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NYU LAW

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Jury Matters

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

Opening Statement

Dear Readers,

Welcome to the March edition of the Civil Jury Project's monthly newsletter.

This issue continues a section of the newsletter—re-launched in our last issue—that contains testimonials from recently discharged jurors.

In addition, this issue features pieces by a judicial advisor, an academic advisor, and one of our research fellows. The first, by the Honorable Catherine Shaffer, outlines some "tricks of the trade" that she has learned since first becoming a judge twenty years ago in King County, Washington. The second, containing research results from Professor Christopher T. Robertson, analyzes what effect blinding experts has in juror perceptions of those experts. And the third, by research fellow Michael Shammas, discusses findings in a December law review article suggesting that experts may be less accurate than jurors in evaluating questions implicating public policy--at least with regard to just compensation determinations.

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

Upcoming Events

March 19, 2020

State Judges Workshop

New York, NY

March 20, 2020

Federal Judges Workshop

New York, NY

March 26, 2020

Jury Improvement Lunch

Boston, MA

April 1, 2020

Dinner Event by the Combined Minneapolis Inns of Court: "Jury Trial Innovations"

Minneapolis, Minnesota

April 2, 2020

Speech at the Harvard Law Forum: "The Disappearing Civil Jury Trial: What Can Be Done About It?"

Cambridge, MA

May 20, 2020

Jury Improvement Lunch

Fort Lauderdale, FL

Some Tricks of the Trade from a Civil Trial Judge

By the Honorable Catherine Shaffer

Though it surprises me to realize how much time has gone by, I became a Superior Court (general jurisdiction) judge in King County, Washington, twenty years ago, in 2000. Luckily for me, that was also the year that the Washington State Jury Commission made its report on recommended jury practices, based on its own research and research by jury commissions in other states. I took the report very seriously, and it has shaped my practice in civil cases ever since. Most of the "tricks" I discuss in this article were drawn from that report. [1]

In every civil case tried to a jury in my court, I conduct a detailed Civil Rule 16 conference, with the lawyers attending in person, usually meeting with me in my jury room. If the case is straightforward, I generally do this on the Friday afternoon before the trial begins on Monday. If it is complex, the conference occurs six to two weeks before trial. I have three principal objectives at these conferences: 1) to acquaint the lawyers with my jury practices; 2) to get a detailed witness by witness estimate of the time needed for trial, from which I create a schedule for the jurors; and 3) to get the lawyers to provide me with an "agreed" set of jury instructions that both sides want, from which we can draw advance introductory instructions for jurors. At these conferences, I show the lawyers a humorous video about an imaginary class where students are not allowed to take notes, are not told what will be on the test until the end, must listen to teachers talk about complex subjects without being allowed to ask questions and are required to look at visual items at the same time teachers are speaking about other topics. It's a great way to get lawyers thinking about helping the jury understand their case. [2] I also have the lawyers come out with me to my courtroom and sit in my jury box. This really helps the lawyers to get a sense of how challenging it can be for jurors to see, and tends to greatly improve the visibility of exhibits. And I show the lawyers a sample juror notebook so they can start to think about how to work with the notebooks.

What are these notebooks she is talking about, you may be wondering? In every case, whether criminal or civil, each juror in my court upon empanelment in the jury receives a three ring notebook. The front of the notebook bears the juror's number. In the front pocket of each notebook is a stenographic pad with the juror's number, and a pen. The first document in the notebook is the case schedule, which shows the hours each day we expect to be in session, the date the case is expected to go to the jury for deliberation, and the times we normally take breaks. It also shows my name, courtroom number, and court telephone number, and we provide the jurors with their own copy of these schedules on request, redacted to remove the case name and number. The next item in the notebook is a list of potential witnesses. In every notebook we also provide the standard preliminary instruction, which includes standard language on note-taking, so that the jurors can follow that instruction as I give it to them, if they choose. In each case, at the end of the case, we give each juror in their notebooks a copy of the final instructions. And in civil cases, the final pocket of the notebook holds the standard forms that my state uses for jurors posing written questions to witnesses.

Some Tricks of the Trade From a Civil Trial Judge (Cont.)

In civil cases, I also encourage the lawyers to use the juror notebooks for other items as well. In complex cases, it can be extremely helpful to provide jurors with special items, such as agreed glossaries of specialized terms, agreed chronologies of events, or agreed corporate organizational charts that show witness titles. I very strongly encourage lawyers to look at their agreed jury instructions and to consent to allow the jury to be instructed on agreed important definitional instructions. For example, it is very useful in cases involving alleged negligence to advance instruct the jury on the standard definitions of negligence and proximate cause Understanding these terms helps jurors see the relevance of evidence as it is presented. Similarly, it is worthwhile to advance instruct the jurors on the need to treat corporations and individuals in the same fair and unbiased way. Instructing in advance on assessing expert witness testimony is helpful. In fact, it is surprising how many of the final instructions are agreed by all parties, and how many can be useful as advance instructions to orient the jury on key legal concepts. I do not force lawyers to agree to advance instructions, but the video footnoted above is persuasive as to why they often will choose to do so.

Finally, it is always worthwhile for lawyers to consider making copies for the jurors of admitted exhibits that will often be referred to during trial. Jurors often strain to see documents, even when lawyers have blown them up to sufficient size. And in the jury room in deliberations, twelve jurors each have to wait to see the single admitted exhibit in the admitted exhibit notebooks. To avoid these problems, I suggest to lawyers that as to some exhibits that will be referred to often in trial, such as the contract in a contract dispute, the key medical records in a medical negligence case, or the product documents in a products liability case, once a foundation has been laid and the exhibit is admitted, I will permit them to distribute three-hole punched copies of the exhibit to the jurors to put in their notebooks and view during trial when the exhibit is being discussed. To avoid stuffing the juror's notebooks with huge numbers of exhibits, I suggest that for other, less frequently used exhibits, the lawyers simply distribute copies of the exhibit to jurors after they are admitted, allow the jurors to look at it while the exhibit is being discussed without putting it in their notebooks, then have the jurors pass back their copies of the exhibit for collection when the testimony moves to a different topic.

For those jurisdictions that, like mine, allow jurors to pose written questions to witnesses in civil cases, here is my procedure. I tell the jurors during my advance trial instruction, which includes specific language on the guidelines for posing such questions, that when live witnesses are called to the stand, they should remove their question form, put the name of the witness on the form, and jot down questions as the witness testifies. I tell them that many of those questions will be answered as the lawyers examine, and to cross off answered questions as they are answered. At the end of the witness' testimony, whether or not the jurors have written anything on their form, they all pass down their forms for my bailiff to collect. This keeps juror questions anonymous. Then I review the questions briefly at sidebar with counsel to decide which will be asked. Then I pose the questions that will be asked to the witness. Then the party that called the witness asks follow up questions, followed by the party that did not call the witnesses. There are no further follow up rounds: the witness leaves the stand. Juror questions are filed with the court clerk.

I hope my fellow civil jury enthusiasts find these practices interesting, and perhaps helpful. There does always seem to be a slightly better way to build our civil jury trial mousetraps.

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[1] For those who want to read the whole report, here is the link: https://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf

[2] Here is the link to the video, available to all on You Tube. https://www.youtube.com/watch?v=oM6nwGPKX2Q&t=6s

Catherine Shaffer *is a judicial advisor for the Civil Jury Project and a Superior Court judge serving in King County, Washington.*

Blinded Experts: A New Solution for Credibility in Litigation

Adapted from research by Christopher T. Robertson

Litigators know that expert testimony is essential to supporting almost any claim or defense, and the credibility of the expert can be the difference between a quick favorable settlement versus a drawn-out case that ends in an expensive loss.

Unfortunately, even when an expert has impressive credentials, judges, juries, and opponents perceive that she is biased, since the lawyer hand-picked her and influenced her opinions. It is hard to get a fair evaluation of a case from such 'hired guns,' and harder still to persuade judges and jurors that they are credible.

New empirical evidence shows that a litigant who produces an expert free of this taint will have a tremendous advantage, translating to quicker settlements and better outcomes at trial. Blinded experts meet that need.

WHAT IS A BLINDED EXPERT?

Double-blind research trials have been the gold standard for scientists since the 1950s. Now, in litigation, a fair and qualified expert can be chosen by a neutral intermediary to review a case before learning which party requested the review.

HOW DOES BLINDING WORK?

Either party can initiate the blinding process, without the knowledge of the adversary or the court. An intermediary works between the attorney and the expert, to prevent the expert from being biased by the attorney's selection and affiliation. The attorney specifies the expert's qualifications, such as specialty and education, and provides a file of the case facts. The intermediary locates an experienced expert who meets the criteria and agrees to testify for either side, depending on the merits of the case.

The intermediary then provides the case facts to the expert, without divulging the identity of the client. The expert confirms that she has all necessary information, and produces a written report of her opinions, which is returned, via the intermediary, to the attorney.

The attorney chooses whether or not to disclose and proceed with the blinded expert. If so, since the core opinion is locked down in writing, the attorney can prepare the expert for deposition, paying for additional expert time as normal. On direct, the witness explains the purpose and procedure for blinding. The lawyer may also use other witnesses.

New Advisor Spotlight

Hon. Amy Totenberg

United States District Court for the Northern District of Georgia

Hon. Charles A. Pannell, Jr.

United States District Court for the Northern District of Texas

WHAT IF THE OPINION IS UNFAVORABLE?

Although you cannot go back to the blinded pool, you can retain another expert in the usual fashion or dispose of the case. The fact that a blinded expert was retained and dismissed should be protected as attorney work product, just like any other consulting (non-testifying) expert. The adversary will generally not even know that a blinded expert was consulted. Thus, blinding has little risk.

WHAT ARE THE BENEFITS OF BLINDING?

Case Evaluation: Before investing months of work and hundreds of thousands of dollars to prosecute or defend a case, an attorney must evaluate it with a clear head. A confidential, blinded expert opinion reveals whether a case is worth that investment, and helps an attorney persuasively communicate that reality to a client.

Settlement: Once disclosed to the other side, a favorable blinded opinion serves as a powerful signal, helping the opponent see the merits of a claim or defense. A litigant with a favorable blinded opinion can demand a quicker and more favorable settlement.
Fewer cases will proceed to the more expensive and risky stages of
litigation, where nobody really wins.

***Daubert* and Summary Judgment:** A blinded expert shows a judge which side has science on its side, and why the other side's hired gun should be excluded. With nothing more than a hired gun, it will be hard for the other side to show that there is a genuine dispute of material fact.

Trial and Arbitration: Factfinders want an expert they can trust. Research with hundreds of mock jurors has found that they understand the concept. Indeed, blinded experts more than doubled the odds of a favorable verdict for either party. In a half-million dollar case, a blinded expert is worth about $175,000. The blinded expert shows the judge and
jury which side can be trusted.

HOW IS INTEGRITY ASSURED?

The intermediary's only purpose is to maintain credibility. The intermediary will maintain a balance of plaintiffs and defense attorneys as its clientele and advisors, and will keep the persons who select the experts separate from those who deal with the attorneys. Experts will be pre-screened, to ensure that they have recommendations from plaintiffs and defense attorneys, or other indicia of objectivity. The intermediary will provide an affidavit report specifying how the expert was selected, and specifying that only one such expert was consulted. Over the long run, the intermediary has every incentive to maintain the integrity of the blind.

HOW MUCH DOES BLINDING COST?

The attorney pays the expert's fees to review a case, as normal. If an attorney chooses to use testimony from a blinded expert rather than a conventional expert, then blinding will provide a potential advantage without imposing any additional costs.

Christopher T. Robertson is associate professor of law at the University of Arizona. He holds a JD from Harvard Law School and a Ph.D. from Washington University in St. Louis.T he initial concept for blinded expertise was published in 85 New York University Law Review 174 (2010). Support for the empirical research was provided by the Petrie Flom Center at Harvard Law School. For a more complete discussion of blinded experts, visit: http://www.blind-expertise.com

Analysis: "What is Just Compensation?"

By Michael Elias Shammas

Are you entitled to a jury of your peers when the federal government wants to condemn your property? If so, who does a better job at accurately assessing a property's value—juries or experts? Finally, who values property higher—government experts or laypeople?

The answers might surprise you.

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The most surprising answers concern the second and last questions. If you want more value than you are owed, you might actually prefer the commission of government experts. *See* Wanling Su, *What is Just Compensation?*, 105 Va. L. Rev. 1483, 1529 (2019) ("[E]mpirical evidence suggests [that] government appointed commissions systematically misvalue homes [and that] commissions overvalue homes *as often as* they undervalue them.") (emphasis added).

The least surprising answer concerns the first question, because if you care about the Seventh Amendment (like most readers of this newsletter), you should prefer a jury, as both the amendment's plain language as well as the methodology used by courts in its application suggest that everyone should have a right to trial by jury in federal condemnation proceedings.

Unfortunately—even though the Seventh Amendment's "historical test represents a rare instance in which the modern [Supreme] Court has come to almost complete agreement on methodology," *id.* at 1535 (citing Darrell A. H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L.J. 852, 887 (2013))—citizens are often denied a jury in condemnation proceedings.

Indeed, despite broad agreement over the nature of the historical test—emphasizing that the Seventh Amendment "preserves" the right to a civil jury and therefore that, in analyzing what the amendment protects, one must look to what was protected in the courts of England at the time of the Bill of Rights' 1791 adoption—courts have been inconsistent in

application. As you may have already guessed, one area where this inconsistency is especially notable concerns the question of whether it is permissible for government agencies to determine "just compensation" in eminent domain cases.

The Historical Test

Such inconsistency is puzzling. As Wanling Su argued in December in an excellent law review article, the Seventh Amendment's historical test clearly imposes a procedural requirement that a jury decide compensation in order for the "*just* compensation" requirement to be met.*Id.* at 1483 (emphasis added). If the historical test is applied correctly, a jury is not optional but mandatory. That is, the constitutional language puts forth not a suggestion but a *requirement*, and any fair examination of the history—like that in Su's law review article—reveals that the substitution of government agencies for juries is flatly unconstitutional.

In her piece, Su persuasively and comprehensively corrects the "common misperception" that juries did not determine just compensation in eighteenth-century English and colonial practice. *Id.* at 1484. She argues that this misperception largely "stems from late nineteenth century dicta," *id.* at 1487, and that it has been wrongly codified in Federal Rule of Civil Procedure 71.1 (which gives district courts the right to deny jury demands). Unfortunately, such dicta are flatly at odds with "[t]he historical records documenting both English and American practice in 1791." *Id.* at 1492. These records unequivocally show that English courts did not waive their "customary practice of impaneling juries when it came to takings." *Id.*

Jurors versus Experts

Although most of Su's piece analyzes the history of the Takings Clause, the most interesting part concerns not the historical basis for the right to trial by jury in condemnation cases but rather the empirical evidence showing that jurors do a better job than experts. Contrary to public opinion, Su finds that lay jurors come to *more* accurate conclusions than experts.*Id.* at 1530.

This finding is significant because the logic for why jurors are more accurate than experts applies to contexts outside just compensation. Indeed, an advantage that juries—all juries—have is that they are not repeat but one-time players. This means that unlike experts (repeat players), jurors do not have to worry about their reputation, which in turn allows for greater honesty and for more disagreement among jurors.

Thus, while *one* expert might be better than *one* layperson in deciding a complex issue such as the fair market value of a home, in group contexts lay jurors consistently make better decisions than experts. This superiority of laypersons to experts stems from the fact that disagreement heightens the likelihood that a group will come to an accurate conclusion, yet experts have less incentives to disagree than lay people because "[d]isagreement signals that at least one of the group members is wrong and [therefore] carries with it professional repercussions." *Id.* at 1533. Needless to say, lay jurors do not have to worry about any such "professional" repercussions, and therefore (unlike experts) are not disincentivized to disagree.

What Jurors Say

- "I really liked meeting people from every aspect of life and getting to know people, where they came from, and how different all of us were. Being able to meet new people and see how they felt about what we were doing as jurors, that was very enjoyable."
- "If the tables were turned and if I were someone relying on a jury, . . . I would want them interested, paying attention, and buying in, and I think once you go through the process entirely as a juror, you can't help but have the perspective that jurors are providing that to the parties."
- "I felt very respected and I felt that we were very important to the process. I really enjoyed that feeling."
- "You learn new things about how the legal system works and about how other aspects of society work. I really enjoyed it."
- "I would like to be on another jury; I really enjoyed it. It is definitely worth it and I would do it again. I would highly recommend everybody do it at least once."

For more testimonials, including video interviews, click here.

CIVIL JURY PROJECT
at NYU School of Law

Look out for the April Newsletter!

Tune in next month for more articles by our judicial and academic advisors and testimonials from jurors who have recently finished serving on a civil jury.

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