For publication Wednesday, May 31.
Civil Jury Project Series, Number 1 out of 10.

Innovating For Wise Juries: Attorney Conducted Voir Dire

By Stephen D. Susman, Richard Lorren Jolly, Roy Futterman, Ph.D., The Civil Jury Project

This is the first in a series of articles on the Civil Jury Project's proposed innovations that can resuscitate the American jury trial. Each week we offer a summary of a different innovation, the legal support for its use, and empirical studies on its popularity. Each innovation has been proposed by academics and practitioners, implemented by state and federal judges, and are not prohibited in most jurisdictions. Most importantly, each innovation addresses the main criticisms leveled at juries— that they are too long, too expensive, too unpredictable—and are designed to make trial by civil jury a more desirable form of dispute resolution.

Innovation One: Attorney Conducted Voir Dire

Voir Dire has been the main method for selecting jurors in this country since the founding. Lawyers historically handled this process, but over the last few decades federal judges have taken near complete control over jury selection. This is a problem. The Civil Jury Project at New York University School of Law has been monitoring this issue as part of its overall mission to support and re-invigorate the power of juries in our legal system.

It is important to remember that lawyer-conducted voir dire is central to constructing a jury of one's peers. One reason juries even exist is because back in the day the King of England could not afford judges, so he forced people from the community to work for free. Luckily, these people probably also knew a little bit about property rights, criminal activity, who was sleeping

with whose spouse, et cetera. This made the trial move at a quick and dirty pace, but also motivated lawyers to carefully select who they would let decide their client's fate.

As lawyers are prone to do, they realized that voir dire could be used as a sword rather than just a shield. By the twentieth century, voir dire became the time that lawyers argued their case, trying to get the jury on their side right out of the gate. And it was common knowledge that you win or lose your case during voir dire. Around the 1980s, however, federal judges—imbued with a newfound fixation on efficiency—came to see this as a problem. Judges took away lawyers' rights to ask almost any questions, seeing it as a waste of time and an invasion of jurors' privacy. They thought lawyers were abusing the system and decided that they would handle jury selection themselves instead.

This shift has carried serious consequences. Judges have tended to conduct voir dire in a perfunctory way, often rapidly selecting jurors in just a couple of hours. They accomplish this by basing most of the voir dire on limited demographic questions. This results in a jury selection process in which attorneys are forced to make arbitrary decisions, and invites discrimination. When lawyers have only demographic information to work with, they are left with relying on racial and social stereotypes. Furthermore, because the lawyers are not conducting questioning, it can be difficult if needed to prove discrimination. The Supreme Court has noted that discriminatory intent is often "best evidence[d] . . . by the demeanor of the attorney who exercised the challenge." When judges conduct voir dire, however, the evidentiary record with which an appellate court can determine if there has been a *Batson* violation is unhelpfully limited.

In addition, judge-conducted voir dire often results in a less impartial jury by misusing the judge's role as authority figure. The courtroom remains one of the last American institutions

in which an authority figure enjoys near royal treatment—having people rise upon entry, for instance. Voir dire questioning by this authority figure encourages potential jurors to meekly answer questions in a way that they believe the judge wants to hear. The practice encourages jurors to give the socially desirable response that, "Yes, I can be fair and impartial, your Honor." To be sure, a famous empirical study by jury expert Dr. Susan E. Jones showed that jurors are less prone toward self-disclosure when judges rather than lawyers handle voir dire. In that study, jurors questioned by judges changed their answers in conformance with their understanding of what a judge expected almost twice as much as when interviewed by a lawyer. Lawyers, because of their comparatively non-privileged positions, are better at eliciting biases than are judges.

It seems that the pendulum may finally be swinging back, however. Some federal judges are slowly beginning to allow lawyers to participate once again in jury selection. And the Civil Jury Project is spreading the word that it is possible to realize the benefits of lawyer-conducted voir dire, while also preventing its abuse. One way to do so, for instance, is for judges to impose strict time limits on both jury selection and the trial itself. These limits force the lawyers to strategize from the outset, and not waste time chest pounding in front of the venire. Another option is for the court to administer substantive pre-voir dire questionnaires, which are specifically tailored to the case and agreed to by both parties. Alternatively, the court could provide information about the venire in advance so lawyers may perform online research. Both of these approaches allow the lawyers to more quickly dismiss jurors without wasting the court's or the venirepersons' time. Finally, the Civil Jury Project encourages judges to experiment and report on what they find to be most effective. Trial judges enjoy tremendous discretion over their courtrooms, and with boldness may identify new approaches not yet considered.

If we truly believe in providing litigants with a jury of one's peers, we must adopt strategies to ensure that parties and their representatives have a say in selecting their jury. When only judges participate, the result is a less representative and less fair cross section of the community. Yet, if judges and lawyers work together, they can secure the jury's promise of democratic participation in the administration of justice.

Next week, we will address another easily implemented innovation that can better civil jury trials: Setting strict trial time limits.

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Civil Jury Project Series, Number 2 out of 10.

Innovating For Wise Juries: Setting Trial Time Limits

By Stephen D. Susman, Richard Lorren Jolly, Roy Futterman, Ph.D., The Civil Jury Project

This is the second in a series of articles on the Civil Jury Project's proposed innovations that can resuscitate the American jury trial. Each week we offer a summary of a different innovation, the legal support for its use, and empirical studies on its popularity. Each innovation has been proposed by academics and practitioners, implemented by state and federal judges, and are not prohibited in most jurisdictions. Most importantly, each innovation addresses the main criticisms leveled at juries— that they are too long, too expensive, too unpredictable—and are designed to make trial by civil jury a more desirable form of dispute resolution.

Innovation Two: Time Limits

This week, we focus on an obvious and relatively easy innovation: Setting early and strict time limits. Principle 12 of the American Bar Association's American Jury Project Principles and Standards provides that "[c]ourts should limit the length of jury trials insofar as justice allows," and that "jurors should be fully informed of the trial schedule established." Every state and federal appellate court to address the issue has confirmed that judges can unilaterally set reasonable time limits on each side's presentation of evidence or other parts of the trial, such as opening and closing arguments or voir dire. Of course, parties remain free to draft their own

agreements, which should be encouraged since they are likely most familiar with the existing evidence.

These time limits save money. Often the expense of trial corresponds directly with when the case is set for trial (and correspondingly how much time the parties have for discovery), whether the case will actually go to trial when it is set, and how long the trial takes. The sooner a judge sets a trial date and time limits, the more likely the limits are to have a beneficial effect on the amount of pretrial discovery sought. A lawyer facing a time limit of several days is going to have a hard time justifying to his client or partners why he needs multiple depositions that will never be read or shown to the jury. In this way, the effects of trial time limits can trickle down and affect the entire dispute resolution process. Justice Gorsuch reported last year that only about 40% of the cases set for trial actually go when they are set and over 90% of motions for continuance are granted. This tremendously increases the expense and uncertainty of insisting upon trial rather than settlement. Time limits allow a judge to set cases at separate times, one after another. No trial needs to be continued because another has dragged on too long.

Time limits also have positive effects for the jury. First, shorter trials have more diverse juries. At voir dire, the announcement of shorter trials keeps many potential jurors from being excused due to economic hardship, particularly in allowing many professionals and freelance workers to be able to rearrange their schedules to be able to work while serving with minimal interruption. Jurors also appreciate tighter, faster trials with fewer argument tangents and less repetition, and feel less time pressure, meaning that they can deliberate at a more thoughtful pace.

Even without judicial input, attorneys can realize these benefits by structuring trial agreements that include time limits. Most lawyers who have participated in a time-limited trial

report that time limits force them to try a better case. Unfortunately, however, data collected as part of the Civil Jury Project's national survey shows that only 47.7% of attorneys have used trial time limits, and only half of those recommend them. The most common reason given by adverse attorneys is that they believe artificial time constrains hamstring good lawyers without regard for the realities of the case. This fear is exactly backwards. Though it is true that time limits may force attorneys to abandon weaker alternative arguments, this trimming of the fat often results in a stronger overall argument. Confident attorneys should welcome this practice.

Trial time limits, then, offer the easiest way that judges and practitioners can start to increase the number and improve the quality of America's jury trials. Because they ensure that lawyers do not waste time and money on duplicative evidence production, make it so that jurors can restructure their time and be mentally present for the entire trial, and help practitioners put forward their best arguments, setting early and strict time limits should be a relatively easy innovation to put in place in your next case.

Next week, we will address another easily implemented innovation that can better civil jury trials: Providing jurors instructions on the substantive law at the start of the case rather than at the conclusion.

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Civil Jury Project Series, Number 3 out of 10.

Innovating For Wise Juries:
Preliminary Substantive Preliminary Instructions

**By Stephen D. Susman, Richard Lorren Jolly, Roy Futterman, Ph.D.,
The Civil Jury Project**

This is the third in a series of articles on the Civil Jury Project's proposed innovations that can resuscitate the American jury trial. Each week we offer a summary of a different innovation, the legal support for its use, and empirical studies on its popularity. Each innovation has been proposed by academics and practitioners, implemented by state and federal judges, and are not prohibited in most jurisdictions. Most importantly, each innovation addresses the main criticisms leveled at juries— that they are too long, too expensive, too unpredictable—and are designed to make trial by civil jury a more desirable form of dispute resolution.

Innovation Three: Substantive Preliminary Instructions

One of the easiest ways to better civil jury trials is to give juries substantive instructions on the law at the beginning of the trial rather than at its conclusion. Such preliminary instructions resemble the final instructions and are not limited to things such as burden of proof, how to judge a witnesses' credibility, or taking notes. These instructions aim to facilitate, first, a greater understanding by jurors of their duty in the decision-making process by providing them with a legal framework for assessing the parties' arguments, and second, better decision making.

Jurors take in information at trial in a convoluted fashion through witness testimony given in the unfamiliar and strange structure of a direct and cross-examination. They hear bits of information out of narrative order and must struggle to fit these pieces together into a logical

story of the events of the case. In post-trial interviews, it is not uncommon for jurors to report that they did not really understand what exactly they would be asked to decide until after the jury instructions were given at the tail end after days or weeks of trial. By giving jurors preliminary instructions, the court provides jurors more context for what they are about to hear, so that they will be better able to understand, process, retain and prioritize information as it comes in.

Substantive preliminary instructions are encouraged by legal organizations, and almost every jurisdiction permits them. For instance, Principle 6 of the American Bar Association's Principles for Juries and Jury Trials suggests that "[c]ourts should educate jurors regarding the essential aspects of a jury trial." The relevant law is undoubtedly an essential aspect of the trial. Likewise, Federal Rule of Civil Procedure 51(b)(3) provides federal courts with considerable leeway in determining when to instruct a jury, stating that instruction may take place "at any time before the jury is discharged." Most every state, except Nevada and Texas, permit substantive preliminary instructions, with seven states requiring the practice. And in Texas it is permitted so long as the court states that the instructions are tentative and might change after the evidence is presented, and the parties have chance to object to the instructions, and then, at the end, the instructions are repeated.

Practitioners and judges tend to agree that these instructions are valuable. According to the New York State Trial Project, 92% of judges and 79% of attorneys thought that preliminary substantive instructions were helpful to jurors' understanding of the law. Likewise, according to a national survey administered by the Civil Jury Project and the American Society of Trial Consultants, of the nearly forty-four percent of responding attorneys that had experience with preliminary substantive instructions, just 2.2% did not recommend them. This makes it one of the most popular proposals that we are recommending.

Despite this strong support, the National Center of State Courts has found that just 19% of state and federal civil trials included preliminary instructions on the legal elements of the case. While the reasons for this disparity are unclear, we suspect that substantive instructions are absent because counsel and the court just get too busy with handling other things. There is so much to schedule in trial preparation that the relevant actors likely have little time to draft and debate even preliminary substantive instructions. This is especially true since at least some instructions on claims and defenses will prove unnecessary once dropped during the course of the trial.

Nevertheless, practitioners should confer and insist that the court provide the jury with substantive preliminary instructions. The limited time expense will only make the jurors more knowledgeable about the issues, and therefore better prepared to pay attention throughout the entire trial. As a result, the jury is more likely to reach an accurate outcome—something all parties presumably value.

Next week, we will address another easily implemented innovation that can better civil jury trials: Allowing jurors to ask witnesses questions.

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Civil Jury Project Series, Number 4 out of 10.

Innovating For Wise Juries: Juror-Posed Questions

By Stephen D. Susman, Richard Lorren Jolly, Roy Futterman, Ph.D., The Civil Jury Project

This is the fourth in a series of articles on the Civil Jury Project's proposed innovations that can resuscitate the American jury trial. Each week we offer a summary of a different innovation, the legal support for its use, and empirical studies on its popularity. Each innovation has been proposed by academics and practitioners, implemented by state and federal judges, and are not prohibited in most jurisdictions. Most importantly, each innovation addresses the main criticisms leveled at juries— that they are too long, too expensive, too unpredictable—and are designed to make trial by civil jury a more desirable form of dispute resolution.

Innovation Four: Juror-Posed Questions

While we would like to pretend otherwise, most trials are exceedingly boring for all involved. This is doubly true for jurors, who ordinarily must sit quietly as well-paid experts testify on obtuse and confusing subjects, and long-winded attorneys present duplicative evidence ad nauseum. It is understandable when jurors get lost in the weeds and decide cases based not on evidence or argument, but on their initial suspicions. Yet, it need not be this way. One way to combat juror confusion and boredom is to allow jurors to ask witnesses questions.

It works as follows: Before a witness takes the stand, the court provides each juror a piece of paper on which she may write a question. When a witness finishes testifying, but before

being excused from the stand, the jurors are told they may submit a written question anonymously to the witness. The bailiff gathers the sheets from every juror and passes them to the judge who scans them to see if any juror has submitted a written question. Every juror submits paper to prevent the parties from knowing which jurors are submitting which questions. The judge shows the questions to the lawyers at the bench. If there is no objection, the lawyer who called the witness asks the question to the witness, and the other lawyer then gets an opportunity to cross.

In practice, we have found that the jurors have actually attempted their own version of ensuring anonymity. After a trial was over, one juror explained that she sometimes wrote with her non-dominant hand so that the attorneys would not be able to figure out that many questions had come from her. The attorneys were pleased with the questioning, because they were able to see where jurors were getting confused, so the trial teams were able to adjust their presentation of the evidence going forward. They also liked involving the jurors more in the nuts-and-bolts of the trial and ensuring that the jurors' needs were met by the attorneys before deliberations.

No federal evidentiary or court rule prohibits juror from questioning witnesses, and every federal circuit court to have addressed the practice has held it permissible. The consensus approach is whether or not jurors may question witnesses should be left up to the trial judge's discretion, and must take efforts to maintain juror neutrality. Many states have adopted the same judicial-discretion approach, with some going even further—such as Arizona, Colorado, Indiana, and Wyoming—and mandating that jurors be allowed to submit questions of of witnesses. Only a small handful of states, specifically Georgia, Minnesota, Mississippi, and Nebraska, outright prohibit the practice.

According to the New York State Jury Trial Project in 2005, 74% of judges and 50% of

attorneys in civil trials believed that juror questions helped jurors to better understand evidence presented. Despite these benefits, many practitioners are skeptical of juror-posed questions. According to a national survey administered by the Civil Jury Project and the American Society of Trial Consultants, many are wary of the practice because of challenges with respect to objections, time, and usefulness. They also worry that when juror-posed questions are inadmissible, and thus not asked or answered, it leaves inquisitive jurors spurned and frustrated. When properly conducted by an attentive judge, however, these concerns are easily managed. For instance, the judge might explain why a given question is objectionable. Similarly, the practice may be halted if the parties feel that it is undermining the proceedings. To be sure, the benefits and ease of administration make worth giving this innovation a try.

Next week, we will present another innovation to make trial by civil jury better: administering substantive questionnaires before voir dire.

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Civil Jury Project Series, Number 5 out of 10.

Innovating For Wise Juries: Pre-Voir Dire Questions

By Stephen D. Susman, Richard Lorren Jolly, Roy Futterman, Ph.D., The Civil Jury Project

This is the fifth in a series of articles on the Civil Jury Project's proposed innovations that can resuscitate the American jury trial. Each week we offer a summary of a different innovation, the legal support for its use, and empirical studies on its popularity. Each innovation has been proposed by academics and practitioners, implemented by state and federal judges, and are not prohibited in most jurisdictions. Most importantly, each innovation addresses the main criticisms leveled at juries— that they are too long, too expensive, too unpredictable—and are designed to make trial by civil jury a more desirable form of dispute resolution.

Innovation Five: Substantive Questionnaires Before Voir Dire

Often litigants try to avoid trial by jury because they worry that jurors are biased, ignorant, or worse. We have already discussed how attorney-conducted voir dire can help to correct for this, but that is only possible if attorneys are provided the information necessary to perform voir dire competently. One way to empower attorneys to seat more competent juries is for courts to administer substantive questionnaires in advance of voir dire.

More Information in Advance Speeds Up Voir Dire

Virtually every court provides counsel with some basic demographic information about each juror before voir dire begins, but often the standard juror information form provides only

the level of education, the current occupation and employer of the juror and spouse, and whether the juror has served before. Also, this bare bones information is only provided as the venire files into the courtroom. In the interest of allowing counsel to better identify juror bias with a shorter oral voir dire, courts should require potential jurors to provide answers to a more comprehensive questionnaire, tailored to the particular case and agreed to by both sides in advance. These questionnaires would be designed to elicit information regarding the jurors' background characteristics, experiences, activities, opinions, and evaluations in advance of the oral voir dire.

Courts vary on their openness to substantive questionnaires. Jury consultants generally push for them, and judges ponder whether they make voir dire more efficient or more cumbersome. Our experience has been that as long as they are not too lengthy, irrelevant, or intrusive of the jurors' privacy, they are highly beneficial. The hot issue today is the timing of administering the questionnaires, and when the answers are provided to counsel. If administration occurs before the jurors report to the courthouse, jurors who need to be excused for cause or hardship can be identified quickly without lengthy sidebar discussions for each one.

This also allows the lawyers to conduct extensive Internet research on the venire using social media and simple Google searches. This increasingly common practice (which is often done in a rushed and awkward fashion during a fast voir dire process) allows attorneys to speed up the oral voir dire, by only asking the follow up questions rather than asking each potential juror, for instance, to what organizations they belong. Potential jurors also have the benefit of not having to announce personal information aloud in open court, and appreciate the ability to speak freely in a more private communication to only the attorneys and judge.

Not only do substantive questionnaires make jury selection better for everyone, a 2008 study by the American Bar Association found that the majority of responding judges and

attorneys believed using jury selection questionnaires increased the efficiency of jury selection. Furthermore, 78% of judges and 47% of attorneys believed the use of juror selection questionnaires did not affect the fairness of the trial process. Accordingly, this simple practice of asking jurors important and substantive questions early can help make trial by jury a more reliable form of dispute resolution. And the few detriments can be easily controlled by judges exercising sound discretion over what questions are permissible and what attorneys may do with the answers.

Next week, we will address another innovation worth giving a try: Letting counsel give opening statements before voir dire in front of the entire venire.

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For publication Wednesday, July 5
Civil Jury Project Series, Number 6 out of 10.

Innovating For Wise Juries: Openings Before Voir Dire

By Stephen D. Susman, Richard Lorren Jolly, Roy Futterman, Ph.D., The Civil Jury Project

This is the sixth in a series of articles on the Civil Jury Project's proposed innovations that can resuscitate the American jury trial. Each week we offer a summary of a different innovation, the legal support for its use, and empirical studies on its popularity. Each innovation has been proposed by academics and practitioners, implemented by state and federal judges, and are not prohibited in most jurisdictions. Most importantly, each innovation addresses the main criticisms leveled at juries— that they are too long, too expensive, too unpredictable—and are designed to make trial by civil jury a more desirable form of dispute resolution.

Innovation Six: Opening Statements Before Voir Dire

This week we continue our focus on achieving better civil jury trials through reforming the voir dire process. This week's idea is remarkably simple: Allow counsel to provide complete opening statements to the entire venire before voir dire begins instead of after the jury is impaneled. Allowing attorneys to give their opening statements before rather than after voir dire carries benefits and only minor theoretical detriments.

The chief benefit is that early opening statements create a more substantive and comprehensive voir dire. In courts that leave voir dire entirely up to the judge, or limit the lawyers' questions, openings allow potential jurors to be questioned on their reactions and biases related to key case issues. This is important because it helps potential jurors understand the

relevance of specific lines of questioning. If potential jurors understand what the attorneys are driving at, they are more capable of searching their individual experiences and biases to provide better, more complete answers. Counsel for both sides can then more cogently exercise peremptory and for-cause challenges, thus resulting in a more satisfactory decision-making body.

Another advantage of this practice—although more for the judicial system generally than directly for the parties—is that it increases the satisfaction of those persons who are called but not selected to serve. Overwhelming evidence shows that jury service is beloved by those who actually serve to verdict, but hated by those who report to the courthouse, sit around all day, and are sent home. The latter group understandably views jury service as a complete waste of time. By allowing everyone to hear openings, all jurors get a taste of what is at stake in the case and will hopefully walk away more appreciative of our judicial system.

Many states already have laws that provide for mini-openings before voir dire, which obviously serve a similar function to our proposal. And according to a national survey administered by the Civil Jury Project and the American Society of Trial Consultants, 66.5% of attorneys with experience of mini-openings recommended them, while just 12.6% did not. The problem with mini-openings, however, is that they elongate the proceedings by requiring attorneys to repeat the opening after jury selection. There is no reason for this repetition. Indeed, we are unaware of any rules, state or federal, that prohibit judges from imposing on, or attorneys from consenting to, delivering their full openings before jury selection. In fact, Judge Thomas Marten of the U.S. District Court of Kansas developed the practice over twenty years ago, and still uses it today. You can read his considered perspective on the benefits here.

Some courts and attorneys are adamantly against this innovation. And some states, like Oklahoma, even have laws providing that "Counsel shall scrupulously guard against injecting

any argument in their voir dire examination." The fear is that opening statements before voir dire pre-dispose the jury to reach conclusions inappropriately early, and that they encourage biased jurors to self-select into the trial. Based on our decades of experience with voir dire, however, we are underwhelmed with these objections.

First, the idea is just to have jurors hear an opening earlier in the day or at most a few days earlier than they would have otherwise heard it. A person who would make a firm verdict decision based solely on an opening statement is exactly the person who should be questioned and exposed in voir dire rather than later.

Second, as to the argument that jurors would self-select onto a jury, we would argue that the legendary (and usually mythical) stealth juror only applies to high-profile and/or celebrity cases, and should also be exactly the person who should be exposed and questioned in voir dire.

We instead raise the more realistic concern that, rather than fear jurors self-selecting onto jurors, early opening statements would instead aid potential jurors in self-selecting themselves off of juries. Anyone who would like to get off jury duty would have more specific information from an opening statement with which to claim bias. That said, as any tear-stained jury consultant can tell you, those same people would be the ones good at getting out of jury duty anyway through cleverness and persistence.

As long as we are upending the sacred structure of civil trials, why stop there? Next week, we will present another innovation to make trial by civil jury better: Allowing counsel to make interim arguments throughout the trial.

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Civil Jury Project Series, Number 7 out of 10.

Innovating For Wise Juries: Interim Arguments

By Stephen D. Susman, Richard Lorren Jolly, Roy Futterman, Ph.D., The Civil Jury Project

This is the seventh in a series of articles on the Civil Jury Project's proposed innovations that can resuscitate the American jury trial. Each week we offer a summary of a different innovation, the legal support for its use, and empirical studies on its popularity. Each innovation has been proposed by academics and practitioners, implemented by state and federal judges, and are not prohibited in most jurisdictions. Most importantly, each innovation addresses the main criticisms leveled at juries— that they are too long, too expensive, too unpredictable—and are designed to make trial by civil jury a more desirable form of dispute resolution.

Innovation Seven: Interim Arguments by Counsel

Like our previous innovation recommending allowing jurors to submit questions following testimony, this next innovation aims to achieve a better and faster jury trial by ensuring that jurors comprehend the relevance of the evidence presented. Interim arguments are summations of the evidence made by counsel before or following testimony. Counsel can use these arguments to explain the importance and relevance of the expected or elicited testimony. It can also serve to break up the monotony of back-to-back witness testimony, keeping jurors engaged.

There is a significant amount of support for interim arguments. Standard 13(G) of the American Bar Association's American Jury Project Principles and Standards, provides that

"[p]arties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues including: . . . interim openings and closings." And the advisory notes to Rule 51(b)(1) of the Federal Rules of Civil Procedure reference the use of interim arguments: "The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments." Courts agree, too; for instance, the Second Circuit has "noted repeatedly that a district court can greatly assist a jury in comprehending complex evidence through the use of intelligent management devices, [. . . including] interim addresses to the jury by counsel."

But interim arguments are not practiced regularly. According to a 2015 study conducted by the National Center for State Courts, only 1% of civil trials included interim summaries of evidence. And a national survey of attorneys conducted by the Civil Jury Project and American Society Trial Consultant Association found that only 9% have experience with this innovation. Despite this scarcity, some empirical data has shown that interim arguments are beneficial. A study conducted by the American Bar Association found that over 80% of the jurors reported that interim arguments were helpful to aid juror comprehension of the case.

As we have previously noted, jurors take in information at trial in a highly confusing manner through watching adversarial questioning of witnesses. Jurors hear chunks of information out of narrative order and must struggle to fit these pieces together. By allowing attorneys to summarize what has just occurred in the testimony and how it fits into the wider case narrative, the court would be substantially improving juror comprehension throughout every step of a trial. This would likely serve to speed up deliberations as well, as there may be less need to have testimony re-read.

In addition, allowing counsel to make statements or arguments to the jury during the course of a trial would allow the court to rein in counsel, who often use their questions of witnesses to make arguments to the jury. The only possible objection is that it might increase the time of the trial. But, in fact, if the lawyers could explain to the jury why they are calling a witness or what the witness has just demonstrated, the lawyers may also feel less need to repeat things—which remains the most common objection that jurors have to the way lawyers try cases. Thus, interim arguments can make trials both quicker and more accurate.

Next week, we will present another innovation to make trial by civil jury better: back-to-back expert testimony.

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Civil Jury Project Series, Number 8 out of 10.

Innovating For Wise Juries: Matching Experts

By Stephen D. Susman, Richard Lorren Jolly, Roy Futterman, Ph.D., The Civil Jury Project

This is the eighth in a series of articles on the Civil Jury Project's proposed innovations that can resuscitate the American jury trial. Each week we offer a summary of a different innovation, the legal support for its use, and empirical studies on its popularity. Each innovation has been proposed by academics and practitioners, implemented by state and federal judges, and are not prohibited in most jurisdictions. Most importantly, each innovation addresses the main criticisms leveled at juries— that they are too long, too expensive, too unpredictable—and are designed to make trial by civil jury a more desirable form of dispute resolution.

Innovation Eight: Matching Expert Testimony

In this innovation, we answer the question that is on most legal analysts' minds: What if both sides' expert witnesses sat in a hot tub discussing the case while a jury watched?

One of the most common objections to jury trials is that lay jurors are incapable of understanding expert testimony on complex issues, and that they are often persuaded by style more than substance. Our current proposed innovation allows both sides' experts to be matched by subject and to testify back-to-back. Alternatively, in another version of the same idea, it allows concurrent expert testimony, wherein both of the matched experts engage in a dialogue, testifying and answering questions at the same time. The goal is to aid juror comprehension by allowing jurors to more easily compare the testimonies of "battling" experts, as compared with

the current practice wherein experts may testify days or even weeks apart. In so doing, it makes jury trials more easily understood by jurors and thus more predictable and accurate.

Both of these expert matching methods are uncommon in the United States, but presenting expert testimony concurrently has been widely practiced in Australia since the 1970s. There, experts sit together and both testify and answer questions at the same time as if they were all sitting around talking, hence the technical name: Australian Hot Tubbing. Some have proposed importing the practice. Indeed, allowing experts to testify concurrently is one of the methods suggested in Wigmore's Treatise on Evidence to improve the use of expert testimony. Nothing prevents American courts from doing so. Federal Rule of Evidence 611 gives trial courts "control over the mode and order of examining witnesses and presenting evidence," and nothing in our review suggests laws or rules in any jurisdiction that would prohibit some form of this practice.

Because the practice is rare, there is little empirical data on it from the United States. Indeed, according to a national survey conducted by the Civil Jury Project and the American Society of Trial Consultants, just 21.7% of respondents had experience with back-to-back experts. In Australia, however, numerous studies have shown that expert matching methods like these have a number of beneficial effects. They include enhancing communication, comprehension, and decision making, as well as saving time, money, and institutional resources.

There is no reason to suspect that the same benefits would not occur in the United States. As we have previously discussed, it is difficult for jurors to put together the crucial information in a case when it is spread out and interrupted by testimony on other issues. Putting relevant testimony in front of a jury in tighter chunks would help jurors comprehend what is often the most difficult information in a case. There is a clear benefit to all parties and the court to

assisting jurors in understanding the experts' arguments for both sides of each issue. Allowing competing experts to settle the points on which they agree, and quickly move onto the controversy will also save resources. There is thus no need for lawyers to reintroduce the various issues and opinions throughout the trial.

Next week, we will present our final innovation and perhaps one of the most controversial: Allowing jurors to discuss the case before final deliberation.

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Innovating For Wise Juries: Discussions Before Deliberations

By Stephen D. Susman, Richard Lorren Jolly, Roy Futterman, Ph.D., The Civil Jury Project

This is the ninth piece in a series of articles on the Civil Jury Project's proposed innovations that can resuscitate the American jury trial. Each week we offer a summary of a different innovation, the legal support for its use, and empirical studies on its popularity. Each innovation has been proposed by academics and practitioners, implemented by state and federal judges, and are not prohibited in most jurisdictions. Most importantly, each innovation addresses the main criticisms leveled at juries— that they are too long, too expensive, too unpredictable—and are designed to make trial by civil jury a more desirable form of dispute resolution.

Innovation Nine: Jury Discussion of Evidence Before Deliberation

Jurors spend inordinate amounts of trial time sitting in the jury room together waiting for the judge and attorneys to hash out issues. What if this down time were put to meaningful use?

While traditionally jurors have been instructed not to discuss the evidence before entering deliberations, some jurisdictions have allowed jurors to discuss the evidence so long as all jurors are present in the room and no vote or decision is made. The idea is to ensure more accurate fact-finding and juror comprehension, as well as to motivate the jurors' involvement in the trial. Jurors who discuss matters throughout the trial may recall evidence more readily when formal deliberations begin. Allowing the practice also makes for a more rewarding juror experience: Jurors do not view time spent meaningfully in the jury room as wasted.

Arizona has been at the forefront of this innovation. For over twenty-five years, the states has required that "jurors shall be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence." Colorado, too, allows jurors to "discuss the evidence among themselves in the jury room when all jurors are present." And North Dakota grants courts discretion in civil cases to "allow the jury to engage in pre-deliberation discussion. Some states, such as Georgia, which have not approved pre-deliberation discussions, have also not explicitly prohibited the practice.

We are sure that many of our readers will think this innovation egregious, and conclude that these state rule makers are, in forensic terminology, nutty. Defense attorneys in particular may be concerned about discussions occurring before they have even put on their case. Indeed, a national survey conducted by the Civil Jury Project and the American Society of Trial Consultants found that concerns over premature verdicts were the most common objection to this practice. Other objections were that it would cause undue confusion and waste time. To be sure, allowing jurors to discuss evidence before final deliberations proved to be among the least popular of our recommended innovations.

Substantial empirical evidence belies these fears. The Arizona Jury Project, for instance, found that 89% of juries that were instructed that they could discuss the evidence in the case before deliberation chose to do so. And data shows that those jurors who have been allowed to engage in interim discussions, but have been instructed not to make any final decisions until final deliberations, follow the instruction. This suggests that the jurors want to both engage with each other, yet realize the importance of providing fairness. They do not want to jump the gun and decide the case erroneously.

Numerous studies, like this one for instance, have found no significant difference between those jurors permitted and those prohibited from discussing evidence as to when during the course of the trial they started to solidify their decision of who should win the case. Research participants in mock trials are routinely observed changing their opinions throughout the case presentations, particularly as to how their views of the actions of the parties in the case fit within the law they learn from the jury instructions and verdict form. In fact, the early part of deliberations usually involve a venting of emotions about the case and a gathering of consensus about the case facts before moving on to overall opinions as to the verdict questions.

Next week, we will conclude this series by collating the motivations behind the previous nine innovations, and the Civil Jury Project's overriding theory that it is relatively easy to have better informed jurors that would make the jury trial a more desirable form of dispute resolution.

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