

STATE BAR LITIGATION SECTION REPORT

THE ADVOCATE



WHEN PRACTICES COLLIDE:
CROSSROADS IN CIVIL AND
CRIMINAL CASES



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CHAIR'S REPORT

The Importance of Juries—and How We Can Support Them



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WELCOME TO THE LATEST EDITION OF *THE ADVOCATE*. The Litigation Section's flagship publication has done it again – bringing together some of the best lawyers and judges in the state to write timely, practical pieces that our members can put to use in their practices. In this edition, the authors tackle the intersection of criminal and civil litigation. The next time one of your cases bleeds into the arena of criminal law (perhaps a client will want to discuss with you whether to invoke the Fifth Amendment during a deposition) you will be glad to have this edition on your bookshelf. Thanks to our editor-in-chief Professor Lonny Hoffman for his always outstanding work on this publication.

Juries serve a crucial role in both civil and criminal litigation – but they are criticized and few want to serve on them

In thinking about the overlap between criminal and civil litigation, I am reminded of a common bond between the two: juries play a central, crucial role in resolving our society's disputes. Whether they are determining civil liability or criminal culpability, our justice system relies upon jurors to decide issues from the mundane to the monumental. Jurors are the vicarious voice of their community – literally democracy in action.

My wife Emily was recently called to jury duty in Harris County. While she was happy to fulfill her civic responsibility, she was concerned about the disruption that a lengthy trial might bring to our family. Among the press of daily errands and the busy-ness of life, a jury summons represents an additional time commitment and hassle many would prefer to avoid. When she returned from the courthouse that day, however, she bubbled over with stories from the experience. She had been a member of the venire during the jury selection in a headline-grabbing case: Antonio "A.J." Armstrong Jr. was accused of murdering his parents while they slept in their Bellaire-area townhome. He was just 16 at the time of the events in question. Two juries had already failed to come to consensus regarding a verdict, one in 2019 and the other in 2022. Emily was not seated on the jury, but left the experience deeply moved by the gravity of jurors' responsibilities, the solemnity of the proceedings, and the gut-wrenching decisions that lay ahead for the twelve citizens who held Mr. Armstrong's fate in their hands. What had started as an inconvenience transformed into an eye-opening lesson that reminded her of the importance of juries and the crucial role citizens play in the judicial system. This story repeats itself every day in our courts: those who react to the call for jury duty with reluctance (or even dread) gain a deep appreciation for the role and the judicial system once they experience jury selection (and perhaps a trial). To a person, every juror I have spoken to after a verdict in one of my trials appreciated and enjoyed serving on a jury – no matter how much they had originally hoped to avoid it.

As a lawyer, I sometimes get asked by friends or family, "What is the best way to avoid getting picked for a jury?" I deflect and respond, "Please don't try to avoid it in the first place." The same people who complain that they do not trust juries are often the same ones who try to avoid serving as a juror. In my practice, I frequently represent corporations. Business leaders involved in litigation often fret about the prospect of "runaway juries," and worry that a venire will have too few thoughtful, educated citizens to serve as potential jurors. But sometimes those same businesspeople will brag about how clever they themselves were in avoiding jury service by saying just the right thing during voir dire to convince the parties to strike them from the panel. The cognitive dissonance is stunning: on one hand, they believe that they themselves are too important to serve on a jury, but on the other, they complain that Texas juries do not include more people like them. Here is the simple truth: if you want to have a jury of your peers when you have a dispute, you need to be willing to serve when called to resolve someone else's dispute.

We need to encourage jury service and improve the juror experience

To encourage our fellow Texans to serve on juries – and improve their experience when they do – there are a number of simple steps we can take. We need to listen to jurors: they consistently suggest that service is unnecessarily inconvenient, trials are lengthy and repetitive, and the restrictions placed on them are cumbersome. Attorneys and judges can improve the juror experience, resulting in a streamlined presentation of evidence, minimal wasted time, and, ultimately, happier

jurors who will sing the praises of the judicial system. The *New York Times* recently reported that once a citizen serves as a juror, he or she is more likely to hold attorneys and judges in high esteem. Ruth Igielnik, *Americans Still Put Their Trust in Juries. Will Trump’s Trials Break That Faith?*, N.Y. TIMES (Aug. 28, 2023). The underlying study from which the newspaper drew this conclusion, conducted by polling company Ipsos, showed that jurors are considerably more likely than other citizens to trust just about everyone involved in the legal system – other jurors, attorneys, judges, and police. Following is a comparison of the percentage of respondents who reported having “a great deal” or “a fair amount” of trust in different participants in the justice system:

	General Population	Jurors
Citizens serving on juries	58%	76%
Civil litigators and attorneys	40%	60%
Corporate attorneys	22%	39%
Defense attorneys	40%	62%
District attorneys, state attorneys or other prosecuting attorneys	42%	70%
Federal court judges	44%	71%
Local police and law enforcement	62%	75%
National or federal law enforcement	49%	68%
Non-legal staff working in the court system	47%	75%
State court judges	46%	74%
Supreme Court Justices	43%	55%

(available at <https://www.ipsos.com/sites/default/files/ct/news/documents/2023-08/Jury%20Service%20Survey%20and%20Legal%20System%20Topline%2008%2028%202023.pdf>)

Clearly, once jurors experience the judicial system, they put more faith in it. Now how do we get them in the door and make their experience a good one?

Make jury service more convenient

Some inconvenience is inherent to jury service. Citizens must take off from work, miss family events, navigate rush-hour traffic, and rearrange schedules to spend time at the courthouse. Worse, at times citizens will assemble for jury selection only to be told that a case has settled and the trip to the courthouse was wasted. Some Texas counties have invested in technology to ensure that potential jurors receive prompt communications about their service beyond the initial paper summons received through snail-mail. For example, in Travis County, the “I-Jury” system ensures that a registered juror receives: (a) a reminder call the night before jury service; (b) a text message either reminding the potential juror of his or her service; (c) immediate notification of any last-minute cancellations.

In my most recent jury service in Harris County in 2021, I was pleasantly surprised to find free coffee, parking, and wireless Internet. These basic creature comforts can make all the difference in a juror’s day as they wait for selection to begin – and make them more likely to tell their friends, co-workers, and neighbors that jury service really isn’t so bad after all. Counties need to expand efforts to make appearing for jury service as painless as possible.

Make jury service less financially burdensome – and more equitable

Across the state, a high percentage of citizens who receive summons simply don’t show up. A Harris County study reported that the juror response rate in 2018-2019 was a dismal 20%. See Harris County Commissioners Court’s Analyst’s Office’s “Juror Pay Memo,” 5/2021 (available at https://ccao.harriscountytexas.gov/Portals/72/Documents/JurorPay_FINAL.pdf). Justice Randy Wilson observed a decade ago in *The Advocate* that these numbers are not quite as dire as they seem at first glance: the 80% “no-shows” include 25% of juror summons that are returned as undeliverable as well as those who notify the clerk that they are disqualified or exempt from service. Hon. Randy Wilson, *From My Side of the Bench: The Problem with Jury Response Rate - Let’s Get the Numbers Right*, 61 THE ADVOCATE 65, 66 (2012). Correcting for these factors, Justice Wilson

explained that 62% of recipients respond to successfully delivered jury summons in some way. But whether the no-show rate is 38% or 80%, we still have a problem.

Those who do report for jury duty often do not reflect the diversity of our communities. For example, while African Americans represent 22.4% of Harris County adults, they comprise only 16.1% of jurors responding to summons in 2018-2020. Similarly, while 29.1% of Harris County adults are Hispanic, that demographic group represented only 19.1% of jurors during that same period. Harris County Juror Pay Memo, at 5.

Other highly populated counties suffer from similar disproportionate response rates. Over twenty years ago, the *Dallas Morning News* and *SMU Law Review* performed a comprehensive study of a week of jury data in Dallas County. Robert C. Walters, et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 320 (2005). In addition to racial disparities similar to those in Harris County, the study revealed that lower-income populations were much less likely to jury summons. While nearly 40% of Dallas County citizens come from households earning \$35,000 or less, only 13% of the people participating in jury service do. Missing work for jury service impacts African Americans and Hispanics more than their Caucasian counterparts: more than 19% of Hispanics and 17% of African-Americans reported that their employers would not pay them for time missed for jury service – compared to only 5% of Caucasian people. The most frequent response when the study's 401 "no-shows" were asked to explain why they failed to report for jury duty? Money. While employers cannot legally fire employees for attending jury duty, they do not need to pay them for time missed. No work means no pay for many citizens.

Empirical results suggest that jury pay matters. In 1999, El Paso residents voted to increase juror pay to \$40 a day, at a time when the state required only \$6. Response rates to summons popped from 22% to 46% within a year, and to 60% by 2002. Harris County Juror Pay Memo, at 9, 12. Hispanic participation more than doubled within less than two years. Because El Paso simultaneously implemented other jury reform measures, it is difficult to determine how much of the bump in response was caused by the pay increase. But it is safe to say that increases in juror pay likely translate to increases in response rates, particularly among low-income populations. Increasing jury pay has ramifications that implicate far more than just individual jurors' finances – it makes our system more fair and representative.

Happily, by the time you read this, the financial burden on Texas jurors will have decreased (at least somewhat). As of September 1, 2023, juror pay will be increased from \$6 to \$20 for the first day and from \$40 to \$58 for each day served on a jury thereafter, as a result of Texas Governor Greg Abbott signing House Bill 3474 into law in June 2023. That pay can be supplemented further by the county, and some district clerks have made strides to do so. For example, Harris County District Clerk Marilyn Burgess reacted to the pay increase by saying, "Although this increase is very good news, more is needed in terms of jury pay," Burgess said. "I am committed to continuing to work with Commissioners Court to supplement the local pay to make it where all can afford to serve." Jen Rice, *Harris County jurors to get a pay raise as Abbott signs bill authorizing increase*, HOUSTON CHRONICLE (June 16, 2023).

Make jury service more interactive – consider allowing note-taking and jury questions

Finally, we need to improve the juror experience in the courtroom, and ensure that they are equipped to render informed, reasoned verdicts. When you think about it, the rules we place on jurors are counter-intuitive. Normally, when trying to learn and understand a new subject, students are encouraged to ask questions, and interactive presentations and group discussions are considered most conducive to learning. But jury trials turn that model on its ear: jurors are told (under penalty of being found guilty of juror misconduct) not to discuss the case with anyone – even their fellow jurors. Imagine that – jurors are asked to sit all day, every day, sometimes for weeks at a time, to master the details of a case, and cannot discuss it with the others given that same task until the very end of the trial. Jurors are even told that if they do know something about a case, they cannot share it: "Do not tell other jurors about your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. Do not tell the other jurors about it." Tex. R. Civ. P. 226a.

Of course, there are good reasons to place some limits on jurors' communications. But attorneys and judges can do more to assist jurors in understanding and deciding a case. Judge Michael J. Brown, an Arizona judge, compares the courtroom to a classroom: "The best analogy for what a jury trial is is a short course in adult education. Once you get into that mode . . . and understand that the judge and the lawyers are all instructors in this course, then you can understand how

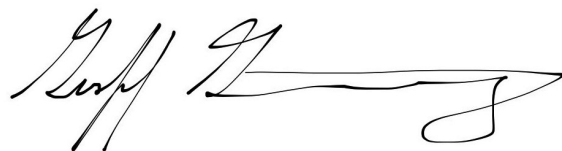
it's supposed to work. It works just like a class. People take notes, people ask questions, people discuss the content of the course among themselves and then they take their final exam." Tim Eigo, *O, Pioneer: Michael Dann Shapes Jury Reform for a New Century*, Arizona Attorney (Feb. 2001). Arizona has been a trailblazer when it comes to jury reforms, spearheaded by Judge Michael Dann's 1993 article on jury trial innovations, including note-taking and juror questions. "These proposals [from Judge Dann] spurred a great deal of empirical research on these practices, especially on juror questions to witnesses, which largely confirmed that they improved juror comprehension, they were not prejudicial to the parties, and they were not overly burdensome to the judge or lawyers in the case," explains Paula Hannaford-Agor, director of the Center for Jury Studies at the National Center for State Courts (NCSC). "Based on empirical findings about the positive impact of this technique, the NCSC Center for Jury Studies strongly supports its use." Michelle Casady, *Letting Jurors Ask Questions Divides Judges*, THE TEXAS LAWBOOK (Sept. 2, 2022). Studies show that when they are permitted to ask questions, jurors become "intensely engaged in the task of problem-solving," and "enthusiastic about the opportunity." Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1971-72 (2006).

While permitting jury questions has the potential to improve jury engagement and decision-making, it must be carefully planned. Permitting jurors to ask questions of witnesses directly may pose problems, both legal and practical. Lawyers may be put in the awkward position of objecting to an improper question from a juror, potentially alienating the factfinder who will determine the fate of the lawyer's client. In a case I tried in Travis County, the parties and the judge worked out a compromise that I thought worked well: at every break, jurors could submit written questions to the bailiff. The judge provided copies to the attorneys, who could then decide if and how to ask questions after the break that might elicit the information sought by the jurors. The attorney became the conduit for the question, and could tweak what might otherwise have been an objectionable question. If the questioning attorney asked the juror question in an objectionable way, the opposing attorney could object and get a ruling. Sometimes, both sides would agree that a question simply had no place in the proceeding, and the question would never be asked of a witness. More often than not, however, the questions helped the lawyers shape the case. At the very least, the juror question provided insight regarding how jurors were reacting the evidence, and permitted adjustments to trial strategy before it was too late. In addition to providing an indication as to what jurors found important midway through the case, the questions would highlight where the evidence had been less than clear – while there was still time to clarify the issue before the witness left the stand. Even is a question revealed that a juror had misunderstood the evidence or focused on an irrelevant issue, it permitted the questioning attorney to ask the witness questions in an effort to get things back on track.

Studies suggest that Texas is behind the curve on implementing these types of measures. The NCSC conducted a survey to determine what jury improvement procedures were employed in 11,752 jury trials across the country between 2002 and 2006 (the results are available at <https://www.ncsc-jurystudies.org/state-of-the-states/state-of-states-survey>). Only 53% of Texas judges and attorneys responded that juror note-taking was permitted in their trials (compare to 95.7% in Wyoming). Hardly any of the Texas trials permitted juror questions: those were allowed in only 1.7% of the cases (compare to 91.3% in Arizona). Note-taking and jury questions may not be right for every case, but I humbly suggest they deserve more acceptance than these numbers suggest.

The jury is the crown jewel of our judicial system and our democracy. Texas lawyers and judges must do all we can to make jury service and outcomes as convenient, fair, effective, and accurate as possible.

As always, if there is a way that the Litigation Section can serve you better, please do not hesitate to contact me. I can be reached at ggannaway@beckredde.com.



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