Civil Jury Project January 2019

Jury Matters

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

January 2019, Vol. 4, Issue 1

Upcoming Events

2.7 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

4.19 Jury Improvement Lunch; Salt Lake City, UT

8.6 Annual Conference of Circuit Court Judges, Naples, FL

Opening Statement

Dear Readers,

Welcome to the Civil Jury Project's first newsletter of 2019. In addition to hosting our first Jury Improvement Lunch in Palm Beach in December, we have been hard at work planning lunches in Oakland, Des Moines, Chicago, and Salt Lake City in the coming year.

This edition includes a response by Judge Paul D. Wilson, an Associate Justice of the Massachusetts Superior Court, to the proposal that federal Judge Thomas Marten and I submitted to the Director of the Federal Judicial Center entitled "A Proposal for Training Newly Appointed Federal Judges in the Law and Handling Trials." Also included is an excerpt from an opinion by federal Judge William G. Young that offers a powerful critique of arbitration, addressing conventional claims of its affordability, speed, and confidentiality for parties to civil litigation.

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 welcome jury scholars to NYU Law

For a preview of subjects that will be discussed by attendees at this first academic roundtable, See Page 6 of the Newsletter.

A response to Hon. Thomas Marten and Steve Susman's Proposal for Training Newly Appointed Federal Judges

By Hon. Paul D. Wilson

I applaud the suggestion that Court of Appeals judges receive some basic information on the work of trial courts. Justices of the Massachusetts Supreme Judicial Court nearly always are former trial judges; last year, for a brief but wonderful period, all seven of those justices were alumni of the Superior Court. Not so the Appeals Court, the intermediate-level appellate court; at any given time, several of its members have not been trial judges, and some, I suspect, did not try many cases as lawyers, either.

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In the paragraph beginning, "Second," the authors point out four reasons for a judge to encourage jury trials over bench trials. They may be disappointed to learn, therefore, that one of those reasons no longer applies in Massachusetts. Last year, the Superior Court adopted a procedure through which the parties can ask the judge presiding over a bench trial to decide the case without issuing lengthy findings of fact and conclusions of law, generally by filling out a form that resembles a jury verdict slip. This option, available only if all parties agree, is intended to apply to situations where getting a prompt decision is more important to the parties than having a full explanation of that decision. This procedure also saves counsel the time and effort involved in preparing proposed findings of fact and rulings of law.

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Regarding the order of trial tasks that a judge might consider: I would be averse to giving jury instructions right after jury selection, unless those instructions are repeated in some form after the evidence is completed. I fear the jurors might be mystified by some of the instructions, until they have the context created by hearing the evidence. On the other hand, while all Massachusetts trial judges instruct the jury after the evidence is completed, many of us also give less detailed instructions, which we call a "precharge," after jury selection and just before opening statements.

Regarding whether the jury is instructed before or after closing arguments: some Massachusetts trial judges have adopted a third variation. First the judge will give the jury the substantive instructions relevant to the case, primarily about the elements of the claims and defenses. Then the lawyers will deliver closing arguments. Then the judge will deliver the remainder of the jury instructions about more generic topics applicable in all civil trials, such as the role of the jury, credibility determinations, expert witnesses, drawing inferences, and the like.

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In the Overview of the Criminal Trial, the authors state that a defendant has a right to reserve opening statement until the government has presented its case-in-chief, but not so in a civil case. However, in Massachusetts the defendant does have that right to reserve in a civil case, although defendants almost never exercise that right, and for good reasons.

That same section states that there are a "very few jurisdictions" where the defendant closes first in a criminal case, followed by the government's closing. Massachusetts is one of those jurisdictions – and the authors might be interested to know that the same rule applies in civil trials. Our theory is that the party bearing the burden of proof should have the advantage of addressing the jury last.

Perhaps because the party with the burden of proof closes last, rebuttal closings are rare in Massachusetts. One exception recently developed, as a result of a 2015 statute that, for the first time, gave plaintiffs' lawyers the right to suggest a dollar figure to a jury as compensation for pain and suffering. (Plaintiffs were always allowed to suggest a dollar figure for types of damages that were more easily calculable, such as medical expenses and lost earning capacity). Out of fairness to defense counsel, who might well hear that suggested damages amount for the first time in the plaintiff's closing argument after defense counsel has already delivered a closing, some Massachusetts judges are now allowing defense counsel a few minutes of rebuttal, limited to the pain-and-suffering damages issue. (I actually give Plaintiff's counsel a choice, stating at the beginning of the trial that, if counsel intends to suggest a pain-and-suffering damages amount, counsel can either tell me and defense counsel that number 48 hours before closings so that defense counsel can deal with it in closing if counsel chooses, or plaintiff's counsel can state that number for the first time in closing, in which case I'd allow rebuttal.)

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On jury questionnaires: In Massachusetts, case-specific questionnaires are public records (unlike the official one-page juror information sheet filled out by everyone who reports for jury duty, which remains confidential). As a result, out of concern for the privacy of prospective jurors, I was leery about using case-specific jury questionnaires. When I first tried it last year, I included a question that invited the prospective juror to ask me to impound any particular answers that the prospective juror believed should be kept confidential. To my surprise, almost no prospective jurors asked for such treatment, which assuaged my fears about creating such public records.

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On the high-profile case: my favorite personal example was a premises liability case involving a rape in a parking garage, which plaintiff's counsel tried very hard to litigate in the press. Complicating matters was that one of plaintiff's lawyers was the inventor of the "Reptile Theory" of jury argument; this lawyer travels the country telling plaintiff's lawyers that: (1) their job is to convince jurors that the same bad things could happen to them and their families and so they should punish the defendant to deter similar conduct, and (2) that the plaintiff's lawyer should ignore any judicial attempts to limit such arguments. Plaintiff's

lawyers then misbehaved so badly in front of the jury that I was forced to overturn a multi-million-dollar verdict. That case, and some other high-profile cases, landed me on a panel last year at a Superior Court Educational Conference, sitting between a colleague who had already been depicted in the movie "Spotlight," handling discovery matters in the early lawsuits against the Roman Catholic Archdiocese of Boston concerning sexual abuse by priests, and the colleague who handled the first murder trial of Aaron Hernandez, former tight end of the New England Patriots. Hearing about their experiences, and living my own, made me agree wholeheartedly that this is indeed an area full of "special considerations," to quote the proposal, and is therefore worthy of attention in the training of new trial judges.

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One "special consideration" that might be mentioned under high-profile cases, or perhaps separately, is the constitutional right to a public trial, and the limitations imposed by that right on the judge's ability to control access to the courtroom, and to control what happens in the spectator gallery of the courtroom. Most commonly this arises in gang-related cases on the criminal side, but it can occur in civil cases in which emotions run so high among spectators that violence is a threat.

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On jurors discussing the evidence during a civil trial: I was surprised to read that some states are now requiring that judges allow this. A few years ago, the Massachusetts Supreme Judicial Court actually banned such discussions except in rare cases. The danger, of course, is that jurors may be unable to follow the judge's instructions not to reach any conclusions until they have heard all the evidence.

Hon. Paul D. Wilson is an associate justice for the Massachusetts Superior Court.

"Whatever were they thinking? Myths and Realities Concerning Courts and Arbitration"

By Hon. William G. Young

Excerpt from CellInfo, LLC vs. American Tower Corporation

How could an otherwise sophisticated agreement have made such a hash out of the parties' intentions concerning the interplay of arbitration and court processes? It appears that in this "big law" era, the drafters operated under the myth that arbitration is cheaper, faster, and more confidential than litigation (only one of these is true) without talking to trial lawyers who understand the reality that while people may not want trials, what they do want is a firm and reasonably prompt trial date before an impartial fact-finder as the best chance for a fairly negotiated settlement.

Consider:

Cheaper? Arbitration is expensive.

Arbitration which, as here, contemplates pre-hearing discovery is markedly more expensive.

Arbitration before a panel of three arbitrators is more expensive still. Indeed, it's as expensive as the full panoply of federal court litigation. Expense comparisons are, of course, tricky. Since the federal courts are supported by the public, the incidental costs of actual hearings are less expensive to the litigants than a comparable hearing before arbitrators (where the parties bear all the incidental costs). Federal court discovery, on the other hand, is especially expensive. Here, of course, the agreement contemplates the arbitrators authorizing discovery. Moreover, under the Agreement here, each of the arbitrators was expected to be familiar with the industry. Id. at 13-14.

More to the point, the initial costs of finding, selecting, and launching a three-person arbitration panel outstrip the costs of filing a complaint in the federal district court. So, even before accounting for the real costs -- discovery -- which comes later, parties have already spent more by choosing arbitration. Genuine trial lawyers know all this. Doubtless, that's why no party here actually has had recourse to arbitration though five months have now passed. Federal Court litigation is expensive as well -- too expensive. Coupled with other factors, arbitration may be more desirable, yet it is a myth to think it cheaper than a focused, well-conducted federal trial.

Faster?

On this factor, the federal courts in Massachusetts win hands down. Again, the trial lawyers know it. When Cellinfo sought to pick up the pace, it called for a preliminary injunction and brought the Court into action as a player. When the Court's contemplated pace outstripped the lawyers' ability to keep up, they jointly negotiated a slowdown. Indeed, had the parties genuinely wanted court adjudication they could have agreed to it, and this case would have been resolved before arbitration could get off the ground. This is not an isolated phenomenon. It is applicable to all types of federal civil litigation. So long as at least one party wants speed, federal courts in Massachusetts clearly outpace arbitration.

Confidentiality?

Here, arbitration comes into its own. While this Court will assiduously protect the parties' trade secrets, now that the parties are headed for settlement or arbitration their affairs will disappear entirely from public view.

Secret, private tribunals carry with them a host of other societal ills, but on these policy issues the Congressional mandate in the Federal Arbitration Act is crystal clear -- corporate secrecy is preferable to public transparency. Doubtless Cellinfo and America Tower have many business reasons for wishing to shield their inter-corporate squabble from the eyes of competitors and present and potential clients.

What may be most troubling about secret proceedings is the lack of any oversight of the process itself. Who is to know if the arbitrators themselves commit improprieties, or counsel are lax, make missteps, or are frankly incompetent? Instead, corporations console themselves when paying their legal bills with the myths that they have chosen a cheaper and faster means of dispute resolution -- although neither is true.

Which is the better approach to adjudication? I am not so self-regarding (or confident) to stake a claim. The honest answer -- it depends. As regards this case, the facts are these:

The litigation costs will be roughly equivalent, though the start-up costs of arbitration are greater. So long as one party wants speed, the Massachusetts federal courts are markedly faster, 5-8 months start to finish. In arbitration, Cellinfo and American Tower can cloak themselves in secrecy; in federal court they cannot. At the conclusion of arbitration, the parties will receive an award but no explanation and will have virtually no appellate rights. At the end of a federal trial the parties will get a thorough written decision and award.

Each will have full rights to appeal to one of the finest appellate courts in America.

Which course is better? You be the judge.

Judge William G. Young, Judge of the United States District Court, District of Massachusetts, has been an active trial judge for more than 25 years.

Introducing the Civil Jury Project's First Academic Roundtable

By Anna Offit

On April 24th the Civil Jury Project will welcome over a dozen researchers to NYU Law to share ongoing work related to civil juries. In the coming months, participants will be invited to share an overview of the work-in-progress they hope to share and receive feedback on. Like other workshops hosted by the law school, this one will consist of a day of informal presentations and unstructured discussion. A sampling of the draft papers and proposed projects that will be workshopped include the following:

- A project that will explain why few attorneys have chosen to take advantage of a "fast track" trial option that sets a guaranteed trial date within 180 days while still permitting discovery and dispositive motions.
- Ongoing research at the intersection of law and linguistics focusing on rewriting jury instructions that are utilized in courtrooms in Massachusetts.
- Preliminary findings from a project sponsored by the American Bar Association's Commission on the American Jury. This project involves a national survey of legal practitioners that probes their assessments of the factors contributing to declining jury trials.
- A planned qualitative study of attorneys who have participated in time-limited civil trials.
- A paper on the assumptions about jury decision-making embedded in Rule 407's prohibition on plaintiffs' introduction of evidence of subsequent remedial measures.
- A paper on the history and current practice of voir dire in the United States which is part of a broader study on the history of the civil jury.
- A draft paper questioning whether radical jury reforms should be implemented to make the civil justice system less risky and expensive for litigants and burdensome for jurors.
- A discussion of work on the impact of forced arbitration on the 7th amendment, the non-representativeness of arbitrators qua fact-finders, among other issues.
- findings from a recent study of race-based exclusion during jury selection in criminal cases.

Anna Offit is a Research Fellow at the Civil Jury Project.

New Advisors Spotlight

Hon. Dane Watkins
District Judge in the Seventh Judicial District of Idaho

Hon. Barry Schwartz
Denver County Court Judge

Hon. Charles Harrington
Arizona Superior Court in Pima County

Hon. Leslie Miller
Arizona Superior Court in Pima County

Status of Project: Spring 2019

The Civil Jury Project looks forward to continuing its efforts throughout 2019 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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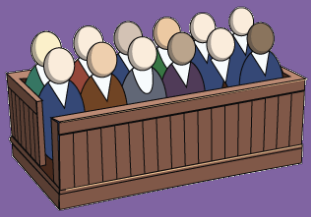
Preview of Future CJP Newsletter Content . . .



Dr. Jeffrey T. Frederick will share tips on how to encourage the participation of prospective jurors during group voir dire.

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