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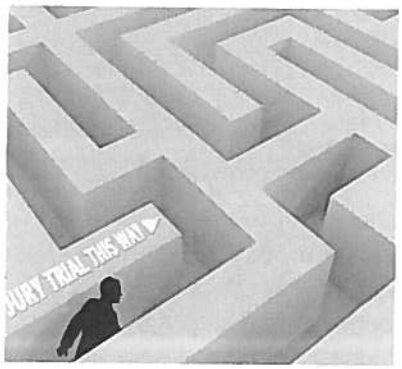
# VOIR DIRE

## Inside this issue

# Expedited Jury Trials Secure Americans' Precious Right to Trial by Jury

**By Brian W. Tyson**




*National Jury Summit directed attention to opportunities for advancements in the trial system and improving public access*

National Jury Summit
Austin, Texas
October 10, 2013

The dramatic reduction in the number of civil jury trials in recent years should be a wake-up call to Americans wishing to preserve a fundamental constitutional right. One of America's most basic rights — the jury trial — is in jeopardy.

Themed as the "Expedited Jury Trial," the National Jury Summit held in Austin, Texas, Oct. 10, 2013, was a call to action that focused on reducing the cost and time involved in civil litigation and improving access to jury trials. Examining reform efforts that have already taken place in federal and state courts was a key topic, as well as addressing ways to handle complex litigation proceedings.

Numerous studies, including a recent report by the National Center for State Courts, have demonstrated that there is overwhelming support for the jury trial among Americans. And yet, there is an alarming downward trend occurring in the nation's civil courts.

"There is a widespread perception that civil jury trials are too complex, too expensive and too lengthy," said Michael T. Callahan, president of the American Board of Trial Advocates, the organization sponsoring the Summit. "The decline in jury trials is a chilling sign that fewer citizens are able to exercise their Constitutional promise of access to justice."

Mr. Callahan described the problem another way. Imagine if someone threatened to remove your right to freedom of speech or the right to bear arms, the public outcry would be widespread. Erasing access to the civil jury trial is equally detrimental to citizens who have no other recourse, he said.

ABOTA, in collaboration with the National Center for State Courts and the Institute for the Advancement of the American Legal System, has advocated changes that will improve the system's ongoing quality and relevancy.

"Juries are the backbone of our democracy and are as critical as the right to vote itself," said Summit Chair Gilbert H. Dickinson of the Denver law firm of Dickinson, Prud'Homme, Adams & Ingram, LLP. "The jury trial not only provides protection to the litigants, it also directly involves our citizens in the judicial branch of government. The declining numbers of jury trials demonstrates the need for innovations that will make the system more effective and efficient. Inaction is not an option."

The National Jury Summit took steps to remove barriers — real and perceived — that prevent cases from proceeding to trial. The Summit called for the implementation of expedited jury trials (or "summary jury trials" in some states) and streamlined pretrial procedures. Recommendations and alternatives were discussed among lawyers, judges, courtroom administrators and law professors. ■

## Presenters in order of appearance

***Professionalism and the Rule 1 Goals of a "Just, Speedy, and Inexpensive" Determination of Actions***

**Justice Douglas S. Lang,**
5th District Court of Appeals, Dallas, Texas
Board of Trustee, the American Inns of Court

*An Overview of Expedited Trial Programs across the Country*

**Paula L. Hannaford-Agor,**
Director, Center for Jury Studies,
National Center for State Courts

***State Projects Targeting Low Damage Cases Topic 1: Pretrial procedures: Disclosure and Discovery under an Expedited System***

MODERATOR: **Michael P. Maguire**
ABOTA Foundation Vice President,
Orange County Chapter, Calif.

PANELIST: CALIFORNIA: **Robert B. Gibson**
Orange County Chapter, Calif.,
ABOTA National Member

NEW YORK: **The Honorable Lucindo Suarez**
Supreme Court of the State of New York

COLORADO: **John R. Rodman**
(Rule 16.1): Colorado Chapter ABOTA Member

OHIO: **The Honorable Thomas D. Lambros (Ret.)**
Janik, LLP

***State Projects Targeting Low Damage Cases Topic 2: Trial Procedures: Expedited Trial Formats and Options***

*Disclosure of Trial Experience — A Matter of Ethics*

**Professor Tracy McCormack,**
Director of Advocacy
University of Texas School of Law

*"Finding Efficiencies for Higher Value Cases" Overview of Reform Efforts in Federal and State Courts*

**The Honorable Rebecca L. Kourlis (Ret.)**
Executive Director, Institute for Advancement of the American Legal System

*Panel discussion and presentation of specific state programs*

MODERATOR: **The Honorable Rebecca L. Kourlis (Ret.)**
Executive Director, Institute for Advancement of the American Legal System

PANELISTS: UTAH: UTAH'S NEW RULES:

**The Honorable Derek P. Pullan**
4th District Court Judge, Utah

COLORADO: CIVIL ACCESS PILOT PROJECT:
**Gordon W. Netzorg**
Sherman & Howard, Denver, Colo.

*Addressing the Parties' Needs in Complex Litigation*

MODERATOR: **Mark P. Robinson, Jr.**
2013 ABOTA National President-Elect

PANELISTS: **The Honorable Rebecca L. Kourlis (Ret.)**
Executive Director, Institute for Advancement of the American Legal System

**Stephen D. Susman**
Susman Godfrey, L.L.P
New York, New York

**The Honorable Gail A. Andler**
Superior Court of California, Orange County

*Closing Comments and Recommendations*

**Michael T. Callahan**
ABOTA National President

## About the National Jury Summit

The National Jury Summit was open to lawyers, judges, legal professionals, and the public. The American Board of Trial Advocates has conducted National Jury Summits since 2005.

2005 National Jury Summit, Las Vegas — "The Present State and Future of the 7th Amendment Right to Trial by Jury"

2007 National Jury Summit, Las Vegas — "Saving the Jury Trial"

2009 National Jury Summit, San Francisco — "Protecting the Jury Trial — A Curriculum for Success"

2011 National Jury Summit, Chicago — "The Jury Trial of the 21st Century"

2013 National Jury Summit, Austin, Texas — "The Expedited Jury Trial"

2015 National Jury Summit, San Francisco Ritz Carlton, San Francisco, April 30, 2015

# Federal Civil Jury Trials Decline to New Lows

**By Mark Curriden**
Senior Writer for *The Texas Lawbook*

Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit warned a group of lawyers and federal judges in 1997 that civil jury trials were headed to extinction.

"There are certain elites in this country who don't trust juries," Judge Higginbotham, a Reagan appointee from Dallas, said at the time. "The future of our jury system is very much in danger."

Despite the warning, most lawyers and judges scoffed. After all, no state in the country trusted citizen juries to resolve personal and business disputes more than Texas.

During the 16 years since Judge Higginbotham's warning, civil jury trials have plummeted to historic 40-year lows.

In 2012, there were 135 civil jury trials in the federal courts in Texas — down from 360 in 1997.

The state courts have witnessed a similar decline. Last year, there were fewer than 1,200 civil jury trials in state district courts in Texas — a one percent decline from 2011 and down nearly 300% from 1997, when there were 3,369 jury trials.

While plaintiff's lawyers have cried foul for more than a decade, prominent judges and lawyers representing large businesses have suddenly started sounding the alarm.

"My fear is that we are returning to the French legal system prior to the French Revolution when trials did not exist and cases were all done on paper," says Judge Higginbotham. "The reduction in jury trials isn't about the empty courthouse — it is about the alienation of the people from the process. The jury system is about governance."

Legal experts agree.

"There's this distrust of juries, which I truly don't understand," says Jeff Lowenstein, a partner at Dallas-based Bell Nunnally & Martin. "Nobody works harder or feels more deeply about dispensing justice than 12 of our fellow citizens.

**Federal Jury Trials Conducted in Texas**

| District | 1997 | 2011 | 2012 |
|---|---|---|---|
| Northern District (DFW) | 77 | 35 | 28 |
| Southern District (Houston) | 135 | 59 | 56 |
| Eastern District (Includes Plano) | 71 | 28 | 23 |
| Western District (Austin & San Antonio) | 77 | 19 | 28 |

Source: Administrative Office of U.S. Courts

**Civil Jury Trials in Texas Courts**

| District | 1997 | 2011 | 2012 |
|---|---|---|---|
| Dallas Co. | 268 | 174 | 176 |
| Harris Co. | 611 | 271 | 240 |
| Tarrant Co. | 177 | 108 | 103 |
| Travis Co. | 78 | 18 | 15 |

Source: Texas Administrative Office of Courts

"So many lawyers counsel their business clients to avoid juries because they are too risky, and that's just not true," says Lowenstein. "This is one of those situations where we don't realize what we had until it's gone."

Dan Worthington, president of the Texas Association of Defense Counsel, an organization comprised of lawyers who represent insurance companies, manufacturers and other businesses in the state, says the decline in jury trials is a "profoundly negative" trend for individuals and businesses.

"This is an unhealthy trend for those seeking justice," says Worthington, who practices law in McAllen. "Unfortunately, I predict this trend is going to continue."

Judge Higginbotham and others say the problem isn't because juries are out of control and deliver unjustly verdicts.

Multiple studies have shown that Texas juries tend to be more conservative in awarding damages than citizens in other states. A 2012 study by Thomson Reuters of civil jury verdicts nationwide found that the median damage award in Texas was $12,189, making Texas juries the fourth-stingiest in the country.

Worthington and legal experts say the dramatic drop in jury trials isn't the result of fewer disputes. Instead, they say that the ability to have disputes decided by a jury has been severely curtailed by a combination of efforts during the past two decades, including tort reform and appellate court decisions, which have severely curtailed people's abilities to have juries hear and decide their claims.

They also say that thousands of civil complaints that were once heard by juries are now resolved pretrial in mediation or have been pushed into the private world of arbitration.

Texas juries decided 12% fewer personal injury and medical malpractice cases, 15% fewer business disputes and 50% fewer product liability cases during the past year compared to 2011.

Statistics show that juries in 2012 sat in judgment of 800% fewer product liability claims, including cases of faulty medical devices, dangerous prescription drugs, defective tires and accident-prone cars than they did in 1996.

"People get very upset when other constitutional rights are taken away or limited, but we are witnessing our Seventh Amendment right to a civil jury severely attacked, and people don't seem to care," says Joseph Ahmad, a Houston lawyer who represents businesses in employment law-related disputes.

State district judges in nearly every major metropolitan area — the exception being Dallas — conducted fewer jury trials in 2012 than they did the previous year or any of the previous 16 years, although the annual slope downward

*Thousands of civil complaints that were once heard by juries are now resolved pretrial in mediation or have been pushed into the private world of arbitration.*

seems to be leveling out.

- Harris County District judges conducted 240 civil jury trials in 2012, an 11% drop from a year earlier.
- Travis County District courts recorded only 15 jury trials to verdict, a 17% decline.
- Tarrant County witnessed a 4% drop in 2012.
- Dallas County District judges actually conducted two more trials in 2012 (176) than they did a year earlier (174).

In 1996, Harris County juries resolved 616 civil disputes, compared to only 240 in 2012.

Victor Vital, a litigation partner at Greenberg Traurig in Dallas who represents large corporations, said the high cost of taking a lawsuit to trial has made jury trials cost prohibitive.

"The number-one culprit is the extraordinary cost of discovery, especially e-discovery," he says. "Business clients evaluate the financial risks and the costs."

Vital says judges need to be more of a gatekeeper on the discovery demands of the lawyers, which he says will keep the cost of litigation lower and encourage more clients — be they individuals or businesses — to want to go to trial.

To address the issue, the Texas Supreme Court implemented its new "expedited trial" rules for cases where $100,000 or less is in dispute. The new rules limit discovery and push cases to trial quicker.

But many lawyers say the Texas appellate courts are a significant part of the problem. They say the justices have widened the "no evidence review standard" by shifting issues that were once considered questions of fact decided by juries and made them questions of law decided by judges.

"The appellate courts in Texas have become so conservative and so favoring defendants that I advise my business clients who have a rock solid case that we should file the lawsuit in another state," says Adam Schiffer, a Houston lawyer who represents Texas businesses in high-stakes litigation.

"I know that if I get a good jury verdict for my business clients – a verdict that is fully supported by the facts and the law — that there is a significant chance that the Texas Court of Appeals or the Texas Supreme Court is going to take it away from us," says Schiffer.

When the Texas Supreme Court and the intermediary appellate courts reverse so many jury verdicts, the lower courts take it as a strong signal that they should be more aggressive in tossing cases before the evidence even makes it to a jury, according to legal experts.

"The Texas appellate courts have all but told trial judges that they need to grant more motions for summary judgment and let fewer cases go to trial," says Steve McConnico, an Austin lawyer who represents large corporations in business disputes.

"We write motions for summary judgment today for our corporate clients that we would have laughed at only a few years ago," says McConnico, whose clients include large energy and pharmaceutical companies. "The Texas Supreme Court has made proving causation and damages in all kinds of cases much more difficult.

It is sad that this valuable and effective constitutional right is going away and people are not more outraged," he says. ■

# Obituary: The American Trial Lawyer
## Born 1641 — Died 20??

**By Hon. Mark W. Bennett**

The American trial lawyer (ATL), who, in innumerable ways, enhanced the lives of so many Americans and made the United States a fairer, healthier, safer, more egalitarian and just nation, passed away recently. Although a precise age is uncertain, ATL is believed to have been at least 371 years old at the time of death.

The cause of death is uncertain. A blue-ribbon panel of forensic coroners performed one of the most extensive autopsies in history. They were unable to determine the precise cause or time of death. However, they were unanimous in their conclusion that death was not sudden. In fact, ATL had been placed on the Endangered Species List a decade or so before death. The autopsy determined that ATL most likely died from a long-term, progressive illness that began more than 40 years ago and was exacerbated by a slow, debilitating virus related to multifocal leukoencephalopathy—more commonly known as *Celotex-Anderson-Matsushita* Syndrome—a disease of the central nervous system. The death certificate also lists the following probable causes of death: a strange autoimmune disease known as *Iqbal & Twombly*; a surge of "litigation industry" lymphoblastic cancer cells—replacing healthy trial-lawyer- skill cells; the vanishing civil jury trial—causing a massive drain of healthy red blood cells that were the lifeblood of ATL; a genetic mutation of the civil justice system that came to be known as "ADR"; the tragic inability of young offspring of ATL to obtain an essential growth hormone—trial experience; the inability of courts to implement reforms that would have reduced the enormous costs of getting cases to trial and enabled ATL to go off life support; a persistent metastasizing growth of the parasitic belief that trial judges should be "litigation managers" and that jury trials are a "failure of the system"; and the media, which, with the speed of an aggressive glioblastoma, spread inaccurate information about allegedly frivolous lawsuits and verdicts like the McDonald's "hot coffee" case.

### Developing America

ATL was preceded in death by greatgrandparents born in England, Scotland, and Wales, who were called to the bar as barristers, and by grandparents born of the colonial struggle for enduring freedom. The first colonial charter, enacted on December 10, 1641, the Massachusetts Body of Liberties was the first to provide, by name, for trial by jury in civil cases. The colonists prized the right to trial by jury as indispensable to their liberty. After that, trial by jury was mentioned in virtually every major document and speech delivered before the Revolution.

ATL reproduced plentifully and moved quickly through the developing America. At first, ATL was educated primarily through apprenticeships and "reading law." Early revolutionary heroes who learned law through apprenticeships included John Adams, Alexander Hamilton, John Jay, Thomas Jefferson, and John Marshall. In 1799, the College of William and

Mary appointed Jefferson's former tutor and signer of the Declaration of Independence, George Wythe, as the first law professor in the United States. As a Virginia judge in 1806, Wythe tried to end slavery in that state by judicial interpretation. In a twist of fate, Wythe's grandnephew, charged with Wythe's murder, was acquitted because a Virginia law prohibited the only eyewitness, an African American, from testifying in the Virginia courts because of her race.

ATL had some famous siblings, among them Abraham Lincoln, the 16th president of the United States. Lincoln's most famous criminal case occurred in 1852, when he defended William "Duff" Armstrong, who was accused of murder. Armstrong was acquitted when Lincoln used judicial notice of the *Farmer's Almanac* to demonstrate that the moon was too low in the sky for the eyewitnesses to see what they claimed they saw.

Clarence Darrow, born in 1857, was one of the greatest progeny of ATL. Darrow defended Leopold and Loeb, the Scottsboro Boys, and, of course, John T. Scopes, accused of teaching the evolutionary origin of humans. In the Scopes trial, Darrow's opponent was a former presidential candidate, Williams Jennings Bryan.

In 1869, ATL's first sister, Arabella Mansfield, from Burlington, Iowa, became the first woman admitted to the bar in the United States. Mansfield never practiced law, but she was an educator and was active in the women's suffrage movement, working closely with Susan B. Anthony.

ATL's progeny spread rapidly across the expanding United States, reaching every state and territory. By the mid-1900s, there were terrific trial lawyers in every major city. Here, in Iowa, while there were many great trial lawyers in the larger cities like Des Moines and Cedar Rapids, there were also great trial lawyers in smaller communities such as Sioux City, Waterloo, and Council Bluffs. Some of the best trial lawyer legends come from small towns like Spencer and Primghar, Iowa. These trial lawyers were in trial several times a month, trying an auto injury case one week and a will contest, land dispute, or commercial case

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the next. Unlike their "litigator" half brothers and sisters, the old school trial lawyers were feared—not for their overly burdensome discovery acumen but for their uncanny ability to cross-examine a witness, like a saber slicing through butter, without the need for a prior deposition. They were world-class raconteurs and would hold the jurors in rapture with their spellbinding closing arguments. They had no need for notes and would never read their closings from a script. They tried cases solo, without an entourage of partners, associates, or legal assistants. Their lifeblood was trying cases in the courtroom.

**Criticisms and Successes**

ATL had critics. ATL was accused of filing too many frivolous lawsuits, driving up the price of goods and services, and making our society too litigious. However, others praised ATL for ably defending the U.S. Constitution and its Bill of Rights. ATL is, perhaps, more responsible for our enduring freedoms and the enforcement of our nation's laws than any other. American products, from airplanes to scalding coffee, pharmaceutical drugs, and scores of others, are safer and kill and maim far fewer Americans. Hundreds of thousands of lives have been spared from tobacco-related deaths, and billions have been saved in health care costs. Civil rights and liberties are morefully enjoyed. Minorities are more fully integrated into our nation's government, schools, jobs, and public accommodations. Air and water are cleaner. Roads, highways, hospitals, doctors' offices, and facilities for the aged and mentally and physically disabled are much safer. Individuals who have been bilked out of billions of their life savings in fraud schemes have obtained significant relief, as have stock holders in massive securities fraud cases. Corporations and individuals falsely accused of negligence, defamation, infringing others' intellectual property, and harming others in untold ways have been vindicated. Hundreds on death row have been exonerated. Law enforcement, jails, and prisons are more humane. ATL aided thousands in the free exercise of their religion and prevented government from favoring any particular establishment of religion. ATL liberated the mentally ill from often horrid institutional conditions and gave the disabled access to employment and public accommodations. In short, ATL fought oppression, unfairness, illegality, fraud, discrimination and injustices — both small and large, at every turn. ATL often left the practice of law to go into public service to make America a better place. President Abraham Lincoln is a classic example, leaving his work as a circuit-riding trial lawyer to guide the nation through one of its most difficult times. Less well publicized are the hundreds of thousands of progeny who were role models in their communities and served in every imaginable civic activity. They donated millions of hours to serve their communities. ATL was always a leader and a doer. ATL and progeny advised and counseled presidents and paupers and served on school boards and in Congress, and several have been awarded the Medal of Honor. They have worked pro bono in hundreds of thousands of cases and worked for low wages for countless nonprofit and public interest groups.

**Survivors**

ATL is survived by offspring

known as American litigators (ALs). Legend has it that the first litigator was the bastard child of ATL and ADR. Genetic sequencing reveals that ALs have specific DNA nucleotides: ALs do not try cases; ALs "litigate" them. ALs populate large and small firms alike. Most importantly, ALs are defined by their lack of real jury trial experience. They spew courtroom jargon to clients and opposing counsel as if they were real trial lawyers. However, ALs are a fraud. Even uninitiated associates, after hearing the same few war stories over and over, sense the truth that ALs are not the true progeny of ATL. ALs prance around their law firms espousing how they routinely pound opponents into the ground in the courtroom. They don't. The closest they get to trial is as office Clarence Darrows. They file motions as if they are preparing to go to trial and bill endless hours for developing untested and unrealistic trial strategies—knowing they will never be used. ALs earn a living by generating Everest-like mountains of paper. They are paper tigers. They never work alone, always traveling in packs. As trial dates approach, their relentless bravado evaporates into unlimited excuses to settle. They will do virtually anything to avoid trial.

At a recent meeting of the American Litigators Association, the largest bar group in the country, the well-known fierce litigator, Benjamin Rambo, whose mother, grandfather, and great-grandfather were trial lawyers, gave the keynote speech. Rambo had the audience spellbound as he regaled them with his most famous war story. Rambo worked the crowd as he reached his crescendo: "I looked the mediator directly into her eyes and said . . ." A stunned silence followed, and then a single voice could be heard, murmuring, "He really showed that mediator!" A chorus of awed whispers joined in: "Unbelievable!" The offspring of the American Litigator jumped to their feet for a standing ovation.

Ironically, Benjamin Rambo has in his office a framed quote that belonged to his great-grandfather, a Tennessee country trial lawyer and southern raconteur of great renown. In faded, barely legible calligraphy are words from the commencement address by Charles May at Rambo's great-grandfather's 1875 University of Michigan Law School graduation:

> *The jury system is the handmaid of freedom. It catches and takes on the spirit of liberty, and grows and expands with the progress of constitutional government. Rome, Sparta and Carthage fell because they did not know it, let not England and America fall because they threw it away.*

Services for the American Trial Lawyer will be held at federal and state courthouses across the United States. Honorary pallbearers include Gerry Spence, David Boies, Daniel Petrocelli, and Roxanne Conlin. In lieu of flowers, memorial contributions may be sent to the ABA. ■

**Judge Mark W. Bennett** is a United States District Court Judge in the Northern District of Iowa. He is a frequent contributor to VOIR DIRE.

# Fast Track Jury Trials: The Abbreviation of the Traditional Jury Trial

**By Matthew J. Story and Brittany F. Boykin**

On March 7, 2013, South Carolina Chief Justice Toal issued the Fast Track Jury Trial Administrative Order permitting implementation of the Fast Track Jury Trial statewide.[1] The Administrative Order builds upon and provides a uniform structure to the ad hoc system used in Charleston and surrounding counties for more than 10 years. Fast Track Trial Jury Trials (Fast Tracks) have become a popular method of trying cases in those areas that have experimented with the system. The Charleston County Clerk of Court reports that from 2010 through the end of 2012, approximately 40% of cases tried to verdict were Fast Tracks. Depending on the case, Fast Tracks can provide advantages such as a date-certain trial and reduced out-of-pocket expenses.

## History of Fast Track Jury Trials in South Carolina

A Fast Track is an expedited, yet abbreviated, trial tried before an attorney who is paid by the parties to act as a judge with a six-person jury panel. It first appeared in South Carolina approximately 13 years ago. Charleston attorneys Samuel R. Clawson and Karen McCormick participated in the first Fast Track before the Hon. Daniel J. Piper in Charleston. Since then, attorneys in the First and Ninth Circuits have repeatedly engaged in Fast Tracks, which were generally called "Summary Jury Trials." Fast Tracks in South Carolina have binding jury verdicts and are used almost exclusively in personal injury cases.

## Benefits of a Fast Track Jury Trial

The Administrative Order establishes the rules and procedures for the Fast Track process. The rules are flexible to allow the parties to present their case in a traditional manner; however, the parties are also permitted to agree to a relaxed application of the evidentiary rules for a more streamlined presentation. Parties who desire to engage in a Fast Track do so by entering into a "Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer."[2] The agreement is irrevocable absent a finding of fraud.

Cases are tried before an attorney who is mutually agreed upon and compensated by the parties. This attorney, known as a Special Hearing Officer, must be a member of the South Carolina Bar and must have completed the trial experience requirements of Rule 403. The costs of the Special Hearing Officer are typically split equally between the parties.

One of the most appealing facets of the Fast Track is that the parties are given a date-certain for trial. Once the parties provide the clerk of court with a filed copy of the consent order, the case is removed from the docket and a mutually convenient trial date is set. Date-certain trials can provide an inherent cost savings by avoiding the need to appear for multiple roster meetings or the need to issue repeated subpoenas to witnesses. Under the Administrative Order, parties are also able to limit their expenses by being excused from mandatory mediation and/or arbitration.

Under the Order, the parties may agree to a high/low agreement, not to be disclosed to the jury. Defendants and their insurance carriers typically insist on a high of policy limits or less as an absolute condition. To a defendant and the defendant's insurer, this is particularly important due to limited or no post-trial recourse to the litigants. On the other side of the equation, a low can often be negotiated to provide a plaintiff with a guaranteed recovery equivalent to the minimum amount a jury might be expected to award or perhaps a first offer. In a case where the defense feels the minimum verdict is close to zero, a low is sometimes offered to help offset the costs associated with the proceeding. Sometimes the low is zero. The undisclosed high/low agreement is often the first issue discussed after the parties broach the possibility of a Fast Track. In cases involving minors or incapacitated persons, the Order requires that a circuit court judge approve the consent order and the high/low agreement just as if approving a minor settlement.

Although the Supreme Court's order makes clear that the parties *may* agree to modify the rules of evidence, the practical experience has shown that relaxing the rules of evidence has been one of the most important cost-saving features of the Fast Track Trial system. If the parties cannot agree to relaxed rules of evidence, it is likely a sign the case is not suited for the Fast

Track Trial system. An agreement to modify the rules of evidence should be written into the stipulations section of the consent order for the Fast Track. The form promulgated by the Supreme Court provides a line for "Other" agreements, and this would be an appropriate place to state the stipulations regarding this point.[3]

When discussing modifications from the rules of evidence, the parties generally agree that reports, records and affidavits may be offered in lieu of live testimony. If depositions have already been taken in a case, excerpts may be submitted or read regardless of the availability of the witness. Doctors' reports, hospital records, x-rays, EMS reports, tax records and lost wage verifications are all commonly submitted as evidence without the necessity of calling a single witness to provide foundation or authentication.

This kind of agreement greatly reduces the cost of the trial to the litigants. In a modest personal injury case, calling doctors live or securing their appearance at trial through video depositions can generate costs that exceed the reasonable value of the case or costs that substantially erode the plaintiff's recovery. In contrast, the cost of obtaining a reasonably detailed medical report is several hundred dollars. The cost of obtaining the doctor's notes is often much less. With an agreement to relax the rules of evidence, these documents can be submitted in a Fast Track Trial without the necessity of calling any witness. By waiving authentication and foundation requirements, defendants also receive the benefits of being able to introduce medical records that may include reports of pre-existing conditions, as well as documents showing other accidents and injuries that may account for the plaintiff's complaints.

The parties should also discuss whether they agree that "ex parte depositions" may be used and to what extent. The term "ex parte depositions" is expressly referenced by the S.C. Supreme Court as something that the parties may agree is admissible in a Fast Track Trial. An ex parte deposition is a term that generally refers to any deposition to which the other side is not invited. It may be a fact witness but is more often a medical witness.

*The sooner the parties agree that the case should go before a Fast Track, the greater the cost-savings that can be realized.*

Parties should not enter into a Fast Track with the expectation that they will be able to introduce evidence that would most likely be excluded by a circuit court judge. It should be noted that the evidentiary rules that are typically modified are those relating to authentication and format of presentation, not those governing relevance. Subsequent remedial measures, stale convictions and evidence of liability insurance should remain excluded, just as in traditional trials. Hearsay rules typically remain in force and unmodified.

At what point in a lawsuit should the parties and their counsel discuss the option of a Fast Track? The sooner the parties agree that the case should go before a Fast Track, the greater the cost-savings that can be realized. Cases can be identified for Fast Track before suit is filed. Others are agreed to only after the case is on the trial roster.

To consent to a Fast Track both parties generally need to have enough information to evaluate the case. This may require an exchange of basic discovery materials, either formally or through voluntary exchange. In some cases, depositions may have to be taken and subpoenas issued to have the evidence necessary for a Fast Track Trial.

The Administrative Order is silent on whether discovery will still be available after the agreement to have a Fast Track Trial is reached between the parties. In practice, attorneys usually discuss what discovery is left to be completed at the time they enter into Fast Track discussions. This allows the parties to approximate how many weeks or months will be needed before the trial is scheduled and also fosters reasonable expectations as to the time and expense each party's preparation will entail.

The Administrative Order provides that documentary evidence be exchanged at least 30 days before the scheduled trial, unless that time is modified by the order. Upon exchanging proposed documents, the parties then submit to a pre-trial conference with the Special Hearing Officer at least 10 days before the trial to address any objections and exchange a witness list.

Any evidence not produced at the pre-trial conference is excluded unless otherwise agreed to by the parties. There is typically no need to have the pretrial conference in a courtroom as there is usually no record kept of any of the proceedings.

Fast Tracks are only restricted by the agreement of the parties. The Order permits the parties to limit or forfeit post-trial motions, by agreement. However, in the case of inconsistent verdicts the Special Hearing Officer must recharge the jury to return to deliberations to resolve any inconsistencies. The clerk of court does not enter Fast Track judgments except by motion to the circuit court and a showing that the jury's verdict has not been satisfied.

### Caveat Emptor: no appeal, post-trial motions may be limited

While Fast Tracks offer many benefits to the parties involved, litigants engaging in a Fast Track forfeit their right of appeal except in instances of fraud. It is quite likely that this exception will be interpreted narrowly as it is with arbitration awards. It will not be

sufficient to prove a jury decided the matter incorrectly. Ultimately, the parties must be willing to accept whatever rulings are made by the Special Hearing Officer. There will be no appeal from a Fast Track even if the Special Hearing Officer reads a jury charge that is incorrect or incomplete. Even manifest errors of law are not appealable. Fast Track Trials are not recorded by an official Judicial Department court reporter, making an appeal even more difficult and unlikely.

The Administrative Order states that the parties *may* agree to waive motions for a directed verdict, motions to set aside the verdict, or motions for additur or remittitur. Even those who have experience in Fast Tracks should be careful to specify their agreement on this issue. Before the Court's Order, most Fast Tracks were tried with the understanding that the presiding attorney lacked the power to set aside the verdict. Under the current Administrative Order, Special Hearing Officers will have the power to hear post-trial motions for additur, remittitur and new trial unless the parties agree otherwise.

### Is your case right for a fast track jury trial?

By far, the experience in the First and Ninth Judicial Circuits is that Fast Tracks are well suited for personal injury cases. Although the practice first started with modest sized bodily injury cases, the positive experience of the bar led to larger bodily injury cases being tried via Fast Track. Cases with substantial medical expenses have been tried using Fast Tracks, as well as cases involving substantial issues of liability. There is no reason Fast Tracks must be limited to personal injury cases. At least one insurance coverage case has been tried via a Fast Track Jury Trial. In that case, the only issue was the residence of the plaintiff at the time of the accident. Other types of cases may be suitable for Fast Tracks. The best test is to ask whether the issues in the case are principally factual questions to be determined by a jury.

Questions raised in basic negligence cases, such as liability and damages, are seldom overturned on appeal. Therefore, agreeing to a Fast Track and waiving the right to appeal may be an attractive alternative in these cases. However, cases involving novel issues or a convoluted area of law are probably not suitable for a Fast Track. Care should be exercised where there is a thorny evidentiary question that has a substantial impact on the case. The parties should not agree to a Fast Track unless they are willing to accept the decision of the Special Hearing Officer, with no appeal. Such cases may be more suitable for a traditional jury trial where the parties retain the recourse of an appeal.

### Your day in court

The jury is selected after qualification and voir dire by a circuit judge. Most commonly, this is accomplished on Monday at the beginning of a civil term, but there is no reason a jury could not be selected from a criminal term jury panel. Ten jurors are drawn and each side strikes two. The six jurors are then sworn just as in a traditional jury trial. Once the jury is selected, the trial usually begins on another day, providing the litigants the entire day to start and finish the trial.

On the day of trial, the Special Hearing Officer gives a preliminary instruction. In the past, the presiding attorney has simply read an abbreviated preliminary instruction, with an introduction to this effect:

> Ladies and gentlemen of the jury, the parties have agreed to expedite the normal course of this trial. For instance, you may have noticed that there are only 6 of you rather than 12. During the trial, you may notice that the attorneys will present documentary evidence rather than call a live witness. Attorneys may present testimony by depositions or live witnesses. While the parties have agreed to some expedited procedures, this does not lessen the importance of this case, for either the plaintiff or the defendant. You are to give this case the same attention and consideration as you would if the parties had not agreed to this procedure.[4]

Each side gives a brief opening statement. The plaintiff proceeds with his case, followed by the defendant's case. Live witnesses provide direct testimony and are subject to cross-examination. To facilitate an expedited process, the Administrative Order encourages parties not to present more than three live witnesses. As an accommodation, affidavits may be read to the jury and as well as any reply affidavits. Depositions may be read and video depositions played for the jury. Records may also be read and/or introduced into evidence. Each side gives a closing argument. The "Special Hearing Officer" instructs the jury and they are sent to deliberate. Ultimately, the jury renders a binding verdict, subject only to the high/low agreement of the parties.

### Conclusion

The Fast Track Jury Trial is yet another option to resolve disputes. It is a proven viable alternative to achieving expedited and cost-efficient results while retaining the integrity implicit in a jury's verdict. ■

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[1] Fast Track Jury Trials Administrative Order, Appellate Case No.: 2013-000389, March 7, 2013

[2] The Administrative Order provides a template for the "Consent Order: Fast Track Jury Trial and Appointment of Special Hearing Officer" at http://www.sccourts.org/forms/dspFormID.cfm?formID=SCCA239

[3] See "Consent Order: Fast Track Jury Trial and Appointment of Special Hearing Officer" Form: http://www.sccourts.org/forms/pdf/SCCA239.pdf

[4] "The Basics of Summary Jury Trials" presentation by Samuel R. Clawson and Matthew J. Story of Clawson and Staubes, LLC ©2008

# Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases

By Stephen D. Susman and Thomas M. Melsheimer

## I. Introduction

For many years, trial lawyers and judges have been decrying attacks on the jury system.[1] These attacks have taken many forms and the participants have come from all branches of government and the citizenry. Some of the attacks are quite explicit. Legislatures can eliminate or make more difficult the pursuit of certain claims, such as medical malpractice.[2] This has sometimes been called "tort reform" and dates back several decades,[3] but the causes of action affected have not been limited to traditional torts. Courts can make it easier to dismiss claims by *(1)* heightening pleading requirements prior to discovery, *(2)* relaxing standards for granting summary judgment prior to a jury trial, and *(3)* making it impossible for the plaintiff to prevail by precluding expert testimony or refusing to certify class actions.[4] Potential litigants can, by written contract, force future disputes into binding arbitration, where the role of the court is limited, with a few exceptions.[5] Potential jurors too have had a hand in "attacks" on the system by refusing to show up for jury service or by aggressively seeking ways to avoid such service.[6]

Other attacks on the jury system are less explicit but also play a role in what several commentators have called "the vanishing jury trial."[7] Judges, who are understandably interested in managing congested dockets in a court system that is often resource-strapped, encourage alternative forms of resolution outside the courtroom, such as mediation.[8] In the Old West, the iconic term "hanging judge" was used to describe a judge with a reputation for harsh sentencing.[9] 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.[10]

Lawyers have also played a role in placing the jury system under attack.[11] Either because of a lack of experience or a lack of appropriate economic incentives to be efficient, lawyers have driven up the cost of litigation by unnecessary motion practice, unneeded discovery and a failure to seek cost-saving agreements and protocols. These practices all make the ultimate prospect of case resolution by a jury more expensive, more remote in time, and, consequently, less likely to occur.

The inefficiencies practiced by lawyers litigating cases before trial are not made harmless if the case actually makes it in front of a jury. In that event, 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."[12]

Though we mourn the near-extinction of the jury trial, we do not address here the broader issue of ever-increasing judicial and legislatives efforts to curtail jury trials, or the efforts by a broad segment of corporate America to keep disputes with their customers and employees out of court altogether through the use of boilerplate arbitration clauses.[13] All of these trends are real, and have been the subject of extensive commentary from a variety of viewpoints.

It is worth noting, however, one important reason why arbitration is winning the dispute resolution competition against jury trials: jury trials are deemed more expensive and more dangerous.[14] Groups like the Judicial Arbitration and Mediation Service (JAMS) and the American Arbitration Association (AAA") have developed rules that are intended to make their services less expensive.[15] Yet there is no reason why the kind of rules JAMS and AAA have adopted cannot be used for jury trials, such as trial time limits and limits on discovery, practices we discuss in this article.

In this article, we advocate change that trial lawyers can do something about — today. What we seek to change is the hesitancy of judges and trial lawyers throughout the country, especially in Texas, to compel or to agree to practices that, in our experience, lead to more engaged and informed juries, more efficient trials and outcomes that clients on both sides will be more likely to accept or, at the very least, use as a legitimate guidepost for settlement. Some of these practices involve trial procedure while others involve lawyer conduct. None of these practices is particularly radical. All have been utilized successfully in courts throughout the country and some [*436] have been institutionalized in the rules

of procedure.[16] Although, where appropriate, we cite to "success stories" and validation of the various practices, what we discuss here is not intended to be a comprehensive summary of every practice that can improve litigation generally, or even the conduct of jury trials specifically. Rather, what follows is a series of practices that we have personally utilized or experienced that, if adopted uniformly, will improve the quality of jury trials and perhaps even act as another rejoinder to those who see jury trials as something to be limited or avoided.[17]

The term "adopted uniformly" is important. We are not naive enough to think that the practices we discuss in this article, no matter how efficient and beneficial to the jury trial process they may be, will be as common as invoking "the Rule" before the first witness is called.[18] Yet they should be. None of the procedures we discuss ought to be unique to any particular jurisdiction or type of civil case. Each can be applied regardless of a case's simplicity or complexity. In fact, in all cases, the benefits of these changes are substantial, and the risks or costs are either non-existent or exaggerated.

## II. Why Sensible Practices Have Failed to Take Root Uniformly

One of the biggest obstacles to these practices, apart from simple inertia, is the presence of trial lawyers who do not try many cases and thus can neither rely on sufficient experience to be comfortable advocating these practices to their client, nor predict how they would be utilized in court.

We do not have a ready solution for this problem, and it has been the subject of extensive discussion elsewhere.[19] It is an unavoidable truth that most young lawyers today — and, by young, we mean almost any lawyer under 45 — do not have the same experience in trying cases (and will not) as lawyers who graduated from law school in the 60s, 70s, or 80s.[20] And many young lawyers who claim trial experience are counting events like arbitration as trials even though arbitration is far removed from a jury trial in many significant ways.[21]

*We place responsibility for improving jury trial procedures substantially on the counsel for the parties. They are in the best position to adopt these sensible practices by agreement and to cajole, if necessary, a skeptical court into allowing the parties to utilize agreed-upon procedures.*

Consider the following scenario that occurs at some point in nearly every case of even modest complexity. Both sides amass a team of lawyers with a senior lawyer at the helm. The junior members of the team engage in extensive discovery efforts and invariably reach the point of a dispute. Lengthy single-spaced letters or e-mails are exchanged. The dispute eventually finds its way to a motion before the court to compel discovery and, at some point before the court actually decides the dispute — either because common sense has prevailed or because the court has ordered it — the lead counsel for the case meet by telephone or face-to-face to discuss the issue. Once this meeting occurs, the dispute is often reduced to either no dispute at all or is severely limited. Why? Are the senior lawyers simply more agreeable by nature or unwilling to abide conflict? Of course not. We believe the issue is resolved because experienced trial lawyers know that 90% of everything that happens in discovery never makes its way into court, which is another way of saying 90% of what happens in discovery is not important to the outcome of the case. As such, experienced trial lawyers can decide rather quickly if something is worth fighting about. Most of the time, it is not.

Another obstacle to practices to improve the jury trial is the tendency of lawyers in an adversary system to try to determine whether any particular practice is beneficial to their side while being detrimental to the other side. This issue arises from the assumption that "if the other side likes it, I don't." There is no easy solution to this problem. This mindset generally diminishes with trial experience, but, as we stated, such experience is hard to come by. We suggest that discussions like those in this Article, supported by lawyers at bar conferences and training sessions within law firms, in addition to formal law school education in the efficacy and neutrality of such practices, may slowly ebb the fear that comes from inexperience.[22]

The final obstacle to sensible practices to improve the conduct of jury trials is the inherent conservatism of the bench.[23] Judges "have seldom been accused of being progressive."[24] They, as members of a tradition-driven institution, embrace what has been done before and are sometimes skeptical of new approaches.[25]

We offer two responses to these multiple concerns. First, the practices we discuss here are not new and are, in fact, proven to work well. Jury questions, for example, date back 100 years or more.[26] The other practices have been successfully utilized in courtrooms for decades.

Second, we place responsibility for improving jury trial procedures substantially on the counsel for the parties. They are in the best position to adopt these sensible practices by agreement and to cajole, if necessary, a skeptical court into allowing the parties to utilize agreed-upon procedures. Although many judges have written approvingly of the practices described in this Article,[27] these practices remain the exception rather than the rule for courts in Texas and throughout the country.[28] That is why it is up to counsel for the parties to adopt these improvements by agreement. Of course, a trial judge has the discretion to conduct

the trial in a different way, but it is our experience that, when presented with an agreement of counsel, the court rarely objects.

The practices we present here do not advantage either side. They are lawful and fully within the discretion of every trial judge in nearly every jurisdiction we have encountered. They improve the process of the jury trial and can, in some instances, reduce the costs of such a trial. But due to a combination of special interest politics and inertia, these practices will likely never be legislated or uniformly imposed by court rule. For those among us serious about preserving the Seventh Amendment right to trial by jury, we think these practices are critical to the survival of that right.[29] Certainly, it's about time for advocates of the Seventh Amendment, which we hope includes every trial lawyer, to show at least as much passion for preserving those rights as those who advocate Second Amendment rights.[30]

There will most likely remain people who believe that jury trials are more dangerous than guns. The perceived danger of jury trials arises from two circumstances: the availability of punitive damages in many cases (though this availability has diminished significantly over the years)[31] and the perceived difficulties of juror [*441] comprehension, especially when it comes to complex issues.[32] Trial lawyers cannot diminish the risk of punitive damages, but they can take steps to ensure juror comprehension. Making things intelligible ought to be the trial lawyer's stock-in-trade. The innovations we discuss in this Article are primarily aimed at that very issue — making the trial easier to comprehend for the jury.

## III. Practices for Improving Jury Trials

### A. Hard Time Limits

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. The courts that have adopted the practice, such as in the Eastern District of Texas,[33] rightly see time limits as a way to allocate the precious resource of judicial time to as many cases as possible.[34] Time limits do more than just conserve [*442] 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 scare resource, on the important issues rather than on collateral ones.

*If the jury is told the trial will last no more than a week or a week plus a day or two of the following week, the availability of a broader cross section of jurors increases.*

We have observed several obstacles to the practice of setting hard time limits, none of which is insurmountable. First, parties who may have spent several years litigating a case, and who have strong feelings about what issues are important, may be reluctant to bind themselves to time limits. Second, inexperienced trial lawyers may resist time limitations in part because they do not understand how to use them to their advantage in presenting their own case.

Finally, based on our experience, some judges view time limits as overly intrusive on the rights of the parties to present their cases as they see fit, or otherwise inappropriate for complex cases.

The first obstacle, the parties' fear of constraining themselves to time limits, can be overcome by the lawyers. The party's attorney can explain to his or her client that a shorter trial will be less expensive, which ought to be seen by the client as a benefit. Similarly, the attorney can explain that time constraints can lead to the improvement in the quality of the presentation which will also serve as an advantage for the client.

The second obstacle, the fears of the inexperienced trial lawyer, is rooted in lawyers not having had the opportunity to see the benefits of time limits in actual trials and can be overcome simply by experience. The benefits of time limits are widely discussed in professional journals and at professional seminars and bench/bar conferences.[35]

Indeed it is our view, based on experience, that shorter trials produce better results. This is true for several reasons. First, the quality of jurors seated on the panel increases with shorter trials. We have all had the experience of a trial judge telling the venire panel that the trial will last several weeks or even as long as a month. Hands shoot up to offer a variety of hardships and objections, most of which are freely honored by the presiding judge.[36] But, based on our experience, if the jury is told the trial will last no more than a week or a week plus a day or two of the following week, the availability of a broader cross section of jurors increases.

Nor do juries lack the facility to digest complex cases in shorter time periods. An entire industry of trial consultants makes its living conducting focus group studies or mock trials which condense an entire case into a single day or at most two days.[37] These exercises are routinely done in nearly every complex case, and trial counsel rely heavily on these studies to inform them about the strengths and weaknesses of the case, to predict a case outcome to some degree, and to guide settlement strategy.[38] If such important strategic information can be gained in a day or two of study, surely a case of nearly any complexity can be fairly

tried in two weeks or less. Finally, as we discuss later in this Article, an increasing number of juror members come from a demographic accustomed to faster and more abundant receipt of information.[39]

The final obstacle, judicial reluctance, can also be overcome by the lawyers, though an agreement by both sides may be necessary to convince a skeptical or unwilling trial judge. Trial time limits are within the broad discretion of the district court in controlling the order and timing of the trial.[40] We note that for judges who routinely set time limits, they do so without any concern about limiting the rights of the litigants, as experience has proven that the time limits aid jury comprehension and, though lawyers may protest a particular time restriction as unreasonable, it is our experience that the parties almost always fail to use every minute allotted to them.[41] In contrast, where the court refuses to set hard time limits, but instead leaves open the possibility that the trial may last longer than the amount of time allotted, the lawyers usually end up exceeding the amount of time allotted.[42]

As far as what is a reasonable time limit for a trial of moderate complexity, we believe between fifteen and twenty hours per side is a generous amount of time.[43] In the Eastern District of Texas, for example, long known as one of the most active patent venues in the country,[44] cases involving complex technology and billions of dollars in alleged damages are routinely tried in two weeks or less, and less-complex patent trials are often concluded with five or six total days of trial time.[45] No matter the time restriction, we are not aware of any reports from jurors in any of the Eastern District venues that a trial was hurried.

Time limits can be tailored to fit the specific needs of any case. Certain nuances can be agreed to by counsel before presenting the proposal to the court. For example, based on our experience, some judges include "all" the trial time in time limits, including opening statements and closing arguments. We think that approach carries the practice too far. Judges rightly impose equal time limits on each side's opening and closing remarks, and we do not see a benefit to the notion of one side "saving" its extra time to use for an extended closing argument. If anything, a party should be discouraged from taking excessive time in closing, a point in the trial where most jurors already have all the information they need to make a decision.[46]

Another nuance is "docking" time from the time allocation of the losing party for the time spent hearing an objection about the admissibility of an exhibit or testimony. This practice is inadvisable for two reasons. First, it requires too much precise timekeeping from the court in deciding, after a ruling that takes a middle ground on admissibility, to whom to allot the time. Second, as we discuss below, by agreeing to a practice that decides nearly all of the exhibit admissibility issues before the trial starts, the need for objections during trial can be almost eliminated.[47]

Simply put, time limits can be applied to every jury trial with beneficial effects for the parties, the court, and the jury. For trial counsel skeptical of this statement, we offer our own experience in trying complex commercial cases of all kinds in timed trials of an absolute maximum of four weeks, and many in one to two weeks. The work involved with time limits comes before lead counsel ever rises to address the jury. During preparation, lead counsel must come to grips with what the important issues are in the case, understand how he or she can best present them, and embrace the realization that the jury is only going to be able to take in so much information effectively. Each of these steps in the preparation process will help prevent trial counsel from overburdening the attention span of the jury with witness after witness, deposition clip after deposition clip, and document after document, none of which advances the trial counsel's cause. A leading jury consultant once famously observed that eighty to ninety percent of jurors make up their minds at the conclusion of the opening statements by both sides or shortly thereafter.[48] Although our experience does not fully comport with that broad assessment, most trial lawyers acknowledge that jurors develop strong opinions long before the last witness takes the stand, and rarely would a longer presentation truly improve one side's chances of winning.[49]

We have long believed that trial length does not favor either side in a trial and thus limits on trial time are outcome neutral. Although it is sometimes couched as "conventional wisdom" that a shorter trial favors the plaintiff, we have not seen that play out in our experience. Recent empirical research supports this view. In a review of every patent trial conducted between 2001 and the middle of 2011, the researchers observed no statistical difference between the trial length of a plaintiff win or a defendant win.[50] These results should not surprise a seasoned trial lawyer in patent cases or in any kind of case. A contrary result defies logic and common sense. Regardless of the burden of proof, both sides in a civil jury trial have a story to tell, a position to advance. It simply does not take less time to put on a persuasive plaintiff's case than a persuasive defendant's case. Defense counsels who insist that they need more time to prevail in front of a jury instead may need to spend more time out of court evaluating their case and developing a compelling story. The axiom of "the more you say, the less people remember" [51] is rarely more true than in a civil jury trial.

Nonetheless, not every judge will set time limits as a matter of routine, even though the practice would seem to be squarely in their interests as stewards of scarce judicial resources. Comments such as "I'd like this case done by next Friday," from the court do not count as hard time limits. Those kind of precatory statements do not result in the full advantages inherent in hard time limits. Like the other practices we describe in this article, trial counsel must assume the responsibility for coming to an agreement on a time limit and should present it to the court.

### B. Juror Questions

The practice of jurors asking questions of witnesses is not a new development. In one of the

celebrated trials of lawyer Abraham Lincoln in 1859 involving an alleged homicide, a juror asked a question of one of the state's witnesses. No objection was raised by either side.[52] Military tribunals have long followed the practice of allowing the fact finders, known as "members," to ask questions of witnesses.[53]

Today, the practice is mandated in civil trials in four states (Arizona, Colorado, Florida, and Indiana),[54] meaning the trial judge must permit jurors in civil cases to pose questions to the witnesses. It appears to be prohibited in several other states and left to the discretion of the trial court in the remaining states.[55] In other words, juror questions are the exception, rather than the rule, in the vast majority of courtrooms.

In an age of instant feedback by inquiries via Google and Twitter, we believe that allowing jury questions can be critical to engaging jurors. We do not make this comment as a mere anecdote. An increasing number of jurors come from the generations known as "Gen X" and "Gen Y," both demographics accustomed to receiving information, and assessing it, in ways far different from so-called "baby boomers." [56]

Many of the Generation Xers grew up with a relatively strong familiarity with computers and the Internet. Members of Generation Y came of age with an even more sophisticated understanding of the Internet as a learning tool, including the power of search algorithms like Google to put answers to questions at their fingertips.[57] Their attention spans are less than that of their parents.[58] The notion of not providing the opportunity for jury trials to be conducted with questioning by jurors, when an increasing number of jurors will be in the Generation X and Y profile, strikes us as myopic in the extreme.

Unlike the trial time limits discussed above, jury questions have been the subject of rather extensive judicial analysis and scholarly commentary. The distinguished Judge Easterbrook, writing for the Seventh Circuit in 2009, approved the use of jury questions and concluded that the practice kept the jurors alert and focused on the issues in the case.[59] Texas civil courts have repeatedly approved the practice.[60]

Yet in our experience, juror questions are not routinely used in complex litigation. Various objections have been offered, none of which has significant merit.

One objection to the use of questions is the supposition that the jurors will become advocates, as opposed to neutral fact finders, or that the questions will cause the jurors to formulate positions early in the trial before all the evidence is introduced and the instructions are provided by the court. Empirical evidence does not validate this fear and, in any event, strikes us as a naive view of social science.[61] Jurors, like any of us, constantly come to conclusions about facts in the case, regardless of whether they are permitted to ask questions. Empirical research has shown, for example, that jurors embrace a "story model" of decision making and "jurors bring preconceptions and knowledge of the world to their task, [and] they actively construct narratives or stories from trial evidence ..." to "increase the story's internal consistency and convergence with their world knowledge."[62] In other words, jurors are likely to construct a story to fit the evidence regardless of whether they are permitted to ask questions. They may well keep an "open mind," but that is a far cry from saying that they are not making decisions about the evidence and the witnesses as the case proceeds. Concerns about jurors failing to keep an open mind can be dealt with as they are in every trial — with repeated cautionary instructions from the court to withhold judgment until the deliberation process.

Other opponents of jury questions offer the related concern that juror questions will tend to favor the plaintiff, because they are the party putting on evidence first.[63] These opponents argue that since the plaintiff bears the burden of proving its case, questions asked early in the trial process may facilitate the plaintiff's proof.[64] We have not seen this concern materialize in practice. Moreover, if defense counsel is worried about the plaintiff's case being too intelligible or that the fragility of her defense could not survive the plaintiff's case-in chief, that concern should counsel the lawyer towards settlement, not towards the prohibition of jury questions.

Other opponents claim that the practice must be prohibited because jurors may ask impermissible questions, or ones calling for inadmissible evidence.[65] Yet, in every trial, the attorneys themselves pose some impermissible questions, and the court intervenes appropriately upon objection. Consequently, this fear fails to justify abjuring the practice. This can be avoided by having the jurors put their questions in writing and having the court screen them before they are asked to the witnesses. A related concern posits that an unasked juror question will result in the juror blaming one party or the other.[66] We have no experiences that have supported this fear.

Finally, opponents object based on the premise that the use of juror questions materially adds to the length of the trial.[67] This concern is overblown. Although it does take up court time to consider juror questions after each witness, and the questions may well provoke additional questions from counsel, the additional time is minimal — perhaps thirty to forty-five minutes in a two-week trial.[68]

The use of juror questions in a trial has enormous benefits to the fact-finding process and the juror experience. Based on our experience, the use of these questions increases juror understanding of the issues in real time, and does so in a way familiar to an increasing number of jurors from younger generations. It encourages jurors to pay attention to the trial by investing them with the power to inquire about an issue that is important in their mind.[69] This is especially true in a trial lasting more than a few days. Finally, the substance of questions asked can provide important insight to the lawyers about how their case is perceived by the jury, and what issues demand more clarification or attention.

Last year, the Chief Judge of the Eastern District of Texas, Leonard Davis, permitted the jury to ask questions in a patent case involving an online tool for seat selection in an

airline and event ticketing website.[70] He did not seek the parties' advice on the process in advance and notified the parties of the process the day the case began.[71]

Judge Davis employed a process for jury questions that can serve as a model for questions in any court. He utilized safeguards and procedures that have been widely discussed and approved.[72] They strike us as the best "rules" for jury questions in practice. In Judge Davis's procedure, he explained that jurors were allowed to ask questions of every witness after a witness's testimony had concluded, but before he or she left the stand.[73] All jurors were provided a blank sheet of paper to ask questions.[74] After each witness concluded testifying, each juror would pass the sheet of paper to the bailiff, whether or not the paper contained a question.[75] The court screened the written questions at side bar with the attorneys present.[76] The court and counsel evaluated the questions to determine if the question was appropriate, and the court afforded both sides an opportunity to make objections.[77] If the court agreed a question should be asked, the court read the question and the witness would answer.[78] Counsel for both sides was then allowed follow-up questions directed to the issue raised by the question.[79]

This process was quick, efficient and allowed the trial to proceed without undue delay. The questions were sometimes mundane — for example, "How long did you work at company X?" — and sometimes insightful. A key issue in the case ended up being why a 15-year-old version of a software program had not been preserved by a third party. One juror posed this question to the very first witness with an ability to answer the question. Yet, neither counsel for the parties thought to ask it first. Judge Davis found the process so successful that he publicly stated that he would probably continue to use it in future trials.[80]

Juror questions were also successfully utilized in a minority stockholder oppression and breach of fiduciary duty case in state court in Dallas in 2009.[81] Instead of the judge initiating the procedure, both sides agreed and presented to the judge a proposal for the jurors to ask questions in a manner similar to the procedure used by Judge Davis in Tyler.[82] The presiding judge of the 192nd District Court, Judge Craig Smith, embraced the procedure, along with time limits for the overall trial.[83] Juror questions in the case were plentiful and allowed both sides the opportunity to adduce clarifying testimony from the witnesses.[84]

*Because the [juror] questions frequently reached the heart of the matters..., they allowed counsel on both sides to tailor their presentations more effectively...There was rarely an instance when a question by a juror did not lead to clarifying questions on redirect or additional inquiries on the subject with subsequent witnesses.*

One issue that arose in the case involved a potential concern with the use of juror questions, but it was easily managed by the trial judge. Although the jurors asked questions anonymously, over time the identity of a particular juror who had a question for nearly every witness became clear and, as the trial wore on, the juror became increasingly adversarial with his questions, prefacing one with: "Answer the following question yes or no."[85] Judge Smith did not allow these types of questions to be asked.[86] The court always retains the power to refrain from asking a juror question, and the best practice is for the court to inform jurors of this possibility at the beginning of the trial. An instruction that informs the jurors that sometimes a question will not be asked, either because it is not allowed under the rules or because it will be addressed with another witness, is a simple way of ensuring that jurors do not become confused or frustrated if one of their questions is not posed.

A final issue of concern regarding juror questions is to what extent the questions can be referenced by trial counsel in closing argument. Judge Smith allowed full use and reference to questions by the jurors;[87] Judge Davis did not, and instructed counsel to refrain from any reference to juror questions.[88] Although we understand Judge Davis's concern with giving too much attention to juror questions, we think it is sensible to allow counsel to reference them in an appropriate way, just like references to questions from counsel or from the court.

As one of the authors of this article was trial counsel for a group of defendants in the above-described patent trial (the CEATS case), and since both authors served as co-counsel for the plaintiffs in the state court case, we can endorse firsthand the overall benefits of this procedure.[89] In both cases, juror questions had all the traditional benefits of the practice and no visible disadvantages. The trial was not extended in any material way, and both sides came in under the time limits prescribed by the court. Because the questions frequently reached the heart of the matters in dispute, they allowed counsel on both sides to tailor their presentations more effectively. For example, in both trials described in this Article, there was rarely an instance when a question by a juror did not lead to clarifying questions on redirect or additional inquiries on the subject with subsequent witnesses. Finally, the questions allowed counsel for both sides to assess — admittedly in an imperfect way — how the jury was reacting to the evidence, and it provided both sides at least some assurance in advising their clients on their prospects.[90] Why any trial lawyer would not want to know this type of information

is beyond us. Lawyers (or their clients) pay thousands of dollars in an imperfect attempt to recreate the actual jurors' perspectives and views when they hire a "shadow jury" to give feedback on the day's events in the courtroom. We believe the more effective practice is to hear this information straight from the horse's mouth.

### C. Interim Arguments

As with the other practices described in this article, the use of interim arguments — statements about the evidence offered by counsel throughout the trial — is not a new concept. Judge Robert Parker, a former district court judge in the Eastern District of Texas and justice on the United State Court of Appeals for the Fifth Circuit, wrote encouragingly about the practice in 1991.[91] While it surfaces in some courts, it is far from routine and in our experience, most cases do not utilize it.

Interim argument, in Judge Parker's words, "permits counsel to respectfully focus the jury's attention on the significance of developments of a trial as they occur."[92]

More specifically, interim argument allows counsel to point out to the jury why a witness is being called, to highlight which aspect of the case the witness will address, to tell the jury the significance of an answer to a question, to direct the jury's attention to a particular instruction or rule of law and connect it to testimony or exhibits, and to comment on strategy of opposing counsel.[93]

Interim argument has been deemed especially effective in long trials where the time between hearing a piece of evidence and reaching a verdict may be many weeks.[94] Our strong preference for hard time limits and shorter trials does not, however, make the practice of interim arguments any less desirable. In fact, in timed trials involving complex issues — like a patent or antitrust case — interim arguments can help the jury make sense of evidence and issues about which they are likely to be very unfamiliar.[95]

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Properly used, interim argument can expedite a trial's progress. This is especially true when a party needs to address testimony on a particularly nuanced issue, such as inducement in a patent case, or market definition in an antitrust case. The use of an interim statement to preview testimony or summarize its importance allows the party adducing the testimony to focus on the important facts without much testimonial wind up or explanation. By doing so, the proponent of the evidence can streamline her presentation — a lengthy deposition clip can, in many instances, be reduced to a few key minutes when combined with an explanatory introduction or preview. Or a witness whose testimony is legally important to a particular element of proof — in a way that may not seem obvious to the jury — can be highlighted and explained.

There are no legal or procedural obstacles to this practice, as it falls within the court's broad discretion in how to conduct the trial.[96] It can be effectively employed by giving each side 30 minutes, broken down into no more than five-minute segments, to use throughout the trial as the counsel deem fit. Perhaps in a shorter trial of only a few days, a briefer amount of time can be allotted.[97]

### D. Use of Preliminary Substantive Jury Instructions

At first consideration, the notion of preliminary jury instructions may seem out of place in this discussion. After all, it is commonplace in almost every court for the trial judge to give a set of instructions to the jury before the trial begins. These instructions include information on how the trial is to be conducted, the schedule, and perhaps even a brief overview of the arguments to be offered by each side.[98]

Such general instructions are not what we are advocating here. Rather, we endorse the use, at the beginning of the trial, of more substantive legal instructions about the issues that the jury will confront in the case. This approach has been endorsed by judges and commentators,[99] but like the other improvements advanced in this Article, is infrequently used in most courts.

For example, Chief Judge James Holderman of the Northern District of Illinois wrote approvingly of the use of such preliminary instructions outside of the patent context in a 2009 law review article.[100] He noted specifically that preliminary instructions on the law helped "orient" the jurors in the case and allowed them to more easily make factual connections between the evidence and the issues in the trial.[101]

The practice is frequently used in the Eastern District of Texas in patent cases. Typically, the court in an Eastern District patent trial will play the Federal Judicial Center's so-called "patent video," a video summarizing the patent process and providing some background legal instructions on the law of infringement and invalidity.[102] The video is approximately 17 minutes in length and lays out, in a neutral fashion, the common issues that arise in many patent trials.[103] This practice normally occurs prior to voir dire, and helps orient the entire panel to the import of the attorneys' questions during jury selection. Nonetheless, outside the Eastern District of Texas and the Northern District of Illinois, the practice of pre-instruction is not widespread.

Perhaps an unwise belief that jurors from older generations would

be able to completely and intelligently sift through days of testimonial and documentary evidence — and only at the end of trial receive guidance on the importance of the evidence, or its relation to proof of a cause of action or defense — led to this practice. However, it strikes us as bordering on foolhardiness to expect a juror from Generation X or Y, accustomed to assembling and processing a vast amount of data over a short period of time,[104] to take in all the evidence in a trial without substantive guidance on the law to govern their decision.

Based on our experience, some opponents object that only after the trial concludes do the parties and the court truly know the issues before the jury. While perhaps technically true, it is only a poor trial advocate indeed who begins the trial without a largely complete sense of the legal issues in the case. Certainly, if there are issues dependent on the admission of a particular piece of evidence, whether documentary or testimonial, it is wise to avoid pre-instruction on those precise issues. But that strikes us, and has struck judges that use the practice, to be a rare exception rather than the rule.[105] Having the court provide general instructions about the legal issues in a case is always sensible, and will not vary regardless of the actual evidence adduced.

### E. Juror Discussion of Evidence Before the Conclusion of Trial

The principle that the jurors should not discuss any issue in the case before the evidence has been concluded and the jury finally instructed is well established.[106] Nonetheless, we believe that a serious discussion of improving civil jury trials must include a re-evaluation of this longstanding approach.

The argument for prohibiting juror discussion before the conclusion of the evidence is easy to understand. The jury is supposed to consider all the evidence, keep an open mind, and only come to a conclusion after all the evidence has been presented and in light of the legal instructions provided by the court.

But of course the notion that jurors remain passive recipients of information who store it for later consideration defies common sense. That is the description of a hard drive, not a human being. People learn in different ways, no doubt, but our experience as trial lawyers tells us that no one learns in the way presumed by the current practice of prohibiting jury discussion of the evidence during the trial. Indeed, every trial lawyer takes note at the end of the trial day of a particularly effective cross-examination or the admission of an important document. Why would we do so if, in fact, we didn't expect that at least some of the jurors drew the precise conclusions we hoped they would draw? In any event, it seems quite likely the current practice inhibits juror comprehension of the issues, especially in a trial lasting more than a few days.

Michigan lawmakers recognized the counterfactual characteristics of the traditional approach in adopting a rule in 2011 that allows jurors to discuss the evidence while the trial proceeds.[107] Under the Michigan practice, the court, as is customary everywhere, informs the jury that they are not to decide the case until after they hear all the evidence, legal instructions, and arguments of counsel.[108] However, the court may (but it is not required to) also instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during breaks in the trial so long as all the jurors are present and so long as those discussions are understood to be tentative and not final.[109]

Before Michigan adopted the new rules,[110] the courts conducted a pilot program for several years testing this approach along with other reforms, including some discussed in this Article.[111] The pilot program sought feedback on the rules from lawyers and the jurors themselves.[112] The feedback produced a startling finding. With respect to the new practice of allowing discussion of the case during the trial, over 90% of the participating jurors viewed the practice as increasing understanding of the issues and the fairness of the trial overall.[113] Only one in ten lawyers believed the new practice increased the fairness of the trial and barely two in 10 believed that the process improved juror comprehension.[114]

That last point, the disparity between what jurors thought about their own comprehension and what lawyers believed about juror comprehension illustrates to us a common impediment to this kind of reform, as well as the other reform-minded practices we advocate in this Article. Lawyers and judges are used to conducting trials in a particular way, the way they learned how to do so or the way "it has always been done." This kind of inertia blocks sensible reforms, even when empirical evidence, such as that gathered in Michigan, demonstrates that real improvement can be had. We advocate here a fresh look at the conduct of civil jury trials and an embrace of procedures — some new, some not new but infrequently used, and some common practices that may not be universal. To achieve the reform we are seeking lawyers and judges are going to have to reevaluate previously held views and traditions. That jurors themselves find a particular approach almost unanimously helpful — like discussion of the evidence before deliberations — should cause lawyers and judges to take notice that the civil jury trial not only can be improved, but must be.

What might be objectionable about interim juror discussion? It might be argued that it somehow creates "unfairness" for one side or the other. As with other practices we advocate in this Article, we do not see the logic of such a claim. Discussion of the evidence by the jurors should not advantage either side any more than the use of time limits, juror questions, interim argument, or preliminary jury instructions. If there are weaknesses in the plaintiff's presentation, for example, it seems to us those would be as easily identified by juror discussion as strengths in the presentation. As for defendants concerned that their evidence is presented later in the trial, we note that cross-examination is designed to bring out at least portions of the defense case and there is no reason to believe that defense-oriented evidence is any less likely to be discussed by jurors than plaintiff-oriented evidence. In short, we view an objection based on unfairness as illogical.[115]

### F. Trial by Agreement

The final concept we discuss is not a single practice but an approach that we believe will improve every jury trial. This approach, first conceived by one of the authors, Stephen Susman, is one that embraces a process seemingly at odds with the adversary system - trial by agreement.[116] In the Susman approach, the crux of conducting a trial by agreement is to enter into a series of agreements designed not to advantage either side, but instead to aid in an efficient and intelligent presentation of the case to the jury.

There are other important benefits as well outside of the jury context, such as saving court resources by avoiding useless and time-consuming disputes, or reducing the expenditure of fees and costs by both sides.[117] Some of the agreements concern pretrial matters where inefficiencies in litigation are most prevalent, such as limiting the length and number of depositions, setting clear provisions for electronic discovery, limiting expert depositions, and sharing a court reporter.[118]

Many of the proposed agreements focus directly on the conduct of the trial itself. These agreements do not simply save time and reduce the costs associated with unnecessary disputes; they also result in a trial process that produces more intelligent and informed results.[119] In that sense they are a substantive improvement to the jury trial.

This approach to trying a case can be seen as an exercise in improving lawyer civility. By reducing the issues in dispute to what is truly material and outcome determinative, attorneys eliminate fractious disputes that can disrupt the relationship between opposing counsel.[120] But that laudatory outcome is a side benefit to the trial by agreement approach, not a primary goal. The goal is an improved jury trial.

The standard list of proposed trial agreements includes the practices we have previously discussed — jury questions, trial time limits, and interim arguments. But the list includes a variety of other practices that will aid the jury trial process.[121]

*The questionnaire must be brief enough so as not to burden the venire members in filling it out.*

One important practice concerns the treatment of exhibits. With competent trial counsel on both sides, there is no reason that agreements cannot be reached on all but a handful of exhibits. It should always be agreed, for example, that a document produced by either party is deemed authentic.[122] Further, in connection with the exchange of proposed trial exhibits, any exhibit not objected to should be deemed admissible.

We say "admissible" and not "deemed admitted" purposely. There are appellate risks inherent in simply "dumping" countless exhibits into evidence. This practice can provide a bloated and confused record on appeal. Consequently, the better practice is for counsel to offer the exhibits into evidence on at least a witness-by-witness basis to avoid an evidentiary "dump."

Counsel should also consider agreeing to the use and content of "juror notebooks."[123] Counsel can provide this resource to the jurors to aid their overall understanding of the case. These notebooks would not contain any argumentative material and would provide a glossary of anticipated terms used throughout the trial, a list of witnesses and other involved individuals, and a short chronology of the events that transpired.[124] Attorneys on both sides could consider including exhibits within the notebooks; however, this type of inclusion is likely to create some disagreement. Counsel could solve this problem by agreeing that each side can pick around five exhibits to include.[125]

Another important practice is the use of an agreed juror questionnaire. Given the limited attorney voir dire available in most federal courts, and the desire for state court judges who allow the practice to do so efficiently, an agreed questionnaire for each unique person to answer will streamline the process and make jury selection a more intelligent exercise.[126] An agreement is critical for this practice to be effective because few judges will have any interest in parsing each side's proposed questions and adjudicating the competing proposals.[127] Basic information that both sides can use should take precedence over questions designed by a psychologist or jury consultant to draw out some critical decision-making trait of a venire person based on what they are reading or whether they watch "reality television" or HBO.

The questionnaire must be brief enough so as not to burden the venire members in filling it out.[128] In some jurisdictions, it will be possible to mail the questionnaire to the venire in advance of the trial, and have it returned by mail so that it can be made available to both sides several days before jury selection.[129] In jurisdictions where this is not possible, and the form is filled out and delivered to counsel on the same day, brevity is critical to allow for a meaningful assessment of the information.

We note that the Texas Supreme Court recently adopted new rules for expedited actions.[130] These new rules establish quick trial settings, limited discovery, and hard time limits on trial.[131] However, they only apply to cases where the relief sought is under $100,000.[132] We praise the Texas Supreme Court for helping move the jury trial process in the right direction; however, as we have advocated throughout this Article, we strongly believe that the principles behind these new expedited trial

rules should be applied universally and should not be limited to causes where relief is under $100,000. By limiting the application of the rules, larger cases will now potentially take longer to get tried and thus will be more expensive and quite possibly less likely to get tried at all. The relatively narrow reach of the new rules suggests to us that neither courts nor legislatures will likely adopt the changes that we have proposed in a broad way by law or by rule. It is therefore even more important for trial lawyers to push for agreements among each other and then to push judges to implement these agreements.

## IV. Conclusion

Trial lawyers should be vocal supporters of the constitutional right to trial by jury in civil cases. They ought to be the "jury lobby." Unlike jurors, who experience the process infrequently and thus may lack the insight into how the system can be improved, or judges, who act as neutrals presiding over the process, and have significant responsibilities in addition to presiding over jury trials, trial lawyers ought to have a vested interest in making the jury trial function more intelligently. For reasons discussed in this article, fewer lawyers have the kind of trial experience necessary to advocate sensible improvements. Others lack the passion we have for the jury system. But for those lawyers who do have the experience and passion, and the young lawyers who work with them, it strikes us that they are the ones who should support the practices we have outlined in this article, and any others designed to make civil jury trials a continuing, intelligent, and efficient part of our democratic government. ■

## Legal Topics:

For related research and practice materials, see the following legal topics: Civil Procedure Counsel General Overview Contracts Law Contract Conditions & Provisions Arbitration Clauses Healthcare Law Actions Against Healthcare Workers Tort Reform.

[1] See, e.g., Patrick E. Higginbotham, So Why Do We Call Them Trial Courts?, 55 SMU L. Rev. 1405, 1423 (2002) ("Ultimately, law unenforced by courts is no law. We need trials, and a steady stream of them, to ground our normative standards ... . Trials reduce 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."). See also Jennifer Walker Elrod, Is the Jury Still out?: A Case for the Continued Viability of the American Jury, 44 Tex. Tech L. Rev. 303, 303 (2012) ("The American jury system is under assault ... . As an unabashed defender of the jury, I have come here today to set out the contrary case, to remind us why the jury is worth fighting for.").

[2] See, e.g., Tex. Civ. Prac. & Rem. Code Ann. § 74 (West 2011) (enacting restrictions on health care liability claims in Texas). See also Congressional Budget Office, The Effects of Tort Reform: Evidence from the States ix (June 2004), available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5549/report.pdf (last visited Apr. 20, 2013) (listing several other types of tort reform such as modifying joint-and-several liability, modifying the collateral-source rule, limiting non-economic damages, and limiting punitive damages).

[3] See Congressional Budget Office, supra note 2, at vii (explaining how tort reform gained its prominence in the mid-1980s).

[4] See, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (discussing heightened pleading requirements under Rule 8 of the Federal Rules of Civil Procedure); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007) (same); Kelly J. Kirkland, Motions to Dismiss Come to Texas, Law 360 (June 13, 2011), available at www.law360.com/articles/249786/motions-to-dismiss-come-to-texas (last visited Feb. 10, 2013) (discussing enactment of procedures for filing motions to dismiss in Texas). See also LaserDynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51, 81 (Fed. Cir. 2012) (holding that the expert's opinion regarding a royalty calculation was "arbitrary and speculative" and therefore required a new trial to be held for determining damages).

[5] Stone v. E.F. Hutton & Co., 898 F.2d 1542, 1543 (11th Cir. 1990) (noting that "federal law favors arbitration").

[6] See, e.g., Courtney Zubowski, Ditching Duty: 70 Percent of Summoned Jurors Never Show in Harris County, KHOU 11 News (July 20, 2012), available at http://www.khou.com/news/Ditching-duty-70-percent-of-summoned-jurors-never-show in-Harris-County-163131306.html (noting that over 70% of jurors summoned failed to appear for jury service in one Texas county). See also Andrew G. Ferguson, Why Jury Duty Matters (2013) (arguing for the constitutional importance of jury duty in the face of general apathy towards it).

[7] Patricia Lee Refo, Opening Statement - The Vanishing Trial, J. Sec. Litig., A.B.A., Vol. 30 No. 2, Winter 2004, at 2. See also Stephen Landsman, The Impact of the Vanishing Jury Trial on Participatory Democracy, Pound Civil Justice Institute, 2011 Forum for State Appellate Court Judges (2011); Craig Smith & Eric V. Moye, Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts, 44 Tex. Tech. L. Rev. 281, 295-300 ("The Seventh Amendment right to a jury trial is vanishing before our very eyes."). See also Mark Curriden, Number of Civil Jury Trials Declines to New Lows in Texas, Dallas Morning News, June 22, 2013, http://www.dallasnews.com/business/headlines/20130622-number-of-civil-jury-trials declines-to-new-lows-in-texas.ece (last visited June 29, 2013) ("In 2012, there were fewer than 1,200 civil jury trials in state district courts in Texas ... a 64% decline from 1997, when there were 3,369 jury trials. The federal courts in Texas have seen an equally significant decline. U.S. district court judges conducted 360 civil jury trials in 1997 but only 135 last year.").

[8] See, e.g., Paul L. Beeman & Scott L. Kays, Opinion: Judges Encourage Use of Mediation, The Reporter: An Edition of the San Jose Mercury News (Mar. 3, 2013), http://www.thereporter.com/forum/ci_22708493/opinion-judges-encourage-use mediation (stating that "because of budget cuts and increased filings, courts are unable to offer a speedy trial for every case" but that "fortunately, alternative dispute resolution methods, such as mediation, exist"); Mediation and Conflict Resolution Office, What is Mediation?, Maryland Judiciary, http://www.courts.state.md.us/macro/whatismediation.html (last visited Apr. 20, 2013) ("The Maryland Judiciary recognizes that in appropriate cases people may achieve more satisfactory outcomes in a less time consuming and less expensive manner by using mediation. The courts function as problem solvers and realize the underlying problems in many disputes cannot be resolved by the decision of a judge or jury."). See generally Trace W. McCormack, Susan Schultz & James McCormack, Probing the Legitimacy of Mandatory Mediation: New Roles for Judges, Mediators and Lawyers, 1 St. Mary's J.of Legal Malpractice & Ethics 150 (2011), available at http://www.stmaryslawjournal.org/pdfs/McCormack_Step12.pdf (last visited Apr. 20, 2013) (questioning the "predominant use of standing rules or judicial practices referring to mediation").

[9] Black's Law Dictionary 917 (9th ed. 2009).

[10] See Marc Galanter, "... A Settlement Judge, Not a Trial Judge:" Judicial Mediation in the United States, 12 J. L. Soc'y 1, 6-8 (1985) (describing a variety of techniques employed by judges in which they actively encourage settlement).

[11] See Paul W. Grimm, The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burden, or Can Significant Improvements Be Achieved Within the Existing Rules?, 12 Sedona Conf. J. 47, 49 (2011) (discussing the problems of excessive discovery and suggesting that "lawyers who profit from actions that increase the cost of civil litigation - notably, adopting a gratuitously confrontational approach to discovery - also contribute to the problem").

[12] See 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) (noting that a common juror complaint is "repetition and redundancy of trial testimony").

[13] See, e.g., Colleen Murphy, Determining Compensation: The Tension Between Legislative Power and Jury Authority, Tex. L. Rev. 345, 353 (1995) (noting that the Supreme Court has upheld legislative initiatives curbing the reach of the Seventh Amendment); Landsman, supra note 7, at 10-14 (discussing how judicial policy favoring arbitration and dismissal has resulted in reduced access to jury trials); Refo, supra note 7, at 3 (stating some reasons why judges prefer to dispose of cases before trial). See also Michael F. Donner, Litigation 101: Thinking Through the Use of Boilerplate Provisions for Arbitration, Mediation, and Attorney Fees in Real Estate Contracts, Probate & Property, May/June 2003, at 20, available at mhttp://www.americanbar.org/content/dam/aba/publications/probate_property_magazine v17/03/2003_aba_rpte_pp_v17_3_may_june_(last visited Apr. 20, 2013) ("Today, almost as an instinctual reaction, lawyers frequently try to avoid placing their clients in a position in which litigation is the sole option if a dispute arises. ADR clauses have become so commonplace in real estate contracts that lawyers often insert them into the agreements first and then ask the necessary predicate questions later.").

[14] See Refo, supra note 7, at 3-4 (finding that trial lawyers have made the process of getting to trial too expensive and litigants - particularly corporate litigants - can no longer abide the perceived uncertainty of a jury trial).

[15] See ADR Clauses, Rules, and Procedures, JAMS, http://www.jamsadr.com/rulesclauses/xpqGC.aspx?xpST=RulesClauses (last visited Apr. 20, 2013) ("In order to save clients time and money, JAMS has instituted new procedural options that allow the crafting of a process that is commensurate with the dispute. With JAMS new Optional Expedited Arbitration Procedures, parties can choose a process that limits depositions, document requests and e-discovery."); AAA Court - and Time - Tested Rules and Procedures, American Arbitration Association, http://www.adr.org/aaa/faces/rules?_afrLoop=387753411397887&_afrWindowMode=&_afrWindowId=null#%40%3F_afrWindowId%(last visited Apr. 20, 2013) (emphasizing that AAA's rules and procedures help "provide cost-effective and tangible value to users across a wide variety of industries and cases"). See also W. Mark C. Weidemaier, The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process, 40 Creighton L. Rev. 655, 658 ("A number of arbitration providers, including AAA and JAMS, have adopted "due process' protocols designed to ensure minimally fair procedures in consumer and employment disputes.").

[16] See Ill. R. Civ. P. 243 (allowing jury-initiated questions in civil trials). See, e.g., S.E.C. v. Koenig, 557 F.3d 736, 741-42 (7th Cir. 2009) (approving juror-initiated questions); United States v. Richardson, 233 F.3d 1285, 1289 (11th Cir. 2000) (approving juror-initiated questions and collecting cases from other circuits to the same effect); Abraham v. Exxon Corp., No 14-98-00888-CV, 2001 WL 894261, at 6 (Tex. App. - Houston [14th Dist.] 2001, pet. denied) (ruling that a trial judge has "broad discretion to control a trial" and thus trial time limits were acceptable); Hudson v. Markum, 948 S.W.2d 1, 3 (Tex. App. - Dallas 1997, writ denied) (approving use of juror-initiated questions); Fazzino v. Guido, 836 S.W.2d 271, 276 (Tex. App. - Houston [1st Dist.] 1992, writ denied) (approving use of juror-initiated questions); Ted A. Donner, New Rule 243 Allows Jurors to Ask Questions of Witnesses in Civil Cases, DuPage Cnty. Bar Ass'n Brief, June 2012, at 18-19, available at http://dcbabrief.org/vol240612art1.html (last visited Feb. 11, 2013) (discussing the new Illinois rule of civil procedure allowing juror-initiated questions).

[17] See generally Ferguson, supra note 6 (arguing for the constitutional importance of jury duty in the face of general apathy towards jury duty).

[18] Fed. R. Evid. 615 (allowing parties to prevent witnesses from hearing other witnesses' testimony in order to avoid fabrication and expose inaccuracies); Tex. R. Evid. 614 (same).

[19] See, e.g., David W. Elrod & Worthy Walker, Fact or Fiction: Are There Less Jury Trials & Trial Lawyers? If So, What Do We Do About It?, 3 Litig. Comment. & Rev. 53 (June / July 2010), available at www.elrodtrial.com/docs/publications/good-reads-david-elrod.pdf (last visited Feb. 10, 2013) (exploring the decreasing number of trials and possible contributing factors); Patrick E. Higginbotham, Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?, 55 SMU L. Rev. 1405, 1417 (2002) (arguing that there is a general expectation that cases will settle before trial and that discovery ultimately becomes a means for settlement); Am. Coll. of Trial Lawyers, The "Vanishing Trial": The College, The Profession, The Civil Justice System, 12 (2004), available at www.actl.com/AM/template.cfm?Section=All_Publications&Template=CM/ContentDisplay.cfm/ContentFileID=57 (last visited Feb. 10, 2013) (discussing the "pro-settlement agenda" of federal courts); J. Gary Gwilliam, Are Trial Lawyers Becoming Extinct or Are We Simply Becoming Negotiators?, in J. Gary Gwilliam: How to Get a Winning Verdict in Your Personal Life (Jan. 22, 2010), available at http://garygwilliam.com/2010/01/are-trial-lawyers-becoming-extinct-or-are-we-simply-becoming-negotiators/(last visited Feb. 10, 2013) ("With a lack of trial experience comes a lack of ability to easily and competently try a case before a jury."); Patrick E. Higginbotham, The Disappearing Trial and Why We Should Care, Rand Review (2004), available at http://www.rand.org/publications/randreview/issues/summer2004/28.html (last visited Feb. 10, 2013) ("Because judges and lawyers are increasingly unskilled and inexperienced in the mechanics of a trial, the measure of what is relevant in discovery itself has become blurred at best.").

[20] Of course, given that lawyers make up the pool from which judges emerge, diminished trial experience among lawyers will eventually translate into lawyers taking the bench with a decreasing amount of actual experience trying cases before juries.

[21] See, e.g., Richard Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev 366, 390 (1986) (discussing the fact that some "arbitrators are less representative of jurors" but that "an arbitrator who is an experienced trial lawyer may render a decision more representative of what the average jury would come up with than the decision of any single jury"; mentioning that, with some types of arbitration, "private attorneys may dislike submitting their disputes to other private attorneys, who in the nature of things are potential competitors for their clients"); Jack M. Sabatino, ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within an Alternative Dispute Resolution, 47 Emory L.J. 1289, 1294, 1296, 1325 (1998) (commenting that (1) "ADR tends to be conducted mainly by private persons ... rather than by public officials," (2) "arbitration may be binding, and thereafter subject only to very restricted judicial review, or non-binding," and (3) "nominally, many arbitration rules and statutes recite that "the rules of evidence shall not apply,' or words to that effect" but that these "declarations of non-applicability are frequently hedged").

[22] Hope Eckert, Teach This Class!, 3 Faulkner L. Rev. 95, 96 (2011) ("[A] new focus on teaching practical skills has emerged in law schools and legal education scholarship.").

[23] Corey Rayburn Yung, An Empirical Study of Judicial Activism in the Federal Courts, 105 Nw. U. L. Rev. 1, 10-13 (2011).

[24] Robert M. Parker, Streamlining Complex Cases, 10 Rev. Litig. 547, 556-57 (1991).

[25] Id.

[26] See infra note 52 and accompanying text (citing to one use of jury questions in 1859).

[27] See, e.g., James F. Holderman, As Generations X, Y, and Z Determine the Jury's Verdict, What Is the Judge's Role?, 58 DePaul L. Rev. 343, 343-44 (2009) (discussing a changing relationship between the judge and jury that requires making changes to the jury's role and courtroom procedures).

[28] Id.

[29] Cf. The Federalist No. 83 (Alexander Hamilton) (arguing that civil jury trials will be preserved even without an enumeration in the Bill of Rights; stating that "the friends and adversaries of the plan of the convention, if they agree in nothing else concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government").

[30] See, e.g., Cameron Desmond, Comment, From Cities to Schoolyards: The Implications of an Individual Right to Bear Arms on the Constitutionality of Gun-Free Zones, 39 McGeorge L. Rev. 1043, 1061 (2008) (describing the remarkable influence pro-Second Amendment groups such as the NRA have had on gun laws in the United States).

[31] See e.g., Michael L. Rustad, The Closing of Punitive Damages' Iron Cage, 38 Loy. L. Rev. 1297, 1298-99 (2005) ("Much of what is asserted about the nature of punitive damages is untrue ... Empirical studies unanimously conclude that high-end punitive damages are rarely awarded."). See also Hot Coffee (HBO 2011) (a documentary proving that the jury system, specifically as it applies to the provision of punitive damages, is not broken despite the beliefs of many Americans). Cf. Tom Melsheimer & Craig Smith, Businesses' Fear of U.S. Jury System Is Irrational, Voir Dire, Summer 2011, at 30-31 (responding to criticisms of the jury trial; explaining that "the jury system cannot thrive and be defended from those who would criticize it without those of us who participate in it speaking out ... . It is up to those who understand and appreciate the system to defend it to the public at large. Our jury system, enshrined in the Constitution, works better than almost any other public institution").

[32] Parker, supra note 24, at 553-55.

[33] See McClain v. Lufkin Indus., Inc., 519 F.3d 264, 282 (5th Cir. 2008) (holding that the district court in the Eastern District of Texas did not abuse its discretion in limiting the time that each side had to present its case). The court further explained that a "district court has broad discretion in managing its docket and structuring the conduct of a trial. It may maintain the pace of the trial by setting time limits on counsel." Id. See also Pretrial Hr'g, SSL Services LLC v. Citrix Systems, Inc. and Citrics Online LLC (May 21, 2012) (Civil Action No. 2:08-cv-158-JRG) (demonstrating Judge Gilstrap's emphasis on strict times limits in the Eastern District of Texas: " ... You are not to use more than 13 hours to put on your case. If you use up your allotment, you have used up your allotment. So that is not a - that [is] not an approximation, that is a firm rule"); Transcript of Trial, Virnet X, Inc. v. Cisco Sys., Inc., No. 6:10cv417 (E.D. Tex. Mar. 4, 2013) (noting Chief Judge Leonard Davis's agreement that "length of trial was not a factor as far as the justness of the results; and that quicker trials led to the same degree of justice with much less expense"). See also Seymore v. Penn Maritime, Inc., 281 Fed. Appx. 300, 302 (5th Cir. 2008) (holding that, despite the Southern District of Texas's decision to limit the party's time to cross-examine witnesses and present its case to ten hours, the party had "sufficient time to develop its defensive theories and present its case"). "Penn fails to show that the district court abused its broad discretion to manage its docket and control the trial." Id.

[34] Sequestration has made judicial resources even more limited. See Bruce Moyer, January - February m2013: Federal Courts Brace for Budget Cuts, Fed. Bar Ass'n,. Jan./Feb. 2013, available at http://www.fedbar.org/Advocacy/Washington-Watch/WW-Archives/2013/January February-2013-Federal-Courts-Brace-for-Budget-(last visited May 2, 2013) ("As a last resort, the courts could be forced to suspend civil jury trials because of minsufficient money to pay jurors."). See also Federal Judiciary Braces for Broad Impact of Budget Sequestration, United States Courts (Mar. 12, 2013), http://news.uscourts.gov/federal-judiciary-braces-broad-impact-budget-sequestration (last visited May 2, 2013) ("Sequestration reduced the judiciary overall funding levels by almost $ 350 million - a 5 percent cut affecting people, programs, and court operations.").

[35] See, e.g., Andrew L. Goldman & J. Walter Sinclair, Advisability and Practical Considerations of Court-Imposed Time Limits on Trial, 79 Def. Couns. J. 387, 392-97 (2012) (arguing that time-restricted trials are advantageous for judges, juries, lawyers, and clients); Martha K. Goodling & Ryan E. Lindsey, Tempus Fugit: Practical Considerations for Trying a Case Against the Clock, 53 Fed. Law., Jan. 2006, at 42, 45-46 (2006) (giving practical advice on trying a case with court-imposed time limits); Patrick E. Longan, The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials, [35] Ariz. L. Rev. 663, 667-68 (1993) (analyzing the assumptions behind the case for the use of time limits and offering suggestions on how courts can solve the practical problems of how to choose and enforce appropriate time limits); John E. Rumel, The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials, 26 U.S.F. L. Rev. 237, 238 (1992) (arguing "that trial time limits must comport with due process standards, including both "private' and "public' aspects of the due process clause"). But see Bob McAughan, Time to Justice: Seven Hours or Seven Days?, Landslide, Jan./Feb. 2012, at 44 (arguing that time limits interfere with the proper administration of justice for patent cases).

[36] For example, in a large Medicaid fraud/whistleblower case tried by co-author Thomas Melsheimer in Austin, Texas in 2012, the presiding judge, John Dietz, summoned more than double the normal number of jurors for the venire in part because of extensive publicity associated with the case and in part because of the anticipated length of trial. When informed that the trial may last a month or more, dozens of jurors, understandably, raised some claim of hardship. At the end of the exemption and hardship process, there were barely enough jurors to conduct voir dire with the required number of peremptory challenges per side. If the parties had agreed to a shorter trial time, both sides may well have been advantaged by a larger and more diverse venire. State of Tex. ex. rel. Jones v. Janssen LP, D-1GV-04-001288 (250th Dist. Ct.,Travis County, Tex. 2012). See also Tex. Gov't Code Ann. § 62.106 (West 2011) (listing the exemptions from jury service).

[37] See Areas of Consulting, The American Society of Trial Consultants, http://www.astcweb.org/public/article.cfm/areas-of-consulting (last visited Apr, 21 2013) (listing the different types of services that trial consultants offer the legal community). See also Services, Lundgren Trial Consulting, http://www.lundgrentrial.com/services/ (last visited May 2, 2013) (listing the "actual research specifications and rigorous methodologies custom-tailored to client's case and questions" that the consultants use); Courtroom Intelligence, http://www.courtroomintelligence.com/index.htm (last visited May 2, 2013) ("As courtroom communication experts, we provide objective feedback on the non-legal dimensions of a case and insight into how jurors may perceive the facts associated with a lawsuit.").

[38] See supra note 37 and accompanying text (explaining the role that trial consultants can have during the preparation for trial).

[39] See generally Amy J. St. Eve & Michael A. Zuckerman, Ensuring an Impartial Jury in the Age of Social Media, 11 Duke L. & Tech. Rev., 1, 2-3 (2012) (discussing the explosion of social media and its effects on jury trials). See also infra notes 56-58 and accompanying text (noting how quickly members of Generation X and Generation Y receive and assess large quantities of information).

[40] See Sims v. ANR Freight Sys., Inc., 77 F.3d 846, 849 (5th Cir. 1996) ("[A judge] may maintain the pace of the trial by interrupting or setting time limits on counsel."). See also Fed. R. Civ. P. 1 (providing that the rules of procedure must be construed to secure the "just, speedy and inexpensive determination of every action"); Fed. R. Civ. P. 16 (further authorizing federal judges to issue pretrial orders limiting proof); Fed. R. Evid. 403 (stating that evidence may be excluded if "its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, [or] misleading the jury, ..." or by considerations of "undue delay, wasting time, or [needless presentation of] cumulative evidence"); Fed. R. Evid. 611(a) (stating that "the court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: ... make those procedures effective for determining the truth; [and] ... avoid wasting time ... "); Rumel, supra note 35, at 237 ("Trial judges ... have increasingly placed time limits on the evidentiary portion of civil trials.").

[41] Rumel, supra note 35, at 253.

[42] See supra note 33 and accompanying text (discussing the reasons for Judge Gilstrap's and Chief Judge Davis's approval of strict time limits for trial).

[43] See, e.g., Centocor Ortho Biotech, Inc. v. Abbott Labs., 662 F. Supp. 2d 584 (E.D. Tex. 2009) (five day patent infringement trial, involving only one patent and one defendant, and resulting in a jury verdict of $1.6 billion).

[44] Li Zhu, Taking off: Recent Changes to Venue Transfer of Patent Litigation in the Rocket Docket, 11 Minn. J.L. Sci. & Tech. 901, 902 (2010) (noting that "many consider the Eastern District of Texas ... to be a "rocket docket,' because it boasts one of the most active patent dockets in the country").

[45] See, e.g., Saffran v. Johnson & Johnson, 778 F. Supp. 2d 762 (E.D. Tex 2011) (five day patent infringement trial, involving only one patent and defendant, and resulting in a jury verdict of $ 482 million); Synqor, Inc. v. Artesyn Techs., Inc., No. 2:07-CV-497-TJW-CE, 2010 WL 3860154 (E.D. Tex. Sept. 28, 2010) (seven day patent infringement trial, involving numerous patents and defendants, and resulting in a jury verdict of over $95 million); Eolas Techs Inc. v. Adobe Sys. Inc., No. 6:09-CV-446, 2010 WL 2026627 (E.D. Tex. May 6, 2010) (patent jury trial with time limits, involving multiples patents and defendants, and resulting in a jury verdict for the defendants on invalidity); Centocor Ortho Biotech, Inc. v. Abbott Labs., 662 F. Supp. 2d 584 (E.D. Tex. 2009) (five day patent infringement trial, involving only one patent and one defendant, and resulting in a jury verdict of $ 1.6 billion). See also supra note 33 and accompanying text (noting the use of time limits by Judge Gilstrap and Chief Judge Davis, two judges in the

Eastern District of Texas which handles highly complex, high-dollar cases regularly).

[46] See Dennis J. Devine, Jury Decision Making: The State of the Science 181-210 (2012) (discussing the "integrative multi-level theory of jury decision making" and highlighting the importance of the "opening statement" and "what is perceived or learned during the trial itself").

[47] See infra Part III.F (discussing the role of trial agreements).

[48] Donald E. Vinson, Jury Trial: The Psychology of Winning Strategy 171 (1986).

[49] See, e.g., Lisa Blue et al., Psychological Profiling in Voir Dire: Simple Strategies Any Lawyer Can Use, 31 The Advocate (Texas) 20, 21 (2005) ("Judgers are likely to have their mind made up early in the case and will be less likely to change their minds in deliberations."); Eliot G. Disner, Some Thoughts About Closing Statements: Another Opening, Another Show, Practical Litigator, Jan. 2004, at 61 ("There is substantial evidence that juries normally make up their minds long before closing argument.").

[50] See generally Mark Lemley et al., Rush to Judgment? Trial Length and Outcomes in Patent Cases (Stanford Public Law, Working Paper No. 2217690, 2012) (Chief Judge Davis of the Eastern District of Texas has noted Lemley's research with approval in ordering strict time limits.).

[51] See Robert Blackey, History: Core Elements for Teaching and Learning 18 (mentioning that Francois Fenelon, a Catholic archbishop, coined this phrase three centuries ago).

[52] Stephen R. Kaufmann & Michael P. Murphy, Juror Questions During Trial: An Idea Whose Time Has Come Again, 99 Ill. Bar J. 294, 294 (2011).

[53] Mil. R. Evid. 614(b) ("Interrogation by the court-martial. The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.").

[54] 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)). See also 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").

[55] See Shari Seidman Diamond et al., Juror Questions During Trial: A Window into Juror Thinking, 59 Vand. L. Rev. 1927, 1929 (listing a few states that strictly forbid juror questions during trial). See also Mott, supra note 54, at 1100 (explaining that Mississippi courts "condemn" and "forbid" the practice of jurors asking questions and that Texas, Georgia, and Minnesota bar the practice in criminal cases).

[56] See Peter Reilly, Understanding and Teaching Generation Y, English Teaching Forum, 2012, at 1, 3 (2012), available at http://americanenglish.state.gov/files/ae/resource_files/50_1_3_reilly.pdf (defining Generation Y as being born between 1981 and 1999 and learning in different ways than prior generations); M.J. Stephey, Gen-X: The Ignored Generation, Time (Apr. 16, 2008), available at www.time.com/time/arts/article/0,8599,1731528,00.html ("Generation X - roughly defined as anyone born between 1965 and 1980 ... [who] "can't manage to read anything longer than an instant message[.]'").

[57] K.C. Jones, Generation "Y' Loves Google, Telecommuting, Survey Finds, Information Week (Nov. 30, 2007, 4:25 PM), http://www.informationweek.com/generation-y-loves-google telecommuniting/204400436 (last visited Mar. 8, 2013) (reporting survey results that found Generation Y federal workers preferred accessing information with Google and rarely used print publications).

[58] R. Rex Parris & James Wren, Reach Jurors Across the Generations, 44 Trial, Mar. 2008, at 19, 22.

[59] See SEC v. Koenig, 557 F.3d 736, 742 (7th Cir. 2009) (referring to the benefits of allowing juror questions, "such as keeping jurors alert and focused").

[60] See, e.g., Fazzino v. Guido, 836 S.W.2d 271, 276 (Tex. App. - Houston [1st Dist.] 1992, writ denied) (citing United States v. Callahan, 588 F.2d 1078, 1085 (5th Cir.) (1979)) ("There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it."). See also Hudson v. Markum, 948 S.W.2d 1, 3 (Tex. App. - Dallas 1997, writ denied) ("We agree with the Houston court that allowing jurors in civil cases to submit questions does not constitute fundamental error.").

[61] See Koenig, 557 F.3d at 742 (stating, in response to the concerns that "allowing jurors to ask questions will lead them to take positions too early in the trial," that several studies "were designed to find out whether these risks are realized so frequently that they overcome the benefits, such as keeping jurors alert and focused. Now that several studies have concluded that the benefits exceed the costs, there is no reason to disfavor the practice"); Diamond et al., supra note 55, at 1971 ("The questions reveal that, rather than assuming the role of advocates during the trial, jurors are instead intensely engaged in the task of problem solving."). See generally Mott, supra note 54 (discussing the overarching benefits and consequences of allowing juror questions). See also Marder, supra note 54, at 739 (citing opinion of Chief Judge Holderman of the Northern District of Illinois - based on thirty years of experience - that "that jurors want to be fair and that they will keep an open mind in evaluating the evidence that is presented" (internal citation omitted)).

[62] Paula L. Hannaford et al., The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination, 67 Tenn. L. Rev. 627, 630 (2001). See also Dennis J. Devine, Jury Decision Making: The State of the Science 26 (2012).

[63] Hannaford, supra note 62, at 635-37.

[64] Id.

[65] See Marder, supra note 54, at 734 ("Judges also might be concerned about adding a procedure that can form the basis for an appeal. The judge could make a mistake in allowing a question that should not have been asked or in prohibiting a question that should have been asked.").

[66] Diamond et al., supra note 55, at 1929-30.

[67] Marder, supra note 54, at 733 ("One of the main concerns that judges have about juror questions is that they will lengthen the trial.").

[68] See id. at 733-34 (citing a New Jersey pilot program that found "permitting jurors to ask questions added thirty minutes to the trial").

[69] See Diamond et al., supra note 55, at 1929 (stating that "proponents of allowing juror questions suggest that the opportunity to submit questions will enhance juror comprehension and encourage deeper involvement by jurors so that they pay more attention to the proceedings").

[70] See John Council, Jurors Submit Questions for Witnesses in Patent Trial, 28 Tex. Lawyer, no. 2, Apr. 9, 2012, at 25 (discussing the trial in CEATS, Inc. v. Continental Airlines, No. 6:10-cv 120-LED (E.D. Tex. 2012)).

[71] See id.

[72] See Marder, supra note 54, at 732-33.

[73] One of the authors, Thomas Melsheimer, was lead counsel for most but not all of the defendants throughout the CEATS trial. He offers this analysis based on his personal experience.

[74] Id.

[75] Id.

[76] Id.

[77] Id. Sometimes the objection will be that the question is not appropriate for the particular witness and that a later witness will address that specific issue. In other situations, the question may be overly adversarial or slanted. An objection to one particular question, for example, was sustained because the judge felt that it would "cause more confusion than it will help." The question was: "In your experience as a patent agent, the last three patents ... were not applied for until December 5, 2008, or later. Were any of these patent inventors already in common practice prior to when the patent application was filed in December 5, 2008?" The judge sustained the objection after the objecting counsel suggested that it would be misleading and that it could open up several minutes of additional examination. CEATS, Inc. v. Continental Airlines, Inc., No. 6:10 cv-120-LED, Dkt. No. 1025 at 168:20-170 (E.D. Tex. 2012). A court is also free to modify a question as phrased to omit reference to inadmissible or inappropriate information.

[78] Id.

[79] Id.

[80] Council, supra note 70. See Allison K. Bennett, Eastern District of Texas Experiments with Jurors' Questions During Trial, TheBattleBlawg.com (Mar. 22, 2012), http://thebattleblawg.com/2012/03/22/eastern-district-of-texas-experiments-with-jurors questions-during-trial.

[81] See Indus. Recovery Capital Holdings Co. v. Simmons, No. 08-02589 (192nd Judicial Dist. Court, Dallas Cnty., Tex.) (2009). Both authors, Stephen Susman and Thomas Melsheimer, were co-counsel in this case. Mr. Susman was lead counsel for two of the plaintiffs and Mr. Melsheimer was lead counsel for an additional plaintiff. They offer this analysis based on their personal experience.

[82] Id.

[83] Id.

[84] Id.

[85] Id.

[86] Id. There were other examples of questions that were objectionable. For example, one juror asked whether there was an "investigation" of the defendant, suggesting that at least one juror thought that the defendant had done something wrong.

[87] Id.

[88] See supra note 73 and accompanying text.

[89] We note that the CEATS case resulted in a defense verdict in a jurisdiction seen as plaintiff friendly, while the N.L. Industries case resulted in a plaintiff verdict that was among the largest in the country that year. See Brenda Sapino Jeffreys, $ 178.7 Million Verdict Includes $ 5 Million in Punitives Against GC, Tex Parte Blog (July 20, 2009, 8:07 PM), http://texaslawyer.typepad.com/texas_lawyer_blog/2009/07/1787-million-verdict-includes-5-million-in-punitives-against-gc.html. These two examples confirm our view that juror questions do not, as a matter of principle, advantage one side over another.

[90] Cf. Sec. and Exch. Comm'n v. Koenig, 557 F.3d 736, 743 (7th Cir. 2009) ("Koenig's position seems to be that ignorance is bliss: if some jurors have reached a tentative conclusion in mid-trial, it is best not to know it. Why? ...Lawyers should want to know when some jurors are tending the other side's way, so that they can make adjustments to their presentations in an effort to supply whatever proof the jurors think vital, but missing.") (emphasis in original).

[91] Parker, supra note 24, at 553-54.

[92] Id. at 553.

[93] Id. at 554.

[94] Id. at 553.

[95] Id. at 558.

[96] Id. at 553.

[97] The trial judge can place various restrictions on the use of interim argument. It can be permitted any time during the trial or it can be limited to the beginning or end of each trial day. There can be notice requirements, such that, if a party intends to use some portion of their interim argument allotment, they must provide some period of notice to the other side. The trial judge can also limit any single interim argument to a set period of time, such as three minutes. See, e.g., Data Treasury Corp. v. Bank of Am. Corp. and Bank of Am., Nat'l Assoc., No. 2-05-cv-292 (E.D. Tex. 2010).

[98] See, e.g., Fifth Circuit Pattern Jury Instructions-Civil § 1.1 (2006), available at http://www.lb5.uscourts.gov/juryinstructions/fifth/2006civil.pdf (last visited Apr. 21, 2013) (giving preliminary pattern jury instructions that include admonitions for the jury as well as a brief schedule for the trial).

[99] See Principles for Juries and Jury Trials, A.B.A., Principle 6 (2005), available at http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.a thcheckdam.pdf (last visited Apr. 21, 2013) (stating that the court should give preliminary instructions to the jury that explain the issues of the case and relevant legal principles); Holderman, supra note 27, at 354-55.

[100] Holderman, supra note 27, at 354-56.

[101] Id. at 355.

[102] John D. Gilleland, The Debate Is on: Is the Federal Judicial Center's Patent Tutorial Video Too Pro-Plaintiff?, TrialGraphix 2 (May 1, 2012), available at www.trialgraphix.com/SiteAssets/file/Articles/patent-tutorial-video-too-proplaintiff-john-gilleland.pdf (last visited Apr. 21, 2013).

[103] An Introduction to the Patent System (Federal Judicial Center 2002). See also Gilleland, supra note 102, at 2 (analyzing the video).

[104] See Holderman, supra note 27, at 348-49 (explaining how the influence of and dependence on technology have contributed to the different ways of learning and absorbing information for Generations X and Y).

[105] Id. at 355.

[106] See, e.g., Tex. R. Civ. P. 226a (prescribing instructions to be given to the jury panel including the instruction to not discuss the case with anyone); Step 3: Juror Conduct During the Trial, Your Missouri Courts, available at http://www.courts.mo.gov/page.jsp?id=1014 (last visited June 12, 2013) ("During the trial, until you retire to consider your verdict, you must not discuss any subject connected with the trial among yourselves, or form or express any opinion about it ... ."); Jury Duty: A Handbook for Trial Jurors, Trial Courts of the State of West Virginia, available at http://www.courtswv.gov/public-resources/jury/juryhdbk.htm (last visited June 12, 2013) ("During or before the trial, jurors should not talk about the case with each other ... .").

[107] See Timothy G. Hicks, The Jury Reform Pilot Project - The Envelope, Please, Mich. B. J. (June 2001), at 41, available at http://www.michbar.org/journal/pdf/pdf4article1864.pdf (last visited June 12, 2013) (discussing Michigan's innovation of allowing jury discussion of evidence before deliberations). See also Mich. Ct. R. 2.513(K) ("In a civil case, after informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.").

[108] Mich. Ct. R. 2.513(K).

[109] Id.

[110] Michigan is not the only jurisdiction to adopt this practice. Arizona and Colorado both allow juror discussions of the evidence before deliberation. See Ariz. R. Civ. P. 39(f) (allowing jurors to "discuss the evidence among themselves in the jury room during recesses from trial when all are present" with additional limitations). See also David A. Anderson, Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial, 174 Mil. L. Rev. 92, 112 (2002) (discussing Colorado Supreme Court's approval of juror discussions prior to deliberations). Other jurisdictions have experimented with the practice. See id. at 107-10 (outlining the research conducted by California and D.C. in their evaluations of interim juror discussions). See also Shari Seidman Diamond et al., Juror Discussions During Civil Trials: Studying an Arizona Innovation, 45 Ariz. L. Rev. 1, 4 (2003) (mentioning (1) the use of pilot programs by Maryland and Florida, (2) a judge in Massachusetts who allows interim jury discussion, and (3) a Delaware jury reform commission that considered interim juror discussion).

[111] See Hicks, supra note 107. In addition to juror discussion, Michigan courts now allow for some of the practices that we have advocated for in this Article including preliminary instructions, interim commentary, reference documents, and juror questions. See Mich. C. R. 2.513 (A, D, E, I, K).

[112] Id.

[113] Id.

[114] Id.

[115] The benefits to juror comprehension of interim discussion of the evidence seem obvious to us. Equally obvious is the benefit such discussion would have on the use of juror questions. Jurors who have been able to discuss the evidence during the trial will be better informed to ask more intelligent and more relevant questions of the witnesses.

[116] See generally Stephen D. Susman, About Pretrial Agreements, Trial By Agreement, http://trialbyagreement.com/about/about-pretrial-agreements (last visited Apr. 21, 2013) (advocating for the use of pretrial agreements).

[117] Id. (advocating for the use of trial agreements and listing the different types of agreements).

[118] Id.

[119] Id.

[120] Id.

[121] Id.

[122] Id.

[123] Id.

[124] Id.

[125] Id.

[126] Ted A. Donner & Richard K. Gabriel, Jury Selection Strategy & Science § 16.2 (3d ed. 2012) ("In smaller cases, juror questionnaires can be used to expedite the selection process, to weed out biased jurors without expending valuable court and attorney time. Similarly, in larger cases, questionnaires can be used to quickly reduce the potentially large number of potential jurors whose exposures and predispositions would interfere with their ability to render a fair verdict."). Additionally, Dr. Don Nichols, one of the country's leading jury consultants, who has consistently advised co-author Thomas Melsheimer over the last fifteen years, views a jury questionnaire as a bedrock element of intelligent jury selection.

[127] Susman, About Trial Agreements, supra note 117.

[128] Id.

[129] Id.

[130] Final Approval of Rules for Dismissals and Expedited Actions, Supreme Court of Texas, Misc. Docket No. 13-9022 (Feb. 12, 2013), available at http://www.supreme.courts.state.tx.us/miscdocket/13/13902200.pdf (last visited June 12, 2013) (setting forth the expedited action rules that began taking effect on March 1, 2013).

[131] See, e.g., id. at R. 169 (granting each side "no more than eight hours hours to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments" and also stating that "on motion and a showing of good cause by any party, the court may extend the time limit to no more than twelve hours per side").

[132] Id.