JURY INFRINGEMENT TRIALS

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I. Introduction

A. For several months now I have served as ED of the CJP, a 4-year academic project at NYU established to study why jury trials in civil cases are vanishing, whether it matters, and if so, what can be done about it.

B. There are legitimate complaints about the expense of jury trials, but that expense is largely the result of courts spending enormous amounts of time trying to prevent cases from going to juries or to prevent juries from hearing certain evidence through SJ, Markman, Daubert and MIL hearings.

C. There are also legitimate complaints about juries inability to comprehend complex facts and apply confusing law, but those are largely the result of judges dumbing down juries by not setting time limits on trials and depriving those who can serve without pay for weeks of basic learning tools like the ability to ask questions, discuss the evidence as they go, get preliminary substantive instructions in plain English and their own individual copies of the same for reference during the trial.

D. But since bench trials have vanished more quickly than jury trials, it is obviously nothing inherent about jury trials that have caused their demise. It is rather that the runaway jury verdict was used as the poster child of the litigation reform movement that began in the early 70s with tort reform, that reached full bloom

in the mid-eighties with the Supreme Court's embrace of arbitration and summary judgment to clear dockets, and that is soon, I fear, to culminate in more patent reform legislation including intrusions on the American rule by making the loser pay. Corporate America has been successful in making Main Street associate the word "frivolous" with litigation and "troll" with patents. And you all know too well, the adjectives they use to describe the ED of Texas.

E. The point is: if juries were the innocent victims of a drive by shooting at litigation in general as a means of resolving disputes, then I fear my 4-year study project cannot alone save the 7th Amendment. It will take a major advocacy PR campaign informing the public about the vanishing jury trial in civil cases and why

that is a bad thing. As an adjunct academic, NYU tells me the CJP has got to eschew advocacy.

II. What we can and will do is (1) to encourage courts to adopt innovations on the way juries are selected, instructed and provided tools to comprehend, and (2) to provide to the 7th Amendment advocates statistical evidence, if it exists, that juries can be trusted and that jury trials are not necessarily more expensive. I want to tell you about two initiatives in the latter regard.

A. First, we have decided to replicate the only nationwide study of judge/jury agreement in civil cases that was ever done. That's the study published in 1966, 50 years ago, by Kalven and Ziesel based on a study of 4000 civil cases tried during the 50s. It found that on liability, the judge agreed with the jury 78% of the time. And that while in 20% of the cases, the jury

awarded greater damages than the judge would have awarded, in 15%, the judge would have awarded greater damages. I suspect that as a result of the tort reform, litigation abuse movement and the numerous gate-keeping roles played by judges, a study of jury trials today will show a greater judge/jury agreement and might even show that judges are better for pls than juries.

B. The second initiative that we plan to undertake is to update Prof. Mark Lemley's informative study of all patent cases tried between Jan. 2000 and June 2011. As you know, patent cases are Exhibit One of those who argue for either the repeal of the 7th Amendment or the judicial adoption of a "complexity" exception.

1. In his article "Rush to Judgment," Prof Lemley reported on the results of 624 patent trials, 75% of which were jury trials.
2. Nationwide, patentees won jury trials 63% of the time, and bench trials 51% of the time. While Prof. Lemley concludes that pls lawyers are right to want jury trials, his research doesn't answer whether juries are more generous than judges when it comes to damages
3. His other conclusions were:
    a) The sophistication of the jury pool didn't effect the outcome
    b) Jury trials averaged 8.6 days (including deliberations) compared to 5.74 for bench trials. But

(1) The days of a bench trial are only those on which the court heard evidence and, as we all know, those days need not be consecutive in a bench trial. The research did not measure the time from the start of evidence to the conclusion. My hunch is that average time might be longer than 8 days, and we also know that it's hard for lawyers not to be billing the client for preparing on the off days

(2) Also, the research did not measure the time between the end of the evidence and the decision by the judge

4. In event, the length of trial had no effect on outcome

5. That's true whether it was a jury or bench trial
6. Juries in ED TX find for patentees 70% of the time compared to the national average of 63
7. Trials in ED TX, CDCA and DDel are shorter than elsewhere
8. And finally, long trials are a waste of party and judicial resources, while a short trial, far from a rush to judgment, may produce the same outcome more quickly and cheaply
9. My hunch here is that an update of Lemley's study might even show that the pls' bar is crazy to want juries in patent cases.

III. I am happy to report that as I travel around the country meeting with state and federal judges to get their advice on what the CJP should be doing, I hear the same thing: they are unhappy with the disappearance of trials, are sick about

working in empty courthouses and are very open to doing everything they can to reverse the trend.

A. Ten years ago the ABA recommended virtually every innovative jury trial tactic we are now re-urging judges to try. But the adoption rate has been very, very slow. Perhaps that's because the recommendations came from the organized Bar.

B. The CJP is allied with bar organizations on both sides of the docket and political spectrum, but we are mainly academics, assisted by jury consultants, and I sense we may have a better shot now at getting the ABA recommendations adopted by courts.