

HOW CIVIL JURIES REALLY DECIDE CASES

Lessons from an Empirical Study of Actual Jury Deliberations

The Fellows of the American Bar Foundation Research Seminar

The ABF Fellows Research Seminar was held on February 10, 2007 in Miami. **ABF Director Robert L. Nelson** welcomed the attendees. He noted that the seminar is an annual event at the Mid-year Meeting of the ABA. It is an occasion to celebrate the research conducted at the American Bar Foundation and to benefit from knowledgeable commentary on the research by distinguished members of the legal profession. The seminar was organized under the leadership of The Fellows Research Advisory Committee chaired by The Honorable Miriam Shearing, who is one of the commentators. Nelson informed the audience that the discussion would be led by **ABF Senior Research Fellow Shari Diamond**, who is one of the country's leading jury researchers. The panelists were members of an ABF advisory group that has been working with Diamond on her research.

Nelson introduced **The Honorable Ellen Rosenblum**



who is the current Chair of The Fellows of the American Bar Foundation. Under her leadership the organization has “reached new levels of membership and revenues, achieved greater visibility, and enhanced the quality of its programming,” he reported.

Judge Rosenblum indicated that it was a pleasure to be part of this seminar on jury deliberations because she was a trial judge for 16 years in Portland, Oregon and now serves on the Appellate Court. “My true love is the jury system, and the topic

we are here to talk about today—how juries actually deliberate—is absolutely spellbinding.” She first introduced Shari Diamond. In addition to her affiliation with the ABF as a Senior Research Fellow, Diamond is a professor of law and psychology at Northwestern University School of Law. Prior to joining the law school, she practiced at the law firm of Sidley Austin Brown & Wood. Professor Diamond is the preeminent empirical researcher on the jury process and legal decision-making and has published extensively in both law reviews and behavioral science journals. Her work on juries has been cited by the United States Supreme Court as well as by other federal and state courts. She was a member of the ABA’s American Jury Project and currently serves as a member of the Seventh Circuit American Jury Project Commission.

Judge Rosenblum noted that panelist Robert Grey, Jr. is the immediate past president of the ABA and was the initiator of the American Jury Project, which drafted the new ABA Principles for Juries and Jury Trials. "He is the quintessential example of the kind of ABA President that we hope for because his initiatives outlast his time in office." Mr. Grey was able to bring together not only entities within the American Bar Association but also outside organizations that have an interest in the jury system and in jury reform, Rosenblum pointed out. Mr. Grey is a partner in the Richmond office of Hunton & Williams, where his practice focuses on administrative matters for state and federal government agencies.

Patricia Refo, a partner at Snell & Wilmer in Phoenix, was introduced, followed by Robert Josephsberg, a partner at Podhurst Orseck in Miami, and Maurice Graham, a partner at Gray, Ritter & Graham in St. Louis. Ms. Refo's practice concentration is complex commercial litigation. Since 2000, Ms. Refo has served as a member of the Advisory Committee on the Federal Rules of Evidence of the United States Judicial Conference. She was also appointed by President Grey as Chair of the ABA American Jury Project and is the past Chair of the ABA Section of Litigation. Mr. Josephsberg is a commercial litigator in Florida. Mr. Graham concentrates his practice in corporate litigation, medical negligence, and products liability. He is past President of the Missouri Bar Association.

The Honorable Miriam Shearing was then introduced by Judge Rosenblum, who reported that Justice Shearing "has had a long and distinguished career on the bench." She began as Justice of the Peace in Las Vegas Township in 1976, then became a judge in the District Court Eighth Judicial Circuit. In 1992 Judge Shearing was elected to the Nevada Supreme Court and became the Chief Justice in 1997. Judge Shearing was the first woman in Nevada to hold all these judicial posts



ABF Senior Research Fellow Shari Seidman Diamond began her presentation by noting that it was a special pleasure to address this audience because as members of The Fellows of the ABF they have "directly or indirectly contributed to making it possible for this research to take place." She pointed out that there are a series of often conflicting images of the jury. On one hand, it is viewed as a cultural icon. In the 1830s French commentator Alexis de Tocqueville said the jury was one of the greatest institutions in the American system. But at the same time, Diamond observed, "the jury is a favorite scapegoat, and you cannot open

The jury is a favorite scapegoat, and you cannot open a newspaper or read commentary without running into criticisms of the jury

a newspaper or read commentary without running into criticisms of the jury." Juries are said to be naive, easily manipulated, biased, and incompetent decision-makers. Yet another image of the jury finds it to be "a repository of folk wisdom and common sense." Finally, Diamond noted, there is the portrait of the jury that comes closest to her understanding based on years of studying jury decision-making—the jury as an active problem solver. And this is an important perspective "since we give juries some of our most difficult problems to solve and then ask them to come to a decision."

Diamond reported that her presentation would focus on the Arizona Jury Filming Project in which 50 actual civil jury deliberations were videotaped. There were several sponsors of this complex undertaking but the most prominent is the American Bar Foundation. Funding was also provided by the State Justice Institute and the National Science Founda-

tion. Northwestern University supported a portion of Diamond's time that was devoted to the project. Her collaborators are Mary Rose, formerly an ABF Research Fellow, Beth Murphy and Andrea Krebel of the ABF, and, in the early phases, Neil Vidmar who is at Duke University.

The Arizona Jury Project was instigated because "the Arizona courts are leaders in devising innovations in jury procedures," Diamond reported. In addition to making changes, the Arizona courts were interested in knowing what effect these innovations would have on jury functioning. So the Arizona Supreme Court allowed Diamond and her colleagues to videotape the jury deliberations with the understanding that only the researchers would have access to the tapes. The jurors were advised that the deliberations would be taped, and 95 percent agreed to participate. Litigants and attorneys were somewhat less willing to become involved but many did agree to cooperate. Cameras were set up unobtrusively in the upper corners of the deliberation room, and microphones recorded the conversations. The trials were also videotaped in their entirety, and post-trial questionnaires were administered to all the participants—judges, attorneys, and jurors.

The cases in the study were very similar to the overall distribution of cases in Pima County in Tucson where the filming took place. About half involved motor vehicles, about a third were general tort cases, and the remainder were medi-

Never let the jurors think you are talking down to them because they are very sensitive to that—and it is likely that if you do, you will be underestimating them

cal malpractice and contract disputes. The awards ranged from \$1,000 to \$2.8 million.

"Thirty years ago I thought juries were an interesting phenomenon to study but I was not so sure that the jury was a great institution," Diamond observed. She reported that she felt like the scientist who thought the hummingbird could not fly because it should not be able to fly. "But it turns out that the hummingbird flies very well. And so, as it turns out, the jury actually does quite a good job." The intriguing question then is to try to understand how the jury accomplishes this feat.

Challenges for Jurors: Comprehension and Trust

When jurors enter the courtroom, they encounter an unfamiliar place, Diamond pointed out, "inhabited by professionals with unfamiliar customs who speak an unfamiliar language." Moreover, these jurors will be asked to make an important decision. Yet the situation becomes even more problem-

atic because attorneys and witnesses will be trying to persuade jurors to see things their way and "may intentionally tell jurors things that are not true." Yet Diamond noted that the videotapes indicate that jurors are quite observant and aware of their role in an adversarial setting. For example, at several times during the deliberations jurors commented that the judge appeared to be sleeping during testimony. Diamond shared one juror's response to that observation:

Juror #3: The reason they do that is...that this is all theater. They bring in the evidence and instead of giving us straight facts, they are dramatizing it, so we pick up on certain points and remember certain things. And that's what judges are doing when they close their eyes. They are blocking all of the extra stuff out and just listening.

"This quote reveals the juror's awareness that this is a performance, that there is manipulation going on, and that the judge has got it as well," Diamond reported.

The tapes also revealed that the jurors do not place their trust in everything a witness says, and so they pay attention and take their cues from what they see in the courtroom. This behavior is interesting because the deference of appellate courts to trial courts is sometimes questioned. But one reason for this deference may well be the fact that the transcript only contains the testimony and does not report on nonverbal activity, Diamond

observed. For example, the plaintiff in one case claimed that she might need to get up to walk around during the trial. The jurors obviously remembered this statement as the following exchange shows:

#4: [s]he never got out of that chair the entire trial.

#1: You know something, I was moving more than she was.

#4: And my butt hurt.

#1: She sat like a rock, didn't she?

While some critics of the jury claim that jurors ignore expert testimony or blindly accept what they say, the jurors posed questions to almost half of the experts

During deliberations many jurors expressed the feeling that the opposing counsel were being condescending to them. As one juror stated: "I felt like they were treating us like we were imbeciles." Another said: "It irritates me that they think we, you know, aren't listening or something." These exchanges send a clear message to attorneys, Diamond pointed out. "Never let the jurors think you are talking down to them because they are very sensitive to that—and it is likely that if you do, you will be underestimating them." The jurors

constantly struggle with issues of trust and competence, she noted.

Juror Questions During Trial

The questions that jurors submit during trial is another area in which competence plays a key role. In Arizona jurors are allowed to submit questions, and the cases studied in the filming project reveal that they take advantage of the opportunity. The jurors, in fact "are eager and comfortable with the notion that they should be permitted to ask questions," Diamond reported. A total of 829 questions asked by jurors were analyzed, and the results are reported in an article that was just published in the *Vanderbilt Law Review*. The questions focused on the controversies with which they had to deal and the evidence they had to evaluate. The jurors had more questions for witnesses with lengthier testimony and for witnesses whom the judge rated as important. And while some critics of the jury claim that jurors ignore expert testimony or blindly accept what they say, the jurors posed questions to almost half of the experts. "These are all mostly substantive questions about the expert testimony to help the jurors try to understand it." Further, most of the questions addressed relevant legal issues.

About a quarter of the questions were aimed at clarifying and filling in gaps, Diamond noted. For example a psychologist who testified was asked "what does the term 'reasonable psychological probability' mean?" A physician was asked: "what is a tear of the meniscus?" In both of these cases

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these terms were central pieces of the expert testimony, Diamond pointed out.

Nearly half the questions were focused on cross-checking, that is, using a process of comparison to evaluate the credibility of witnesses and the plausibility of accounts offered during trial. "This goes back to the issue of 'what do I trust, how can I figure out who's helping me, who's telling the truth, how can I figure out how to understand the stories I've been told,'" Diamond observed. The jurors were interested in methods and tests as evidenced in this question: "Following the remodeling, were any tests done to insure proper water flow?" Other questions addressed external standards. One question, "Was there a minimum speed on the highway," was an attempt to determine if the individual was driving too slowly. Another question, "Did your car have an airbag," was directed at finding out what speed the cars were going when

the crash occurred. An activated airbag would have signaled a higher-speed impact.

Assessing Balance in Jury Deliberations

There is a common image among researchers who study juries based on post-trial interviews with jurors or simulated juries and in the media that jurors begin deliberations with strong verdict preferences. They take an immediate vote which shows what the majority prefers, and they then “browbeat or otherwise persuade the minority to come around to their verdict,” Diamond observed. But actual deliberations are far more complicated, “at least in the civil cases we studied.” Deliberations rarely began without disagreement and ambiguity, “meaning that the jurors have not quite decided exactly where they want to be going with respect to the verdict.” Early calls for votes are common but the majority are unsuccessful. Moreover, voting occurs on a variety of different topics, not just on liability and damages. For example, the jury may vote on whether they agree that there was an actual vehicle on the road at the time of the accident as the plaintiff had claimed.

The research team was interested in assessing how balanced the deliberations were, Diamond noted. So every statement that was pro-plaintiff or pro-defendant was coded. These statements include more than just expressions about what the verdict should be but also comments that either a plaintiff’s attorney or a defense attorney would like to hear. Diamond provided two ex-

One characteristic that seems to predict who will be selected as foreperson is a juror who has been perceived to take notes during the trial

amples of pro-plaintiff statements:

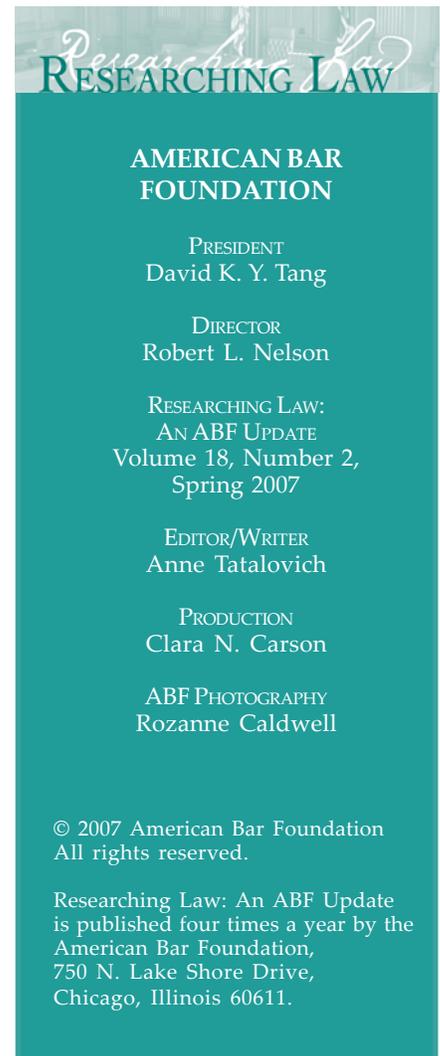
- Case 1: I guess we can’t lose sight of the fact that this wouldn’t of ever happened if he [the defendant] hadn’t run the red light— He ran the red light and I’m sorry you hit someone who has so many problems, but you did—next time be more careful...
- Case 2: So, if that’s how you are for the rest of your life what amount of money makes your life okay?

Two statements provide examples of pro-defense leanings:

- Case 1: She [the plaintiff] wasn’t wearing a seatbelt. She didn’t follow the instructions that [the hospital] gave her. Because right here it says, uh [he pages through a document], oh, “as soon as possible make an appointment to see Dr. X in two days.”
- Case 2: (in response to length of treatment) Which is outrageous as far as I’m concerned.

The valenced deliberations were analyzed to determine how one-sided the discussions were. A minority of the statements jurors made during

deliberations were valenced, Diamond reported. “The rest were trying to fill in the facts, constructing the story, generally more neutral or procedural and not directly in favor of one side or the other.” Among the valenced statements, more were in favor of the defense than in favor of the plaintiff. “So these jurors in Arizona, like jurors across the country, are not the pro-plaintiff jurors that we have been led to believe. For the most part, they are very critical of the plaintiffs’ claims and scrutinize the plaintiff’s behavior quite closely,” Diamond related. Most juries showed a



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mixture of valenced statements, that is, no fewer than 10 percent and no more than 90 percent of the valenced statements favored one side. The extreme juries, in which one side was clearly favored, tended to occur in cases in which the judges agreed that the evidence clearly pointed to the favored party.

The Foreperson in Action

“The foreperson is perceived to play an important role on the jury, but the jury is given little guidance on how it should select the presiding juror or how that person should behave,” Diamond reported. But there are definite patterns in foreperson selection. Males are more than twice as likely to be tapped, and those who have a professional/managerial background are two and one-half times as likely to become the presiding juror. “Jurors with both these characteristics, that is male professionals or managers, are more than two times as likely to become forepersons as jurors who lack one or both of these characteristics.” But there are other factors that come into play. Nearly two-thirds of the forepersons are not professional or managerial males. One characteristic that seems to predict who will be selected as foreperson is a juror who has been perceived to take notes during the trial. Jurors have a good sense of who has been paying attention and also who is congenial, Diamond pointed out. Another factor that predicts foreperson selection is what Diamond and her colleagues call “rule reminders.” So if the

The research reveals that forepersons are active and influential, but they do not control the process and produce verdicts that are out of line with the preferences of other jurors

jurors were permitted to discuss the case in the course of the trial but then started to talk about it before everyone was in the deliberation room, a juror who pointed out that they were not supposed to do so until everyone was present—a rule reminder—is more likely to be chosen as the presiding juror.

During deliberations forepersons, as expected, talked more than other jurors; on average they talked twice as much as other jurors. “But they were not, even in half the cases, the biggest talkers on the jury,” Diamond noted. In 29 of the 50 cases another juror talked more. Forepersons were also active in calling for votes. They were more likely than other jurors to call for a vote, and their calls were more likely to successfully produce a completed vote

(defined as one in which at least 6 of the 8 jurors voted).

Forepersons were twice as likely as the average juror to refer to the jury instructions, three times as likely to read from the instructions, and six times as likely to post items on the board.

To assess the influence that forepersons have on the jury, the researchers coded each time a juror proposed either a liability verdict, a percentage of liability if it was a comparative negligence case or a dollar amount for the total award if they were talking about damages. Two points were noted to derive measures of foreperson influence on the process and the outcome: the first proposal that was made on the issue and the first outcome mention, that is, what the jury actually ended up deciding. Forepersons were twice as likely to give a first proposal. But almost two-thirds of the first mentions came from non-forepersons so the other jurors were actively participating as well, Diamond pointed out. The foreperson was one and a half times as likely to mention first outcomes, meaning that 70 percent of the first suggested outcomes, what actually ended up being the jury’s verdict, came from other jurors.

In Arizona, if the verdict is not unanimous, the only jurors who sign the verdict are those who agree with the outcome. In the 50 cases, most of the forepersons (94%) as well as most of the other jurors (92%) signed the verdict. But in those instances where there was

Jurors who claimed occupational expertise were much less likely to give evidence in favor of only one side

disagreement, the foreperson was equally as likely to not sign the verdict as a non-foreperson. In post-deliberation questionnaires the jurors were asked how they would have decided the case if it had been solely their decision. Forepersons were just slightly more likely (62 percent) than other jurors (59 percent) to agree with the jury's verdict. The research reveals, Diamond noted, that forepersons are active and influential, but they do not control the process and produce verdicts that are out of line with the preferences of other jurors.

Embedded Experts

With the elimination of occupational exclusions, "'experts' exist on the jury as well as in the witness box," Diamond pointed out. So nurses in medical malpractice cases, engineers in auto accident cases, and lawyers and legal secretaries can now be found on juries across the country. This expertise and knowledge can be a valuable resource for the jury system, Diamond suggested. "But there is also the danger of a potentially uncontrolled influence in the jury room, one who is not

qualified as an expert, is not cross-examined, and is not visible to the judge or the attorneys." Jurors are directed to decide what the facts are from the evidence presented in court. But they are also told to consider all the evidence in the light of reason, common sense, and experience.

In the post-trial questionnaires the jurors were asked if there was anything in their backgrounds that gave them particular knowledge or expertise in serving as a juror in the case, and 20 percent claimed 'particular knowledge' or expertise. Some claims, such as "I am a parent," "I am a driver, or "I go to the movies," did not suggest expertise that might lead other jurors to defer, but others were based on more specialized experience. Thirteen percent of the jurors identified something in their occupations that they thought was relevant to serving on the jury, and another 10 percent had relevant occupational backgrounds (e.g., a nurse and an attorney) that led the researchers to characterize them as embedded experts.

The participation level of these embedded experts tended to be higher than that of other jurors. In addition, according to self-reports, the embedded experts also saw themselves as more influential. But these jurors were also unclear about what role their expertise should play, Diamond reported. As one stated:

#7: ...they said two things that kind of confused me. They said we could bring

our experiences ... to bear and our judgment and they also said you can't use any evidence that wasn't introduced.

Other jurors were less hesitant to draw attention to their claimed expertise:

First of all, I've been a mechanic, raised in it my whole life. I've also been exposed to welding with metals...he [the expert] said that was .1 in thickness ... which is not very thick.... My guess is it is probably 13 gauge, which is pretty thin metal. Now the metal used for the panel of the tailpipe is even thinner than that. Okay? Now, I don't know if you noticed it, but when you're are on the road, and you see an auto accident, these little cars wad up...The engineers design the cars to absorb as much energy as possible as opposed to in the old fash-

Permitting juror questions is important because they are not adversarial inquiries, for the most part, but attempts to try and understand what occurred

ioned way...So I'm not impressed by the tailpipe being bent as much as it is. I mean, you know, you could have done that with a ten-speed bicycle.

Other instances of embedded experts offering their views included a physiologist who concluded, based on professional expertise, that the position of the decedent's body could not have caused death. In another case, an engineer explained to fellow jurors how the testimony of the opposing experts assumes different

In many cases, we blame jurors for not understanding when we, the lawyers, are responsible for the communication problem.

methods of producing the fire.

Embedded experts can contribute very useful information, Diamond pointed out. In one case none of the jurors submitted questions, which was surprising since it was a complex financial proceeding. "But it turned out that there was an accountant on the jury, and the accountant was very helpful in explaining the expert testimony to the other members of the jury."

Diamond reiterated that about a third of the jurors made

valenced statements that focused most support (90 percent or more) on one of the parties to the dispute. But the jurors who claimed occupational expertise were much less likely to give evidence in favor of only one side. "They seem to make an effort to spend some time on both sides or—and I think this is the more likely situation—they view the world in more complicated ways, most of them, and so they see arguments on both sides of the case."

Changing the Jury System

Because the jury is an active problem solver, there are changes that could strengthen the jury system, Diamond noted. Permitting juror questions is important because they are not adversarial queries, for the most part, but attempts to try and understand what occurred. "When the jurors in the Libby case asked Judith Miller whether she usually keeps her notes in a bag under her desk, it is likely that they were trying to figure out her ordinary course of events or whether she was treating this encounter in a different way." Under the current system, "we do not do a very good job of communication about the law with the result that there are many instances when jurors do not understand its intricacies." Providing jurors with notebooks and tutorials would give them more background for dealing with complicated cases. While some have suggested providing detailed roadmaps on how to conduct deliberations, telling juries how to proceed on a step-by-step basis, Diamond

indicated that she was less interested in that approach. "What I have seen here is that jurors do quite well in managing their deliberations even when their behavior is sometimes messy and meandering." The final lesson, Diamond observed, is that the jury needs a good press agent "because what we see in the news media is a very biased picture of how juries actually behave."



Robert Grey noted that he found the presentation revealing because it provided important information about the "inner sanctum of one of America's most guarded institutions." He pointed out that he has been given a lot of credit for initiating the ABA's American Jury Project. But it was not an original idea, he indicated. It was the product of an excellent conference, "The Vanishing Trial," that was sponsored by the ABA Section of Litigation, then chaired by Patricia Refo. "I heard very passionate statements by judges and lawyers about what we were losing in terms of opportunities for litigants to find ways to settle their disputes through this very ingenious system we have developed for jury trials." As Shari Diamond indicated in her

presentation, the media portrays jurors as not very knowledgeable and insinuates that they should not be trusted with complex matters. "But I tried cases for about 15 years, and I would trust a jury any day of the week in preference to any other form of dispute resolution." Jurors try "as hard as anybody in our society to get it right, and they take it seriously. So I am a strong proponent of the jury system."

The work that Shari Diamond has done provides important insights, Grey suggested. The first is that jurors want to be respected. They want to believe that the lawyers and judges who are entrusting them to make a decision on complex and crucial matters give them credit for their ability to understand what they are being told. "In many cases, we blame jurors for not understanding when we, the lawyers, are responsible for the communication problem."

Shari Diamond's work also highlights the cultural role that the jury plays in our society. Some 85 percent of the jury trials in the world take place in the United States. "We summon five million people to serve each year; a million of them serve on more than 80,000 jury trials throughout the country." The jury system is a prime example of participatory government, a cornerstone of our democracy, and it is one of the few places where we actually influence what happens in our society, Grey observed. Lawyers, judges, law professors, and researchers need to take the

If you have not read Shari's articles about how real juries work, then you are not doing what you should as a trial lawyer to arm yourself with the best available information about what it is that you do every day

lead in insuring that the system works for those individuals we are asking to make very critical decisions. "This research indicates that we have the ability, the opportunity, and the responsibility to try to make the system work better for jurors so that they can provide justice to litigants."



Patricia Refo pointed out that Shari Diamond's empirical work is extremely important. "I personally think that she is *the* leading researcher on the American jury because she is

taking those of us who try cases to a place where we can quit substituting our anecdotal experiences for empirical research," Refo suggested. "If you haven't read Shari's articles about how real juries work, then you are not doing what you should as a trial lawyer to arm yourself with the best available information about what it is that you do every day." Refo noted that Diamond's articles cover a broad range of topics. An important one is what jurors do about questions in those jurisdictions where they are permitted to ask them. Do jurors, for example, get stuck on a question when it goes unanswered? And the research indicates that, by and large, they do not.

Diamond's research also looks at the impact of allowing juries, especially in civil cases, to speak about the evidence when they are all together in the jury room, but before they are charged and retire to deliberate, Refo pointed out. "Of all the recommendations we set forth in the ABA Principles for Juries and Jury Trials, I daresay that allowing jurors to hold discussions before deliberations was probably the most controversial one. I am mindful, since we are in Florida, that when the Florida committee was considering this innovation, it was rejected by a razor-thin majority of 44 to 1. So I understand that it is not all that popular in Florida." But if you read Shari's articles, you will understand what real juries in Arizona actually do when they are permitted to talk about the evidence, Refo noted. "They do not typically come to an

early conclusion, which is what everybody fears they will do." In fact, juries do what we all would do if we were involved in a decision-making process in our ordinary lives that required us to include someone else, such as a spouse. "Imagine buying a house—an important decision in your life—and that you and your spouse are operating under a decision-making matrix that says you cannot talk about anything until you have seen every possible house, after

My concern is that a message is being sent which portrays a jury trial as a failure, when it certainly is not, and I regret the reduced opportunities that young lawyers have to try cases

which you will be locked in a room and somehow begin and end the conversation about which house you should purchase." This is not the way people function, and Shari's research actually speaks to whether or not the evils that we worry about will occur when you allow juror discussions during trials.

The jury system has worked

well for a couple hundred years, Refo observed, but we should continue to look at ways to make it better, and to give tools to people we have conscripted into government service that will enable them to make better decisions that improve the delivery of justice. "A lot of the innovations that Shari is studying do precisely that."



Maurice Graham stated that he knew he was preaching to a choir that all believed as strongly as he does in the importance of the jury system. "I think it is remarkable that none of us would single out an individual juror and direct that person to decide an issue, but something magical happens when you put eight or twelve people together, and they do an outstanding job."

Graham indicated that one of his concerns as a trial lawyer is the competing pressures that have reduced the number of cases that are tried. "Too often we are told—either by some judges and certainly by mediators—that if the case is not resolved, short of a jury trial, then some parties are being

unreasonable and the system has failed." But a jury trial is certainly not a failure of the system, he asserted.

Graham noted that he is a member of the state committee for the American College of Trial Lawyers, and it has become increasingly difficult to find young lawyers "working 100 percent of their time in the litigation field for their firms who have tried many cases." He

Instructions for jurors should better explain wording that sounds like ordinary language but has special meaning in the legal system

pointed out that young lawyers do not get the opportunity to try the types of cases that he was able to try when he was younger, cases that involved limited money but which allowed him to put witnesses on the stand, cross-examine them, and do all the things that make up a jury trial. "My concern is that a message is being sent which portrays a jury trial as a failure, when it certainly is not, and I regret the reduced opportunities that young lawyers have to try cases."



Justice Miriam Shearing observed that she is also a fan of the jury trial. "In hundreds of cases I have listened to the same evidence the jurors have, and I respect their decision. I almost always agree with them, and in those few instances in which I did not agree, it was a very close call." One facet of Shari Diamond's research that Shearing found very compelling was the work on the unanimity requirement in a jury trial. Diamond found that when unanimity was not required, the dissenting jurors were marginalized. There has been a movement to eliminate the unanimity requirement in order to get more verdicts, and "I do not believe that it is an effective way to get verdicts. It is more important to have full participation by all the jurors," Shearing noted.

Shearing indicated that providing better instructions for the jurors is a critical way to improve the jury system. The instructions should be in plain language. Also, many legal concepts sound like ordinary language, but are really terms of art. It is also important that the instructions give a clear explanation of any of these terms of art. "I think improving jury instructions so that they are relevant to jurors should be a major project."

Allowing jurors to ask ques-

tions is also an important step forward, Shearing pointed out. "I had a criminal trial a couple weeks ago where questions were asked, and I was very impressed at how helpful it was for the jurors." Of course answering questions can help to clarify any misunderstanding regarding evidence that is revealed by the questions. Also, even if a question is not directly relevant, a juror can be distracted when there is a question the juror is pondering, and answering the question can allow the juror to concentrate on the evidence being presented.



Robert Josefsberg reported that he is not just a fan of jury trials but a consumer. "I make my living with jury trials, and I am at a point in my career where I live for jury trials, which I find invigorating and inspirational." Jury trials are an important element in our society, Josefsberg observed. Aside from the fact that it gives jurors an opportunity to participate, juries can protect us from the law, just as law was initiated to protect us from the king. There are many cases where the landlord, the big corporation, or the government has a good case technically, and a judge will follow that technical law. "But a jury of six or twelve strangers can look beyond the technicalities and achieve justice."

A jury of six or twelve strangers can look beyond the technicalities and achieve justice

Josefsberg noted that he has lectured in Europe and South America about the benefits of the jury system, and when he sat down with judges, the most effective argument he made was that "in jury trials, they never shoot the judge afterwards. And the judges got that one." Communication is also critical when interacting with jurors, he pointed out. "One problem is that some erudite, Ivy League-educated lawyers talk down to so many jurors for so long a time that they just get clobbered in courtrooms. Lawyers have to learn to talk like people." A former Surgeon General, Everett Koop, instituted a program at a medical school where he was associate dean that required second-year medical students to speak to grade school children once a month about a medical phenomenon. The lesson here is "if you cannot explain a medical or legal issue to a fourth, fifth, or sixth-grader, then you cannot communicate." In the course of representing a corporation that is technically right, there are times when he gets hurt by juries, Josefsberg related. "I accept that and my client can take it. Overall, I think the jury system is fantastic for our country and the individualism it embraces, and I want you to keep doing everything you can to preserve it."

This is Fay Palmer.

She's the Senior VP & General Counsel for a leading bottled water corporation.

She loves the Red Sox, could do without casual Friday and controls over \$10 million in billings.

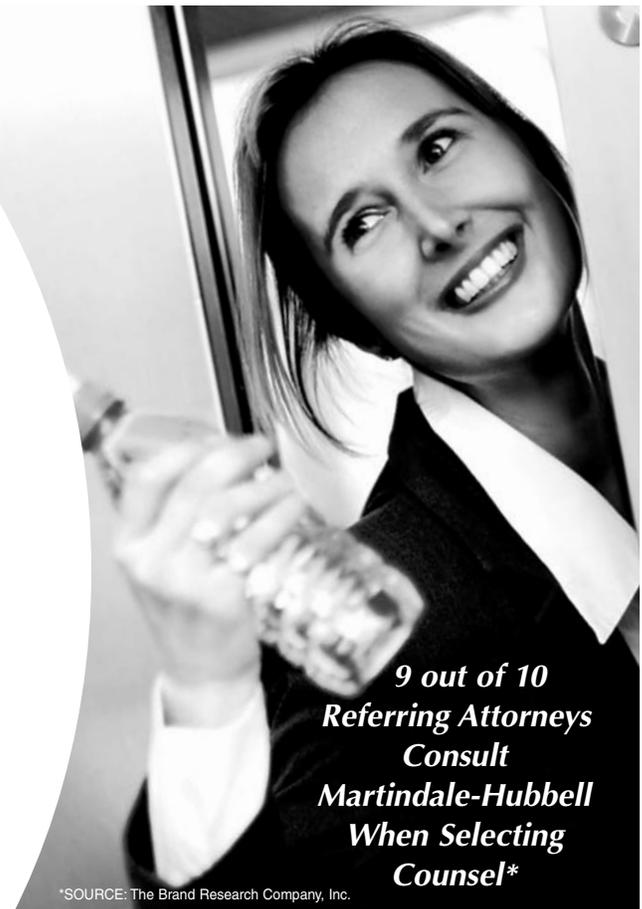
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