Civil Jury Project March 2019

Jury Matters

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

March 2019, Vol. 4, Issue 3

Upcoming Events

3.1 Jury Improvement Lunch; Oakland, CA

3.12 Jury Improvement Lunch; Des Moines, IA

3.14 Jury Improvement Lunch; Chicago, IL

4.4 Jury Improvement Lunch; Salt Lake City, UT

4.16 Inns of Court Program; Cleveland, OH

8.6 Annual Conference of Circuit Court Judges, Naples, FL

Opening Statement

Dear Readers,

Welcome to the March edition of the Civil Jury Project's monthly newsletter. In addition to preparing for the judicial and academic workshops that will be hosted at the law school this spring, the CJP is preparing for several Jury Improvement Lunches across the country. This includes lunches in Oakland, Des Moines, and Chicago in March alone.

This edition of the newsletter features articles aimed at improving attorneys' litigation skills when presenting cases to—and picking—juries. The first is authored by Judicial Adviser Hon. Robert Lasnik and the second by Jury Consultant Adviser Jeffrey Frederick. We also include an Op Ed on the value of the jury system by recently retired Hon. Jim Jordan from the 160th District Court in Dallas County. It recently appeared in the *Dallas Morning News* and is a source of inspiration for scholars and practitioners alike.

Thank you for your support of the Civil Jury Project. You can find a full and updated outline of our status of projects on our website. In addition, we welcome op-ed proposals or full article drafts for inclusion in upcoming newsletters and on our website either by email or here.

Sincerely,
Stephen D. Susman

The Civil Jury Project Supports the #EndForcedArbitration Movement

This morning the CJP attended a panel on forced arbitration, led by tech workers opposed to the practice. You can follow their important efforts HERE on their website.

A View from the Bench

By Hon. Robert Lasnik

One of the major side effects of "The Vanishing Trial" phenomenon in federal court is that of "The Vanishing Trial Lawyer." As a trial judge for almost 30 years (the last 20 on the United States District Court bench in Seattle), I can attest that there is an inverse ratio between experience as a trial lawyer and length of time to present your case. Attorneys who have seen jurors reward brevity and efficiency while punishing repetition and inefficiency realize that it isn't only trial judges who don't appreciate tactics that waste time.

Experienced practitioners watch the jury and sense when they have seen enough. They also understand that jurors do not reward verbosity or gestures that display a lack of respect for the court, opposing counsel, the witness, or the jurors themselves. A few points of presentation should always be considered by the effective trial attorney.

I. Keep It Short and to the Point

I always speak with jurors after they render their verdicts. The most common question I get is "Why do the lawyers think we are stupid or aren't listening? They repeat things over and over and go on way too long." I know most lawyers do this out of fear that the jurors might not understand what happened if the facts aren't hammered into their minds, but if you have selected the jury properly, you know they have the capacity to understand and remember without being treated like numbskulls. Use your support staff and non-lawyer family members as sounding boards. Ask them to watch the jury as you examine witnesses and to listen to your closing argument. They will be able to tell you if jurors are nodding, whether there are any puzzled looks, and whether your argument hangs together. If they don't understand the points you are making in closing, it's time to restructure the argument. If they do understand it, it's time to refine it to make it better.

II. Damn the Depositions and Full Speed Ahead

Maybe it's because depositions don't exist in the criminal trial, but public defenders and prosecutors don't fall into the deposition trap when they shift to civil practice. Those who never handled criminal trials, however, are oddly tied to what was said before. There is nothing that brings the pace of a cross-examination or trial to a screeching halt faster than when the lawyer pulls out a transcript because his list of Qs and As does not line up precisely with the witness' testimony.

There are, of course, times when the witness changes her position 180 degrees and should be called to account for an untruth. But 90% of the time a transcript appears at trial, there is only a slight variation or no real difference at all between what the witness said in the deposition (once the context is established) and what the witness just said on the stand. The "impeachment" falls flat, and the jury is left to wonder what the detour was all about. To make matters worse, the mechanics of impeachment with the deposition are so awkward, arcane, and odd to jurors that they lose the thread of the testimony. All they really want is a story told in a chronological, understandable manner: except in the most egregious cases, the use of deposition transcripts has no part in the efficient, persuasive presentation of your case.

Heavy reliance on deposition testimony – both in preparing questions for the witness and in conducting the examination – has another drawback: lawyers stop listening to what the witness actually IS saying in favor of what they said before. I have seen lawyers on the verge of getting a significant admission (or at least a favorable statement of fact) out of the witness abandon the line of questioning or pull out the deposition transcript because the exact answer wasn't on the list the lawyer had prepared based on the

deposition. Listen to what the witness is saying now and adapt your questioning: that is one of the keys to being an effective cross-examiner.

III. Trials Are Stories: Make Yours More Compelling

Opening statements seem to be extremely difficult for many lawyers. My first bit of advice would be to delete the phrases "The evidence will show" and "We expect the evidence will show" from your statement. They do nothing but break the flow of what should be a unique opportunity to set the stage for the jury. When else will you have a chance to capture the jury's attention, present an uninterrupted version of the facts, and highlight those parts of the case that you want them to listen to and look for as the case progresses? Remember that for most of their lives, jurors get information in narrative form from dramatic presentations in movies or television shows or from reading articles or novels: a good narrative has great impact.

The other purpose of an opening statement is to set up what you will say at closing argument. "Remember last Monday when I told you what we would prove ….well we upheld our end of that promise by presenting you with the testimony and exhibits that establish our case. Now you must uphold your promise to apply the law to the facts and enter a verdict in favor of my client."

IV. The Bench Trial

Many attorneys approach a bench trial in almost exactly the same way they approach a jury trial. While this is certainly appropriate with regards to your *preparation* of the case, it does not apply to the *presentation* of the case. Most trial judges will signal to the parties which areas are of particular interest to the court in coming to a resolution of the case and which issues are not. Too many times I have seen lawyers insist on marching down pathways that I have signaled are not productive because they want to "make a record." With rare exceptions, limiting evidence regarding collateral issues will never be the subject of reversible error no matter how much "record" is created. Just as importantly, your need to "make a record" is not worth offending the judge. The fear factor that leads lawyers to over-try their cases and repeat their evidence and arguments multiple times before a jury has no place in a bench trial. You know the trier of fact is there, is smart, is listening, has the ability to ask questions, understands what the elements of the case are, and knows who has the burden of proof. Try your case, don't "make a record."

V. The Direct Examination of Your Client

Direct examination is, in some ways, more challenging than cross-examination. You cannot lead the witness, limiting the tools you have for eliciting relevant facts. If, despite your hours of preparation, the witness is off script and does not understand where you're going with a question, have a pre-arranged signal and shift to a more comfortable topic to try to "re-ground" your client. You must also use the direct examination to prepare the witness for the hostile cross-examination that will be coming after you sit down. Identifying and discussing problematic evidence and testimony on direct will often help avoid a "gotcha" moment during cross-examination and is well worth the effort.

VI. Juries Decide Cases Based on Facts

One of the difficult lessons for trial lawyers to learn is that the courtroom is not an ice skating rink where jurors hold up cards for style points like Olympic judges after a skater's routine. You don't often get direct feedback regarding your efforts. Even if the jurors have conveyed their love for you and their dislike of opposing counsel, victory is not assured: the jury will decide the case based on the facts of the matter before them.

This was never clearer than in an asbestos case tried in my courtroom a few years ago. Plaintiff's lawyer was obnoxious and disrespectful to the court, to opposing counsel, and to some of the witnesses.

During his rebuttal closing argument one of the jurors stood up – a first for me -- and said, "Your Honor, will you please tell counsel to stop screaming at us!" I wanted to go over and kiss the juror, but I merely said, "I think you made your point." During deliberations, the jury informed me that they were hopelessly deadlocked with one holdout juror. I brought the attorneys into the courtroom and asked if they wanted to accept a non-unanimous verdict (unanimous verdicts are required in federal court in both civil and criminal cases). The defense counsel and their clients, knowing how obnoxious plaintiff's counsel had been and figuring that the vast majority of jurors must share the viewpoint of the one who spoke out during closing argument, agreed to accept a non-unanimous verdict. Plaintiff did, too. The defense was shocked when the jury delivered a multi-million dollar verdict for plaintiff. While the jury hated plaintiff's lawyer, they did not hate the plaintiff (who was a wonderful man) or his wife, both of whom testified with great dignity and integrity during trial.

It's not about you. It's about your case.

VII. Authenticity Is Better Than Audacity

When lawyers come back from a high-profile trial camp put on by one of the giants of the bar, they sometimes feel the need to work one of the great stories they heard into their next closing argument. Be warned: a story can work beautifully in one context, but seem forced, flat, and fatuous in another. Case in point:

A Latino criminal defense lawyer, who wore his long hair tied back with a feather like a Native American warrior, was defending an 18-year old on trial for conspiracy to hire a hit man. The target of the hit was a drug dealer who had shot and killed the defendant's older brother in a drug deal gone bad. The client looked 14 and seemed befuddled by everything in the courtroom. The evidence showed that he had been approached by a government agent and arguably coerced into agreeing to pay for the murder (which never took place). In that context, the story told by the defense lawyer at the end of his closing argument resonated in a special way. "A young warrior brave wanted to challenge the veteran, experienced chief of the tribe and figured out a way to expose the chief as not worthy of being their leader. He captured a small bird and cupped it inside his hands as he approached the chief. 'Is the bird alive or dead chief? If you are so clever and wise, you will know the answer.' If the chief said the bird was alive, the brave would crush it and reveal the chief was wrong. If the chief said the bird was dead, the brave would open his hands and the bird would fly away. The chief looked deeply into the eyes of the man challenging him and said, 'All I can say my son is that his life is in your hands.'"

This was one of the most dramatic moments I ever experienced in a courtroom. What made it resonate was that it fit defense counsel's version of the facts perfectly. His client was the little bird, the jury had his life in their hands, and the overreaching government was the brazen brave determined to do anything for a conviction. I am convinced that the story had something to do with the hung jury in that trial.

Years later I was doing a personal injury trial involving a drywaller who fell off a ladder and injured his ankle while working on a construction site. The damages were small and the liability admitted. When plaintiff's lawyer got to the end of his closing argument and launched into this same story, I almost lost it. The jury looked at him like he was from another planet. I could barely restrain myself from interrupting and begging him to stop. In my mind, it was the perfect example of how a canned argument can't be plugged into the wrong fact pattern.

[This Article was adapted from a previous publication in Litigation Magazine, ABA Litigation Section]

Hon. Robert Lasnik is a Senior United States District Judge of the Western District of Washington.

I'm a retiring judge, and the most inspiring people in my career have been the jurors

By Hon. Jim Jordan

I left bench as a trial judge at the end of 2018. Friends and family have begun asking me which case was most memorable, or which had the biggest verdict, received the most publicity or had the best — or worst — attorneys, what was the hardest part of being a judge, or the most rewarding. But as I near the end of my service, in my quiet moments I most often reflect on the jurors who came through my court.

When I began practicing law 40 years ago, Abraham Lincoln could have walked into most any courtroom in America and felt right at home. Not so much these days. But back in the late '70s, cases were still being tried with many of the same tools Lincoln used — drawings, models, graphs, depositions or written statements made under oath. Sure, videos or film were available back then but they were relatively new or expensive technology for most trial attorneys. Mobile phones, texting, email, PowerPoint and the internet were still mostly Dick Tracy-type science fiction.

When I started, as in Lincoln's time, successful attorneys possessed heightened verbal skills, an ability to root out lies with piercing cross examination, countless rhetorical arguments at the ready, and a keenly developed sense of human nature. I have read that cases in Lincoln's day were tried with the same broad, worldly themes found in the works of Shakespeare and the Bible, often the only two books in a 19th century American home.

The Old Testament story of the Joseph, for instance, contains many of these themes — jealousy, betrayal, redemption, adversity and forgiveness. It also closely resembles, in many respects, our country's origin story — immigration, individualism, foreign powers, reliance on each other, slavery. All put into motion by a simple act of a parent's love for a child; a coat given to a child for comfort, made of many colors to bring joy.

Jurors come from an astonishing variety of different jobs, neighborhoods, ethnicities, education, ages and backgrounds. Some wealthy, many struggling, an occasional celebrity but mostly everyday American citizens who were summoned away from their daily lives, jobs and families to peacefully and fairly resolve disputes for fellow citizens they have never met. For many it's also a rare opportunity to explore experiences, opinions and even family traditions with people very different from themselves.

I remember one jury that was exhausted from more than two weeks of trial and excited to be starting closing arguments and with a chance to finish and go home with a free weekend. But they asked permission to extend the trial into the next week after learning one of them, of a different faith then the rest, would miss an important religious milestone that day for his daughter. The juror had not asked for himself because, the note said, of his belief in duty to his country. All eleven of his fellow jurors joined in the request.

Much of jury duty can be mundane and even at times boring. But often a jury can be inspiring, and strong bonds can be formed easily and quickly among strangers with a common purpose.

Often in the hallway behind the courtroom as we wait on the attorneys and parties to get ready for us to enter, I listen to the jurors chat about their children or their jobs or what they are planning for dinner. I know there is a lot they want to ask me about the case or the attorneys or their clients that I cannot discuss, so I sometimes talk to them about the origins of our courtroom customs or what entertainers, or politicians or sports figures have sat in the very chairs they are now sitting in.

I silently pray their experience has been meaningful and educational, for jurors, more than judges or attorneys must be the apostles of our trial by jury for it to survive as part of our uniquely American system of justice.

Jury trials always start with a panel of mostly anxious people brought up from the central jury room that usually fills the court. Attorneys ask their questions, the people answer or challenge the questions, and 12 are chosen.

But before the process starts, there is a moment, just the briefest of moments: everyone is alert, faces uplifted in anticipation, a brief stillness and quietness, and I can just then see arrayed before me threads from the fabric of Joseph's coat — and I am comforted and I feel joy.

Hon Jim Jordan retired from the bench of the 160th District Court in Dallas County. He wrote this column for The Dallas Morning News.

How to Help Potential Jurors Participate During Group Voir Dire: Eight Tips (and Counting)

By Jeffrey Frederick

I generally write about voir dire, jury selection, and persuasion issues from the attorneys' perspective. Today, I want to shift the perspective from attorneys to potential jurors and how attorneys can help potential jurors more fully participate in the voir dire process.

Goal: The major goal of voir dire is to gather information from potential jurors with which to intelligently exercise peremptory challenges and pursue challenges for cause. This goal requires that jurors actively participate in the voir dire process, giving honest and candid answers. Jurors benefit along with the parties when voir dire is conducted effectively. All trials are not the same, and some jurors are better suited to some cases rather than others. Unfortunately, group voir dire is an intimidating process that can inhibit juror participation. The following eight tips (with more to come in my blog series) are designed to help jurors fight these nonparticipation pressures and more fully participate in group voir dire.

Tip 1: Adopting the Proper Orientation.

Voir dire should be approached as a "conversation," not a job interview or interrogation. A good conversation—one that meaningfully engages the other person—requires attention, interest in what the other person has to say, and good listening skills. All of these characteristics foster juror participation and candor. It doesn't matter whether you are addressing 1, 12, 20, or 100 potential jurors, you are still having a conversation. Bottom line: If you are spending more time "speaking" rather than "listening" to potential jurors, things have gone wrong.

Tip 2—Getting Jurors to Talk from the Start.

You can help jurors feel more comfortable speaking during voir dire by giving them an opportunity to do so at the start. When questioning in relatively smaller groups, have each juror answer four to five simple questions, e.g., name, job, spouse's/significant other's job, any children, and preferred spare-time activities/hobbies. This approach allows jurors to become a little more acclimated to speaking in open court, leading to greater participation during later questioning.

Tip 3—Capitalize on Initial Hand-Raising.

Since group questioning relies heavily on jurors raising their hands to answer questions, help break the ice for jurors by having them raise their hands at the beginning of voir dire. This can be accomplished in one of two ways: (a) asking all jurors to raise their hands in order to help their fellow jurors feel more comfortable in doing so, or (b) asking a question to which everyone must raise their hands (e.g., a question based on a requirement of jury service, such as length of residence in the jurisdiction).

Tip 4—Capitalize on Open-Ended Questions.

A good way to encourage candor and participation is to ask open-ended questions (e.g., "What are your thoughts on . . .?") as compared to closed-ended questions ("How many of you believe that . . .?"). While both types of questions serve their respective purposes, open-ended questions give jurors a chance to express their views in their own words, which encourages candor and decreases nervousness over time.

Tip 5—Avoid the "Looking Good" Bias.

The way we phrase questions can increase or decrease juror willingness to answer honesty. Asking jurors if they are biased or prejudiced, if they can be fair and impartial, or if they understand a law or legal principle triggers the "looking good" answer. Rarely do jurors recognize their biases and, if recognized, freely admit them in open court. Let jurors reveal their biases in terms of their manifestations (e.g., require more evidence or lean in favor of one side). Allowing jurors to reveal manifestations of bias enables them to avoid sitting on cases that would make them feel uncomfortable and put them in conflict with their duties as a juror.

New Advisors Spotlight

Hon. Melissa Moody
Idaho Fourth Judicial District Court

Hon. Steven Hippler
Idaho Fourth Judicial District Court

Hon. James Nutt
Circuit Court of the 15th Judicial Circuit of Florida

Hon. Lucy Brown
Formerly of the Circuit Court of the 15th Judicial Circuit of Florida

Tip 6—Craft Questions with the "Bad" Answer in Mind.

Jurors often are reluctant to answer questions during voir dire, particularly when the answer might indicate bias. The tendency is for jurors to minimize their reported exposure to pretrial publicity (referred to as the "minimization effect") and the strength of their opinions, feelings, and beliefs. The result is that jurors may not raise their hands in response the general questions. However, if you have reason to believe that certain biases or negative views or opinions are present in the jury pool—and you have not heard them expressed—it is important to ask about them. Consider the following:

> "How many of you have strong feelings about punitive damages?" (no response)
>
> "Let me explore this a little further. How many of you feel that punitive damages do more harm than good?" (several jurors raise their hands)

By specifically addressing the potential bias or negative opinion at issue, you remove any ambiguity present in a general question. This approach allows jurors to see the relevance of their answer, thus encouraging juror honesty and candor.

Tip 7—Contrasting Important Viewpoints Within the Same Question.

Another way in which jurors are reluctant to answer questions is the fear that they may be the only ones to raise their hands in response to a question. An approach that counters this fear is to ask questions that contrast important viewpoints or values. In its generic form, it simply asks, "Some jurors believe . . . <x>. Other jurors believe . . . <y>. Which is closer to your viewpoint?" Consider the following approach:

> "People have different views on the causes of crime in our society today. Some people believe that a lack of respect and personal accountability is the major cause of crime. Other people believe that the major cause of crime is the lack of educational, economic, or community ties or opportunities. Which is closer to your view?" (Then ask jurors to choose which side they agree or support.)

Tip 8—Intersperse Majority Response Questions.

The last tip centers on fighting the tendency for juror participation to decline over the course of voir dire. Group voir dire relies heavily on asking questions for which only a few jurors raise their hands (minority-response questioning). As a result, jurors get into a habit of not participating (not raising their hands). We can fight this byproduct of minority-response questioning by interspersing a few majority response questions as voir dire progresses to help jurors reengage in the process. Majority response questions can simply reverse the direction of a normal minority response question, e.g., "How many of you *have not* been a victim of a violent crime?" Or, capitalizing on the initial hand-raising approach, these questions can be based on a requirement for jury service, e.g., "How many of you are United States citizens?" Both of these approaches forward the goal of fostering juror participation throughout voir dire.

Final Thoughts.

Attorneys can employ a number of approaches to help jurors participate fully and honestly in voir dire. By doing so, jurors will have a better overall experience in the process and the parties and the court will benefit by increased juror engagement and candor.

[This piece was adapted from the continuing blog "Tips" series, "*Mastering Group Voir Dire,*" available at http://www.nlrg.com/blogs/jury-research].

Jeffrey Frederick, Ph.D., is Director of the Jury Research Services Division of the National Legal Research Group, Inc.

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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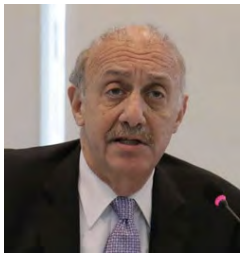

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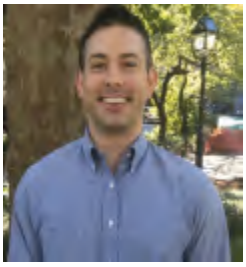

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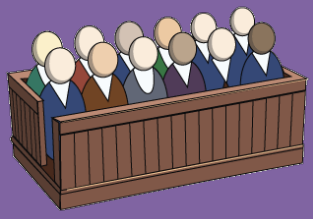
Preview of Future CJP Newsletter Content . . .

The Civil Jury Project will give an update on arguments in a *Batson* case that will be heard by the U.S. Supreme Court later this month.



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