

**INTERVIEW**  
**G. THOMAS MUNSTERMAN:**  
**GUILTY (OF A CAREER**  
**DEDICATED TO IMPROVING**  
**THE JURY SYSTEM)**

*Interviewed by Robert V. Wolf\**

No one has been more involved in the sweeping changes to the jury system over the last several decades than G. Thomas Munsterman. As the long-term director of the Center for Jury Studies at the National Center for State Courts, Munsterman has researched or consulted on virtually every significant jury innovation since he co-founded the Center for Jury Studies in 1979. Although he recently left his post as director—passing the mantle to Paula L. Hannaford-Agor—he remains on the center’s staff as director emeritus, working on projects of his choosing. As a testament to his influence, the National Center for State Courts this year inaugurated the G. Thomas Munsterman Award for Jury Innovation. He also received the 2008 Jury System Impact Award from the American Bar Association Commission on the American Jury Project, sharing this honor with Judith S. Kaye, the chief judge of the State of New York.

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**Your background is in engineering. How did you end up studying the jury system?**

Life takes interesting turns. My degrees—both undergrad and grad—are in electrical engineering. I was working for Bird Engineering in Vienna, Virginia, when a colleague of mine, Dr. William Pabst, was called to jury duty in the federal district court for the District of Columbia. This was the 1970s. He reported every day for several weeks and realized a lot of time was being wasted. Some days things happened and some days things didn't. So he came back to the office and said we should do some engineering about this because, if you think about it, it's a utilization issue—it's queuing theory, inventory control.

**Explain queuing theory.**

It's the study and theory of queues: people or things lining up to be served, such as shoppers in line for checkout at a store; people waiting in cars to pay a toll; workers waiting for an elevator; jurors waiting to be sent to a court for jury selection; or judges waiting for prospective jurors. How do you minimize the wait time given the number of servers, the service time and the arrival time of those seeking service? You would not believe the number of learned papers about elevators. The change to the single queue in airports, banks and post offices is a most elementary example of improvements from queuing theory.

Bill raised the issue of juries at a conference, and there was a person there from the Department of Justice who said, "We'll give you \$10,000 for a good idea, but the grant program requires submission by tomorrow." So Bill went home and wrote up an application on his manual typewriter and got \$10,000 to study the federal district court of the District of Columbia.

We looked at the records for the federal court to figure out what the real demand for jurors was. Why not have them call in the night before to see if they're really needed? We tried to match the number of jurors who reported to the number needed, and found, in the end, that by having them call in the night before we saved them something like \$300,000 a year.

Following that success, the Department of Justice and one of its units, the Law Enforcement Assistance Administration, asked us to take a more general look at jury utilization. We

wrote “A Guide to Juror Usage,”<sup>1</sup> which was published in the 1970s, and then we did a second volume called “A Guide to Jury System Management.”<sup>2</sup>

After that, we decided that the only way to get funding was to set up a nonprofit, so we created the Center for Jury Studies.<sup>3</sup> The first employees were my wife, Janice, now executive director of the State Justice Institute, myself, and Bill Pabst. We started with funding from the Law Enforcement Assistance Administration, looking at the issue of juror management and usage. Then, we began to look at some of the issues that arise before jurors report for service: the list from which names are called, qualifications and summoning. Eventually, we looked at courtroom activity: jury selection, voir dire, in-court communications, jury instructions and the whole jury process.

**You were taking tools from the world of engineering and science and applying them to the court system. Were you among the first to do this?**

Yes. There had been a few studies looking at juries in the 1960s, but we were the first to look at this systematically. To write our first manual, “A Guide to Jury Usage,” we studied a dozen courts in the District of Columbia, Minnesota and Colorado and tried to come up with some generalized rules for improving jury use.

**How did the Center for Jury Studies come to join the National Center for State Courts?**

The Center for Jury Studies worked just fine as long as we had large individual grants from the Law Enforcement Assistance Administration.<sup>4</sup> But when the LEAA went out of business, we needed a larger organization, so we merged with the National Center for State Courts with whom we had worked on jury studies.

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1. G. T. MUNSTERMAN, A GUIDE TO JUROR USAGE (1974).

2. G. T. MUNSTERMAN, A GUIDE TO JURY SYSTEM MANAGEMENT (1974).

3. NATIONAL CENTER FOR STATE COURTS, CENTER FOR JURY STUDIES, [http://www.ncsconline.org/D\\_Research/cjs/](http://www.ncsconline.org/D_Research/cjs/).

4. The Law Enforcement Assistance Administration was established by the Omnibus Crime Control and Safe Streets Act of 1968 and was abolished in 1982.

### **How unique is the American jury system?**

We all like to think it came from England with the settlers and colonists, but, in fact, we were denied trial by jury, which is one of the reasons cited in the Declaration of Independence for breaking with England.

Jury trials are an exercise in democracy, reflecting our distrust of government and of sovereigns. When we look at the number of jury trials per population, nothing comes close to the United States. We estimate that, despite recent decreases in the numbers of jury trials, we still have 95 percent of all jury trials in the world.

But the jury trial is coming back in some places. One of Boris Yeltsin's reforms was to re-institute the trial by jury in criminal cases in Russia. The death penalty cannot be given in Russia without the finding of guilt by a jury. Spain re-instituted juries in 1995; it had been used in Spain before, but Franco got rid of it. The first thing dictators do is get rid of juries. They don't want citizens making decisions.

Japan will be introducing a mixed tribunal jury in 2009. It will be a nine-person jury where six jurors are laypeople, and three of them are judges; they can convict or acquit on a simple majority, but at least one in the majority must be a judge.

China is going to be introducing trial by jury. Korea is experimenting with trial by jury. In all three—Japan, China and Korea—the juries only involve criminal cases.

### **What have been the most difficult changes to make to the jury system during the course of your career?**

I think any change is a challenge, and none of them came that easily, although I think some were more difficult—attempts to reduce preemptory challenges or change the way in which they're exercised, for instance—than others.

The whole move has been to democratize the system. When you think about the most famous jury movie, *Twelve Angry Men*, it's a 1950s movie and the jury is made up of 12 white guys. It wasn't until 1975 in *Taylor v. Louisiana* that the Supreme Court said that we couldn't give women an exemption

just because they're women.<sup>5</sup> At that time, the jury pool in many courts was anything but 50-50 men and women; it was more like ten percent women to 90 percent men.

**So women didn't have to be jurors if they didn't want to be?**

Exactly. A woman could exclude herself. She could check a box that identified her as female and automatically get out of jury service.

In terms of the history of the jury system, we had a long period where not much was happening. Then, we started with the 1960s: civil rights, integration and the recognition of the desire for a representative jury. People asked, "Why is the jury just those who are hand-selected by jury commissioners?" In those days, many states still had jury commissioners, who had full authority to get names from whatever list and select whomever they liked.

We started moving away from commissioners with such broad discretion to using multiple lists, going well beyond just the voter lists. That was a big step, which happened in some states as early as the 1940s and 1950s. Today, no state allows commissioners to hand pick jurors. Then, we started reducing the term of service with one day/one trial, which started in Houston in the 1970s. My first trip when I started studying juries was to go to Houston to look at this thing called one day/one trial. The idea was that rather than having the same people come back over the entire term of the court, you'd have people come back only one day, unless selected for a jury, and then they'd sit to the verdict. What this meant was that we didn't have to excuse as many people because of hardship, and, because we needed more people, we had larger and broader lists, which, in turn, meant we got a better cross section.

We used to have exemptions for people who had certain professions: doctors, lawyers, embalmers and airline pilots. California exempted keepers of alms houses. These exemptions existed primarily because these organizations had a political lobby. Now, most states have no exemptions based on profes-

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5. Taylor v. Louisiana, 419 U.S. 522, 536 (1975).

sion. Everyone serves, which again, gets us to that democratization idea.

We started looking at jury service from the point of view of the juror. We tried to make it more convenient by, for instance, allowing postponements. At first, people thought that postponements were a violation of randomness, but, if done correctly, they stand up to anyone's definition of randomness.

Today, many jurors can fill out forms online. And the orientation for jurors has vastly improved. One of the first juror orientation films was done in New York State with help from the New York State Bar Association. Now, some states conduct orientation on the Web in streaming video.

### **And what about changes that have taken place inside the courtroom?**

Here, much of the credit, I think, goes to a now retired Arizona judge, B. Michael Dann. He was working on his master's in judicial administration at the University of Virginia, and he published a paper in 1993, looking at the judicial model of the jury in which the jury sits there, information is fed to them, and they don't do anything but absorb what is said; they're not reacting until they get in the deliberation room, and then they start discussing the case. He said, "Isn't the more appropriate model an education model in which the judge and the attorneys are instructors and the jury is the students? Don't we have a lot of knowledge about educating people that we're really not using in the courtroom?"

There's a very good video out called "Order in the Classroom,"<sup>6</sup> in which a college professor tells his students that the class will be run as if it were a jury trial: you can't take notes; you can't talk to each other; you all have to agree on the same answer; and you can't ask any questions. The students look at each other in disbelief.

But to get back to Judge Dann: he sent a copy of his paper to the chief justice in Arizona, and the chief justice formed a committee and made Judge Dann the chairman. They recom-

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6. DVD: Order in the Classroom (International Association of Defense Counsel ), available at [http://www.iadclaw.org/jti\\_material.cfm](http://www.iadclaw.org/jti_material.cfm).

mended in-court innovation, things as simple as letting jurors take notes or allowing them to submit questions. There was some experimentation done as to what the instructions to the jury should be. In one of the first tests, a juror interviewed afterwards said, “I had a tough time thinking of a question to ask,” as if the judge in his instructions was somehow mandating a question.

There’s also the idea of giving jurors a copy of the judge’s instructions. In many states, at least one copy of the instructions goes to the jury. When I served as a juror, the judge, as he read the instructions, taped them with a little pocket recorder and then broke off the tab, so the tape couldn’t be changed, and gave the tape to us to be used in the deliberation room.

And that’s an innovation, although it’s kind of amazing to say an innovation is something as simple as taking notes or using a tape recorder.

The idea behind all these changes is to make it a more interactive, more educational experience for the jury. Judge Dann provided the unifying model to make these ideas make sense in a larger way.

**In the preface to the second edition of “Jury Trial Innovations,” you and your two co-editors observe that, after the first edition was published in 1997, you hadn’t anticipated that “jury reform would capture the imagination of so many judges, lawyers, researchers, and citizen-jurors.”<sup>7</sup> Why, considering that the jury system has been around for literally hundreds and hundreds of years and hasn’t really changed all that much, have the last 10 years been such a time of change?**

I think the changes I just mentioned caught the imagination of a lot of people who said, “Doesn’t this make sense? Here we are in the 1990s, and jurors can’t take notes?” Most trials last a couple of days, and maybe you don’t need notes in some of them, but, when cases go on for weeks and weeks, that’s a different story. I remember attending a capital case in Illinois in which maybe a dozen guys were being tried simulta-

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7. G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD & G. MARC WHITEHEAD, *JURY TRIAL INNOVATIONS* (2006).

neously on capital murder charges. It was a prison uprising and several guards were killed. The case went on for months, and jurors weren't allowed to take any notes. I don't know how they even kept the defendants straight. Each defendant had his own lawyers and the jurors just sat there and nodded, and eventually the defendants were acquitted. They didn't convict any of them. They were already serving time, so it's not as if people walked, but the fact was that no one was convicted for the knifing of the guards.

Another idea in complex cases is to give the jury a glossary of terms, or, if we have many witnesses, a blank piece of paper with a picture of the witness, so they can remember what this witness looked like and so they can make all their notes, or copies of documents that are entered as evidence.

A lot of these ideas arose spontaneously. I was talking to a judge in Alabama once who said, "I let my jurors ask questions," and I asked, "How did this come about?" He said, "One day a juror raised his hand and asked, 'Can I ask a question?'" It's just sort of a natural thing for people to do. Likewise, taking notes. In fact, we have jurors now who go into deliberations, who'll ask for flip charts and Post-it notes and laptops because if they're calculating damages, they'd like to have a laptop with Excel on it.

All these ideas have come up from judges or attorneys, who thought this made good sense. A judge in California heard a case on alleged patent infringements and wanted a briefing from the attorneys on terminology, and it was given to the judge and her clerks, and she said, "Wait a minute, this should be given to the jurors," so she held the first jury tutorial, where the witnesses came in and spoke to the jury about computer technology and software. In so many cases, that's where these innovations come from.

### **When reforms are made, are they research-based, or are they considered common sense reforms, and the research comes later to support it?**

The change usually occurs first, although it's not totally uninformed. It's not just "Gee, wouldn't that be fun?" The research helps courts fine-tune the reform or outline the best

practices or explain how it's done. Research also helps us design and evaluate pilot tests of the innovations.

With jurors' submitting questions, there were some judges who were just letting them ask, and people said: "No, they should be in writing, and the parties should have the right to review them." Others asked: "What if the judge decides not to ask a question? Does the juror infer that something is being hidden from them?" Shari Diamond's research, for instance, from Arizona found that one of the first questions that jurors always ask in civil cases is about insurance. One of the recommendations that Shari and Neil Vidmar of Duke came up with was a better instruction on insurance.<sup>8</sup> That's an example of research helping us improve the process.

### **So does the research usually validate the wisdom of reforms?**

Yes, I think it usually offers support for them. I will say that nothing is ever as bad or as good as we thought it would be.

We have had much better research from the 1990s onward than we've ever had before. We now have a large database from actual deliberations, thanks to work in Tucson in Pima County, Arizona, by Shari Diamond and Neil Vidmar.

One of the Arizona courts' innovations is that jurors can discuss the evidence prior to deliberations.<sup>9</sup> Some people call this "pre-deliberation," although I think that's a misnomer because they're told they can discuss the evidence but not begin their deliberations, or not make up their minds. That's a very easy thing to say but a hard thing to do, and there are several arguments against letting jurors discuss the evidence. One thought is that if it's discussed, a juror might express an opinion that might be very difficult to change. Anyway, Shari and Neil worked with the Arizona courts and videotaped civil jury trials and the jury deliberations and discussions. Their research

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8. See Shari Seidman Diamond, et al., *Jury Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003).

9. See 16 ARIZ. REV. STAT. ANN. RCP Rule 39(f) permitting jurors to discuss the evidence among themselves as long as all jurors are together in the jury room.

supports the idea that pre-deliberation discussions are not causing jurors to commit early on.

Another area researchers are looking at is juror stress, the idea that jurors, post-verdict, can exhibit signs of extreme stress. It shouldn't be surprising that after a trial, some jurors have stress and problems, and we're doing things about that now in many jurisdictions. Psychologists are provided, or some effort is made to help the jurors. This came about in the late 1990s and early 2000s when we had some grizzly cases, and the judges were finding that they were having trouble sleeping and they thought, "If I, the hardened judge, can't sleep, how about some of the jurors?"

### **Have any innovations turned out to be mistakes, things that were experimented with but which didn't really work?**

One of the innovations early on was reducing the size of the jury from 12 to six; the Supreme Court, in its decisions permitting it in civil and criminal trials,<sup>10</sup> relied on what we now consider to be poor research, people saying "Oh, it doesn't make any difference. We can save a lot of time, people and money." If you can save money, that always sits well.

Now the feeling is that having smaller juries isn't necessarily a good idea; that by going to a smaller size, you remove wisdom, intelligence, and experience from the jury room. The dynamic of the deliberation changes with a smaller number, and, statistically, the chance of having a representative cross section has got to be worse. In other words, the probability of having an all-white jury of six is much greater than an all-white jury of 12.

When we did a study of eight- versus 12-person juries in California, we saw that very thing.<sup>11</sup> We saw that it wasn't because of peremptory challenges being used in a discriminatory way or any other reason. It was simply because of statistics that say a smaller jury is going to be less representative and less likely to have minorities.

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10. See *Williams v. Florida*, 399 U.S. 78 (1970); *Ballew v. Georgia*, 435 U.S. 223 (1978).

11. G. THOMAS MUNSTERMAN, JANICE T. MUNSTERMAN & STEVEN D. PENROD, A COMPARISON OF THE PERFORMANCE OF EIGHT- AND TWELVE-PERSON JURIES (1990).

In fact, the American Bar Association in 2005 adopted “Principles Relating to Juries and Jury Trials” that called 12-person juries in civil and criminal cases the “gold standard.”<sup>12</sup> So that is one improvement made a while back that people are now re-thinking.

### **Are there any areas still ripe for reform?**

The one area we really haven’t totally solved is jury compensation. New York has one of the highest compensation levels at \$40 a day. Some states pay only \$20 or \$25. Pennsylvania pays \$9 a day, and it has a bill pending to raise it. I don’t think they’ve touched it since 1980.

We don’t have a good lobby for the jury, and that’s probably a good idea.

### **Are you saying it’s good not to have a group lobbying on behalf of juries?**

There have been attempts to form organizations of former jurors, but I’m afraid the concept becomes very political. The fact that jurors don’t have a lobby may mean that the jury hasn’t become a political animal.

Where you have strong state leadership, like in New York, then the courts can come forward and promote legislation to get the jury fees increased, eliminate exemptions and so forth. Jury reform became New York Chief Judge Judith Kaye’s cause. She realized something had to be done. I don’t think any state has had such sweeping changes as we’ve seen in New York. In fact, the New York court system, in collaboration with the National Center for State Courts, sponsored the National Jury Summit in 2001.

In most states, it’s the state’s highest court or the state bar that pushes for change. The American Bar Association first came out with jury standards in the 1980s, but I think that we had a wider and deeper examination after we saw Arizona,

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12. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS: (2005), [http://www.abanet.org/jury/pdf/final%20commentary\\_july\\_1205.pdf](http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf). Principle 3 states that “Juries should have 12 members.”

New York, California and Colorado look seriously at their jury systems.

The American Bar Association, particularly its recent past president, Robert J. Grey, has been very active in forming the American Jury Project that developed the new American Bar Association principals and a commission to develop ways to reach out to the public about the jury. In October 2008, we're having a symposium at Fordham Law School, like one we had in Dallas two years ago, and everyone is saying that every two years we should have a symposium to bring people up to date.

There are a few citizens groups that have become interested. There's one in the District of Columbia called the Council for Court Excellence, which is organized outside the court system. The Fund for Modern Courts in New York is somewhat similar, as is Pennsylvanians for Modern Courts.

### **What are the key issues going forward? Is it jury compensation? Are there other things on the horizon?**

Jury compensation is certainly one of them, as well as getting the changes or improvements, which I've already discussed, adopted in more states.

We've got a number of courts where the desire is, rather than to have one courthouse downtown, to have courts in several locations in the county. The idea is to give better access to justice. Community courts are an example. But if a community court in, say, Los Angeles, is going to do jury trials, are you going to pull jurors from all over Los Angeles County to go to every courthouse in Los Angeles? L.A. has dozens of courthouses where jury trials are held, so how do you allocate citizens based on the needs of the court and on convenience of the citizens? Can you expect that a jury in Van Nuys looks like a jury in Santa Monica, which looks like a jury downtown? These differences present complex issues and methodologies as to how you go about allocating people and how much discretion the court should have in doing this.

Finally, we are seeing some very good work at making jury instructions more understandable. For years, the instructions to the jury at the conclusion of the presentation of the evidence were written for the appellate courts and not for the

jurors. That is, would the instructions pass appellate examination? California was the first to do a complete rewrite of its instructions with the assistance of linguists. A recent symposium brought together committees from various states that are tasked with writing and updating jury instructions. Wouldn't you think that by now we could agree on a definition of "reasonable doubt?"

We're also still looking at the use of juror's time, the whole issue of scheduling, figuring out how many people do we need and trying to minimize the burden on the citizen. Those are ongoing issues.

**Using jurors' time more efficiently was your first issue. That's what brought you into the business.**

The situation has improved. Nonetheless, you ask jurors, what's their biggest complaint, and they say "waiting" and the fact that so few people called actually make it to the jury box. There was a follow-up jury commission in New York that we called the "82 Percent Committee" because only 18 percent of the people who came in the front door actually made it to the jury box, and 82 percent didn't.<sup>13</sup> Today, some courts have the number up to 30 or 40 percent. But, still, we have a lot of people who are called in who are challenged, or the defendant pleads, or the case settles, so we don't need them. So there's always that frustration.

**It seems like we're proud of the jury system and we think it's an integral part of our democracy, but we'd rather someone else do it.**

My line is: "Everybody loves jury duty but not this week."

We've done some looking at the parallel between jury service and voting. We wouldn't dare get rid of voting or have

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13. New York State Chief Judge Judith S. Kaye appointed The Commission on the Jury in 2003. The commission issued a report on June 17, 2004. See THE COMMISSION ON THE JURY, INTERIM REPORT OF THE COMMISSION ON THE JURY TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2004), [http://www.nycourts.gov/reports/Commjury\\_InterimReport.pdf](http://www.nycourts.gov/reports/Commjury_InterimReport.pdf).

some other mechanism for picking our officials; on the other hand, what are our turnout rates on Election Day?

That's why so many reforms are aimed at making it feasible for people to serve so that on the morning when they're supposed to report for duty we minimize the burden. There's no question that if they have to go downtown where they don't usually go, to find a parking place or to take public transportation, it can be difficult and cause them to think, "Well, maybe next time."

The public has never known more about the jury system than they do today thanks to the O.J. Simpson trial, Court TV or the experience of other people. About a third of the population has been called for jury duty. That number is much higher than it's ever been because of things like one day/one trial.

What always amazes me is when I ask someone if they've been on a jury, and they say, "Yea, it was 10 years ago, and on the first day this happened, and on the second day that happened . . . and then this and this and this." It's an incredible, indelible experience. It stays in the memory for years and years, even down to what "he said" and "she said" and the details of deliberations.

### **Is the jury trial vanishing?**

I think there's a large national concern for the vanishing trial, particularly on the civil side and particularly in the federal courts. The decrease in jury trials is not as pronounced in criminal cases.

### **Why is the civil jury trial vanishing?**

We don't know. Research has been done by many people to try and answer that question. We know that jurors are becoming more conservative and less generous in most jurisdictions. Contrary to *The Bonfire of the Vanities*,<sup>14</sup> the awards are getting much smaller, which means that attorneys are less likely to take cases that are more marginal. We have alternative dispute resolution; we have caps on punitive awards; and we have

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14. TOM WOLFE, *THE BONFIRE OF THE VANITIES* (1988).

a whole slew of efforts that could explain why we're seeing fewer jury trials.

### **Do you think efforts should be made to prevent civil jury trials from vanishing?**

If the rights of the individuals can still be maintained, then it doesn't bother me, although the loss of the educational experience of jury service does bother me. If, as when you get some Visa or MasterCards, you have to waive the right to a jury trial, then it's a real problem. Incidentally, there's been some very good research from Cornell University about how often and why companies issue these contracts.<sup>15</sup> They've seen that in jurisdictions where the courts are more highly held, it's less likely that these sorts of clauses are in the contracts. It seems that, if the corporations who are issuing the contracts trust the jury system or trust the courts, they're less likely to try and find an alternative mechanism.

### **What aspect of your work do you find most interesting?**

The thing that keeps me going is the uniqueness of this institution. The citizens are asked to resolve disputes or resolve these factual findings. The participation of these individuals is quite remarkable, as is the fact that in most cases they do it unanimously. The only other thing that has to be unanimous is the U.N. Security Council. It goes back to Alexis de Tocqueville's wonderment at this participatory aspect of our administration of justice. Some of these innovations would not have been needed if we still had two day break-and-enter trials. But when we have these complex cases, we're going to need new tools, and it's very rewarding to see these innovations being used and being used in very inventive ways by creative judges.

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15. See Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 1539 (2007).

**How many courts/court systems have you consulted with over the years?**

Precious few when you consider that there are thousands of them. But I can say I've been in a court in every state. I only know that because once I was in a Holiday Inn waiting for breakfast where they had a placemat that had the states on it, and I just started checking off everywhere I'd been.