Jury Matters

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

February 2019, Vol. 4, Issue 2

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 February edition of the Civil Jury Project's monthly newsletter. Over the past month we have been hard at work planning judicial and academic workshops that will be hosted at NYU Law this spring. We also have a number of Jury Improvement Lunches and other events on the calendar; Judicial Advisor Tom Marten, USDJ Kansas, and I just presented a program on jury trial innovations at the DRI Products Conference in Austin.

This very special edition of the newsletter features a Law Review Forward authored by Hon. Kathleen O'Malley, a Judicial Adviser of the Civil Jury Project. We reprint it with the permission of the American University Law Review, which will publish the piece in its 68th Volume. As you will see, it offers a compelling and emphatic defense of the civil jury for many of the reasons we highlight throughout our programming.

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

Justice Sotomayor and Justice Gorsuch defended civil juries…

… in their dissent from the denial of certiorari in Hester et al. v. United States: "[I]t's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption." 586 U.S.__(2019).

TRIAL BY JURY: WHY IT WORKS AND WHY IT MATTERS

By Hon. Kathleen O'Malley

The Article on which this excerpt is based will appear as a Forward in a forthcoming issue of the American University Law Review: **Kathleen M. O'Malley, *Trial by Jury: Why It Works and Why It Matters*, 68 Am. U. L. Rev. (forthcoming 2019)**. As Judge O'Malley explains in an early footnote, these reflections were originally presented in the form of a speech delivered to the Civil Jury Project.

Many members of this court, me included, have written forewords for this issue of the *American University Law Review*. We should, given this issue's regular focus on the work of the U.S. Court of Appeals for the Federal Circuit and the consistently high quality of the issue's content. I applaud the *Law Review* for making publication of this journal issue an enduring priority, and I commend all who have had a hand in making it happen.

Previous forewords from my colleagues and I have focused on the history, formation, and mission of the Federal Circuit, on changes and challenges it has faced over the years, and on suggestions or concerns for its future. This year, I want to shift focus. I want to take this opportunity—this bully pulpit—to address a topic that is important to me: the fact that patent cases are being used as a vehicle to criticize and chip away at our Seventh Amendment right to a jury trial. I am troubled by this trend and believe we all should be concerned about it— gravely so.

I. Why We Should Care

If recent events have taught us anything, it is that we are a deeply divided country. We have differing views about the direction our country should take and about what policies are needed to take us where we want to go. There is also an increasing distrust in the institutions of government and the ability of those institutions to protect the rights, liberties, and other values we hold dear. At times like this, we need reassurance that the judiciary remains an independent branch of government that stands apart from the two elected branches, and that the judiciary will protect each of us from the tyranny of the majority or the whims of the sovereign. While there are many ways the judiciary can and should provide this reassurance, one way it *must* do so is by protecting the sanctity of our right to trial by jury in all cases, both criminal and civil. This right is a part of what makes the third branch—the judiciary—independent and unique. And it is what protects all of us from overreach by the other two branches of government.

I am an unabashed believer in the jury system, an unabashed believer that juries take their obligations as jurors seriously, an unabashed believer that juries can sort out even complex issues when given the proper tools, and an unabashed believer that juries almost always arrive at conclusions that are rational, fair, and—even if not the conclusion I would reach in all cases—justified by the evidence presented to them and the legal principles they were charged to follow. I am also an unabashed believer that the right to trial by jury is critical to our system of justice and the protection of our liberties.

Our Founders were also unabashed believers in the right to trial by jury. In fact, trial by jury was guaranteed by every colony even before the Constitution and Bill of Rights were adopted. England's subversion of this right was a principal criticism of the English system in the colonies. Among other things, the British began to enforce their unpopular and excessive colonial taxes through courts of equity to avoid the scrutiny of colonial juries. And they sought to exert control over colonial judges and their decision-making by handing control of judicial salaries to the Crown rather than the colonial legislatures. These practices were expressly listed among the "long train of abuses" committed by the sovereign in the Declaration of Independence. The Constitution's silence on the right to trial by jury in civil cases triggered calls for a bill of rights: "[T]he entire issue of the absence of a bill of rights [from the Constitution] was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of a jury trial in civil cases."

document under consideration lacked a specific guarantee of a jury trial in civil cases." When the call for a bill of rights was answered, no fewer than three amendments—the Fifth, the Sixth, and the Seventh—addressed the right to trial by jury. And, two more limited the power of judges, but not juries, in deciding certain issues.

Trial by jury played such an important role in debates on independence and ratification because, as Chief Justice Rehnquist wrote, "[t]he [F]ounders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." Thomas Jefferson referred to trial by jury as "the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's [sic] constitution." And James Madison called trial by jury in civil cases "as essential to secur[ing] the liberty of the people as any one of the pre-existent rights of nature."

As the Founders understood, the right to trial by jury operates to check any temptation the judiciary might have to bend to the will of either the majority or the sovereign—rather than the law. In turn, it operates to resist any temptation by the other branches of government to similarly disregard the law for their own ends.

The Supreme Court has historically recognized the important role juries play in our system. For example, in *Parsons v. Bedford, Breedlove & Robeson*, Justice Story observed—in 1830—that trial by jury "has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." In *Beacon Theatres, Inc. v. Westover*, the Court repeated this point one hundred years later: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Indeed, respect for trial by jury is built into both the rules of civil and criminal procedure and into basic principles of appellate review. Rule 50 of the Federal Rules of Civil Procedure, for example, only permits a court to set aside a jury verdict where the court concludes that "a reasonable jury would not have a legally sufficient evidentiary basis" to reach the conclusion it did. There is no "exception" to Rule 50 for complex civil cases, such as patent cases, just as there is no "exception" for patent law in other rules that direct appellate courts to respect factual findings by a district court judge. Other principles of appellate review, while not spelled out by rule, also require respect for fact-finders like juries. Thus, appellate courts may not consider evidence not included in the record below, may not address an issue raised for the first time on appeal, may not make credibility determinations, and may not reweigh the facts underlying express or implied factual determinations made in the trial court. These restrictions on the appellate function, backed by years of precedent, are predicated on the importance of respecting the trial court's role in the judicial process and particularly the role of the jury as factfinder.

Despite our nation's long history of respect for the right to trial by jury, many now argue that it is time to do away with jury trials in patent cases. I have heard a number of arguments in support of this contention. I will focus here on only three: (1) the assertion that there should be a "complexity exception" to the Seventh Amendment right to a jury trial; (2) the claim that juries are incapable of understanding the factual and legal complexities in patent cases; and (3) the contention that the formation and existence of the Federal Circuit signaled a congressional desire to treat patent cases differently than other civil cases and to eschew jury findings in the interest of "uniformity" in patent law. I reject all three contentions without hesitation.

II. A Complexity Exception

Some scholars have suggested that trial by jury is neither appropriate nor required in complex civil cases. And some Justices and judges have begun to suggest that they may be right. Not only do I reject the notion that the Seventh Amendment's command is an optional one, I also see no need for a "complexity exception" and fear the implications for our system of justice if we were to adopt one.

American jurors have historically been called upon to decide complex cases, including those involving detailed scientific inquiry. The Federal Judicial Center's *Reference Manual on Scientific Evidence*, compiled along with the National Academies of Sciences, reflects the broad range of scientific issues presented in all manner of federal cases today—both criminal and civil. There is little evidence the practice was much different in eighteenth-century England. And, the Supreme Court has shown no willingness to find a "complexity exception" based on the text of the Seventh Amendment or its historical underpinnings. For good reason.

In my years on the district bench, I presided over cases where juries deliberated on matters relating to diverse categories of scientific and complex financial evidence. After every jury trial over which I presided, I spoke to the jury at length—to thank the jurors, to answer questions they might have about the process, and, importantly, to help educate myself and the lawyers about jury dynamics and their deliberative processes. I was always impressed by how thoughtful and careful the jurors were, how objective and logical their analysis was, and by the level of detail at which they were willing to engage. In one highly complex case involving multiple experts and a large volume of exhibits, the jury told me that they agreed to spend the first two full days of deliberations silently going through every piece of evidence, their own notes, and the jury instructions I had given them to assure that, once an interactive dialogue began, it would be one that was fully informed.

While my sixteen years of experience presiding over jury trials is only anecdotal, it is consistent with studies showing that juries, on average, tend to reach reasoned conclusions. If two minds are better than one, nine or twelve are better still. This sentiment—that jurors working collectively mostly get it right even in

complex cases—is shared by most district court judges around the country. As District Judge William Young recently recounted in a ruling rejecting the contention that juries are ill-equipped to decide whether to pierce the corporate veil: "It takes a special type of arrogance simply to conclude that American jurors cannot handle" complex issues involving patent rights, constitutional rights, or antitrust law. There is no reason to abandon the Seventh Amendment because a case presents complex issues, nor—in my view—is there a better alternative available if we choose to do so.

III. JURIES IN PATENT CASES

Although juries often decide complex cases, patent lawyers still insist that juries do not understand their cases. But patent cases are no more complex than those involving toxic torts, aviation disasters, securities fraud, Ponzi schemes, antitrust conspiracies, or even criminal matters with multiple defendants and complex forensic science. I place fault for a less-than-perfect experience with juries in patent cases not at the feet of jurors or the system for trials our Founders created, but at the feet of trial judges, advocates, our court, and, recently—and perhaps most disappointingly—the Supreme Court.

Trial judges and advocates together can improve juror decision-making in patent cases in a number of ways. I will mention only a few. First, early and continued case management by trial courts, with willing input and cooperation from counsel, can narrow and clarify questions that must be put to the jury. Second, advocates can engage in targeted discovery with an eye toward what they or their opponent will *really* need to prove once trial arrives. That will cause counsel to narrow their focus early and not be tempted to take juries down rabbit holes.

Once trial does arrive, trial judges can employ jury questionnaires before in-person voir dire begins, allow jurors to take notes, guard against disjointed or repetitive presentations of proof, require counsel to clarify matters where the possibility for confusion seems obvious, and encourage the use of technology in trial presentations. Trial judges can also provide jury instructions in understandable prose rather than legalese, ensure that each juror has a copy of those instructions with them in the jury room, and insist on verdict forms that provide jurors with an understandable decision-tree to protect against inconsistent or incomprehensible verdicts.

Finally, trial judges should avoid the use of arbitrary time limits that may make it impossible to explain matters adequately to the jury. While time limits are important to impose discipline on the process, what those will be in a given case should depend upon the issues to be decided, the nature of the technology involved, and other case-specific circumstances. Jurors cannot be expected to understand what advocates lack the time to explain. Of course, to do all this, judges need the tools and resources necessary to manage jury trials amid their ever-growing dockets. While critics are quick to complain about the way judicial officers handle complex cases, it remains true that trial court chambers are woefully understaffed—with only two law clerks each—and there are simply too few trial judges authorized for many judicial districts, and too many court vacancies allowed to languish unfilled.

At trial, advocates can refrain from trying to prove—to the jury, judge, their clients, their opponents, or even themselves—that they know more about the relevant science than anyone in the room. They can do what litigators who try all manner of cases to juries do: convey to the jurors *just* that level of

scientific information necessary to their decision-making. In my experience, when jurors get confused about science, technology, economics, or accounting, it is usually because the advocates create the cause for confusion. Patent lawyers tend to overthink and over-present their cases. They need to be tight and succinct in their presentations, use courtroom technology to their advantage, and cross-examine the opposing expert the way they would cross-examine a hostile witness in a car accident case, rather than engage in high-level debates over scientific theory. And, they need to make sure to proffer evidence on *every* fact or legal element they need to prove or disprove, and ensure the evidence gets admitted over the objections that are bound to come. Jurors should not be asked to fill gaps in counsel's presentations or be asked to find for a party on elements of a thin case that are left unproven. Advocates also need to couch their arguments in understandable terms; in ways that walk the jury through the jury instructions, and ultimately, lead the jury to the desired conclusions on the verdict form.

Rather than continue the mantra that patent cases are just too different from other cases to allow them to go to a jury, advocates need to stop treating patent cases as different and use good, solid trial-lawyering skills to educate and persuade the juries they encounter. If they do this, well-instructed jurors usually will reach the right result. As then-Chief Judge Howard Markey wrote in 1985: "There is no peculiar cachet which removes 'technical' subject matter from the competency of a jury when competent counsel have carefully marshalled and presented the evidence of that subject matter and a competent judge has supplied carefully prepared instructions."

But responsibility for the problems arising in the use of juries in patent cases does not end with trial judges or trial lawyers, it includes appellate courts as well. When appellate courts show a lack of respect for jury verdicts and fail to give adequate deference to jury factual findings—and the implications of those factual findings—the ripple effect is devastating. Trial judges become incentivized to take questions *away* from juries whenever possible, fearing that the hard work in supervising a jury trial is a vain exercise. Advocates have less incentive to explain things clearly for the jury because they begin to believe they are playing to a different audience—one who believes it is the first-instance fact-finder because it somehow has a better ability to grasp or understand the issues at hand. This undermines confidence in jury verdicts and multiplies appeals. As Judge Pauline Newman said in her dissent in *Malta v. Schulmerich Carillons, Inc.*: "When the relationship between trial and appellate tribunals is distorted, the consequences disserve the public and the courts."

We on the Federal Circuit have been criticized for weakening the jury function and causing dysfunction in the system in the process. Rooklidge and Weil used the phrase "judicial hyperactivity" to describe our court's alleged penchant for "usurp[ing] elements of the decision-making process that are supposed to be the province of the lower courts, administrative bodies, or even litigants." Writs of certiorari in patent cases now often contain, as one of the principle objections, complaints about our court's supposed failure to recognize the limits of our appellate function and our willingness to usurp the province of the trial court, the jury, or both.

Recent Supreme Court cases have also tended to sideline juries. Whether this means permitting district court judges to dismiss cases that do not seem "plausible" or to resolve cases without "genuine" factual disputes, in the words of one commentator: "Pretrial procedure has become nontrial procedure by

making trial obsolete." And the Supreme Court has questioned the jury's ability to decide certain complex issues in patent cases. Whatever the merits of these Supreme Court decisions, their effect—to downplay the jury function—is apparent.

I believe we *all* should strive to respect the role of juries in *all* cases, including patent cases. Where inefficiencies are perceived, we should exercise care in where we place the blame and with respect to "fixes" we propose. All participants in the process can do more to improve the quality of jury verdicts. In my view, neither the jurors themselves nor the jury system are the problem.

IV. The Federal Circuit and Juries

Nothing about the existence or formation of the Federal Circuit alters my view that jury trials are an important aspect of the adversarial process in patent cases or that our court is obligated to treat those verdicts with the same deference that other circuits must afford verdicts in all cases.

The Federal Circuit was formed in 1982 to address a perceived lack of uniformity in the enforcement of patent rights. Congress felt that a lack of consistency in how the patent law was interpreted and applied endangered innovation by making it difficult to rely predictably on the rights patents conveyed. But the Federal Circuit is still an Article III court governed by the same rules and decisional paradigms that govern every other Article III court, populated by generalist judges, with a broad jurisdictional reach. Congress did not charge the Federal Circuit with deciding whether the patent system should promote innovation, or competition, or access to lower cost medical supplies; it charged the Federal Circuit with applying the law to the cases before it. And Congress did not free the Federal Circuit from the obligation to abide by the Federal Rules of Civil Procedure or those constitutional and common law principles that govern and guide all federal courts of appeals. Indeed, the Supreme Court has made clear in numerous cases over the years that neither the character of patent law nor the unusual character of the Federal Circuit's jurisdiction frees the Federal Circuit from its Article III mantle.

Moreover, the "uniformity" Congress hoped the Federal Circuit would ensure was not one Congress meant to foster by placing patent law in the hands of a narrow set of decision-makers. Instead, Congress hoped uniformity would be borne of having a single appellate court review the decisions of all lower tribunal decision-makers with the same deference those decision-makers have always been due. In other words, Congress hoped uniformity would grow out of the exercise of our traditional adjudicative function, applied to cases arising nationwide. Ultimately, we must accept the fact that patent cases are but one type of civil case arising in the federal system, with all its historical strengths and weaknesses, including resort to jury trials where appropriate.

V. Final Thoughts

In closing, there are two additional points I want to emphasize. First, virtually no other country employs jury trials in *any* civil context, and none afford jury verdicts the respect we do. While international uniformity in patent law has some appeal, we cannot ignore that our Founders felt the right to a trial by jury in both criminal and civil cases should be enshrined in our Bill of Rights. This sets us apart from the rest of the world in what I believe are positive ways. It reflects perhaps the most important protection for individuals against the will of the sovereign and the whims of the majority who might elect that sovereign.

Chipping away at the right to trial by jury in *any* context seems ill-advised, but it is particularly true in the context of intellectual property rights—rights recognized explicitly in the U.S. Constitution.

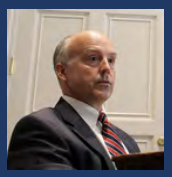
Second, and finally, participation in the jury system is often the only contact with the justice system or the federal government that many citizens ever have. It is a rare opportunity for individuals—whatever the circumstance of their birth or their station in life—to participate in our democracy. It reinforces a fundamental belief in those called to serve that we are all created equal and assures citizens that in our society even the powerful and wealthy are subject to the scrutiny of average citizens. And, perhaps nearest and dearest to my heart, jury trials foster trust in, and respect for, the justice system. When I had the privilege of presiding over jury selections, I was disheartened by how many people felt it would be a waste of their time to participate in the process. But my faith in the citizens of our communities was always renewed when—without fail—even those who had tried to avoid jury duty, later told me it had been a valuable and educational experience.

We should avoid letting the temptation to streamline patent cases prompt the adoption of practices that harm our system of justice or further weaken citizens' faith in the judiciary. As Judge Young asked in *Marchan v. John Miller Farms, Inc.*: "Do you care about any of this? You should. Your rights depend on it." My sentiments exactly.

Hon. Kathleen O'Malley is a United States Circuit Judge of the United States Court of Appeals for the Federal Circuit.

New Advisors Spotlight

Hon. Jill Otake
District Court Judge in the District of Hawaii



Hon. Michael Callan
Justice of the Massachusetts Superior Court

Hon. George Daniels
US District Judge, Southern District of New York

Hon. Daryl Moore
Judge for 333rd District Court in Texas

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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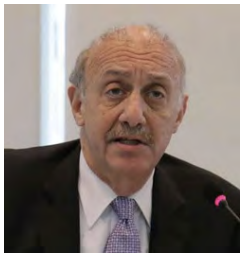

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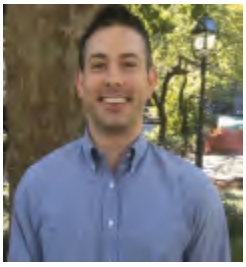

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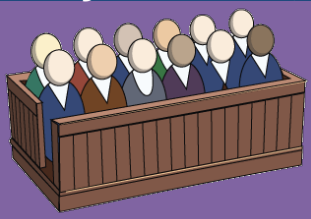
Preview of Future CJP Newsletter Content . . .



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.