state to state.

The ABA released a formal opinion in 2014 prohibiting direct communication with jurors on social media. It considers sending an access request (i.e., a friend or follow request) a direct communication, but allows a

passive review of any publicly available information and also permits the use of websites, like LinkedIn, that send a notification when a user's profile has been viewed.

The New York City Bar Association released a formal opinion in 2012 permitting passive review, but noting that both access requests and website notifications constitute impermissible communication with jurors. This makes the New York City Bar Association's interpretation stricter than the ABA's.

While California has not released a formal opinion, it is presumed to mirror the view of the New York City Bar Association. Because California's rule prohibits both direct and indirect communication with jurors, while the ABA's formal opinion only prohibits direct social media communication, commentators consider "indirect" social media communication to refer to website notifications and recommend using websites, like LinkedIn, cautiously.

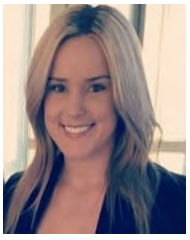
Oregon is unique because, although it has adopted the ABA rule, the Oregon State Bar released a formal opinion in 2013 permitting access requests so long as the recipient of the request understands the attorney's role in the case or if the attorney discloses his or her role in the case. Thus, Oregon permits much more than California, New York City, and other states adhering to the ABA's interpretation.

Judges are also increasingly setting boundaries in their courtrooms concerning attorneys' use of the Internet to research potential jurors. In 2016, a California judge limited attorneys' use of social media to research potential jurors in *Oracle America, Inc. v. Google, Inc*. The attorneys for both parties requested extra time to review completed juror questionnaires, and the judge learned the attorneys wanted this time to conduct an online search of potential jurors. While the judge allowed the attorneys to conduct the search, he required that they disclose to the potential jurors the full extent of the online search they intended to conduct. The potential jurors would then be given a few minutes to adjust the privacy settings of their social media accounts if they wished. In coming to this decision, the judge balanced the usefulness of searching publicly available information online against protecting the privacy interests of jurors.

Other opinions, such as *Carino v. Muenzen*, explicitly recognize an attorney's right to investigate potential jurors online. There, a New Jersey appellate court considered the plaintiff attorneys' request for a new trial after the trial judge prevented them from researching potential jurors online while inside the courtroom. The appellate court held that the judge acted unreasonably because the attorneys' online research was not disruptive to a fair trial.

One court has even suggested that lawyers have a duty to conduct online research of potential jurors. In *Johnson v. McCullough*, the Missouri Supreme Court created a new standard to provide competent representation in the digital age. After the case had been litigated and decided, the plaintiff attorneys discovered, through an online search, that a juror failed to disclose his prior litigation history during voir dire. On appeal, the court held that an attorney must make a reasonable effort to examine the litigation history of potential jurors during voir dire and should not wait until a verdict has been rendered to conduct a search.

Social media continues to evolve, and the boundaries of using it to research potential jurors vary greatly from state to state and courtroom to courtroom. While it provides invaluable information to attorneys assessing potential jurors, the use of social media during voir dire is highly controversial. Thus, it is important for lawyers to understand how their state's ethical rules concerning communications with jurors have been interpreted to apply to social media and to be aware of any judge-specific rules prior to clicking "Search.



Ashley Smith is a third-year day student at the University of Pacific, McGeorge School of Law.

Allison Wieder is a third-year day student at the University of Pacific, McGeorge School of Law.

Hon. Christopher Whitten is in his twelfth year as a Judge on the Superior Court of Arizona in Maricopa County, which sits in Phoenix.

Overview of Susman-Marten FJC Proposal

Steve Susman, Executive Director of the Civil Jury Project, and Judge J. Thomas Marten, Senior U.S. District Judge for the District of Kansas, recently submitted a proposal to the Director of the Federal Judicial Center entitled "A Proposal for Training Newly Appointed Federal Judges in the Law and Handling Trials." The following provides a brief sketch of the proposal.

The Justification:

The proposal was prepared out of a concern that so few cases go to trial. With the decline in trials, few lawyers (outside of prosecutors or defenders) have the opportunity to gain trial experience, and many persons coming to the federal bench have never tried a case to verdict. Given the paucity of trials, when a case does go to trial, the parties are entitled to a judge who has more than a fundamental understanding of the judge's responsibilities. The proposal is designed to assist all new federal judges in contributing to an excellent trial experience for everyone involved.

Although there are many reasons for the decline in jury trials, two of the major causes frequently cited are the cost of a jury trial, and a failure to appreciate the benefits of jury trials. Judges are part of the problem, but largely can be the solution.

As is, new-judge training devotes significant time to handling motions and pretrial case management, with focus on moving cases, usually toward settlement. Of course, most cases must settle or the system could not function. But there are stations leading toward trial that deserve greater emphasis, including judicial means for reducing the costs and increasing the benefits of jury trials.

The Basic Idea:

The proposal lays out a detailed agenda for a one-day training program for newly confirmed federal trial judges that is focused exclusively on handling jury trials, both civil and criminal. It includes the manner and order of: opening statements, jury selection, instructions, witness examinations, expert witnesses, objections, trial motions, closing arguments, jury discussions/deliberations, and other aspects of trial training that do not fit neatly into any of those categories. Ideally, this program will be one full day of the first week of new-judges training, aka Baby Judges School.

Who Should Attend:

At a minimum, all newly appointed Article III Trial Judges. The training will assist those who were not involved in trial work when in practice. The experienced state court judges will benefit from learning the differences in the scope of their discretionary authority and likely will have excellent suggestions for group consideration. Blending judges with little or no trial experience with highly experienced state court judges should yield excellent discussions about different practices. The proposal also suggests this class for United States Magistrate Judges, many of whom conduct civil trials with the consent of the parties. Finally, the proposal also suggests that newly appointed Article III Court of Appeals judges who have not been federal trial judges would benefit from getting some basic information on the work of trial courts.

Instructors:

The proposal suggests that instructors be two to three experienced trial judges and lawyers—chosen to expose judges to the broadest range of available options. The proposal also suggests that one instructor be a judge who has tried a high-profile case, so that he or she can speak at lunch on the challenges of cases generating great media and public interest.

Excerpt from a Summary Judgment Order: Federal Trade Commission vs. D-Link Systems, Inc.

By Hon. James Donato

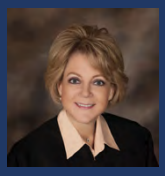
In days gone by, litigants might have seen a sign at the courthouse advising "no spittin', no cussin', and no summary judgment." *See* Hon. Mark Bennet, *Essay*, 57 N.Y.L. Sch. L. Rev. 685 (2012/13). This sentiment reflected the long-held belief that trials are the best way to resolve legal disputes. Federal Rule of Procedure 56 and the trilogy of summary judgment decisions issued by the Supreme Court in 1986 -- *Matsushita*, *Liberty Lobby*, and *Celotex* -- opened a wide door to non-trial adjudications. Parties today file summary judgment motions as a matter of course, usually at considerable expense in terms of attorney's fees and witness time in gathering declarations. Since federal judicial records indicate that summary judgment is granted in a minority of cases, routinely filing the motion almost certainly increases the overall cost of litigating civil cases in federal court without a net benefit.

The parties' cross-motions here are not suitable for summary judgment. Dkt. Nos. 178, 183. All told, the briefs run more than 100 pages and are accompanied by voluminous declarations and exhibits. While sheer size alone is not fatal to a summary judgment motion, the parties' papers demonstrate a panoply of genuine disputes of material fact that will require a trial, and an opportunity to evaluate witness credibility, to properly resolve. This is particularly true for the claim of consumer deception that is at the heart of the FTC's complaint, for which the parties offer competing evidence. *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1144 (9th Cir. 1997). So, too, for the question of an appropriate remedy if the FTC prevails, which itself entails disputed issues about D-Link Systems' current sales and technology practices. The summary judgment motions are denied for those reasons…

Hon. James Donato is a U.S. District Court Judge for the Northern District of California

New Advisors Spotlight

Hon. Michael Villani
Eighth Judicial District Court for the State of Nevada



Hon. Nancy Allf
Eighth Judicial District Court for the State of Nevada

Hon. Joe Hardy
Eighth Judicial District Court, Clark County, Nevada

Hon. Spencer Eig
Eleventh Judicial Circuit of Florida

Recent Civil Jury Project Feedback

From a Judicial Adviser who attended our recent Jury Innovations Workshop:

"Simply put, the workshop was fantastic. Not only did I meet many wonderful judges from across the country, but I also gained valuable insight as to how other jurisdictions handle key aspects of jury trials. Although my court is the country's largest trial court, it is far from the oldest, and I learned from judges whose courts were conducting jury trials back when the soil my courthouse sits upon was under the jurisdiction of Spain! The format was also conducive to having a free-flowing exchange of ideas, which generated helpful suggestions I intend to incorporate in future trials."

From a former juror who shared feedback on WeThePeopleWeTheJury:

"I was honored to be a part of this, and so reinforced by my love for the city: a Jewish judge, a Japanese lawyer for the plaintiff, a Chinese lawyer for the Armenian defendant, and a jury that ranged from a physicist, a rabbi, an assistant teacher to an Amazon driver and student studying sign language – IndoChinese, Jewish, Spanish, 'WASP' American, Japanese. A celebration of my city's diversity."

Overview of Recent CJP Interview Project:

The Civil Jury Project recently interviewed eleven former federal criminal jurors. The case, *U.S. v. Henson*, involved a physician in Wichita, Kansas who was convicted of unlawfully distributing prescription drugs. Though the nearly month-long trial posed a hardship for some—including those with lengthy commutes to the courthouse—the jurors appreciated Judge Marten's efforts to keep the parties on schedule. The jurors also uniformly found the experience of serving as jurors to be educational and gratifying, including those who served as alternates. In particular, they appreciated being permitted to take notes throughout the trial, hear jury instructions early in the trial, and listen to the parties' opening statements before jury selection commenced. Some, however, expressed confusion about whether they were permitted to pose questions to witnesses through the judge as the trial was underway. The Civil Jury Project looks forward to continuing to interview empaneled jurors!

Status of Project: Fall 2018

The Civil Jury Project looks forward to continuing its efforts through the end of the year 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.

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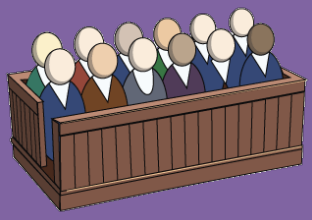
Kaitlin Villanueva
Admin. Assistant

Preview of Future CJP Newsletter Content . . .



Coverage of Wake Forest Law's recent study of racial bias in peremptory challenges.
Read more HERE

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