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Reinvigorating And Enhancing Jury Trials Through An Overdue Juror Bill Of Rights: WWJW—What Would Jurors Want?—A Federal Trial Judge’s View

By Mark W. Bennett¹

Juries are deeply enshrined by the U.S. Constitution and firmly embedded in our system of justice. Thus, it is surprising that jurors do not yet have something akin to their own widely adopted bill of rights. Regrettably, this is the result of too many trial judges failing to practice WWJW —“what would jurors want”—a jury-centered approach to judging. The state of Arizona, with its launch in 1993 of the Arizona Jury Project, is the pioneering jurisdiction of a more jury-centered approach. If trial judges embraced WWJW it would engender greater respect for jurors and lead to trial innovations which would significantly enhance the juror experience. These innovations would also increase the fairness of jury trials. Adopting a bill of rights for jurors improves jurors’ positive experiences and feelings about trial by jury as they participate in the purest form of democracy in action. This article proposes five bill of rights that have been proven to achieve these goals. If adopted by courts and practiced by trial judges, jurors across the nation will exit courthouses as our greatest community ambassadors for the Sixth and Seventh Amendment rights to trial by jury. This is an important step to ensuring that vanishing civil jury trials are not, going, going, gone!

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¹ Mark W. Bennett is in his twenty-second year as a U.S. district judge in the N.D. of Iowa. He has tried jury trials as a judge in five federal jurisdictions spanning the District of the Northern Mariana Islands to the Middle District of Florida.

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“The most stunning and successful experiment in direct popular sovereignty in all history is the American jury.” – Judge William Young, D. Mass.²

I. Introduction

A jury trial for far too many lawyers, especially “litigators,” is like going to heaven: everyone claims they want to go, just not today.³ No one disputes that

² William Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169 (1995) (“No idea was more central to our Bill of Rights -- indeed, to America’s distinctive regime of government of the people, by the people, and for the people -- than the idea of the jury.”); Andrew Guthrie Ferguson, *Jury Instructions As Constitutional Education*, 84 U. COLO. L. REV. 233, 243 (2013) [hereinafter Ferguson, *Constitutional Education*] (“Trial by jury was considered such an important natural right that a restriction on the use of jury trials during the colonial period helped ignite the American Revolution.”) (footnote omitted).

³ I first heard this joke told by a terrific Texas trial lawyer and presenter, Grace Weatherly, of Wood, Thacker & Weatherly, P.C. in Dallas, at the American Board of Trial Advocates (ABOTA) National Jury Summit in San Francisco on April 30, 2015, where I was presenting on my juror-centered approach to judging. She attributed the line to a Texas trial court judge. ABOTA “is a national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution. First and foremost, ABOTA works to uphold the jury system by educating the American public about the history and value of the right to trial by

lawyers do not try cases as often as they used to. Thus, much has been written and often bemoaned about the declining, if not vanishing, civil jury trial.⁴ I recently

jury.” <https://www.abota.org/>.

⁴ Mark W. Bennett, *Eight Traits Of Great Trial Lawyers: A Federal Judge’s View On How To Shed The Moniker “I Am A Litigator”*, 33 REV. LITIG. 1, 2 (2013) [hereinafter Bennett, *Eight Traits*] (“Many articles have been written about the vanishing civil jury trial, and I recently wrote about the rise of the “litigation industry” and the demise of trial lawyers through a mock obituary for the death of the American trial lawyer.”) (footnotes omitted); Xavier Rodriguez, *The Decline Of Civil Jury Trials: A Positive Development, Myth, Or The End Of Justice As We Know It?*, 45 ST. MARY’S L.J. 333, 334 (2014) (Judge Rodriguez noted “...it is widely acknowledged that the percentage of federal civil cases currently disposed of by a judgment at trial is about 1.2%.”) (footnote omitted); John H. Langbein, *The Disappearance Of Civil Trial In The United States*, 122 YALE L.J. 522, 524 (2012) (“A striking trend in the administration of civil justice in the United States in recent decades has been the virtual abandonment of the centuries-old institution of trial...in American civil justice, we have gone from a world in which trials, typically jury trials, were routine, to a world in which trials have become ‘vanishingly rare.’”) (footnote omitted); Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004) (Despite a growing number of dispositions finding a decrease, often significant, in civil jury trials in state courts). Professor Robert P. Burns has summarized the startling statistics on the vanishing civil jury trial in federal courts:

In 1938, about 20% of federal civil cases went to trial. By 1962, the percentage was down to 12%. By 2009, the number sunk to 1.7%. The percentage of jury trials in federal civil cases was down to just under 1%, and the percentage of bench trials was even lower. So between 1938 and 2009, there was a decline in the percentage of civil cases going to trial of over 90% and the pace of the decline was accelerating toward the end of that period until very recently, when there was almost literally no further decline possible.

Robert P. Burns, *Advocacy In the Era Of The Vanishing Trial*, 61 U. KAN. L. REV. 893, 894 (2013) (“It has often been remarked ruefully that ‘trial lawyers’ have almost all become ‘litigators.’”); *id.* at 893; Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002) (“We need trials, and a steady stream of them, to ground our normative standards Trials reduce

observed: “In the span of less than eighty years, our federal civil justice system has morphed from trial by ambush with no formal discovery, but significant numbers of civil jury trials, to the passage of the Rules and the hot mess in which we now find ourselves.”⁵ I described the transition from trial by ambush to trial by avalanche, but concluded what we really have now is “an un-Godly expensive and protracted ‘litigation’ by avalanche industry.”⁶ However, civil and criminal jury trials are still tried in state and federal courts and remain “the purest form of

disputes, and it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement.”); Mark W. Bennett, *Judges’ Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005) (“Summary Judgment is now the Holy Grail of litigators.”); Marc Galanter, *The Hundred Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255 (2005) (“Although it defies popular images of the ubiquity of trials, an abundance of data shows that the number of trials—federal and state, civil and criminal, jury and bench—is declining. The shrinking number of trials is particularly striking because virtually everything else in the legal world is growing—the population of lawyers, the number of cases, expenditures on law, the amount of regulation, the volume of authoritative legal material, and not least the place of law, lawyers, and courts in public consciousness.”) (footnotes omitted). *But see*, D Brock Hornby, *The Business of The U.S. Courts*, 10 GREEN BAG 2D 453, 467-68 (2007) (“Law professors and judges should stop bemoaning disappearing trials. Trials have gone the way of landline telephones—useful backups, not the instruments primarily relied upon, if ever they were. Dramatists enjoy trials. District judges enjoy trials. Some lawyers enjoy trials. Except as bystanders, ordinary people and businesses don’t enjoy trials, because of the unacceptable risk and expense....Trials as we have known them ... are not coming back.”) (footnote omitted).

⁵ Mark W. Bennett, *Essay: The Grand Poobah And Gorillas In Our Midst: Enhancing Civil Justice In The Federal Courts—Swapping Discovery Procedures In The Federal Rules Of Civil And Criminal Procedure And Other Reforms Like Trial By Agreement*, 15 NEV. L. REV. 1, 10 (2015) [hereinafter Bennett, *Grand Poobah*] (footnote omitted).

⁶ *Id.* The litigation industry includes: “...deep sea fishing discovery expeditions, virtually unlimited obstructionist discovery tactics, a parallel cottage industry of discovery companies, e-discovery consultants, armies of contract lawyers, and highly-compensated associates and junior partners of litigation firms who almost exclusively replace real trial lawyers in the discovery process.” *Id.*

democracy in action.”⁷

Trial by jury has a rich tradition in our country in no small part because the framers of our Constitution understood the importance of jury trials to our new nation. They mention juries three times in the Constitution and Bill of Rights⁸—with no fine print or expiration date. Thus, jurors were a central institution “in the creation of America.”⁹ Jury trials are so ingrained in our nation’s history and contemporary culture that they often have their own shorthand names, e.g.: the Scopes Monkey trial; the trial of Sacco and Vanzetti; the Lindberg baby kidnapping case; the Scottsboro Boys trial; the Ford Pinto case; the McDonalds’ Coffee case; the Menendez brothers trial; the O.J cases (both criminal and civil); and the Boston Marathon Bombing trial. Despite the decline of jury trials across the United States, approximately eight million Americans report for jury duty each year.¹⁰ Another three million or so are summoned each year for jury duty, but don’t show up.¹¹

⁷ William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006) (quoting Hon. Raymond J. Brassard, *Juries Help Keep Our Democracy Working*, BOSTON GLOBE, May 1, 2003, at A19, in turn quoting a letter the author received from a juror). *See also*, Antoinette Plogstedt, *E-Jurors: A View from The Bench*, 61 CLEV. ST. L. REV. 597, 601 (2013) (describing the virtues of jury trials as injecting community values into trials, serving as an important safeguard against government power, protecting citizens from potential bias of judges, educating citizens about their rights and responsibilities, encouraging citizen participation in deliberative democracy, and promoting respect for the rule of law.)

⁸ First, near the end of U.S. Const. art. III, § 2: “The trial of all crimes, except in cases of impeachment, shall be by jury.” Second, in the Sixth Amendment for “an impartial jury of the state and district wherein the crime shall have been committed” for criminal defendants. U.S. Const. amend.VI. Third, in the Seventh Amendment for civil cases “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” U.S. Const. amend.VII.

⁹ Andrew Guthrie Ferguson, *The Jury As Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1115 (2014) [hereinafter Ferguson, *Constitutional Identity*] (Discussing how contemporary juries have lost their constitutional identity as constitutional actors in part because of well-meaning jury trial innovations).

¹⁰ Melanie D. Wilson, *Juror Privacy In The Sixth Amendment Balance*, 2012 UTAH L. REV. 2023, 2023 (2012) (footnote omitted).

¹¹ *Id.* *See also*, Robert G. Boatright, *Why Citizens Don’t Respond to Jury Summonses and What Courts Can Do About It*, 82 JUDICATURE, 156, 156-57

With the rich history and current cultural obsession with jury trials, like the sport of boxing there seems to be a Trial of the Century at least every few years,¹² virtually nothing has been written about the rights of jurors in any of these or other trials.¹³

(1999) (explaining that “the number of citizens who merely ignore their summonses is increasing” and discussing summoned juror non-response rates of “20 percent in state courts and 11 percent in federal courts”). I do have a remedy that works for jurors who do not show up. *See* note 12, *infra*.

¹² E.g., Mike Tyson rape trial (1992); Rodney King police officers’ trial (1992); O.J. Simpson murder trial (1995); John Gotti trial (1995); Timothy McVeigh-Oklahoma City bombing trial (1997); impeachment and trial of President Bill Clinton (1998-99); Scott Peterson murder trial (2004-2005); Michael Jackson child molestation trial (2005); Robert Blake murder trial (2005); Phil Spector murder trials (2007 & 2009); Casey Anthony murder trial (2009); Dr. Conrad Murray trial (2011); George Zimmerman-Trayvon Martin murder trial (2013); Jodi Arias murder trials (2013 & 2015).

¹³ The only published juror bill of rights for any court appears to be the one on the Arizona Supreme Court website: “JUDGES, ATTORNEYS AND COURT STAFF SHALL MAKE EVERY EFFORT TO ASSURE THAT ARIZONA JURORS ARE:

1. Treated with courtesy and respect.
2. Afforded privacy and security safeguards.
3. Randomly selected for jury service without regard for race, ethnicity, gender, age, religion, physical disability, sexual orientation or economic status.
4. Provided with comfortable and convenient facilities, with accommodations to address the special needs of jurors with physical disabilities.
5. Informed of trial schedules as often as possible.
6. Informed of the trial process and of the applicable law in plain and clear language.
7. Permitted to take notes during trial and to ask questions of witnesses or the judge, as permitted by law, and to have them answered where appropriate.
8. When the law permits, told of the circumstances under which they may discuss the evidence during the trial among themselves in the jury room, while all are present, as long as they keep an open mind until a verdict is rendered.

I first started thinking about the rights of jurors early in my judicial career, which sprouted the seeds of my jury-centered approach to judging.¹⁴ During the middle of a trial early in my career as a U.S. district judge, one of the jurors, an elderly woman in the front row from a small Northwest Iowa town, raised her hand because she had a question. So, not to be impolite and lacking other more obvious or better options, I called on her. She proceeded to ask in a clear and strong voice why everyone in the courtroom—me, the lawyers, witnesses, and my law clerk—had water but the jurors did not? A great question with no great answer other than

9. Given answers, as permitted by law, to questions and requests that arise during deliberations regarding the law as it relates to their specific case.

10. Offered assistance if they experience serious anxiety, stress, or trauma as a result of jury service.

11. Permitted to express concerns, complaints and recommendations to courthouse authorities.

12. Compensated in a timely manner for jury service.”

<https://www.azcourts.gov/juryduty/JurorBillofRights.aspx>. The origin of this Bill of Rights appears to be ARIZ. SUPREME COURT COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, 9 (1994) (This is a comprehensive report to study, evaluate, make recommendations, and monitor ways to improve jury trials, the effectiveness of juries, and the quality of their verdicts) [hereinafter THE POWER OF 12].

¹⁴ My jury-centered approach to judging is the focus of a law review article written by a former law clerk, while clerking for me, who is now an accomplished Iowa trial lawyer. Kirk W. Schuler, *In The Vanguard Of The American Jury; A Case Study Of Juror Innovations In The Northern District Of Iowa*, 28 N. ILL. U. L. REV. 453 (2008) (Discussing many of my jury trial innovations to improve the juror experience). However, this article starts with my view of jurors’ responsibilities before it discusses their “rights” at the courthouse:

“United States District Court Judge Mark W. Bennett is serious about jury service. Just ask James Ahart. Mr. Ahart, a United States Postal worker, twice failed to appear for jury duty. As a result, he was called in to court to show good cause for his absence. After finding none, the judge sent him to jail for the night directly from the hearing—without a toothbrush, without any champagne, without any party favors, and without his wife, who accompanied him to the courthouse. It was New Year’s Eve.”

Id. at 454.

it had always been done that way. An unacceptable answer for me. My lifelong motto, a paraphrase of a Thomas Edison quote, flashed before me: “There is a better way to do everything—go find it”¹⁵ and I instantly realized that this juror had found a better way. I made a deal on the spot with her and the other jurors—as long as they didn’t bring in alcoholic beverages, they could bring into the courtroom anything they wanted to drink. Years later, when we were updating the technology in the courtroom, we had cup holders installed, matching the courtroom’s historic art deco decor.¹⁶ The question about jurors being able to drink in the courtroom was the genesis of my **WWJW** approach to judging: **What Would Jurors Want?**¹⁷ The central principle of this approach is that improving a juror’s day in court is the most important innovation and virtually all other innovations flow from it. This article represents the evolution and current status of this more than two decade approach to jury-centered judging.

It is curious why more judges, lawyers, and scholars have not written about a practical bill of rights for jurors.¹⁸ Two noted Texas trial lawyers, who have never

¹⁵ *Id.* at 484.

¹⁶ Photo of cup holders.



¹⁷ Schuler, *supra* note 14, at 479; *see also id.* at 457-58 (“Judge Bennett’s first and foremost jury innovation: that the juror’s day in court is every bit as important as the litigant’s.”).

¹⁸ Judge James F. Holderman of the N.D. of Illinois and his then senior law clerk wrote a pioneering and enlightening article about how jury reforms will help the current and next generations of jurors be more fully engaged in jury trials. James F. Holderman & S. Ann Walls, *As Generations X, Y And Z Determine The Jury’s Verdict, What Is the Judge’s Role?*, 58 DEPAUL L. REV. 343 (2009) [hereinafter Holderman & Walls]. Judge Holderman wrote with authority because he personally “tested”, as part of his role as co-chair of the Seventh Circuit Bar

appeared before me but have had a huge impact on my judging through a law review article they wrote, may have the answer, at least for judges: “The final obstacle to sensible practices to improve the conduct of jury trials is the inherent conservatism of the bench. Judges ‘have seldom been accused of being progressive.’ They, as members of a tradition-driven institution, embrace what has been done before and are sometimes skeptical of new approaches.”¹⁹ As one of the nation’s leading experts on jury trial innovations has written, “[u]nless courts are willing to commit substantial levels of judicial leadership and educational efforts to jury improvement, they face an uphill battle to overcome bench and bar resistance to new ideas.”²⁰ Also, as trial judges are replaced with more managerial and settlement oriented judges, whose experience is primarily as “litigators” rather than

Association American Jury Project, many of the concepts I use in jury trials and write about in this article. *Id.* at 346-47. No one who writes about jury trial innovations has catalogued a bill of rights for jurors.

¹⁹ Steve D. Susman & Thomas M. Melsheimer, *Trial By Agreement: How Trial Lawyers Hold The Key To Improving Jury Trials In Civil Cases*, 32 REV. LITIG. 431, 439 (2013) (footnotes omitted) [hereinafter Susman & Melsheimer]. Their brilliant article is now required reading for all lawyers who appear in civil cases assigned to me. My standard trial case management order contains the following language:

III. TRIAL BY AGREEMENT: Within thirty (30) days of this order, each lawyer who has appeared on behalf of any party, and within thirty (30) days of any other lawyer appearing on behalf of any party, must file a short affidavit that they have read the following article: Steve D. Susman and Thomas M. Melsheimer, *Trial By Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431 (2013). Each lawyer must also state in their affidavit whether or not they are willing to make a good faith effort to apply the basic principles of this article and the concepts contained in Pretrial Agreements Made Easy, found at <http://trialbyagreement.com/pretrial-agreements/pretrial-agreements-made-easy/> to this case. **I respect the lawyers’ right not to follow these principles, but the failure to timely file the affidavit will result in a \$250.00 sanction.** The money will go to the court’s “Library Fund” and will be used for the benefit of the bar.

²⁰ Paula L. Hannaford-Agor, *Jury Nullification? Judicial Compliance And Non-Compliance With Jury Improvement Efforts*, 28 N. ILL. U. L. REV. 407, 424 (2008).

“trial lawyers,” it is hardly surprising that less thought, emphasis, and judicial leadership is given to the rights and concerns of trial jurors or, for that matter, to jury trials at all.²¹ While speaking at an anti-trust seminar a few years ago, I was

²¹ Susman & Melsheimer, *supra* note 19, at 433 (“Today, trial lawyers may often encounter a ‘settlement judge’—a judge who is willing to cajole, exhort, or even intimidate the parties into a settlement.”) (footnote omitted). All trial lawyers know first-hand judges like this. A recent law clerk

“informed me that, in her first-year civil procedure class, her professor instructed the class that a jury trial was a failure of the system—a comment the students all dutifully typed into their notes. Is it a surprise, then, that lawyers and judges gravitate towards summary judgment, when they are indoctrinated in law school to think that jury trials are an abomination?”

Mark W. Bennett, *Essay: From the “No Spittin’, No Cussin’ And No Summary Judgement” Days Of Employment Discrimination Litigation To the “Defendant’s summary Judgment Affirmed without Comment” Days: One Judge;s Four-Decade Perspective*, 57 N.Y. L. SCH. L. REV. 685, 707, n.106 (2012/21013) [hereinafter Bennett, “No Spittin’, No Cussin’”]; THE JOINT PROJECT OF THE AM. COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE AND THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYS.: A REPORT ON PROGRESS AND PROMISE 14 (Apr. 2015) [hereinafter A REPORT ON PROGRESS AND PROMISE] (“Knowledge of the trial process is critical for judges responsible for conducting the trial process. We urge that consideration of trial experience be an important part of the judicial selection process. Judges who have trial experience, or at least significant case management experience, are better able to manage their dockets and move cases efficiently and expeditiously. Nearly 85 percent of our respondents said that only individuals with substantial trial experience should be chosen as judges.”): For a thorough analysis of the transition of federal judges from adjudicators to managers see the classic article, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982) (“I want to take away trial judges' roving commission and to bring back the blindfold. I want judges to balance the scales, not abandon them altogether in the press to dispose of cases quickly. No one has convincingly discredited the virtues of disinterest and disengagement, virtues that form the bases of the judiciary's authority. Our society has not yet openly and deliberately decided to discard the traditional adversarial model in favor of some version of the continental or inquisitorial model. Until we do so, federal judges should remain true to their ancestry and emulate the goddess

shocked that a judicial colleague unabashedly stated out loud that “a jury trial is a failure of the system.”²² Indeed, this is exactly the opposite view of Principle 11 “**Trials represent a success, not a failure, of our civil justice system,**” of the leading American College Of Trial Lawyers.²³ In one recent important national study, a surprising fifty-seven percent of the trial lawyers polled thought that trial court judges did not like taking cases to trial.²⁴

But, for those of us in the legal profession who are deeply passionate about the Sixth and Seventh Amendments’ right to trial by jury, implementing a bill of rights for jurors is critical. American jury scholar Professor Andrew Guthrie Ferguson has thoughtfully warned that jury trial innovations reinforce the view that contemporary juries have become a too “task oriented enterprise” and that innovations have negatively impacted the prior sense of jurors’ “robust sense of constitutional identity.”²⁵ So judges should not elevate the efficiency that jury trial innovations bring over teaching jurors about the importance of their historic constitutional role.²⁶ If we truly want and expect a higher response rate from summoned potential jurors, and for them to be the best ambassadors for our civil justice system, a juror bill of rights needs to be adopted and practiced.

Justicia. I fear that, as it moves closer to administration, adjudication may be in danger of ceasing to be.”).

²² Bennett, “*No Spittin’, No Cussin,’*” *supra* note 21, at 707 (“Not surprisingly, the judge was from a big firm ‘litigation’ background.”); Stephen B. Burbank & Stephen N. Subrin, *Litigation And Democracy: Restoring A Realistic Prospect For Trial*, 46 HARV. C.R.-C.L. REV. 399, 399 (2001) (“As early as 1971, one federal district court judge candidly said: “[M]y goal is to settle all my cases . . . Most of the time when I try a case I consider that I have somehow failed the lawyers and the litigants.”).

²³ A REPORT ON PROGRESS AND PROMISE, *supra* note 21, at 14.

²⁴ Interim Report (including 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers), ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM A-6 (August 1, 2008).

²⁵ Ferguson, *Constitutional Identity*, *supra* note 9, at 1136.

²⁶ Ferguson, *Constitutional Education*, *supra* note 2, at 233, 303 (Professor Ferguson suggestions a Model Jury Instruction as a “constitutional teaching moment” for jurors to reclaim their sense of constitutional awareness and thereby strengthen and invigorate contemporary jury service).

- I. Jurors Have The Right Not To Have Their Time Wasted By Judges, Lawyers, Witnesses and Unnecessary, Cumulative, and Excessive Evidence.**
- II. Jurors Have The Right In Jury Selection In Every Civil Case To Be Told Exactly How Long The Trial Will Last—Minus Deliberations.**
- III. Jurors Have The Right In Every Trial To Their Own Set Of Plain English Final Jury Instructions *Prior* To Opening Statements.**
- IV. Jurors Have The Right To Have Their Trial Judge Thoughtfully Consider Innovations That Enhance Their Experience And Improve The Fairness Of The Trial.**
- V. Jurors Have The Right To Juror Creature Comforts.**

Before turning to an explanation of each specific bill of rights, no article about the rights of jurors or jury trial innovations would be complete without discussing the Arizona Jury Project²⁷ and the Seventh Circuit Bar Association American Jury Project (Seventh Circuit Project).²⁸ These two projects represent important empirical research on jury trials in state (the Arizona Jury Project) and federal (the Seventh Circuit Project) courts.

II. The Arizona Jury Project and the Seventh Circuit Bar Association American Jury Project

The Arizona Jury Project was created by the Arizona Supreme Court on April 14, 1993, when it created the Committee On More Effective Use of Juries.²⁹ The principle concerns that gave rise to this Project were “lack of jury representativeness in an increasingly diverse society,” “enforced jury passivity during trials” and “unacceptably low levels of juror comprehension of the evidence

²⁷ THE POWER OF 12, *supra* note 13.

²⁸ AMERICAN JURY PROJECT COMM’N, SEVENTH CIRCUIT BAR ASS’N, SEVENTH CIRCUIT AMERICAN JURY PROJECT: FINAL REPORT (Sept. 2008) [hereinafter SEVENTH CIRCUIT JURY PROJECT].

²⁹ THE POWER OF 12, *supra* note 13, at 2.

and of the court's instructions."³⁰ The Committee was made up of former jurors, lawyers who practice both civil and criminal law, court administrators, academics, and trial and appellate judges.³¹ A key to the success of this project was that the Arizona Supreme Court directed the Committee to consult with current social science studies and to be creative—to think outside the traditional jury trial box and not be bound by traditions and myths that heretofore had defined the jury trial process.³²

The Committee's report included fifty-five specific recommendations, including new ways to improve juror comprehension and to increase juror participation in their process of fact-finding.³³ Fifteen of the recommendations were adopted by the Arizona Supreme Court and became effective through rule changes on December 1, 1995.³⁴ The most controversial recommendation adopted by the Arizona Supreme Court was allowing juries to discuss the evidence during breaks in the trial when all jurors were present rather than waiting until after closing arguments to begin their discussions of the evidence during deliberations.³⁵

³⁰ *Id.*

³¹ *Id.* The Committee met four times in eighteen months and had twenty sub-committees. *Id.*

³² B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 280 (1996) [hereinafter Dann & Logan].

³³ Of the fifty-five recommendations, twenty-eight related specifically to trial procedures. Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussion During Civil Trials: Studying An Arizona Innovation*, 45 ARIZ. L. REV. 1, 4 (2003) [hereinafter Diamond, et al., *Juror Discussion During Civil Trials*]. For a complete list of the fifty-five recommendations, see Dann & Logan, *supra* note 32, at 281-82. For both a list and a discussion of each recommendation, see THE POWER OF 12, *supra* note 13, at 33-133.

³⁴ Dann & Logan, *supra* note 32, at 281.

³⁵ Diamond, et al., *Juror Discussion During Civil Trials*, *supra* note 33, at 5. The Arizona Supreme Court rejected the Committee's proposal to allow early discussion of the evidence in both criminal and civil jury trials, adopting it only for civil jury trials. *Id.*, at 6. Rule 39(f) of the Arizona Rules of Civil Procedure was adopted as follows:

If the jurors are permitted to separate during the trial, they shall be admonished by the court that it is their duty to not converse with or

The Seventh Circuit Project was an outgrowth of the American Bar Association American Jury Project which “produced a single set of modern jury principles, entitled *Principles for Juries and Jury Trials* ‘ABA Principles’ that the ABA proposed be used as a model for state and federal trial courts conducting jury trials across the country.”³⁶ The revised ABA Principles were approved by the ABA House of Delegates in February 2005 at the ABA midyear meeting.³⁷ The Seventh Circuit Project self-proclaimed it “took a leading role nationwide in testing the usefulness and benefits”³⁸ of the ABA Principles in “fifty jury trials...beginning in October of 2005 and continuing through April 2008”³⁹

The Seventh Circuit Project was overseen by the Seventh Circuit Jury Project Commission.⁴⁰ The Commission comprised one Seventh Circuit judge, many district court judges throughout the Seventh Circuit (some of the finest trial court judges in the nation), and outstanding trial lawyers and nationally recognized law professors.⁴¹ Twenty-two federal district judges participated in the fifty jury trials that formed the basis for the project.⁴² In total, four hundred and thirty-four jurors,

permit themselves to be addressed by any person on any subject connected with the trial; except that the jurors shall be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from the trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. Notwithstanding the foregoing, the jurors’ discussions of the evidence among themselves during recesses may be limited or prohibited by the court for good cause.

Id. The most innovative component of the Project was the Arizona Supreme Court’s willingness to allow the videotaping of 50 civil jury trials and the jury discussions and deliberations to test the effectiveness of Rule 39(f). *Id.* at 9-78.

³⁶ SEVENTH CIRCUIT JURY PROJECT, *supra* note 28, at 9.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ A complete list of the Commissioners can be found in SEVENTH CIRCUIT JURY PROJECT, *supra* note 28, at 1-7.

⁴² *Id.* at 8.

eighty-six lawyers, and twenty-two federal district judges completed questionnaires.⁴³

This was one of the most comprehensive studies of jury trial innovations in the federal courts as it involved data from trial judges, trial lawyers, and jurors in real jury trials spread across all but one of the district courts in the Seventh Circuit.⁴⁴ The Seventh Circuit Project put into practice seven jury innovations.⁴⁵

The results of the Arizona Jury Project and the Seventh Circuit Project are discussed where relevant to a specific juror bill of rights.

III. Bill of Rights No. 1: Jurors Have The Right Not To Have Their Time Wasted By Judges, Lawyers, Witnesses and Unnecessary, Cumulative, and Excessive Evidence

If you ask jurors what their number one complaint is about jury trials, as I have for more than twenty-five years,⁴⁶ you would learn it is the way lawyers waste the

⁴³ *Id.* at 13.

⁴⁴ *Id.* at 9-14.

⁴⁵ 1) Twelve-Person Juries; 2) Jury Selection Questionnaires; 3) Preliminary Substantive Jury Instructions; 4) Trial Time Limits; 5) Questions by the Jury During Trial; 6) Interim Statements to the Jury by Counsel; and 7) Enhancing Jury Deliberations. *Id.* at 10. *See also* Holderman & Walls, *supra* note 18, at 346-7 (Discussing Judge Holderman’s role as a co-chair of the Seventh Circuit Bar Association American Jury Project Commission).

⁴⁶ For the twenty-five years I have been on the federal bench, as a magistrate judge for nearly 3 years, and as a district judge for over twenty-two years, I have not only personally “debriefed” every jury after trial, but have also given every juror a questionnaire to take home, fill out, and mail back in a return self-addressed, stamped envelope. The purpose of the “debriefing” is twofold. First, I try to answer any questions jurors may have about their time in court and, second, I personally thank them for their service—in the less formal setting of their juror deliberation room. The questionnaire allows the jurors to anonymously evaluate the performances of the lawyers’, me as the trial judge, and the clarity of the jury instructions; to comment on the use of courtroom technology and the courtesy of the courthouse staff; and to communicate complaints about or suggestions for

jurors' valuable time with excessive repetition.⁴⁷ As a result, jurors don't feel respected—which is something that we as judges and lawyers should want them to be.⁴⁸ Due to the steady decline of real trial lawyers, much has been written about the tremendous waste of time and money perpetrated by what I have labeled as the massive rise of the “litigation industry.”⁴⁹ As Texas trial lawyers Susman and Melsheimer have noted: “The inefficiencies practiced by lawyers litigating cases

improvement of our trial process. During jury selection, I inform the jurors of the importance of these questionnaires as it is my belief that it empowers them to be better jurors—knowing I value their input and feedback. Over the last quarter century, repetition by the lawyers has consistently and overwhelmingly been jurors' number one complaint.

⁴⁷ Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 289 (Robert E. Litan ed. 1993) (observing that a common juror complaint is “repetition and redundancy of trial testimony.”); D. Brock Hornby, *How Jurors See Us*, 1999 MAINE B. J. 174, 177 (“Most commonly, jurors complain about repetitive questioning, excessive objections or other delaying tactics, and general slowness in the presentation of testimony and exhibits.”).

⁴⁸ In an article under the sub-heading **Maybe We Really Do Not Respect Jurors Like We Say We Do**, a state court judge wrote about a lawyer member on the committee to remodel the courthouse, noting the absence of a jury assembly room in the new plans, who commented to the judge: “They were just jurors—they can meet in some room somewhere.” Timothy G. Hicks, *The Jury Reform Pilot Project-The Envelope Please*, 90 MICH. B.J. 40, 42 (2011). Professor Akhil Reed Amar has observed that allowing jurors to take notes, to ask questions of witnesses, and instructing jurors in plain English at the outset of a case demonstrate respect for them. Amar, *supra* note 2 at 1185-86. Several years ago, while attending a meeting in Washington D.C., I stopped in to a civil jury employment discrimination trial in federal court to watch a defense lawyer friend of mine. The jury was sent out several times while I was observing and neither the judge nor the lawyers stood or paid any attention to the jurors when they exited or entered the courtroom. It was as if they were an unnecessary and unwelcome appendage to the proceeding. Perhaps they were just reflecting long-standing locale culture. I was shocked, especially given both the judge and the lawyers were outstanding with superb and well deserved reputations.

⁴⁹ Bennett, *Grand Poobah*, *supra* note 5, at 14, 17. I also have devised the Bennett Multiphasic Litigator Inventory—a ten factor test to conclusively distinguish between “real trial lawyers” and “litigators.” *Id.*, at 15.

before trial is not made harmless” if the case is tried to a jury.⁵⁰ Indeed, in a jury trial, Susman and Melsheimer continue, “those same inefficiencies will manifest themselves in an excessive use of exhibits, unnecessarily lengthy deposition testimony, and a bloated interrogation process that, in our experience, leads to the single most repeated comment by jurors after a trial has concluded: “There was too much repetition.””⁵¹ There has never been a written statement about jury trials that I agree with more. The best way to show increased respect and admiration for jurors is to not waste their valuable time. Because trial judges are not exempt from wasting jurors’ time, here are six innovative solutions to that problem, starting with my tried and true innovation of just saying no to attorney requested sidebars.

A. Just Say No To Sidebars. I started this practice over fifteen years ago in a case with Chicago litigators who could not perform the basic functions of trial lawyers without first requesting sidebars. After several ridiculous sidebars, one of the lawyers on the team (litigators in my experience cannot function solo) requested another sidebar. “May we approach?” he bellowed. I looked him right in the eyes and politely, but firmly, said “No.” He responded, “Excuse me your Honor, perhaps you didn’t hear me. We asked to approach so we could have a sidebar.” I retorted: “That’s exactly what I thought you wanted and the answer from now on is NO!” The jurors roared with laughter, delight, and relief.⁵² That began my “Just Say No to Sidebars” innovation. While I warn lawyers in my trial management order that I practice “Just Say No to Sidebars,” most first-timers don’t believe it and proceed to request a sidebar anyway. I say “NO” and the most amazing thing happens. In fifteen years of saying “NO,” not once has a lawyer made a record during the next break, or at any time in the trial, on what was so important that they needed a sidebar or on how my “NO” prejudiced them. Not once. Upon getting judicial sea legs, I highly recommend the practice. The jurors will love it and it will save a boatload of time. Of course, the rule is not reciprocal. Judges should utilize sidebars anytime if it helps move the trial along or prevents error.⁵³

⁵⁰ Susman & Melsheimer, *supra* note 19, at 434.

⁵¹ *Id.* (footnote omitted).

⁵² In my “debriefing” of the jury after the verdict, jurors often tell me how much they detest sidebars and how appreciative they are when I put an end to them.

⁵³ On the rare occasion that I call a sidebar, it is when a lawyer is repetitive or is simply going too slow—obviously boring the jurors to tears. The sidebar goes like

B. Always Start And End Court On Time—Including Breaks. I explain to counsel at the final pre-trial conference (FPTC) how important it is to me that the jurors not be kept waiting. My aspirational goal for every trial, no matter its length, is to never keep the jury waiting—even for a single minute. To achieve that goal, I need the lawyers to buy into it. If we fail to achieve the goal, I am not smiling. There is nothing more insulting and, I believe, disrespectful to jurors than to keep them waiting for court to start or making them stay late. Judges and lawyers sometimes forget that we volunteered for our jobs, the jurors did not. If the trial day starts at 8:30 a.m., like mine does, that means the jurors are in the box at exactly 8:30 a.m., not 8:31 a.m., 8:32 a.m. or 9:15 a.m. I meet with counsel before trial each morning to resolve any problems they know of or can foresee. If problems arise in the evening or early morning, counsel has my email address and cell phone number. I am always willing to meet as early as needed to resolve any and all issues to ensure the jury is in the box at exactly 8:30 a.m.

C. Computer Generated Random Ordering of Potential Jurors for the Start of Jury Selection. Walk into most courtrooms when jury selection is getting started and you will see time being wasted by a clerk calling names for the initial group of prospective jurors to move from the back of the courtroom to be seated in and around the jury box before questioning can begin. This parade can waste up to 15-20 minutes of precious time. In a jury-centered approach to judging, this sends an initial, poor message to all potential jurors about the court’s lack of efficiency. In lieu of this, the N.D. of Iowa uses a computer program that randomly selects the order of all potential jurors. Thus, if we are seating 29 potential jurors for a criminal case (12 trial jurors, one alternate, with a total of 16 preemptory strikes), the potential jurors are lead into the courtroom from the jury assembly room in the random order generated by the software. They are then seated in that order in and around the jury box. This allows questioning of the potential jurors to begin immediately, without the parade of jurors—each being called individually by name. We also provide counsel with a printed schematic sheet that has the name of each potential juror in their row and seat. Then, if we lose a potential juror

this: “Counsel, please look at the jury as you ask your next question. You lost them a few minutes ago with your boring, repetitive questioning so, if you agree after looking at them, I suggest you move on.” This friendly nudge works wonders. I would rather just dispense with the sidebar and simply ask the jurors to raise their hands if they are bored and want the lawyer to wrap it up, but I leave that innovation for another judge to try.

through questioning and have to replace that potential juror, we simply take a sticker off a second printed sheet with each jurors' names in the order that they will be called and place it on the schematic. That way, the lawyers and I do not have to write down the name of each new potential juror. This is a real timesaver.

D. Efficient and Snappy Voir Dire. Based on many discussions with my colleagues and trial lawyers across the country, I am in a distinct federal trial court judge minority—one that strongly believes that trial lawyers have a significant and important role to play in voir dire. I partner with the lawyers at the FPTC on how we should conduct voir dire. Sometimes, at the lawyers' request, I do the entire voir dire. Sometimes they do the almost the entire voir dire. Mostly, I usually start the voir dire and do the bulk of it, while the lawyers take about 30 minutes or so per side. However, it cannot be like some state courts that permit unlimited attorney voir dire which goes on for weeks with the startling practice of having no judge present.⁵⁴ One would have thought that this practice would have been determined cruel and *usual* infliction of pain years ago by the state—akin to current notions of torture in violation of the Eighth Amendment.

Voir dire can certainly be shortened by several time-saving devices we use in our court. In the prior section I discussed the use of a computer list to randomly select the order of each potential juror prior to jury selection. It is unimaginable that some courts hale potential jurors into the courthouse to fill out a questionnaire at the courthouse! But, it gets worse. In one court where I was a visiting judge trying a complex civil case, they not only had the potential jurors filling out questionnaires the morning of trial, but then made them wait for hours while the lawyers “digested” the questionnaire answers. What a waste of the jurors' precious time. I did not accede to this local practice and, instead, did it the N.D. of Iowa way. The questionnaires were sent out ahead of time, scanned by the clerk's office, and e-mailed to the lawyers the week before jury selection. This allowed the trial lawyers to spend more time on the earlier, seated potential jurors' questionnaires and helped to speed up jury selection.

⁵⁴ New York state courts are an example. “In most civil trials, voir dire generally is conducted by counsel outside the immediate presence of the assigned trial judge, though the judge retains discretion to remain present during any or all parts of the process.” Ann Pfau, Chief Administrative Judge New York Unified Court System, *Implementing New York's Civil Voir Dire Law and Rules 3* (2009). <https://www.nycourts.gov/publications/pdfs/ImplementingVoirDire2009.pdf>.

E. Hard Time Limits On Opening Statements And Closing Arguments.⁵⁵

Twenty-five minutes or so into the vast majority of opening statements, most jurors have a glazed look in their eyes. Most lawyers are not very good storytellers.⁵⁶ Additionally, most great stories are told in far less than twenty-five minutes.⁵⁷ Lawyers who have worked on a case for several years feel compelled to tell the jurors everything they know about the case in opening statements. Unfortunately, without a great story, the jurors have no way of assimilating the information in the opening statement. Thus, most opening statements fall flat. In closing arguments, this problem is magnified because, by then, the jurors have heard and seen all the evidence. Hard time limits on opening statements and closing arguments help lawyers stay on message while avoiding juror frustration, boredom, and disengagement. Remember, they did not volunteer for this civic duty.

F. Strong Judicial Oversight Of The Final Pre-Trial Conference To Eliminate Redundant, Cumulative, and Excessive Witnesses and Exhibits.

Another common juror criticism of lawyers is: “We got it the first time.” Trial judges and trial lawyers have a duty to protect jurors from unnecessary, cumulative, and excessive evidence. Federal Rules of Evidence 102, 403, and 611⁵⁸ provide judges with the tools to make sure this happens and the (FPTC) is a venue in which to accomplish this. Federal Rule of Civil Procedure 16, titled Pretrial Conferences; Scheduling; Management, is also replete with authority to

⁵⁵ I have “borrowed” the phrase “hard limits” from nationally recognized trial lawyers Steve D. Susman and Thomas M. Melsheimer. *See* Susman & Melsheimer, *supra* note 19, at 441.

⁵⁶ Bennett, *Eight Traits*, *supra* note 4, at 4 (“...there is one trait that always separates great trial lawyers from lesser ones: superb, masterful storytelling. I know of no exception. This does not mean that all great storytelling lawyers are great trial lawyers—but that all great trial lawyers are great storytellers.”).

⁵⁷ *Id.* at 15 (explaining that the Gettysburg Address was only 256 words).

⁵⁸ Fed. R. Evid. 102 provides: “These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay....” Fed. R. Evid. 403 provides: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 611(a)(2) provides, in relevant part, that the “court shall exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to....(2) avoid wasting time.”

streamline trials. This includes: “improving the quality of the trial through more thorough preparation;”⁵⁹ “formulating and simplifying the issues and eliminating frivolous claims or defenses;”⁶⁰ “obtaining admissions and stipulations about facts and documents to avoid unnecessary proof and ruling in advance on the admissibility of evidence;”⁶¹ “avoiding unnecessary proof and cumulative evidence;”⁶² “limiting the use of testimony under Federal Rule of Evidence 702” (expert witnesses);⁶³ and “facilitating in other ways the just, speedy, and inexpensive disposition of the action.”⁶⁴

For over two decades, I have required the parties to list all witness and exhibits, with detailed objections to either, in the proposed final pre-trial order. They are required to meet and confer prior to the FPTC to reduce objections and eliminate redundant, cumulative, and excessive witnesses and exhibits. The major emphasis of the FPTC is to use my authority as the trial judge to eliminate as many remaining objections as possible.⁶⁵ When litigators assert numerous frivolous objections to exhibits, I have many tools at my disposal to bring such behavior to a screeching halt. For example, when there are frivolous foundation and hearsay objections to obvious business records, I indicate that if those objections fail at trial—which they will—I will impose substantial sanctions. If judges fail to use the FPTC to eliminate redundant, cumulative, and excessive exhibits, cruel and *usual* punishment is often inflicted on the jurors.

⁵⁹ Fed. R. Civ. P. 16(a)(4).

⁶⁰ Fed. R. Civ. P. 16(c)(2)(A).

⁶¹ Fed. R. Civ. P. 16(c)(2)(C).

⁶² Fed. R. Civ. P. 16(c)(2)(D).

⁶³ *Id.*

⁶⁴ Fed. R. Civ. P. 16(c)(2)(P).

⁶⁵ Schuler, *supra* note 14 at 469 (“Judge Bennett prefers to duke out the admissibility of exhibits before trial. The judge has found that doing otherwise, i.e., waiting to admit exhibits when they are presented, only prolongs the trial and wastes the jury’s time.”).

IV. Bill of Rights No. II: Jurors Have The Right In Jury Selection In Every Civil Case To Be Told Exactly How Long The Trial Will Last—Minus Deliberations

It is grossly unfair to jurors to tell them trial will last at least the seven to ten days the lawyers estimate and then have it last longer. Jurors have busy lives too. They need to be able to plan their lives and those of their families. There is only one way I know of to accomplish this goal with virtual certainty: hard time limits on the presentation of evidence. As super-star Texas trial lawyers Steve D. Susman and Thomas M. Melsheimer have written:

Time limits are perhaps the most easily adopted, and most common form, of jury trial improvement, though the parties may not often see the practice in that light. *** Time limits do more than just conserve judicial resources; they make for better trials—especially better jury trials. In our experience, when the parties are forced to decide how to fit their evidence into a strictly enforced maximum number of hours, the presentation invariably improves. By making hard decisions about which witnesses to call and what lines of inquiry to pursue in front of the jury, the trial lawyer streamlines the case in a way that will better hold the jury’s interest and focus the jury’s attention, itself a scarce resource, on the important issues rather than on collateral ones.⁶⁶

Not only will lawyers try a better case, with a shorter trial improving the jurors’ ability to assimilate evidence and reach a more just verdict, hard time limits show the courts’ and lawyers’ respect for jurors by not wasting their time. “Courts have an ethical obligation to provide citizens with complete and accurate information about the practical demands of jury service including the amount of time that citizens can reasonably expect to dedicate to it.”⁶⁷

⁶⁶ Susman & Melsheimer, *supra* note 19, at 441-42.

⁶⁷ Paula L. Hannaford-Agor & G. Thomas Munsterman, *Ethical Reciprocity: The Obligations Of Citizens And Courts To Promote Participation In Jury Service*, in JOHN KLEINIG & JAMES P. LEVINE (EDS) *JURY ETHICS: JUROR CONDUCT AND JURY DELIBERATIONS*, note 8, p. 30 (2006).

Hard time limits on the presentation of evidence in jury trials is not a new idea, rather, it is a growing phenomenon.⁶⁸ In an article written more than thirty years ago, Professor John Rumel summarized the few existing cases where trial court judges had imposed various types of time limits.⁶⁹ In one, a criminal tax fraud case, Judge Bertelsman not only imposed time limits that both sides objected to (sixteen day trial limit on all parties),⁷⁰ but provided a classic rationale for doing so:

It would seem that early in the career of every trial lawyer, he or she has lost a case by leaving something out, and thereupon resolved never again to omit even the most inconsequential item of possible evidence from any future trial. Thereafter, in an excess of caution the attorney tends to overtry his case by presenting vast quantities of cumulative or marginally relevant evidence. In civil cases, economics place some natural limits on such zeal. The fact that the attorney's fee may not be commensurate with the time required to present the case thrice over imposes some restraint. In a criminal case, however, the prosecution, at least in the federal system, seems not to be subject to such fiscal constraints, and the attorney's enthusiasm for tautology is virtually unchecked.⁷¹

⁶⁸ Andrew L. Goldman & J. Walter Sinclair, *Advisability And Practical Considerations Of Court-Imposed Time Limits on Trial*, 79 DEF. COUNSEL J. 387, 387 (2012) (“...it is becoming more common for courts to impose time limits during trial.”). This article also lists nine benefits of time-limited trials, some solely from the defense perspective: “Time limits force the defense to focus on what’s important. Time limits ensure the defense has a fair opportunity to put on its defense without being accused of wasting time. Shorter trials help to maintain the jury’s attention. Time limits reduce the likelihood of jurors being excused for hardship during voir dire or during trial. Time limits may hamper the plaintiffs’ ability to meet its burden of proof and/or cross-examine defense witnesses. Time limits restrict the number of video depositions played at trial. Time limits reduce cumulative testimony by experts. Time limits motivate judges to control evasive adverse witnesses. Time limits provide clients with some logistical and budget certainty.” *Id.* at 392-396.

⁶⁹ John E. Rumel, *The Hourglass And Due Process: The Propriety Of Time Limits On Civil Trials*, 26 U.S.F. L. REV. 237 (1992).

⁷⁰ *Id.* at 245.

⁷¹ *Id.* See also, *United States v. Reaves*, 636 F. Supp. 1575, 1576 (E.D. Ky. 1986).

Judge Bertelsman saw time limits as a reasonable means to control “burgeoning litigation” and to force “counsel to conform their zeal to the need of the court to conserve its time and resources.”⁷² Judge Bertelsman also endorsed a statement from an article that: “All jury trials should have time limits substantially less than the time now required.”⁷³ Judge Bertelsman further elaborated that litigators have a “tendency to want to present the evidence not once, but many times over, and to adduce needlessly cumulative evidence not only on the controverted issues but also on those that are all but uncontested.”⁷⁴ Interestingly, Judge Bertelsman, while deeply concerned about his own time, the control of his docket, and the public interest in more efficient trials, did not directly address the infliction of pain longer trials impose on the invited guests—the jurors.

In recognition of the growing use of hard time limits in civil cases, the Federal Rules of Civil Procedure were amended in 1993 to explicitly give trial court judges the power to impose, at any pre-trial conference, an order “establishing a reasonable limit on the time allowed to present evidence.”⁷⁵ The Advisory Committee Notes to this amendment indicate:

It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.⁷⁶

⁷² Reaves, 636 F. Supp. at 1580.

⁷³ *Id.* citing Roger W. Kirst, *Finding A Role For The Civil Jury In Modern Litigation*, 64 JUDICATURE 333, 337 (1986).

⁷⁴ Reaves, 636 F. Supp. at 1579.

⁷⁵ Fed. R. Civ. P. 16(c)(2)(O).

⁷⁶ FED. R. CIV. P. 16(C)(2)(O) advisory committee’s note (1993).

In my experience, most judges impose hard time limits because of docket pressure.⁷⁷ I impose them because I hate to see jurors suffer—inflicted with all too often cruel but usual punishment because of cumulative, unnecessary, and excessive evidence.⁷⁸

The Arizona Jury Project recognized the importance of hard time limits on the presentation of evidence. The first recommendation under the Trial section was: **Set and Enforce Time Limits for Trials.**⁷⁹ The explanation was: “Given the

⁷⁷ *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 473 (7th Cir. 1984) (Disapproving of “rigid” time limits, but affirming the time limits below and recognizing “in this era of crowded district court dockets federal district judges not only may but must exercise strict control over the length of trials, and are therefore entirely within their rights in setting reasonable deadlines in advance and holding the parties to them,”); *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 442-42 (1st Cir. 1991) (“District courts may impose reasonable time limits on the presentation of evidence.”) *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987) (“We agree with the Seventh Circuit that, ‘in this era of crowded district court dockets federal district judges not only may but must exercise strict control over the length of trials, and are therefore entirely within their rights in setting reasonable deadlines in advance and holding the parties to them.... *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 473 (7th Cir. 1984).”); *Lareau v. Page*, 840 F. Supp. 920, 933 (D. Mass. 1993) (Judge William Young, after citing the “era of crowded district court docket” language of *Flaminio*, went on to observe: “Establishing time limits for the trial of cases is, in fact, an integral part of the Cost and Delay Reduction Plan adopted for the District of Massachusetts on November 18, 1991...The value of pre-set time limits tailored to the trial of particular cases is becoming increasingly apparent.”).

⁷⁸ I have yet to impose hard time limits in criminal cases. However, in a recent criminal jury trial I was so concerned about the lack of efficient and comprehensible presentation by the prosecution of their case in-chief, I stopped the trial to ask the jurors to do something I have never done before. I asked each juror to take a piece of paper from their notepads and answer two questions and then pass their answers down to the court security officer. I asked the court security officer to shuffle the papers so we would not know which juror answered the questions. The two questions were: 1) Do you find the way the evidence is being presented confusing? 2) How many find that the way the evidence is being presented is very boring? I then read aloud the results that the vast majority of the jurors answered “yes” to both questions. *United States v. Orellana*, CR14-4046-MWB, (N.D. Iowa May 21, 2015).

⁷⁹ THE POWER OF 12, *supra* note 13, at 22.

benefits to the parties, jurors and the court system of trials that are as short as fairness permits, judges ought to be given express authority, by rule, to impose reasonable time limits on trials or portions of trials.”⁸⁰

The Seventh Circuit Project looked at hard time limits for evidence presentation. The use of hard time limits was premised on the ABA American Jury Project’s Principles and Standards which provides: Principle 12 – COURTS SHOULD LIMIT THE LENGTH OF JURY TRIALS INSOFAR AS JUSTICE ALLOWS AND JURORS SHOULD BE FULLY INFORMED OF THE TRIAL SCHEDULE ESTABLISHED.⁸¹ To further ABA Principle 12, the ABA adopted Standard 12(a) which states: “The court, after conferring with the parties, should impose and enforce reasonable time limits on the trial or portions thereof.”⁸²

While the Seventh Circuit Project covered 50 jury trials in Phases One and Two, only seven trials in Phase One used time limits.⁸³ The time limits were only studied in Phase One and in only seven of the 50 jury trials studied in both phases.⁸⁴ The Final Report noted that the sample size of the seven trials was too small to “draw any meaningful conclusions.”⁸⁵ However, the Final Report surmises that the “limited evidence” indicates that the trial judges in the study were reluctant to use time limits because they would not increase the efficiency, fairness, or satisfaction with the trial process.⁸⁶ That may explain why so few judges in the study chose to use time limits—but runs contrary to the limited evidence available from the actual seven trials that used time limits.⁸⁷ That evidence establishes that only two percent of the judges, four percent of the lawyers, and one percent of the jurors in the seven trials with time limits thought the trials were too short.⁸⁸ Yet, eleven percent of the judges, nine percent of the lawyers, and a whopping twenty-four percent of the jurors *still* thought the trials were too long.⁸⁹ Eighty-three percent of the attorneys participating in the time

⁸⁰ *Id.*

⁸¹ SEVENTH CIRCUIT JURY PROJECT, *supra* note 28, at 45.

⁸² *Id.*

⁸³ *Id.* 14, 15, 45-47.

⁸⁴ *Id.* at 9, 14.

⁸⁵ *Id.* at 14.

⁸⁶ *Id.*

⁸⁷ *Id.* at 57-59.

⁸⁸ *Id.* at 57.

⁸⁹ *Id.*

limit trials did not believe the time limits affected the “fairness of the trial process”—but only twenty-five percent of the lawyers in the trials without time limits thought time limits would not affect the “fairness of the trial process.”⁹⁰ Even with the time limits, the jurors found the trials substantially less efficient than the judges and lawyers involved.⁹¹ The jurors also found even in the time limit trials that more repetitive and redundant evidence existed than either the judges or lawyers thought.⁹² Finally, the jurors gave a very high rating to how important it was to be told by the trial judge how long the trial would last based on the time limits.⁹³

More and most telling is the substantial difference in responses between the minority of judges that did use time limits (twenty percent) and the majority that did not (eighty percent).⁹⁴ Only fourteen percent of the judges who used time limits thought they decreased the fairness of the trial (the same percentage that thought it increased the fairness) while twenty-seven percent of the judges who did not use time limits thought fairness would decrease.⁹⁵ More compelling is that sixty-seven percent of the judges who actually used time limits thought it increased the efficiency of the trial while only eight percent who did not use time limits thought time limits would increase efficiency.⁹⁶ Not a single judge who used the time limits thought the efficiency of the trial was decreased, yet twenty percent of the judges who did not use time limits thought time limits would decrease efficiency if used.⁹⁷ How using time limits could not increase the efficiency of a jury trial is beyond me. This data confirms what I have always thought. Judges who use time limits find benefits in them and judges who do not are much more skeptical of time limits—which explains why they don’t use them. I, too, was skeptical until I tried them. Now, I would never conduct a civil jury trial (other than an extremely short one) without them.

The failure of the Seventh Circuit Project to recommend the use of time limits, or at least to have studied them further in Phase Two, or in a further study, reflects a

⁹⁰ *Id.* at 58.

⁹¹ *Id.*

⁹² *Id.*

⁸² *Id.* at 58.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

serious absence of a jury-centered approach to judging. Jurors want hard time limits because it enhances their ability to fairly decide cases and informs them of how long their service is likely to last.

In every case where I have imposed hard time limits, the lawyers agreed after the trial was completed that the limits helped them try a more persuasive and better case by forcing them to focus on the most important evidence and cross-examination points. Indeed, no lawyer has actually used all the time provided to their side.⁹⁸ I use the procedure outlined in the advisory committee's note to Fed. R. Civ. Pro. 16 (c) (2) (O). I discuss with the lawyers before the FPTC that I will be imposing hard time limits on their presentation of evidence and encourage them to reach agreement on how much time is needed for the presentation of evidence and how the time should be divided. I then make the final decision at the end of the FPTC, after I have fully explored the parties' witness and exhibit lists with them and have listened to their judgments about the time needed. There is usually quick agreement. In one recent civil trial, the parties were reluctant to agree to the use of time limits in any fashion. I then emailed them Steve D. Susman and Thomas M. Melsheimer, *Trial By Agreement: How Trial Lawyers Hold The Key To Improving Jury Trials In Civil Cases*, 32 REV. LITIG. 431 (2013) and required them to read the article (this was before I added this to my trial management order) and report back to me. In response, they agreed to the time limits I had suggested. Somewhat surprisingly, they also agreed that the plaintiff could have seventy percent of the time and the individual and municipal defendants combined needed only thirty percent. I was very pleasantly surprised.

While we have a chess clock at my law clerk's desk in the courtroom, we have gravitated to using an online chess clock to measure the time limits. The time for each side includes their direct and cross-examination. The time for stretch breaks runs on the time of the party doing the examination when the stretch break occurs. The other "real" mid-morning and mid-afternoon breaks do not count against the parties, but I add that into the schedule so I can tell the jurors in jury selection exactly how long the trial will last. Because I do not hold sidebars and require the lawyers to meet with me either before the jury is brought in each morning or after

⁹⁸ Susman & Melsheimer, *supra* note 19, at 445 ("...it is our experience that the parties almost always fail to use every minute allotted to them.") (footnote omitted).

they are sent home at the end of the day to address and resolve potential problems, my calculations on the length of trial are remarkably accurate.

At bottom, shorter trials are better and fairer trials.⁹⁹

V. Bill of Rights No. III: Jurors Have The Right In Every Trial To Their Own Set Of Plain English “Final” Jury Instructions *Prior* To Opening Statements

Most jury trial innovators argue for preliminary instructions before opening statements.¹⁰⁰ That is because most judges wait to instruct the jury until after the attorney’s closing arguments.¹⁰¹ Some judges give each juror a written copy of the instructions, others give the jury just one copy, and yet others give no written copy

⁹⁹ *Id.* at 442-44 (noting that shorter trials increase wider juror participation due to fewer jurors being excused; jurors are able to assimilate complex matters in a short period of time; and shorter trials save clients considerable costs).

¹⁰⁰ THE POWER OF 12, *supra* note 13, at 80 (“The committee strongly endorses the use of preliminary instructions in both civil and criminal cases.”); SEVENTH CIRCUIT JURY PROJECT, *supra* note 28, at 13 (“The Seventh Circuit Project jury trials in which this concept [preliminary instructions] from the ABA Principles was tested resulted in over eighty percent (80%) of the jurors, over eighty-five percent (85%) of the judges and over seventy percent (70%) of the lawyers who participated stating they believed that this intended goal of enhancing juror understanding was accomplished. The Commission therefore strongly recommends use of this procedure in future state and federal civil jury trials.”); Nancy S. Marder, *Bringing Jury Instructions Into The Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 451(2006) (“Even if judges still give the bulk of the instructions at the end of the trial, they can give some of the instructions earlier in the proceeding. It would be useful for judges to give jurors ‘preliminary jury instructions’ in which they tell jurors about their role, the case, and the law so that jurors have some framework in which to place the trial that is about to unfold. These preliminary instructions should be given orally and in writing, and jurors should be told that the instructions are subject to change depending on developments at trial.”).

¹⁰¹ Marder, *supra* note 100, at 491.

at all.¹⁰² My practice for years has gone much, much farther. In every type of criminal and civil case, I give each juror their own written set of plain English *final* instructions before opening statements. The instructions come complete with a meaningful table of contents, bullet points, and white space. All instructions are self-contained. By self-contained, I mean all the elements of each claim or defense are contained within the instruction itself. Equally important is the verdict form in chart format which can be shown to the jurors in voir dire to ensure that they are capable of deciding the precise issues presented in each unique jury trial. The verdict form is a single snapshot of the entire case.

I served on our circuit's Model Jury Instruction Committee for a decade.¹⁰³ It was, and is, a superb Committee made up of federal district judges, magistrate judges, assistant U.S. Attorneys, assistant Federal Public Defenders, and lawyers from private practice. They do a fabulous job of drafting legally accurate model instructions for both civil and criminal cases. I resigned from the Committee a few years ago because I was frustrated with the Committee's pace in moving towards plain English instructions. After all, the Arizona Jury Project recommended plain English jury instructions back in 1994.¹⁰⁴ Equally frustrating was the Committee's unwillingness to embrace my longstanding approach to a more juror-friendly format with bullet points and lots of white space. This was in lieu of traditional lengthy paragraphs full of terms average jurors never use and likely don't understand. Jury instructions have not kept up with the way in which most people now receive their information. Can you imagine a PowerPoint© presentation using

¹⁰² Scott Donaldson, *Improving Jury Service*, 73 ALA. LAW. 190, 192-93 (2012) (Judge Donaldson notes that Alabama generally does not permit even a single copy of written instructions to go back to the jury nor are preliminary instructions generally allowed).

¹⁰³ Mark W. Bennett, *Unspringing The Witness Memory and Demeanor Trap: What Every Judge And Juror Needs to Know About Cognitive Psychology And Witness Credibility*, 66 AM. U. L. REV. 101,113 (2015) ("Pattern instructions have achieved popularity across the country as a modern guide for various reasons; they decrease the time lawyers spend on crafting jury instructions, and they increase the predictability of how the judge will instruct, assuming the judge uses available pattern instructions. At least in theory, pattern instructions decrease the frequency of appeals and reversals.") (footnotes omitted).

¹⁰⁴ THE POWER OF 12, *supra* note 13, at 99 ("Use Only Plain English in Trials, Especially in Legal Instructions.").

a series of lengthy text-only paragraphs or a web page chock full of nothing but text?¹⁰⁵ I have been using my own plain English instructions based on bullet points and white space for many years—completely eschewing the very Model Instructions I helped develop as a member of the Committee.¹⁰⁶

Professor Nancy Marder has described the problems of jury instructions as a “conundrum.”¹⁰⁷ They are a conundrum because they are the only way the judge communicates the law to jurors “yet jury instructions are written and presented in a manner to defy comprehension to those untrained in the law.”¹⁰⁸ Marder notes that some thirty years of empirical research confirms that jury instructions are drafted in language that lawyers understand but jurors do not.¹⁰⁹ Despite all of the empirical research, “jury instructions remain fairly impervious to change.”¹¹⁰ This was precisely my frustration while serving on our circuit’s Model Jury Instruction Committee. Historically, there has been a far greater preoccupation on instructions being a correct statement of the law even while remaining incomprehensible to most jurors.¹¹¹ This is largely the result of model jury instruction committees being composed of judges and lawyers.¹¹² Thus, there is a widespread consensus

¹⁰⁵ Professor Marder notes that the “cumbersome way in which jury instructions are now presented hardly meets these young jurors’ expectations.” Marder, *supra* note 100, at 510.

¹⁰⁶ Holderman & Walls, *supra* note 18, at 9 (Discussing the effect of technology and the internet on the ways Generation X, Y, and Z’s learn, and noting that most current U.S. district court judges are members of the earlier “Baby Boomer” generation).

¹⁰⁷ Marder, *supra* note 100, at 451.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (footnote omitted).

¹¹⁰ *Id.* at 452.

¹¹¹ See, e.g., Robert G. Nieland, *Assessing the Impact of Pattern Jury Instructions*, 62 JUDICATURE 185, 188 (1978) (Nieland cites the JUDGES OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, BOOK OF APPROVED JURY INSTRUCTIONS (1938), in their notorious statement that “[t]he one thing an instruction must do above all else is correctly state the law. This is true regardless of who is capable of understanding it.”).

¹¹² Amiram Elwork, Bruce D. Sales & James J. Alfini, *Juridic Decisions: In Ignorance Of The Law Or In Light Of It?*, 1 LAW & HUM. BEHAV. 163, 164 (1977) (“Although [pattern instructions] have been prepared to be legally accurate, little attention has been given to making them understandable to the average juror. Most

in the legal community that current jury instructions all too often “fail to achieve clarity.”¹¹³ This remains true in spite of the decades old 2005 recommendation by the American Bar Association’s *Principles for Juries and Jury Trials* that: “All instructions to the jury should be in plain and understandable language.”¹¹⁴

I have frequently been asked at CLE and judge training programs—how can one possibly give *final* instructions before opening statements? Skeptics align along two distinct avenues. The first, and most frequent objection is: “don’t you have to withdraw and add instructions frequently?” The simple answer is no. Because my FPTC is so rigorous, this situation seldom arises—maybe once in every 50 trials. If a claim is not being submitted, I simply ask the jurors to turn to page 8, titled, for example, “Breach of Contract Claim,” explain that the claim is no longer in the case for them to decide, and instruct that everyone take their pens and draw a big X through it—doing the same to the corresponding part of the verdict form. I then add that they are not to speculate as to the reason this claim is no longer a part of the case. Adding a supplemental instruction is even easier. I simply pass it out to each juror before closing arguments and read it. I have never had a party object to this process.

The second group of naysayers claim it is too much work. It is really the same amount of work, it is just done earlier in the trial process. The scheme of honing the jury instructions and locking them down before trial is done by email with the lawyers. The emails are then filed and made a part of the docket. After reviewing the parties’ proposed jury instructions, I make modifications and email my proposed set with detailed annotations on why I am instructing the way I am. The lawyers and I often go through three quick rounds of emails as we narrow the differences. When I am satisfied our work is done, I send them my final set. Any remaining objections are filed. The final set of jury instructions is ready to go a week before trial. While there are times when cases settle on the eve of trial and

drafting committees are composed solely of judges and lawyers, and few committees have been willing to hire language experts.”).

¹¹³ Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The “Kettleful Of Law” In Real Jury Deliberations: Successes, Failures, And Next Steps*, 106 NW. U. L. REV. 1537, 1545 (2012). For an excellent and concise discussion of the history of jury instructions in the United States and an overview of empirical studies on juror comprehension of instructions, *see id.* at 1540-46.

¹¹⁴ *Id.* (citing Am. Bar Ass’n. *Principles for Juries And Jury Trials* princ.14A, at 107).

the instructions are not used, they are inevitably used in a future trial. I rarely consider the work wasted. More importantly, I have never kept a juror waiting while working on instructions. A jury-centered approach to judging would not let that happen. Yet, in many trials, the jurors are sent home for a day or have to wait for many hours while the instructions are being hammered out.¹¹⁵ What a waste of jurors' precious time.

In a recent study, updating the National Center for State Courts 2007 *State-of-the-States Survey of Jury Improvement Effort*, the use of preliminary instructions on legal elements increased in federal courts in civil cases from seventeen percent in 2005 to twenty-five percent in 2014.¹¹⁶ In state courts the increase was only from eighteen to nineteen percent.¹¹⁷ Thus, there is enormous room for improvement.

VI. Bill of Rights No. IV: Jurors Have The Right To Have their Trial Judge Thoughtfully Consider Innovations That Enhance Their Experience And Improve The Fairness Of The Trial

A. Juror-Friendly Daily Trial Schedule.¹¹⁸ In 1994, after polling two juries in lengthy trials—using the traditional 9:00 a.m. to 5:00 p.m. schedule for two weeks and my modified 8:30 a.m. to 2:30 p.m. with two twenty-minute breaks and no lunch break schedule for two weeks—I found jurors unanimously preferred the modified schedule.¹¹⁹ This schedule allows most jurors to make it home in time

¹¹⁵ This was the conclusion of the Arizona Jury Project, which included recommendation 39: Do not Keep Jurors Waiting While Instructions are Settled. THE POWER OF 12, *supra* note 13, at 102 (“Frequently, juries are kept waiting for long periods of time while instructions are being settled by the judge and attorneys.”).

¹¹⁶ Paula Hannaford-Agor, *But Have We Made Any Progress? An Update On The Status Of Jury Improvement Efforts In State And Federal Courts*, 6 (April 27, 2015 National Center for State Courts Center for Jury Studies) (unpublished manuscript) (on file with the author).

¹¹⁷ *Id.*

¹¹⁸ For a more thorough discussion of the advantages of the modified trial schedule, *see* Schuler, *supra* note 14, at 474-476.

¹¹⁹ *Id.*

for the evening meal; accommodates more jurors who are self-employed; gives the lawyers time to prepare for the next day without losing a lot of sleep and to catch up with other clients and cases; allows me to schedule a variety of hearings in the afternoon and keep my docket rolling; and is a win-win for everybody but my court reporter.¹²⁰ This schedule generates nearly as many real-time pages of transcripts as the more conventional trial schedule and, thus, is more efficient.¹²¹ Also, my experience as a trial judge has taught me that, like down-hill skiing, the most dangerous part of the trial day is late-afternoon. Late afternoon is when most skiing injuries occur and when lawyers, jurors, and trial judges are getting tired, more likely to be a little cranky, and bickering between counsel and witnesses increases—as does juror boredom.

B. Visual Voir Dire. Jurors, like the rest of us, learn through a variety of senses. Many years ago, I decided that a visual PowerPoint voir dire was better for jury selection than the traditional oral approach. At first, I simply displayed my written questions in a series of PowerPoint slides. I found that jurors became more responsive to my questions and would often preface a response by starting: “As I am looking at the question I thought of...” Somewhat coinciding with my move towards plain English jury instructions with plenty of white space and bullet points, I gravitated away from full questions to more bullet points in the PowerPoint slides. They now include photographs, a cartoon, videos, a colorful reasonable doubt chart in criminal cases, and some sound effects. Because we are a small court, there is an early slide with a picture of each of the judges in the district and I tell the prospective jurors a short story about each judge.¹²² The cartoon is about preemptory challenges and shows a pair of large arms grabbing two jurors out of the jury box. I discuss the jury selection process with the prospective jurors and explain it is really a process of deselection. I introduce a little humor as I tease the potential jurors and ask them where they think the large

¹²⁰ *Id.*

¹²¹ *Id.* at 476.

¹²² For example, when the photograph of our ninety-five year old senior judge in Cedar Rapids is displayed, I explain that Judge McManus was appointed by President John F. Kennedy on July 17, 1962, when I was just twelve years old and that he could have retired with full pay thirty years ago.

mechanical arms removing them from the jury box come out of in our historic, but state-of-the-art high tech courtroom.¹²³

C. Juror Note-Taking. The only shocking news about this early and most frequently used jury trial innovation is that there are actually judges that do *not* allow jurors to take notes.¹²⁴ Both judges and jurors in actual field studies in Massachusetts, Ohio, and Tennessee report strong support for note-taking with as high as ninety-six percent of jurors in the Massachusetts study reporting “that note taking was somewhat to very helpful.”¹²⁵ Several other significant benefits of juror note-taking have been observed in mock trial studies. Juror note-taking improved understanding and memory of evidence; increased efficiency of deliberations; increased rejection of information that was not in evidence; and note-taking jurors rated themselves more attentive.¹²⁶ I have allowed jurors to take notes in every trial I have ever conducted and simply cannot fathom a rationale for not allowing it. A juror in one of my prior trials commented in her post verdict evaluation, “Without notes I don’t know how anyone can come up with a good decision by just memory.”¹²⁷

I instruct the jurors on the various do’s and don’ts of note-taking.¹²⁸ I also suggest taking notes right on the set of jury instructions each juror has or on the notepad and pen we give them.

¹²³ I realize not every trial judge has access to a high tech courtroom. Those that do not might be more aggressive in asking local bar associations or community service clubs and organizations to fund the technology.

¹²⁴ Paula Hannaford-Agar, *supra*, note 115, at 7 (indicating that in 2005 seventy-one percent of the courts allowed note taking and in 2014 seventy-six percent did).

¹²⁵ B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 14 (Cornell Law Faculty Publications, Paper 402 2004) [hereinafter Dann & Hans] <http://scholarship.law.cornell.edu/facpub/402>.

¹²⁶ *Id.* at 13.

¹²⁷ Schuler, *supra* note 14, at 482 n.121.

¹²⁸ **Note-Taking**

You are allowed to take notes during the trial if you want to.

- Be sure that your note-taking does not interfere with listening to and considering all the evidence
- Your notes are not necessarily more reliable than your memory or another juror’s notes or memory
- Do not discuss your notes with anyone before you begin your deliberations

D. Juror Questioning Of Witnesses. President Abraham Lincoln was a trial lawyer before becoming President.¹²⁹ In an alleged homicide case, in September of 1859, Lincoln was defending Peachy Quinn Harrison. A juror asked a question without objection from Lincoln, the prosecutor, or the judge?¹³⁰ I was a late comer to this innovation. For years, I thought juror questioning of witnesses was a bad idea because it would transform an adversarial system into an inquisitorial one. In 2011, I attended my first ABOTA Jury Summit Conference and listened to several Texas state court judges discuss very favorably their experiences with jurors asking witnesses questions. I decided to try it. Cautious at first, I waited for all counsel to agree. After the first trial I allowed juror questioning of witnesses at, I was convinced it was a superb innovation and have required it in all civil jury trials.¹³¹

-
- Leave your notes on your chair during recesses and at the end of the day
 - At the end of trial, you may take your notes with you or leave them to be destroyed
 - No one else will ever be allowed to read your notes, unless you let them
 - If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence
 - An official court reporter is making a record of the trial, but her transcripts will not be available for your use during your deliberations.

¹²⁹ Stephen R. Kaufmann & Michael P. Murphy, *Juror Questions During Trial: An Idea Whose Time Has Come Again*, 99 ILL. BAR J. 294, 294 (2011).

¹³⁰ *Id.*

¹³¹ I do not allow jurors to ask questions in criminal cases based on the problems that could arise with the presumption of innocence and shifting the burden of proof. At least five states prohibit the practice of jury questions in criminal trials: Georgia, Minnesota, Mississippi, Nebraska, and Texas. *See Johnson v. State*, 507 S.E. 2d 737, 742 (Ga. 1998) (“Clearly, a juror is not permitted to question a witness.”); *State v. Costello*, 646 N.W. 2d 204 (Minn. 2002); *Wharton v. State*, 734 So. 2d 985, 990 (Miss. 1998) (holding that “juror interrogation is no longer to be left to the discretion of the trial court, but rather is a practice that is condemned and outright forbidden by this Court”); *State v. Zima*, 468 N.W. 2d 377, 379–80 (Neb. 1991) (“Since due process requires a fair trial before a fair and impartial jury, the judicial process is better served by the time-honored practice of counsel eliciting evidence which is heard, evaluated, and acted upon by jurors who have no investment in obtaining answers to questions they have posed.”) (citations omitted); *Morrison v. State*, 845 S.W. 2d 882, 886–89 (Tx. Crim. App. 1992)

In a small but increasing number of states, jury questions of witnesses is not only encouraged but required by state law.¹³²

In the Arizona Project, 829 questions submitted by jurors in 50 civil jury trials in Arizona were thoroughly analyzed.¹³³ The comprehensive results found:

[T]hat juror questions generally do not add significant time to trials and tend to focus on the primary legal issues in the cases. Jurors not only use questions to clarify the testimony of witnesses and to fill in gaps, but also to assist in evaluating the credibility of witnesses and the plausibility of accounts offered during trial through a process of cross-checking. Talk about answers to juror questions does not dominate deliberations. Rather, the answers to juror

(holding that jurors are not permitted to ask witnesses questions: “A change in our system involving intrusion of one component into the function of another may only be established through the limited rule-making authority of this court, subject to the disapproval by the legislature or by the legislature in accordance with due process.”). For an interesting point-counterpoint law review article on this subject see John R. Stegner, *Why I Let Jurors Ask Questions In Criminal Trials*, 40 IDAHO L REV. 541 (2004) and N. Randy Smith, *Why I do Not Let Jurors Ask Questions In Trials*, 40 IDAHO L. REV. 553 (2004). Judge N. Randy Smith, an Idaho state trial court judge, was appointed to the Ninth Circuit Court of Appeals in 2007. http://www.ce9.uscourts.gov/ninthcircuit/circuit_judges.html.

¹³² Susman & Melsheimer, *supra* note 19 at 448. *Id.* at note 54 states:

See also Nancy S. Marder, *Answering Jurors’ Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 747 (2010) (citing Gregory E. Mize & Paula Hannaford-Agor, *Jury Trial Innovations Across America: How We Are Teaching and Learning from Each Other*, 1 J. CT. INNOVATION 189, 214 (2008)); Nicole L. Mott, *The Current Debate on Juror Questions: “To Ask or Not to Ask, That Is the Question”*, 78 CHI.-KENT L. REV. 1099, 1100 (2003) (stating that Arizona, Florida, and Indiana “explicitly allow jurors to submit written questions to witnesses” and that a Colorado Superior Court Committee had “recommended that jury questions be permitted in both civil and criminal cases.”).

¹³³ Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window Into Juror Thinking*, 59 VAND. L. REV. 1927 (2006).

questions appear to supplement and deepen juror understanding of the evidence. In particular, the questions jurors submit for experts reveal efforts to grapple with the content, not merely the trappings, of challenging evidence. Moreover, jurors rarely appear to express an advocacy position through their questions.¹³⁴

The Seventh Circuit Project looked at juror questions for witnesses during trial.¹³⁵ The Seventh Circuit Project's examination of juror questions of witnesses was premised on the ABA American Jury Project's Principle 13(C) which provides in part: "In civil cases, jurors should, ordinarily be permitted to submit written questions for witnesses."¹³⁶

Judges in the Seventh Circuit Project permitted juror questions of witnesses in thirty-eight jury trials.¹³⁷ Jurors submitted questions in only thirty-one of the thirty-eight trial (83%).¹³⁸ Jurors submitted an average of eighteen questions per trial averaging six questions per day.¹³⁹ Fifty-six percent of the jurors indicated they submitted at least one question per trial.¹⁴⁰

The demographics of jurors asking questions is very interesting. The likelihood of a question by a juror did not depend on juror age, gender, race, or ethnicity.¹⁴¹ Jurors with a graduate education were more likely to ask questions, but fifty percent of the jurors at every educational level asked a question.¹⁴² Ironically, the only factor associated with the likelihood of asking a question was prior jury

¹³⁴ *Id.* at 1931.

¹³⁵ SEVENTH CIRCUIT JURY PROJECT, *supra* note 28, at 15-24, 60-62.

¹¹³ *Id.* at 15. The remaining portion of the ABA American Jury Project's Principle 13(C) describes the recommended procedure for juror questions of witnesses. *Id.* This includes instructing the jury at the beginning of the trial about the procedure for their questions; the judge should make the questions part of the record; the lawyers should be given an opportunity outside the presence of the jury to object or suggest modifications to the question; the judge or lawyers should ask the question depending on what the lawyers prefer; and the lawyers should be given an opportunity to ask follow up questions after the juror question is asked. *Id.*

¹³⁷ *Id.* at 19.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 21.

¹⁴² *Id.*

service—first time jurors were more likely to ask questions than jurors with prior jury service.¹⁴³

Seventy-four percent of the judges, forty-seven percent of the lawyers, and sixty-seven percent of the jurors thought juror questions increased the fairness of the trial.¹⁴⁴ None of the judges, only seven percent of the lawyers, only five percent of the losing lawyers, and one percent of the jurors believed the juror questioning decreased the fairness of the trial.¹⁴⁵

Seventy-seven percent of the judges, sixty-five percent of the lawyers, fifty-eight percent of the losing lawyers and eighty-three percent of the jurors thought juror questioning increased or helped juror understanding.¹⁴⁶

The primary purposes for jurors asking questions in descending order were: to get additional information; clarify information already presented; to check on a fact or information; and to cover something the lawyers missed.¹⁴⁷

In an earlier national field experiment in which 160 cases spanning 33 states were randomly assigned to permit or not permit juror questions, jurors allowed to ask questions of witnesses rated themselves as better informed than those who were not allowed to ask questions.¹⁴⁸ One study in New Jersey estimated that juror questioning of witnesses during trial added only thirty extra minutes to the trial.¹⁴⁹ In my experience, it is less than that.

Numerous studies now widely support juror questions in civil cases. Studies in Los Angeles County, Massachusetts, Ohio, New Jersey, and Tennessee found that jurors, judges, and lawyers who participated in trials where jurors were allowed to question witnesses strongly supported this innovation.¹⁵⁰

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 22-23.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 24.

¹⁴⁸ Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121, 122 (1994).

¹⁴⁹ Diamond, et al., *supra* note 133, at 1932-33 (footnote omitted).

¹⁵⁰ Dann & Hans, *supra* 125, at 14-15 (an extensive study of juror questions in 239 criminal jury trials in Colorado found that: “Overall, the results reveal that juror

Juror questioning of witnesses in civil cases has risen nationally from sixteen percent in 2005 to twenty-five percent in 2014.¹⁵¹ State trial courts (twenty-eight percent) are significantly more likely to allow juror questioning of witnesses than federal courts (eighteen percent).¹⁵²

E. Juror Electronic Retrieval Of Evidence During Deliberations. Our court provides the jurors with a simple, easy, high tech solution to view all admitted evidence electronically in the jury deliberation suite without the assistance of any court personnel.¹⁵³ This saves jurors valuable time in hunting for and in passing around the one set of hard copy exhibits traditionally admitted into evidence.¹⁵⁴ It allows all of the jurors to view the evidence on a large monitor in the jury deliberation room. The Jury Evidence Recording System (JERS) allows all types of evidence admitted during trial: exhibits, photographs, videos, and audio recordings to be viewed and/or listened to electronically by the jurors during deliberations.¹⁵⁵ This includes an exhibit list by number and description that simply requires the jurors to click on the exhibit for all jurors to see and/or hear.

F. Debriefing The Jury Following Their Verdict. The process of debriefing the jury after their verdict makes jurors feel as important as they truly are. It is best described by my former law clerk Kirk W. Schuler:

questioning has little negative impact on trial proceedings and may, in fact, improve courtroom dynamics.”).

¹⁵¹ Paula Hannaford-Agar, *supra*, note 115, at 7.

¹⁵² *Id.*

¹⁵³ The computer that runs this software cannot perform any other functions in the jury deliberation room and has an easy-to-use instruction sheet that jurors have no problem following. This is a tribute to the advancing curve of technology. In 1991, a distinguished U.S. district judge suggested that courts might provide technology to do this, but alluded to the fact that it would require an “operator” in the jury deliberation room. Robert M. Parker, *Streamlining Complex Litigation*, 10 REV. LITIG. 947, 958 (1991).

¹⁵⁴ Our juries also receive the traditional single hard copy of exhibits.

¹⁵⁵ The JERS system stores all exhibits submitted prior to trial and then a law clerk, court room deputy, or judge designates just those exhibits admitted to be shown to the jury. JERS also has the ability to restrict how jurors may view a specific exhibit, e.g. video only, audio only, or zoom off or on. JERS can also capture through the courtroom electronic evidence presentation system exhibits not admitted prior to trial.

Judge Bennett hurries to the jury room to “debrief” the jury. The judicial clerk follows in order to retrieve the exhibits. The exhibits, however, provide little motivation for heading to the jury room compared to the ensuing dialogue between the judge and the jury.

The debriefing is informal. Judge Bennett simply thanks the jurors for their service and asks them if they have any questions. The jury is always anxious to ask questions. Moreover, the jurors are usually unafraid to ask anything because of the friendly rapport the judge established with them during voir dire. Frequently, their questions are about the case at bar, but sometimes they are about the legal process in general. Often, jurors want to know about Judge Bennett’s job. If the trial was a criminal case and the defendant was found guilty, the jurors inevitably ask what happens next—when is sentencing, what happens at sentencing, and what the defendant’s likely punishment will be. Questions about different trial strategies are common, and often jurors comment on what they found credible or incredible, or what they would have liked to have heard more about.

The jurors love the chance to speak with the judge. Sometimes the debriefing lasts up to an hour; other times it may last just a few minutes. It usually depends on Judge Bennett’s schedule, as most jurors are willing to stay longer to discuss matters with the judge if time allows. After days of sitting in trial without uttering a word, jurors finally get their chance to speak up. It is cathartic, and no doubt makes their experience better. It is also amazing to listen to, and one of the best perks of being Judge Bennett’s judicial clerk. For a moment, all the legal research, legal writing, and legal “life” that define a clerk’s job are suspended. In their place, in that small jury room, are the unmistakably real explanations, questions, and thoughts of a working single mother, a retired Vietnam veteran, a college student, or even a new American citizen. Apart from the verdict, it is one of the purest connections between the law and the layperson.¹⁵⁶

¹⁵⁶ Schuler, *supra* note 14, at 483. One of the purposes of debriefing the jury is to obtain jury feedback as “an invaluable evaluation tool, and operates as a way to make sure each jury trial thereafter is one step better.” *Id.*

The highly respected New Jersey Supreme Court recently banned, in no uncertain terms, the practice of post-verdict “debriefing” a jury, off the record and outside the presence of counsel, as an impermissible *ex parte* communication.¹⁵⁷ While I respect this holding, I disagree with it.¹⁵⁸ It is important for the legal profession to monitor this issue as other courts will now undoubtedly grapple with it.

G. Empowering The Jury And Obtaining Crucial Feedback—Juror Evaluations Of The Judge, Lawyers, And Trial Process. In every jury trial in

¹⁵⁷ *Davis v. Husain*, 106 A.3d 438 (N.J. 2014). After the jury returned a modest verdict for the plaintiff, and while the judge was debriefing the jurors without counsel present and off the record, one juror told the judge “she was surprised that defendant had not placed his hand on the Bible before he testified.” *Id.* at 441. The trial judge then let the lawyers know of this juror comment because at oral argument on a remitter motion defense counsel informed the court the defendant didn’t place his left hand on the bible for religious reasons. *Id.* at 442. In remanding the case for further proceedings, the court established a bright-line rule: “We therefore prohibit, as part of our constitutional supervisory authority over the conduct of criminal and civil trials in this State, *ex parte* post-verdict communications between a trial judge and jurors.” *Id.* at 447.

¹⁵⁸ This issue is fodder for its own article. At bottom, I trust trial judges not to ask inappropriate questions during debriefing and to immediately notify counsel and make a record on anything a juror inadvertently discloses that might raise a concern. In twenty-one years of debriefing hundreds of criminal and civil juries, I advised counsel and made a record twice based on statements made by a juror. Both cases settled before post-trial hearings were held. While a judge could debrief the jury on the record, with counsel present to avoid the *ex parte* concern in *Davis v. Husain*, the debriefing would lose its informality and candor and dramatically stifle the discussion. As an experiment years ago, I debriefed a few juries with counsel present. The jurors said virtually nothing. I have also asked jurors if they would prefer to have counsel present and they never have. The alternative of not debriefing the jury has two serious ramifications. First, it deprives me of the opportunity to let the jurors know in the informal setting of the jury deliberation room how much our court appreciates their efforts by taking the time to chat with them and answer their questions. It allows me to pass out the juror evaluation forms and to shake the hands of each juror. Sometimes the jurors ask for selfies with me or want me to autograph their set of instructions. Second, in those rare instances in which a juror discloses something the parties need to know, debriefing provides a vehicle for shedding light on what might have been undisclosed juror misconduct.

my quarter century as a federal trial court judge, I have sought written input about the trial from the jurors after their verdict. During jury selection, I inform the prospective jurors that I will meet with them after their verdict to debrief them, try and answer any questions they have, to thank them for their service, and to give them a stamped, self-addressed envelope with a questionnaire to evaluate me as the trial judge, the lawyers, and the trial process. They can take the form home, fill it out at their leisure, and send it back in the envelope. It is optional, but most jurors take advantage of this trial innovation. I explain to the prospective jurors that we have made major changes in the way our court conducts trials based on the important feedback we have received from jurors over the years. When I meet with the jurors after their verdict, I hand each an envelope and explain again that, while filling it out is optional, I greatly appreciate and value their feedback. Can you imagine buying a new car and not having the manufacturer ask for your feedback? It is hard for me to imagine why a trial judge would not want, seek, and benefit from such feedback. Once the questionnaires are returned, we share the pertinent portion of the evaluation with each lawyer. In the age of competitive advertising, I do not want the lawyers to see and be able to use their adversaries' evaluations for their economic advantage. I find that the jurors' evaluations are almost always spot on! The best way to improve yourself, and any process, is to obtain feedback. The famous entrepreneur and philanthropist, Bill Gates, has said: "We all need people who will give us feedback. That's how we improve."¹⁵⁹

H. Interim Summaries Or Arguments By Counsel In Complex Or Lengthy Civil Jury Trials. The Arizona Jury Project suggested educating judges and lawyers about interim summaries or arguments by counsel in certain cases.¹⁶⁰ The Committee did not think it necessary to establish a rule giving direct authority to judges for this, because they believed the current Arizona rules of procedure in both civil and criminal cases gave judges authority by "implication."¹⁶¹ Nor did

¹⁵⁹ www.ted.com/talks/bill_gates_teachers_need_real.../transcript, 0:37.

¹⁶⁰ THE POWER OF 12, *supra* note 13, at 93 (Recommendation 35: "Trial judges and attorneys should be made more aware of the advantages of interim summaries for the jury after discrete segments of especially long trials or trials in unusually complex cases.").

¹⁶¹ *Id.*

the Committee feel it necessary to provide a rule about the “technique” for interim arguments or summaries.¹⁶²

The Seventh Circuit Project actually tested the use of interim statements.¹⁶³ The Commission suggested some standards while testing interim statements.¹⁶⁴ These included time limits, no advance notice, outside the presence of witnesses covered by Fed. R. Evid. 615 (sequestration), and before or after a witnesses testimony.¹⁶⁵ Interim statements by counsel were used in 17 jury trials.¹⁶⁶ This study is important because the difference in the evaluation of this innovation by judges who used it and those that did not is significant.¹⁶⁷ After using interim statements, eight-eight percent of the judges indicated they would use them again.¹⁶⁸ Only twenty-three percent of the judges that did not use interim statements thought they would be helpful.¹⁶⁹

Only eight percent of judges and four percent of lawyers in the study thought that the use of interim statements decreased the efficiency of the trial.¹⁷⁰ A significant majority of the judges who used interim statements thought the statements both increased the jurors’ understanding of the case and increased their own satisfaction with the trial process.¹⁷¹

Thirty-two percent of the jurors found the interim summaries to be most helpful in introducing evidence; twenty-six percent in summarizing evidence that had just been presented; and thirty-four percent found both useful; only eight percent of jurors did not find interim statements useful at all.¹⁷²

¹⁶² *Id.*

¹⁶³ SEVENTH CIRCUIT JURY PROJECT, *supra* note 28, at 32-35, 63-65. The Final Report cites the ABA American Jury Project Principle 13 and Standard 13(G) as encouraging parties and judges to be open to the use of interim statements as one means of enhancing “juror comprehension.” *Id.* at 32.

¹⁶⁴ *Id.* at 33-34.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 34.

¹⁶⁷ *Id.* at 34-35; 63-65.

¹⁶⁸ *Id.* at 63.

¹⁶⁹ *Id.* at 65.

¹⁷⁰ *Id.* at 63.

¹⁷¹ *Id.*

¹⁷² *Id.* at 65.

Another study indicated that only one percent of state and federal courts allow interim statements.¹⁷³ I have yet to use interim statements in my civil jury trials, but now have it as an option in the trial management order—if both parties agree. I want to have some personal experience with this innovation before I allow it over lawyers’ objections.

I. Allowing Jurors To Discuss The Evidence Among Themselves Before Deliberations. This is without question the most controversial innovation of the Arizona Jury Project.¹⁷⁴ Perhaps so controversial that the Seventh Circuit Project did not test it or even mention it in their Final Report. The Arizona Jury Project’s recommendation on this issue, titled 37. **Allow Jurors to Discuss the Evidence among themselves During the Trial**, was: “After being admonished not to decide the case until they have heard all the evidence, instructions of law and arguments of counsel, jurors should also be told, at the trial’s outset, that they are permitted to discuss the evidence among themselves in the jury room during recesses.”¹⁷⁵

The Committee concluded that the traditional approach of not allowing the jurors to discuss the evidence until deliberations is “unnatural, unrealistic, mistaken and unwise.”¹⁷⁶ The Committee further concluded the traditional rule was “anti-educational, nondemocratic and not necessary to endure a fair trial.”¹⁷⁷ Benefits of their new recommendation, according to the Committee, included: increasing juror comprehension; questions by jurors could be asked of one another in a timely way that may be forgotten by the time of deliberations; cliques might be reduced through early venting; and tentative judgments could be tested by group knowledge.¹⁷⁸ The Committee recommended to the Arizona Supreme Court that

¹⁷³ Paula Hannaford-Agar, *supra* note 115, at 7.

¹⁷⁴ Diamond, et al., *Juror Discussion During Civil Trials*, *supra* note 33, at 4 (labeling juror discussion of the evidence before deliberations “the most controversial” of the changes recommended and adopted as a result of the Arizona Jury Project).

¹⁷⁵ THE POWER OF 12, *supra* note 13, at 96.

¹⁷⁶ *Id.* at 97.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 98.

this innovation be adopted for both civil and criminal trials.¹⁷⁹ The Court adopted it only for civil cases.¹⁸⁰

¹⁷⁹ *Id.*

¹⁸⁰ Ariz. R. Civ. P. 39(f):

If the jurors are permitted to separate during the trial, they shall be admonished by the court that it is their duty to not converse with or permit themselves to be addressed by any person on any subject connected with the trial; except that the jurors shall be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from the trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. Notwithstanding the foregoing, the jurors' discussions of the evidence among themselves during recesses may be limited or prohibited by the court for good cause.

A typical jury instruction in Arizona Superior Courts for this innovation reads like this:

You jurors may discuss the evidence during the trial, but only among yourselves and only in the jury room when all of you are present. Despite what you have heard or experienced in other trials, where jurors cannot discuss the evidence among themselves during the trial, that rule has been changed in Arizona to permit jurors to talk with each other about the evidence during civil trials like this one. The reason for this change is that the courts believe that juror discussions during trial may assist jurors in understanding and recalling the witnesses, their testimony and exhibits. The kinds of things you may discuss include the witnesses, their testimony and exhibits. However, you must be very careful not to discuss or make up your minds about the final outcome, or who should win the case, until you have heard everything—all the evidence, the final instructions on the law and the attorneys' arguments—and your deliberations have begun. Obviously, it would be unfair and unwise to decide the case until you have heard everything.

Diamond, et al., *Juror Discussion During Civil Trials*, *supra* note 33, at n.11.

Any judge considering adopting or any lawyer thinking to urge this innovation should carefully study Professor Shari Diamond’s seminal article.¹⁸¹ The article includes a study of fifty videotaped actual jury deliberations in Pima County (Tucson) Arizona.¹⁸² This innovation appears to be neither the panacea thought by its advocates, nor suffer the doomsday consequences predicted by its detractors.¹⁸³ In another national study, only six percent of state civil jury trials and one percent of federal trials allowed jurors to discuss the case among themselves prior to deliberations.¹⁸⁴

Again, I have yet to use this innovation in my civil jury trials, but now have it as an option in the trial management order to use if both parties agree. I want to have some personal experience with this innovation before I allow it over lawyers’ objections.

VII. Bill of Rights No. V: Jurors Have The Right To Juror Creature Comforts

If more judges approached jury trials with the mantra WWJW, juror creature comforts would be of greater concern. While the Arizona Jury Project included in its Proposed Bill of Rights for Arizona Jurors that they be: “Provided with comfortable and convenient facilities” they did not expand on this statement.¹⁸⁵ Our court provides jurors with the following specific creature comforts.

A. Comfortable Seating In The Jury Box. I encourage all judges to sit in the courtroom jury box. Don’t just sit for a minute or two, but work there for forty minutes or so to get a sense of how comfortable the juror seating is. If it is not comfortable, do something about it.

B. Stretch Breaks. Sitting all day listening to lawyers and witnesses drone on is no easy task. Thus, giving jurors “stretch” breaks every forty minutes or so, and every time a new witness is sworn in, is critical to keeping the jurors’ attention. I inform jurors in lay terms at the beginning of the trial about the federal witness

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 73-79.

¹⁸⁴ Paula Hannaford-Agar, *supra*, note 115, at 7.

¹⁸⁵ *Id.* at 132.

sequestration rule—Fed. R. Avid. 615. Thus, every time a witness steps off the witness box (which I moved years ago to the middle of the courtroom—directly across from the jury box to help create an evidence corridor for jurors where they can look straight ahead and see the witness and the evidence projected on a large screen above the witness, allowing jurors to see the evidence, the witness, and the witnesses’ demeanor all at once)¹⁸⁶ the jurors are instructed to take a stretch break. The break lasts until I have sworn in the new witness.¹⁸⁷ If a witness goes more than forty minutes or so, I politely interrupt and give everyone in the courtroom, including the witness, a much appreciated stretch break.

C. More Frequent Stretch Breaks And Standing To Listen To Testimony. Jurors with back or other health problems affecting their ability to sit are seated in the back row of the jury box. This allows them to stand more frequently, whenever they want, without affecting the site lines of the other jurors.

D. Nutritious Snacks. In addition to the ubiquitous coffee and donuts, we provide, each day in the jury room, fresh fruit and a variety of healthy snack bars. We also provide unlimited bottled water. There are also vending machines available in a public area for the jurors’ use.

E. Microwave Oven And Refrigerator. We provide a full size refrigerator and microwave in the lobby area of the juror deliberation suite. This enables jurors to bring their own snacks and beverages and accommodates any special dietary or health needs.

F. Cookies. When all else fails to make a trial a positive experience for juror, trial judges should try bribing them. In trials of 4 days or more, I have, for years,

¹⁸⁶ The trend of placing monitors in the jury box, usually shared by two or more jurors, is well intended, but actually counterproductive for jurors. In such a courtroom design, it is virtually impossible for jurors looking down at the monitors studying exhibits to be able to see the witnesses’ demeanor. In one sense, this may not be all bad because, as I have recently written, the stock jury instructions on witness demeanor fly in the face of well-established cognitive psychological principles. Bennett, *Unspringing The Witness and Memory And Demeanor Trap*, *supra* note 133.

¹⁸⁷ I often chuckle to myself when a new witness walks into the courtroom to be sworn in. I wonder if they think they have walked into a yoga studio, because most folks in the courtroom, including the parties, lawyers, jurors, and myself are in various poses of stretching.

baked cookies for the jurors. It works wonders. I personally bake them and leave them a note, in the jury room, on the plate of cookies explaining that they were baked with my own hands. They frequently comment on the juror evaluation forms how much they appreciate this personal touch. When trying cases in other districts, I buy treats for the jurors but find that, while jurors appreciate it, this lacks the more personal touch of baking the cookies myself.

VIII. Conclusion

“The juror was a central figure in the creation of America. As individual hero, a collective voice of protest, or part of an institution that symbolized a democratic, local, and leveling power, jurors intertwined themselves in the American character.” – Andrew Gurthrie Ferguson¹⁸⁸

As a trial judge, my awe and respect for jurors has grown steadily since graduation from law school forty years ago. This has led to a jury-centered approach to judging. This approach is consistent with and reinforces the historical understanding of jurors as constitutional officers. It is surprising given the distinctive role of jury trials in this nations’ history that jurors do not have their own widely adopted bill of rights. My jury-centered approach to judging reflects and incorporates the results of the two major studies on jury trial innovations: the Arizona Jury Project (state court) and the Seventh Circuit Bar Association American Jury Project (federal courts). The pivotal question in this approach is: what would jurors want? (WWJW). The answers to this simple, but rarely asked question, forms the basis for this article’s proposed five bill of rights for jurors. These five bill of rights, focusing on jury trial innovations, ensure proper respect for the constitutional role of jurors and simultaneously enhance the fairness of jury trials.

My dear colleague and uber passionate jury trial sage, Judge William G. Young, from the District of Massachusetts, has written: “Having set themselves adrift from their constitutional partner—The American jury—federal trial judges now find themselves bereft of the central wellspring of their moral authority.”¹⁸⁹ Adopting these five juror bill of rights would go a long way towards mooring trial judges to

¹⁸⁸ Ferguson, *Constitutional Identity*, *supra* note 9, at 1115 (footnotes omitted).

¹⁸⁹ Young, *supra* note 2 at 81.

their historic constitutional partners. My three goals were modest. The first was to articulate my WWJW approach to judging through these five juror bill of rights. The second was to stimulate further discussion and writing about ideas that, not only increase the fairness of jury trials for the parties, but help produce hundreds of thousands of roving community ambassadors for the constitutional rights of trial by jury. My third goal was to help nudge a slow-moving judiciary towards change remembering, as Martin Luther King, Jr., proclaimed: “The arc of the moral universe is long but bends towards justice.”¹⁹⁰ However, it does not bend on its own. Adopting and implementing this bill of rights for jurors helps bend the arc towards justice.

¹⁹⁰ See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63, 197 (1988) (“[O]ne of King’s favorite lines, from the abolitionist preacher Theodore Parker, [was] ‘The arc of the moral universe is long, but it bends toward justice.’”).