

# Jury Matters

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



January '17, Vol. 2, Issue 1

## Upcoming Events

- Feb, 1-3  
2017 Kansas Legal Revitalization  
Conference, Kansas City,  
*Susman on Vanishing Jury  
Trials—Why? Do we care?  
What to do?*
- Feb. 9, 2017 Jury Improvement Lunch,  
Houston, Texas
- Feb. 9, 2017 Texas Business Litigation  
Annual Seminar, Houston,  
*Susman and Jolly on Jury  
Trial Innovations*
- April 4, 2017 Civil Trial Innovations  
Conference, Missouri,  
*Susman on the Preservation  
of Trials and Trial Judges*

## Opening Statement

Dear Readers,

Welcome to a New Year! The Civil Jury Project at New York University remains hard at work studying and bettering civil juries as well as raising public awareness of their decline.

The past year has been a huge success in large part because of the participation of our judicial, academic, and practitioner advisors. With their help, we held multiple conferences, sponsored academic presentations, and launched public outreach programs. We also conducted numerous studies, including those outlined in the pages of this month's newsletter. The coming year will see us doubling our efforts. We are developing new large-scale empirical projects as well as advancing a broader public dialogue through the use of traditional and social media. We are confident that 2017 will prove another exciting year.

We value your continued participation and interest in the CJP. You can find out more about our efforts by visiting our website [here](#).

Sincerely,  
Stephen D. Susman

## What is it like to be a lawyer and a juror?

While it is no longer the case that lawyers are struck from juries as a matter of course, most lawyers will still never have a chance to serve. So we went and asked a real New York attorney who recently served on a criminal jury to tell us about her experience.

Find out more on pg. 4





## CIVIL JURY PROJECT at NYU School of Law



# Juries are Valuable.

## The Civil Jury Project and Baylor Law School are testing whether juries add value to large commercial contracts.

Profs. James Wren and Elizabeth Fraley have been working with the Civil Jury Project to study contracts in Form 8-K filings by reporting corporations in 2015. This is a replication of the now decade-old study conducted by Profs. Geoffrey Miller and Theodore Eisenberg.

We reviewed the contracts for the presence of jury waiver or arbitration clauses. Since these are material contracts filed by sophisticated parties, it is reasonable to assume that the presence or absence of one or both of these clauses reflects a purposeful decision. The choice to submit a potential dispute to a jury therefore suggests something about the value of juries in certain commercial agreements.

Admittedly, our results are still preliminary. At this point, however,

we do know that of the 4011 contracts reviewed, 29.54% had a jury waiver clause and another 12.94% had an arbitration clause. This means that roughly 57.52% of the contracts filed use juries as their dispute-resolution tool. Furthermore, there is a strong correlation between contract standardization and the presence of these clauses. That is, the more standardized the contract, the more likely it is to employ a jury waiver or arbitration clause.

If jury trials were as expensive and risky as is typically assumed, we would expect a much higher percentage of sophisticated parties to forgo jury trials. There may be a number of reasons why we do not see more waivers, including transaction and agency costs. Still, our preliminary results suggest that juries add value to

these contracts. It reflects the considered judgments about what kind of dispute-resolution arrangement best serves the joint interests of the parties. These parties, at least to some degree, want a jury to decide their case.

We will be further aggregating our data in order to test a number of hypotheses, including whether certain types of contracts were more or less likely to contain a jury waiver or arbitration clause. We also plan to conduct interviews with a number of attorneys to discuss why or why not they maintained the use of a jury. We anticipate completing our analysis and publishing the results in the coming year.



## Elevator Pitch: What About the Rest of Us?

Even if sophisticated corporations understand the value of juries, most people remain skeptical. They view jury service as an interruption to their work and busy lives.

For this reason, the Civil Jury Project and the American Society of

Trial consultants constructed a short piece—an “elevator pitch,” if you will—on the value of juries and why everyday people should be excited about serving.

It focuses on how through jury service, average citizens are given the opportunity to deliberate on

and resolve disputes affecting their daily lives. That is, the jury is democracy in action. And, in many ways, the jury box is as powerful as the ballot box. You can read it [here](#).



# What do the attorneys think about juries?

The Civil Jury Project and the American Society of Trial Consultants asked nearly 1,000 practicing attorneys to tell us about their experience with the declining civil jury trial. The results are in and we have a lot to talk about.

The ASTC and the Civil Jury Project have conducted a survey of more than 900 attorneys nationwide. Between May 3, 2016 and August 1, 2016, we surveyed lawyers who try cases (and, more frequently do not) in state and federal courts to ask how their practices have changed over the last five years, what they perceive to be the cause of the decline in civil jury trials, and what they think can be done to increase and improve jury trials. In this [report](#) you'll find empirical data on how many jury trials attorneys surveyed try annually, the most common reasons a case is not tried before a jury, and the respondents' experience with and support for jury trial innovations designed to streamline jury trials, increase jury comprehension and assist jurors with decision making. The survey includes a number of open-ended responses in which attorneys offer their own explanations for the disappearance of civil jury trials and what can be done about it.

First the bad news: the extent of the decline in trials has impacted lawyers' practices dramatically. Although nearly three-quarters (72%) of attorneys surveyed say

they handle up to 50 cases per year, and 65% of these say the vast majority of their cases are eligible for jury trial; in 2015 about half (47%) report having only one to three jury trials and another 42% say they have had zero.

The reasons given for cases not proceeding to trial include client and attorney uncertainty about jury decision-making, the time and cost associated with on-going litigation and/or a trial, mandatory ADR, and adverse rulings or pressure from the courts to resolve cases short of trial.

The good news is that civil attorneys say they are eager for increased engagement with the bench to find ways to reverse the decline. They ask for greater limits on discovery (and consequences for parties who abuse them), limits or bans on mandatory ADR, and more efficient courts (with better support from the legislature for adequate funding), to promote a return to greater access to our fundamental and Constitutional right to a civil trial by jury. Suggestions given by respondents reflect a strong desire to increase the value of participation in civil jury trials for judges, lawyers, litigants and jurors alike.

The survey results are consistent with the education and outreach being offered by a number of Civil Jury Project initiatives and we look forward to joining lawyers and judges across the country in an ongoing conversation about ways to improve the jury trial experience.

In addition, the ASTC and Civil Jury Project are also in the beginning phase of a Public Survey in which we will study the general public's perception and understanding of the decline in jury trials. We will also be testing how important it is to them that we keep the right to a civil jury trial as guaranteed by the 7th Amendment. We are very excited about this additional study and will have more news soon.



**Charlotte A. Morris** (Charli) is a trial consultant who played a critical role in the study.

## Lawyers as Jurors by Halley Josephs



We have continued our coverage of the TV show *Bull*, a procedural drama following the antics of an intrepid jury consultant.

You can read our review of every episode [here](#).



The Hon. William Young wrote a fantastic review on Prof. Thomas's *The Missing American Jury*

You can find his insightful and thorough analysis [here](#).

Less than a month into my new position as an associate at Susman Godfrey, I was called to jury duty at the New York Supreme Court in Manhattan. As a lawyer and former law clerk, I always thought serving on a jury would be an unparalleled opportunity to understand the justice system from a perspective that is usually off-limits to people with my background.

I expected to be dismissed. Still, I listened intently during voir dire, sensing the general mood of the jury pool as a mix of dread and boredom. When the lawyers questioned me, I answered their queries about my background, disclosing an externship at the U.S. Attorney's Office and two federal clerkships. The judge asked me whether I could put aside my legal training and apply only her instructions on the law in the case at hand. I answered in the affirmative, but this was not an easy question since all jurors bring their experiences and knowledge with them.

To my surprise, the next day I was chosen as Juror #12 in a criminal forgery case. More surprising to me, however, was how seriously the other jurors took their duty when assigned, no matter how much they may have wanted to initially avoid jury duty. There was a stark contrast between the mood of the jury pool and that of the empaneled jury. During voir dire, I heard plenty of grumbling about missing work and family obligations, and a general feeling that those selected were the "unlucky" ones. Among my fellow jurors, however, that mood gave way to a sense of awe and responsibility that we had been entrusted to listen to the evidence and decide the defendant's fate.

The two days of jury deliberations that followed a day-and-a-half trial were truly eye-opening. My fellow jurors, all laypeople with no legal background, dove into each element of the charged offense with a care revealing their understanding of the difficult decision that lay before

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us. As I watched them struggle to parse the judge's instructions, we continuously debated the extent to which the evidence proved the defendant's intent to commit the charged act, rather than his propensity to commit similar acts, and how much weight to accord to the defendant's prior arrest for a similar crime. Everyone, even the quieter members, weighed in on the pieces of evidence that swayed their votes from innocent to guilty or vice versa.

At times I found myself having to work hard to heed the judge's admonition to heed the judge's admonition to apply only her instructions on the law. This required staying silent when asked legal questions by my fellow jurors, and, with much restraint, not interjecting my legal knowledge into the discussion to shape how the others interpreted the law or instructions. A jury is composed of individuals with myriad backgrounds, life experiences, and outlooks. As one of twelve, I did not want my training to have an outside influence on the decisions of the rest of the jurors.

Ultimately, our deliberations took more time than the trial, which speaks volumes for each juror's sense of responsibility and ownership over the process. Even though we ended our two days of deliberations without reaching a verdict, and the judge declared a mistrial, I came away with a renewed sense of the value of juries within the justice system. I believe my fellow jurors, many of whom were directly engaging with the legal system for the first time, did as well.

## Status of Project: Spring 2017

The Civil Jury Project looks forward to continuing its efforts throughout 2017 with the following objectives:

- Continue 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 to understand their techniques
- Develop plain language pattern jury instructions
- Advance a large scale survey regarding public perceptions of public dispute resolution
- 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. We believe that 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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