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

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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 legislative 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

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in many significant ways.²¹

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.

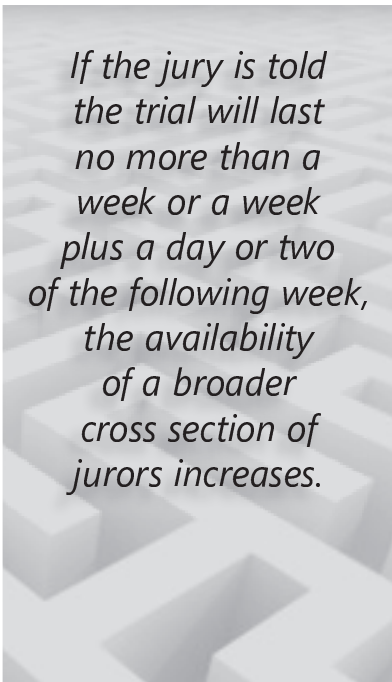
The practices we present here do not advantage either side. They are lawful and fully within the discretion of every trial judge in nearly every jurisdiction we have encountered. They improve the process of the jury trial and can, in some instances, reduce the costs of such a trial. But due to a combination 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



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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 scarce resource, on the important issues rather than on collateral ones.

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

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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

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

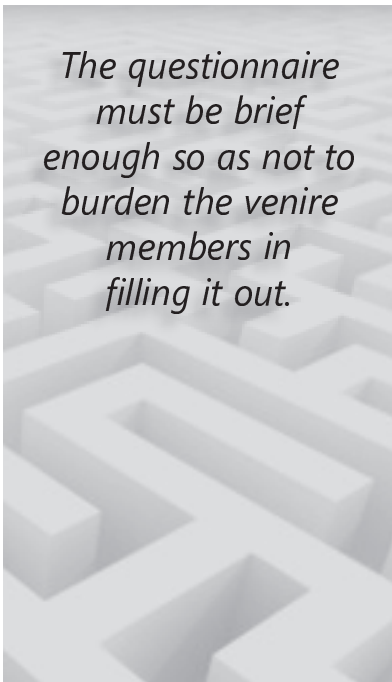
The final concept we discuss is not a single practice but an approach that we believe will improve every jury trial. This approach, first conceived by one of the authors, Stephen Susman, is one that embraces a process seemingly at odds with the adversary system - trial by agreement.¹¹⁶ In the Susman 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



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

other practices that will aid the jury trial process.¹²¹

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 enforced 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 [\(http://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v17/03/2003_aba_rpte_pp_v17_3_may_june_\(last%20visited%20Apr.%202013\)\)](http://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v17/03/2003_aba_rpte_pp_v17_3_may_june_(last%20visited%20Apr.%202013)) (“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/xpGc.aspx?xST=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?_afzLoop=387753411397887&_afzWindowMode=&_afzWindowId=null#%40%3F_afzWindowId%20 (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 Citrix 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 Seymour 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 2013: 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 insufficient 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-IGV-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

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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-telecommuting/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 Patent 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.thecheckdam.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.

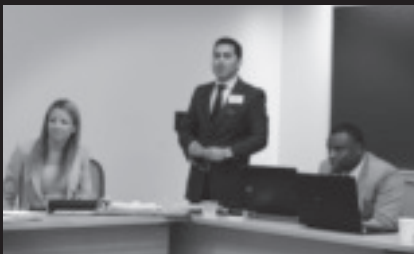
¹⁰¹ *Id.* at 355.

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).

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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.courts.wv.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 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.*

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