

Jury News

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What's New in the World of Juries: Highlights from the 2008 ABA Jury Symposium

Three years after releasing its *Principles for Juries and Jury Trials*, the American Bar Association (ABA) Jury Commission convened the third biennial ABA Jury Symposium in New York City October 16–17, 2008, to continue the discussion of how the principles affect jury trial management and procedures in state and federal courts around the country and the world. The symposium featured New York Chief Judge Judith Kaye as the keynote speaker, a series of panels on topics ranging from corporate views of trial by jury to notorious trial management, and many opportunities for symposium participants to exchange news about jury improvement efforts in their respective states and countries.

CORPORATE AMERICA SPEAKS OUT ON JURY TRIALS

The symposium began Thursday afternoon with a sobering view of corporate confidence in trial by jury from Kathryn Oberly, corporate counsel of Ernst & Young, who noted that organization's preference for alternative dispute resolution (ADR), especially arbitration, over trial by jury to resolve disputes with its employees and customers. She explained that lay juries cannot fully comprehend complex financial and accounting evidence, and they are often overwhelmed by the multi-million dollar stakes involved in these types of disputes. That view was countered by Donald Lough and Sara Moss, respectively the corporate counsel for Ford Motor Company and the Estée Lauder cosmetic company, both of whom expressed their belief that juries do a good job of deciding cases at costs similar to or less than arbitration. Lough went on to explain that, in his experience, juries rarely "get it wrong," and when they do, it is usually because the trial judge did not follow the ABA principles in a misguided effort to achieve "judicial efficiency," especially in jury selection. In a subsequent symposium panel, Professor Ted Eisenberg of Cornell University Law School reported on empirical research that supports the general views of Ford Motor Company and Estée Lauder. Eisenberg found that the vast majority of contractual agreements filed with the Securities and Exchange Commission do not include jury trial waivers or mandatory arbitration clauses, suggesting that sophisticated corporate organizations do not, in fact, distrust jury decision-making.

EFFECTIVE JURY IMPROVEMENT EFFORTS REQUIRE CONSISTENT AND CREDIBLE JUDICIAL LEADERSHIP

Friday morning began with Chief Judge Kaye's keynote address, in which she recounted New York State's many achievements in improving citizens' jury service experience, described some of the barriers that continue to impede effective reform, and challenged her state court peers to make similar improvements in their jury systems. During the panel immediately following that address, supreme court justices from Connecticut and New Jersey and the chief judge of the federal Southern District Court of Illinois were given an opportunity to respond to Chief Judge Kaye's challenges with reports of ongoing jury improvement efforts in their respective court systems. The prevailing themes of their comments were the difficulty in implementing reforms due to bureaucratic inertia and entrenched misconceptions by the bench and bar about jury competence. Panelists agreed on the importance of credible judicial leadership to keep forward momentum and ongoing training for the bench, bar, and court staff.



RESEARCH RELATED TO THE ABA PRINCIPLES

The next panel featured new empirical research on a diverse set of issues addressed in the ABA principles. Professor Shari Diamond of Northwestern University School of Law began the discussion with the impact of jury size on jury diversity. After examining the resulting demographic makeup of several hundred juries impaneled by an Illinois trial judge, Diamond confirmed the commonly held belief that prosecution and defense counsel exercise peremptory challenges based on race and gender, but she found that their respective discriminatory efforts typically cancel each other out. The size of the jury to be impaneled, however, had a lasting impact on the composition of the resulting jury; twelve-person juries were significantly more likely to include minority representation than six-person juries.

Professor Ted Eisenberg then criticized the U.S. Supreme Court for its misinterpretation of the empirical literature on jury awards involving punitive damages in its recent decision in the Exxon Valdez oil spill case. The court reduced the punitive damage award from \$5 million to \$2.5 million on grounds that under federal maritime law, the amount of punitive damages should be limited to no more than the amount of compensatory damages. In coming to that conclusion, the court recognized that the ratio of compensatory to punitive damages is very small: typically 1:1 or lower. Although he praised the court for taking note of the empirical evidence on punitive damages, Eisenberg argued that the majority opinion demonstrated the justices' misunderstanding of basic statistical theory by replacing the median ratio of 1:1 with a ceiling. The court also failed to appreciate that punitive awards exceeding the median are generally those with nominal compensatory damages for which a 1:1 ratio would hardly provide a useful deterrent effect, as punitive damages are supposed to do.

Harkening back to the earlier panel discussion among judicial leaders, I reported on a curious finding from the *State-of-the-States Survey of Jury Improvement Efforts* in which judges apparently disregarded established court rules or common law that prohibit or mandate the use of various jury trial procedures such as juror note taking, permitting jurors to submit written questions to witnesses and providing written copies of jury instructions. I concluded that these instances of "judicial nullification" likely reflect judicial resistance to jury improvement efforts that would only be overcome by consistent judicial leadership and training.

HIGH-PROFILE TRIALS

The final panel of the symposium featured Michael Raiff, a media lawyer from Vinson & Elkins; Judge Terry Ruckreigle, who presided in the Kobe Bryant rape case; Mary Jo White, who prosecuted the first World Trade Center bombing trial; Neal Sonnett, who defended Manuel Noriega; and Tom Munsterman, one of the original authors of *Managing Notorious Trials*. In a far-ranging discussion of how the ABA principles apply in high-profile trials, the panelists expressed a great deal of support for the use of written questionnaires during voir dire, cameras in the courtroom, pretrial gag orders and decorum orders, and notice to the media about decisions involving media access to trial proceedings.

Dennis Drasco, chair of the ABA Jury Commission, closed the symposium with a promise to reconvene in two years to debate the impact of the ABA *Principles for Juries and Jury Trials* as they celebrate five years of active use and debate in the legal community. I intend to be there, and I hope many of you will be, too. Keep abreast of the work of the ABA Jury Commission at <http://www.abanet.org/jury/>.

ABOUT THE AUTHOR

Paula Hannaford-Agor is director of the Center for Jury Studies at the National Center for State Courts. For more information on the Center for Jury Studies and its work, visit www.ncsc-jurystudies.org.