Jury Matters

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

May 2019, Vol. 4, Issue 5

Upcoming Events

5.16 Jury Innovations Program; New York; NY

5.16 Jury Improvement Lunch; Dallas TX

5.17 Minneapolis Judicial Lunch

6.6 Jury Improvement Lunch; Toledo, OH

8.6 Annual Conference of Circuit Court Judges; Naples, FL

9.12 Jury Improvement Lunch; Denver, CO

10.17 Jury Improvement Lunch; Houston, TX

Opening Statement

Dear Readers,

Welcome to the May edition of the Civil Jury Project's monthly newsletter. Over the past month we have welcomed dozens of state court judges to participate in an extremely productive trial innovations workshop here at the law school. In the very same week, legal and interdisciplinary jury researchers from around the country joined us for an academic roundtable to share current and future research projects on the civil jury.

The theme of this issue is social media and the civil jury. First, Professor Tenzer and Mr. Montalvo discuss the implications of extensive pre-trial publicity on facilitating fair trials. Professor Hoffmeister then describes the challenge of discovering whether jurors use the internet to investigate their cases as trials are underway—a concern that is likely overstated. The final article offers an overview of our recent Academic Roundtable, which included presentations by seventeen jury scholars who traveled to NYU Law from around the country.

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

Click below to view the Western District of Washington's

UNCONSCIOUS BIAS JUROR VIDEO

And see what 125 juror thought of the video in the report that accompanies this Newsletter.

A Call to Respect Pre-Trial Social Media Publicity

By Leslie Garfield Tenzer, Academic Adviser to the Civil Jury Project, and Richard Montalvo

Social media posts appear problematic for judges considering whether to grant a motion to transfer venue based on pretrial publicity. At both the criminal and civil levels, judges faced with weighing pre-trial publicity often reject social media as a medium capable of influencing juror partiality. These cases ignore both the ability of social media to persuade and the effectiveness of long-standing judicial tests to guide judges in making their decisions.

Twenty-eight U.S.C.A § 1404 grants a civil judge the authority to transfer any civil action to another district "in the interest of justice." The genesis of § 1404 stems from the Fourteenth Amendment's due process clause and the Sixth Amendment guaranty to an impartial jury. A party can move for a change of venue pursuant to Federal Rule of Civil Procedure 12(b)(3) if, among other things, the moving party can demonstrate that as a consequence of negative pretrial publicity, actual or presumed prejudice exists. In making the determination, a civil court must consider (1) the plaintiff's choice of forum; (2) the convenience of the parties; (3) the convenience of the witnesses; and, (4) the interests of justice.

At the heart of a venue change based on the interest of justice is the ability of the media to rob potential jurors of impartiality. Civil courts have recognized television, radio and newspapers' potential to affect juror partiality by, for example, pulling on heartstrings, inflaming community bias and highlighting the threatened loss of a local football franchise. A Minnesota trial court granted defendant's request for a change of venue based on a series of newspaper articles citing defendant's past medical malpractice claims. The Ninth Circuit upheld a trial court decision to transfer venue upon a showing of pervasive prejudicial publicity due to intense newspaper and television accounts.

Recently, parties have presented evidence of pretrial social media publicity in support of their § 1404 motions with limited success. In *In Re Dan Farr Productions,* 874 F.3d 590 (9th Cir. 2017), a trademark action initiated by San Diego Comic Convention (SDCC) against Dan Farr Productions, a court ruled that alleged negative twitter posts that reached over 35,000 followers were insufficient to support a finding that justice would not be served if the trial were held in San Diego. The court failed to find a causal link between defendant's social media evidence and the jury pool. Even if every Twitter follower were in the jury pool, the court observed, that group would constitute only approximately 8.9 percent of the relevant jury pool, which is insufficient to demonstrate that twelve unbiased jurors could not be found.

In *Gotbaum v. City of Pheonix,* 617 F.Supp.2d 878 (D. Ariz. 2008), the District Court for the District of Arizona denied defendant's motion to transfer venue based on a series of blog posts and website articles that circulated among the community. Plaintiffs argued the blog posts were so disparaging that they made it impossible for a Phoenix court to empanel an unbiased jury. The trial court rejected plaintiffs' arguments citing the absence of prejudicial newspaper, television or radio reports as reason to deny plaintiffs' claims.

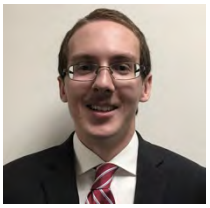
In *United States v. Agriprocessors, Inc.*, 2009 WL 721715, at 4 (N.D. Iowa Mar. 18, 2009), an Iowa District Court found that negative online comments posted to a news website, without any evidence of traditional negative pretrial publicity, was insufficient to justify a change of venue. In *Freeman v. Grain Processing Corp.* a court did grant a change of venue after plaintiffs presented evidence of intense negative television, newspaper and social media publicity. With respect to social media the court said, "by itself, this online activity is not sufficient to justify a change in venue"

These cases illustrate a problem pervasive among trial courts, which is a failure to recognize the ability of social media to persuade. Courts are misguided in dismissing social media as an influential method of communication. Its potential to reach mass audiences, coupled with its potential to sway, demand that courts include social media in its group of media scrutinized for purposes of deciding whether pretrial publicity warrants a change of venue. To date, courts have discounted social media content because it is too new, lacks legitimacy, or is opinionized rather than objective. Quite the contrary, social media is more established than was television when courts began to scrutinize broadcasts for pretrial publicity. The medium has become an integral part of communication, used by governments and heads of state to communicate matters of import, and by traditional journalists to share their stories. While social media is, to a degree, filled with opinions and thoughts, those opinions take on the same quality as the biased news reports that courts ruled were persuasive enough to justify changes of venue. Social media presents information in much the same way as "traditional news media" comprised of newspapers, radio, and television. An exploration of their similarities makes clear that courts must include social media evidence when applying the totality of circumstances standard to pretrial publicity review.

Social media, while akin to "traditional news media" in so many ways, does have a uniqueness seen by the courts who have been faced with considering the newest medium. Authentication, interpretation and questionable influence are reasons courts have discarded social media evidence. In one criminal action, the court questioned whether a defendant set up his own Facebook account damning him, which gave rise to his argument that the Facebook account negatively influenced juror impartiality. But the long standing four-pronged test civil judges apply when evaluating whether to grant venue transfer is flexible enough to minimize any credibility concerns that may arise from the uniqueness of social media. The similarities of social media to the traditional news media, coupled with the flexibility of courts to evaluate whether the media has actually or presumably tainted a jury pool, demand that courts scrutinize social media evidence to the same degree as they do traditional new media. A failure to so do is against the interest of justice.

[Art credit: Nina Azzarello, via Designboom]

Leslie Garfield Tenzer is a Professor of Law at the Elisabeth Haub School of Law at Pace University and the



Richard Montalvo is a 2L at the Elisabeth Haub School of Law at Pace University and Pace Law Review's Editor in Chief

Keeping Jurors Off the Internet

By Thaddeus Hoffmeister, Academic Adviser to the Civil Jury Project

While there were many unique aspects of the recent trial of reputed drug lord and former leader of the Sinaloa Cartel, Joaquin Guzman (El Chapo), one has stood out for all the wrong reasons. According to recent court filings by Mr. Guzman's defense counsel, a number of jurors discussed the case prior to deliberations and regularly followed news coverage of the trial via Twitter. On the broad spectrum of juror misconduct, discussing a case prior to the admission of all the evidence is not the worst sin a juror can commit. In fact, some jurisdictions even allow this practice in order to improve the deliberation process. However, no jurisdiction allows jurors to gather facts about the trial on their own, especially highly prejudicial information, which allegedly occurred in Mr. Guzman's trial. Defense counsel's motion for new trial alleges jurors accessed articles via Twitter that claimed Mr. Guzman had "drugged and raped girls as young as 13."

For those who follow juries closely, the claims raised by Mr. Guzman's attorneys are unfortunately not surprising. Courts have long struggled with how to prevent jurors from accessing information about the case outside of the courtroom. Historically, courts relied on sequestration and jury instructions. However, with the growing costs associated with housing and caring for jurors and the increased reluctance of citizens to be separated from their family and friends, courts have moved away from sequestration and instead increasingly rely on instructions.

Traditionally, jury instructions directed the juror not to read, listen, or watch anything about the trial. For those willing to make a few sacrifices, those instructions were fairly easy to follow. While some jurors still violated the rules, the numbers were fairly small. In the Digital Age, where social media is omnipresent, these traditional instructions seem quaint and anachronistic. Historically, jurors had to make some effort to seek out information about the trial e.g., physically go to the library or scene of the accident/crime. Today, information about the trial is at the juror's fingertips worse yet it is often sent to the juror directly through social media. Jurors in Mr. Guzman's trial were most likely bombarded with stories about the defendant on their social media news feeds. This has led some to wonder whether what measures, if any, can be taken to curtail juror misconduct in the Digital Age.

To date, a number of solutions have been proposed to curb internet use by jurors. These reform measures take both the carrot and stick approach. Category A (the stick) solutions focus on greater oversight and punishment of jurors. Here, suggestions include fining, sequestering, investigating, threatening, monitoring, and requiring additional oaths. Category B (the carrot) solutions focus on greater juror education and empowerment. Here, suggestions include permitting jurors to ask questions, improving jury instructions, and providing jurors with trial notebooks. While each one of these proposals has been implemented in at least one courthouse across the country, the most common measure employed has been updating jury instructions.

A major challenge with implementing any reform proposal is measuring success. This is because no one at this very moment can tell you how often jurors go online. Only after finding the depth of the problem can we learn whether or not any one reform proposal has made a difference. Scholars, practitioners, and judges have all tried to discover the depth of

the problem but each study to date to include the one done by this author has had flaws.

One of the first ever studies done on the effects of "new media" on jurors was conducted in 2010 by the Conference of Court Public Information Officers (CCPIO). As a result of this study, which involved polling individuals in "courtroom communities," the CCPIO found a growing temptation for jurors to use technology. This study, however, did not go further and determine whether jurors used technology improperly nor did it actually poll individual jurors.

The Federal Judiciary Center (FJC) conducted a survey of federal judges in 2011 and updated that survey in 2013 to determine what percentage of jurors went online. In 2011, 6 percent of judges acknowledged use of the Internet by jurors. This number went up to 7 percent In 2013. While this survey was quite expansive with respect to the number of judges contacted, it was limited to the federal judiciary and never involved actual jurors.

Another study was conducted in New Hampshire Superior Court. Like the study by the FJC, the NH study only involved questioning judges about internet use by jurors. The NH study reported a fairly high number of examples of online juror misconduct, upwards of 30%. However, the sample pool was extremely limited. Only 10 New Hampshire state judges participated and no jurors were questioned.

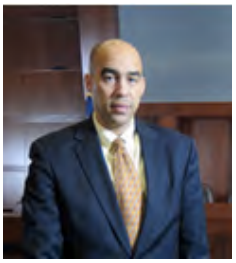
The author of this article conducted his own study in 2012 in which he sent questionnaires to judges, defense attorneys, and prosecutors at the federal level. Approximately 10 percent of the survey respondents reported personal knowledge of online research by one or more jurors. Unfortunately, because the overall small sample size (41 responses) and the fact that the survey was limited to federal court an accurate picture of internet use by jurors cannot be drawn.

U.S. District Court Judge Amy St. Eve, Circuit Court Judge Charles Burns, and Michael Zuckerman have also conducted their own study on jurors and the Internet. Their survey started in 2012 with an informal jury poll. It was then updated in 2014 to ask jurors whether they had been tempted to use the Internet and if they had what prevented them from doing so. While this survey was definitely an improvement from others because jurors were actually questioned, the questions posed to the jurors did not specifically ask whether they violated court rules and used the Internet. Nonetheless, this survey is quite valuable because it looks at what drives jurors to commit misconduct.

To date, the most comprehensive study on jurors using the Internet was done by the National Center for Jury Studies (NCJS). Here, the NCJS surveyed judges, attorneys, and jurors from 6 states. Interestingly, the survey did not uncover any instance of a juror committing online research although some jurors did acknowledge other forms of misconduct like discussing the case prior to the admission of all the evidence. NCJS plans to conduct a follow up study in which they survey jurors after they have left the courtroom in the hope that jurors will be more forthcoming.

As the six studies illustrate, it is no easy to task to determine when and how often jurors use the Internet. Despite the challenges with obtaining such data, it is nonetheless invaluable, especially in determining which reform proposals are best suited to combat internet use by jurors. Absent a reliable study, similar to the one undertaken by Hans Zeisel and Harry Kalven in the 1960s, it might take a high profile case like Mr. Guzman to get the courts to take online juror misconduct more seriously and enact wholesale change.

[Art Credit: Marketo Blog, "Art of Social Media"]



Thaddeus Hoffmeister has written extensively on both jurors and social media. His latest book *Social Media Law in a Nutshell* examines the impact of social media on the legal system. His latest article is *Social Media, the Internet, and Trial by Jury.*

New Advisors Spotlight

Hon. Ursula Hall
Harris County , TX 165th District

Hon. Kyle Carter
Harris County, TX 125th District York

Hon. Rabeea Collier
Harris County, TX 113th District

Hon. Tanya Garrison
Harris County, TX 157th District

Highlights from Last Week's Academic Roundtable

By The Civil Jury Project

Last Wednesday, the Civil Jury Project welcomed seventeen jury scholars to NYU Law for a day of presentations and informal discussion of their current and future civil jury studies. Several themes emerged as the day progressed. First, there was consensus that this is a moment to think boldly about jury reform and the future of the civil trial. To this end, presenters described creative efforts to enhance the fairness and accessibility of jury trials. In some cases, this entailed thinking about dramatically expanding the number of jurors empaneled on cases—or providing jurors with judicial robes to underscore the seriousness of their responsibility.

Other presenters lamented the fact that lawyers fail to utilize "expedited" tracks that guaranteed limited discovery and timely trial dates. In many cases, lawyers who expressed theoretical interest in having expedited trial schedules as an option chose not to take advantage of them in practice.

Other presenters advocated reforms that might help judges keep prejudicial photographic evidence away from jurors in a principled way, or dramatically simplify the language of jury instructions.

To this end, one presenter traced the evolution of the process by which American lawyers question, excuse, or empanel perspective jurors. Another presenter prompted lively discussion about ways that voir dire can inculcate a sense of civic engagement among citizens.

These are only a few examples of the types of imaginative and interdisciplinary projects taking shape in law schools and social science departments across the country. The Roundtable also benefitted from the presence of Elizabeth Sonnenberg, the Judicial Assistant of Civil Jury Project Judicial Adviser Hon. William G. Young of the District of Massachusetts. In addition to bringing state and federal judges together to discuss significant jury innovations of our time, the Civil Jury Project will continue to create a forum for academics to workshop and elicit feedback on ongoing projects. With this in mind, the Civil Jury Project's Research Fellows welcome your suggestions for projects to tackle in the next academic year. Please feel free to send comments on this front to Anna.Offit@nyu.edu.

NEW YORK UNIVERSITY

CIVIL JURY PROJECT
at NYU School of Law

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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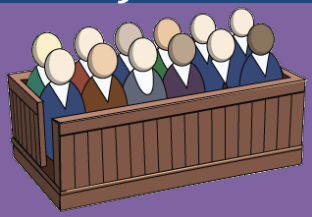
Admin. Assistant

Preview of Future CJP Newsletter Content . . .



Hon. David G. Campbell shares reflections on declining federal jury trials in a special article.

Hon. Jack Zouhary shares lessons from a recent jury trial he presided over.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
OFFICE OF THE CLERK
U.S. COURTHOUSE, SUITE 2102
700 STEWART STREET
SEATTLE, WASHINGTON 98101

WILLIAM M. MCCOOL
District Court Executive
Clerk of Court

LORI LANDIS
Chief Deputy Clerk

MEMORANDUM

Date: April 16, 2019

To: Judge John C. Coughenour

From: Jeff Humenik – Jury Administrator JH

RE: Summary Report – Implicit Bias Questionnaire for Jurors

Please see the following summary of responses from the Implicit Bias Questionnaire completed by jurors who served in this court. We received 125 responses. Please let me know if you have any questions or need additional information. Thanks.

SUMMARY REPORT – IMPLICIT BIAS QUESTIONNAIRE FOR JURORS

1. Prior to your jury service, had you ever heard the term "implicit bias?"

75 – Yes **51 –** No

Notable comments: "I'm familiar with concept; I might not have heard of it referred to by that term."

2. Prior to watching the implicit bias video, how familiar were you with the concept of implicit bias?

38– Not at all familiar
49 – Somewhat familiar
41 – Very familiar

Notable comments: "My company has provided a lot of training on this topic to their leadership team."

3. Do you think the video effectively explained the concept of implicit bias?

123 – Yes **2** – No

Notable comments: "This concept needs concrete visual examples for a lot of people to understand."; "Well explained but a bit dull."; "Yes, could be better."

4. Did you find any component of the video to be offensive?

3 – Yes **119** – No

Notable comments: "Not really, it was slanted in its point."; "Naming the African American gentleman as 'Mr. Brown.'"; No, besides the grey text on white background being too hard to read."; "When showing the jury the person of color commented her hardship and the response was curt and short when it seemed to be a language barrier and could've been explained."; "No, but I think other factors besides age, color, gender, should be included."

5. Do you feel that the video influenced how you answered the questions of the judge and lawyers during jury selection?

48 – Yes **73 –** No **4 –** Maybe

Notable comments: "It helped me understand that as long as I was aware of the bias, I could overcome it."; "I delayed making judgments until most of the evidence had been presented."; "Yes, good refresher."; "It put the idea of implicit bias in my mind and made me think of it in the case."; "Yes, reminded me to dismiss any internal reactions/feelings."; "Yes, I kept it in mind and evaluated my initial responses."; "Yes, more conscious of my biases."

6. Without discussing the substance of your deliberations, do you feel that the video influenced how you considered the testimony and evidence during your deliberation?

64 – Yes **55 –** No **6 –** Maybe

Notable comments: "Opens your mind to hearing the facts."; "In the end, no. The testimony and the evidence considered as a whole led the way."; "I think the judge's instructions were what I relied upon most."; "Maintained open mind to all testimony and evidence."; Yes, I gave everything a second thought."; "Mostly during the week and how I was listening to the presentation of facts."

7. Did you find the video educational on the concept of implicit bias regardless of whether it affected how you viewed the evidence or deliberated?

113 – Yes **8 –** No **2 –** Maybe

Notable comments: "I found the video weak. As an African American woman, I experience this every day."; "Yes, always good to be reminded to be aware of it."; "Yes, it summarized the concepts effectively."

8. Do you think how you considered the evidence or deliberated would have been different if you had not seen the implicit bias video?

27 – Yes **80 –** No **15 –** Maybe

Notable comments: "Not very different, if at all – other instructions to weigh the evidence would have encouraged similar consideration."

9. Having gone through the trial process, do you believe the implicit bias video should be shown to jurors before trial?

120 – Yes **2 –** No **1 –** Maybe

Notable comments: "Yes – but very improved to help jurors understand their own biases"; "Not – Judge says the necessary same message during introduction"; "It spoke to us as educated people, and set a high bar."