DISTINGUISHED JURIST IN RESIDENCE LECTURE

WHAT JURIES REALLY THINK: PRACTICAL GUIDANCE FOR FUTURE TRIAL LAWYERS

*The Honorable Amy J. St. Eve**

DANIEL CAPRA: Thank you all for attending the webinar today. It's my total pleasure to introduce to you Judge Amy St. Eve. Judge St. Eve was appointed to the Seventh Circuit Court of Appeals in 2018 and before that served as the U.S. District Judge for the Northern District of Illinois from 2002 to 2018. She graduated from Cornell Law School. She's an adjunct professor at Northwestern Law School and has written several articles concerning litigation and jury decision-making.

Before coming to the bench, Judge St. Eve among other things practiced at Davis Polk, served as special counsel in a Whitewater prosecution, and was an Assistant U.S. Attorney. While a judge she has served with distinction on many Judicial Conference committees, most importantly, the Committee on Rules of Practice and Procedure but also the Committee on Court Administration and Case Management and the Committee on the Budget.

With the Rules Committee, Judge St. Eve was the go-to person on many projects. It's just mind-boggling how valuable her work was there. And so I have the honor to have her here today to talk about her article, "What Juries *Really* Think: Practical Guidance for Trial Lawyers."[1] Judge St. Eve is going to make a presentation and then I will ask some questions that I have received from students, with particular thanks to the *Fordham Law Review*. So Judge St. Eve, I turn it over to you.

JUDGE AMY ST. EVE: Thank you Professor Capra, and thank you for inviting me to speak today. It's certainly an honor to be here and talk to everybody. I'm sorry to tell you, Professor Capra, that I am not going to talk about specific rules of evidence today. But I will talk a little bit about what juries like in terms of presenting evidence. So we'll skip the rules. I'll save that for you, and I'll talk about some of the practical matters. So our talk

* Circuit Judge, U.S. Court of Appeals for the Seventh Circuit. This Lecture was held virtually on October 20, 2020, at Fordham University School of Law.

1. Honorable Amy J. St. Eve & Gretchen Scott, *What Juries* Really *Think*: *Practical Guidance for Trial Lawyers*, 103 CORNELL L. REV. 149 (2018).

today is about an article that I wrote about two years ago regarding juries and what juries really like.

So here's what I'm going to do: I'm going to talk first about the background of the juror study. Then I'm going to talk about the study's findings, and then we're going to talk a little bit about the key takeaways from the findings.

I got this idea in about 2011. I went on, as Professor Capra said, the U.S. District Court in 2002. Before that I was a trial lawyer. I had been an Assistant U.S. Attorney in Chicago. I tried a lot of cases. So I had a lot of experience before juries. And as a district court judge, I tried quite a few cases as well. I've never felt like "the dying trial" was applicable in Chicago, because we were all busy trying cases.

I teach trial advocacy, too. So that was part of the impetus behind this project. And I was always trying, both in the classroom and in the courtroom, to tell lawyers, look, juries don't like certain things. Or there are certain things that juries do like. And I knew what juries liked and disliked because after every case I tried, I would go back and I would talk to the jury and inevitably, every jury wanted to talk to me about what they liked that the lawyers did and what they didn't like that the lawyers did. It was always fun and enlightening to hear what they had to say. So I thought, why don't I try to turn this into some type of study that I can present to help lawyers and law students learn what it is that juries really like.

So that was the concept or the thought behind this project. Between 2011 and 2017, I handed out surveys after every jury trial. The response rate was very high from the jurors. I had over 500 jurors during this approximate six-year period, over fifty trials. They were civil and criminal and the participation in the survey was voluntary.[2]

Because there were both civil and criminal trials and they took place over a long period of time and a wide variety of cases, the questionnaire pool was very diverse. We had a very broad, diverse jury pool that was completing these surveys. So we weren't just getting the perspectives of certain types of jurors or certain types of cases; the cases really ran the gamut.

I would provide my questionnaire after I went back and talked to the jurors. It was the last thing I did. I gave the questionnaire to the jurors and I would tell them, "Look, I am writing an article for lawyers." And this was usually after they had talked to me about the lawyers and what they did and didn't like that the lawyers had done.

I told them it was completely voluntary, that their responses would be anonymous. I wasn't going to share them with the lawyers. They shouldn't put their names on them. There would not be any response back to them in any way, and there was no obligation to complete it. But I asked them if they would take a little bit of time and provide it to my courtroom deputy when they were done. And then I left the room so they didn't feel any pressure, one way or the other, to complete it.

2. For more detail on the survey methodology, see *id.* at 150–52.

The questionnaire had five questions, four of which are relevant here. I had broad, open-ended questions because I wanted to hear what the jurors had to say. I didn't want to put any ideas into their heads of what these answers should or shouldn't look like. So I kept the questions broad.

The first question was, "Please list three things that the lawyer did during the trial that you liked in the order that you liked them." The second question was, "Please list three things that the lawyers did during the trial that you did not like in the order that you didn't like them." The third question was, "What would you have liked to see the lawyers do differently or better?" And then fourth, just a very open-ended question: "Any other comments about the trial?"

The fifth question I had was not relevant to this presentation. I've written two articles on the fifth question, which had to do with social media and the jurors' temptation to look at social media,[3] but I will save that for another day.

As I said at the beginning, the response rate was very high. The response to the first question was a little bit over 90 percent. The response to the second question was about 89 percent. And then the third and fourth questions: roughly 55 percent on the third question, and about 50 percent on the fourth question.

When I sat down and reviewed these questionnaires, it was really fascinating to see the common themes that came through on all of these questionnaires. I was able to break down the responses from the jurors into two broad categories: First, their comments about courtroom behavior—how the lawyers were conducting themselves and behaving in the courtroom. And second, the case presentation, their comments on the lawyers' presentation of evidence, questioning of witnesses, how they actually presented their case to the jury.

There were four very strong themes that came across in these questionnaires, which we can break down into organization, preparation, professionalism, and efficiency. So, how organized you are in the courtroom, your style and delivery in the courtroom, your behavior and professionalism in the courtroom, and your presentation of evidence in the courtroom.

The first one, organization and preparation, was the number one response for what they liked best, and the number one response, when it was bad, for what they didn't like. So be organized and prepared when you try your cases. And this includes technicalities in terms of having your exhibits premarked and don't fumble around with the evidence, have your witnesses ready to go. And it also goes to the substantive presentation of your case. So be prepared when you're directing the witness or cross-examining the witness. Have your questions flow. Have your questions in order. So the responses covered the gamut of both the technicalities as well as the presentation.

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3. Honorable Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1 (2012); Honorable Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64 (2014).

So, let's look at what some of the jurors said. Here are quotes, some things that the jurors actually wrote down on the questionnaire. Here's a sample of what they liked:

"Very organized."

"Did the trial in a timely manner."

"Prepared, polished, organized," and in parentheses, "photos and phone calls." That was the presentation of photographs and recorded telephone calls during a trial.

"Prepared—didn't waste time." You're going to hear that theme through all of these categories. Don't waste my time.

And here are things that they said about what they didn't like:

"Lack of preparedness—seemed to wing it."

"Have a better plan" and "better execution of the plan."

"Computer setup was slow. Could have marked files better."

The jurors also gave some suggestions for lawyers of how to be better organized and better prepared. Here's the sample of what they said:

"Prepare more thoroughly so evidence isn't missing" and you can "think of the next question without long pauses." Here we go again: Don't waste our time, make sure you're prepared. Make sure you're ready to go.

Another comment, "More to the point questioning."

"Less fluff."

"Limit sidebars." Jurors don't like sidebars. Some judges won't have sidebars during trials. Jurors really don't like them because, again, they feel like their time is being wasted.

Another suggestion, "Stipulate to more facts." Things come in much more quickly if they're stipulated to.

And, "Be more concise." Brevity and clarity are so important.

The next big category that we could break jurors' responses into concerned style and delivery. This was the second most common theme that came through on the juror questionnaires, again, both in the positive comments of what they liked and in the negative comments.

One of the number one complaints—and it was our number one positive, depending on which question they were answering—was: connect with the jury. This covers basic commonsense things that sometimes lawyers forget when they're nervous or when they stand up. They don't remember some of these basics. Introduce yourself to the jury. Speak to them directly and make eye contact with them. Some of the basics that you learned about communicating with people certainly apply with the jury.

Here was a big one: Speak slowly and loudly for all jurors to hear and process. There were many questionnaires where the jurors complained that the lawyers were speaking too quickly and they couldn't follow them. And another one: save the drama. Jurors generally don't like a lot of drama in the courtroom.

Here are some comments from the jurors on style and delivery:

"The defense had arms crossed way too much and did not try to make a connection with the jury," and then, parentheses, "no smiles."

So those of you who have taken psychology, what you learned about crossing your arms and the message that it conveys, that goes for the jury as well.

"Don't put on a show,"—"just present the evidence." Here we are, no drama, just present the evidence.

"Calm down and don't let emotions get in the way."

"Eye contact and an attempt to tell a coherent story to the jury was effective."

"Speak to the jury, like you're speaking face to face with one person."

No drama! This was a common theme throughout the questionnaire. And my last point here is, don't use TV lawyers as your guide. Jurors would say that. They don't like it if you are overdoing it. You can certainly be passionate and should be passionate about your case. But don't cross over the line into too many theatrics. The jurors don't like attorneys who are overdramatic, and one juror said that she would like to see the attorneys "calm down and not let emotions get in the way." So keep the drama out of the courtroom.

The next category that came across loud and clear through the questionnaires was professionalism. Jurors don't like unprofessional lawyers. This means being professional to multiple audiences: opposing counsel, the witness who is testifying on the stand, the jury, the judge, of course, and your cocounsel.

Opposing counsel: we had a lot of comments showing jurors did not like it if a lawyer was outright rude to opposing counsel. The jurors generally want to see you get along. Again, despite what you see on TV, those of you who are going to go out and practice law and be litigators, don't use TV as your guide. Civility in the courtroom is very important.

Here are some comments they had:

"Collegiality between the plaintiff and defense was evident, that was positive."

"Less interrupting of each other."

"Show more respect towards each other."

"More professionalism and respect for each other."

A few more comments about professionalism toward opposing counsel:

"Attorneys were courteous to each other."

"Attorneys were willing to help each other out (example, a computer charger)." That came up during a trial when one of the lawyers was trying to present evidence through a computer and he couldn't find his charger and the lawyer for the other side said, "Well, wait a minute, I have one. You can use mine," and the jurors noticed and appreciated it.

"Both sides were very kind and open to one another, not bad-mouthing."

So all of these comments were listed in the top three comments of what jurors liked best about what the lawyers did.

Witnesses: professionalism should extend to witnesses as well. The questionnaires made clear that jurors do not like it when lawyers interrupt witnesses, when they make sarcastic remarks to the witnesses, when they talk down to the witnesses, when they ask irrelevant personal questions of the witness (when it looks like they're just trying to harass the witness), and when they act too aggressively toward the witnesses.

Here are some comments that came from the jurors about being professional to witnesses:

"Did not like the lawyers being very sarcastic and rude, acting like the witnesses were stupid."

"The young male lawyer spoke disrespectfully to a witness. He spoke to him as if he was of low intelligence."

"When attorneys make rude remarks on cross that are below the belt, it makes them look really ugly."

Do not "get personal; just need the facts."

"Picked on witnesses that were not pivotal and then took it too far."

"Asked personal (i.e. salary or wealth) questions of peripheral witnesses."

"Acted too aggressively with the female witness asking about having a child at home that would impair her ability to do her job." And the juror here noted specifically it was a female attorney.

So there is a fine line here, because sometimes you have a witness that you need to be more aggressive with because of who that witness is, for example, if a criminal defendant takes the stand and testifies in a criminal trial—but there's a line to be drawn between aggression and personal attack that jurors don't like you crossing over.

When you're putting witnesses on the stand, if you're directing or if you're cross-examining, you need to think about who that witness is and what type of tone you should take with that particular witness. As these comments indicate, jurors don't like it, when a witness is minor, if you go over the top and you're rude to that witness. So keep in mind when you're questioning witnesses, based on what these jurors have said, how important is the witness? And basically, make sure that you don't cross that line of just being a "jerk," as one juror said.

The jury: make sure you are professional to the jury. That sounds like an easy one that most trial lawyers should know. The big takeaway from the survey is that jurors want to be respected. They don't want to be talked down to, and they don't want you wasting their time.

Here are some things that they said:

"Treat us like we have a brain." So don't be condescending to them.

"Liked that lawyers did not treat jury like kids."

"As a juror, felt very respected."

"The lawyer undermined jury's intelligence with meaningless theatrical counterclaims to opposition regarding seemingly obvious facts of the case."

"Don't stare." That's another common theme that we saw. They want you to have eye contact with them, but they don't want you staring at them.

The judge: jurors also want you to be professional to the judge. As I have said to lawyers before, as the judge I'm the one who makes sure that we start on time. I'm the one who gets to send them home at the end of the day on time. I'm the one who gives them breaks. I'm the one that makes sure that they get food. Of course they're going to want you to be professional to the judge. So don't cross that line with the judge. Not only will you irritate the judge, but you are potentially going to irritate and alienate the jurors.

Here are some things that they noted:

"Be cooperative and respectful to the judge and his or her staff." That is a very important lesson, both during the trial and outside of the trial. You should always be respectful to the judge's staff, to the court reporter, to the courtroom deputy. Make sure that you treat them with respect. Stand up when objecting. Do not interrupt or argue with the judge. And the jurors like the judge.

You should also display professionalism at the counsel table. Sometimes lawyers forget that the jury is sitting right in front of you. And if you're sitting down and you're not putting on a witness or cross-examining a witness, sometimes lawyers forget that the jury is still right there and they're watching you. They're interested in what you're doing. So make sure that you maintain your professionalism when you're sitting at counsel table. One juror wanted to "instruct the plaintiff not to be sleeping at the table and to show some interest."

The jurors have noted when lawyers from the same team failed to work as a team. I've had jurors say to me after trials, "What was going on at counsel table? The plaintiff's lawyers weren't getting along and they made it clear to us"; or, "the Government wasn't getting along." So they notice those things, make sure you are professional.

Make sure you talk to your clients. They should be professional as well. Here's another comment a juror gave about counsel table: "The attorney looked a little bored and too relaxed and was leaning back with her arm up on the chair."

"Used their cell phones." Jurors can't use their cell phones; they notice when you are using your cell phones. So be very conscientious of that.

"I saw one of the lawyers picking his nose." They're watching you, be careful what you're doing.

"Staring, raising eyebrows with arms crossed, not trying to make a connection with the jury."

Another one said, "Showed frustration with their own team when things didn't go exactly as planned." I had one lawyer who was in my courtroom quite a bit. And he liked to sit in his chair and rock and when he did that, the chair was a little bit squeaky and I had to tell him because we finally got a note around day three from a juror saying, "Will you please tell this lawyer to stop rocking in his chair." So lawyers, notice what you're doing.

And jurors not only notice lawyers' verbal cues. They also really notice your nonverbal communication: facial expressions, eye rolling, laughing at

inside jokes, sleeping. You should remind your entire team sitting at counsel table to be very professional with their nonverbal communication as well.

Interestingly, we also had some comments about appearance. Not a lot, but we had some comments about appearance and making sure the professionalism extends to it. And here are some comments we saw:

"Counsel had a hole in the seam of his jacket."

"The defense did not seem as well put together, shirts wrinkled, hole in the back of his jacket."

"Bright green nail polish—distracting on the TV as she was pointing. Not professional."

"Did not like that the attorneys make me pay attention to their personal ties, instead of just information." So think about your tie or look in the mirror before you go into the courtroom.

And "Unprofessional clothing."

I was in the middle of trying a case, this was years ago when the White Sox made it to the World Series, and the lawyer for the defendant (it was a criminal case) came in one morning after a very late game the night before in a suit that looked like it had been dragged out from the bottom of his dirty clothes. He was wrinkled really from head to toe. And, the jury—the minute I walked back to talk to them after the verdict—that is all they wanted to talk about. They didn't want to talk about the evidence; they wanted to talk about that rumpled suit and how the lawyer could come into court looking like that. So take a look in the mirror before you walk into the courtroom.

The final category that the juror questionnaires revealed was evidence presentation and jurors' strong beliefs about how you present your evidence. The most important theme that came through on evidence presentation: do not repeat what you're saying. The jurors really, really despise repetition, because they feel like you're talking down to them. They feel like you think they're stupid if you keep repeating matters over and over.

Here are some examples of what they said:

"Repeating of the question 304 times"

"Repeated the same thing over and over."

"Stop asking the same questions over and over."

"Lots of repeating, same thing—okay, we get it."

"Would like to see attorneys question the witness without repeating the same question three different ways and then summarizing."

"The lawyers constantly rephrasing sucks."

So the jurors get it. You don't have to ask the same questions and you shouldn't ask the same things over and over. Again, they feel like you're talking down to them. That you think they're stupid if you keep asking the same thing over and over. And back to the other common theme, you're wasting their time. They don't like their time wasted.

So you should ask clear and relevant questions. They don't like lengthy, compound, or convoluted questions; they like short, clear, and easy to understand questions.

Another thing about evidence presentation: don't confuse the jury. We saw numerous comments about feeling like the lawyers were trying to trick them or confuse them and they didn't like that. Here are some comments that we got:

"Don't try to fool the jury, just stay with the facts."

"Appeared to be trying to confuse us."

"Repeatedly asked questions which they know will be objected to just so they can say it aloud."

"Twist and nitpick unimportant facts."

Another thing that we saw about evidence, presentation, and trials—and I thought this was very interesting—we had a lot of comments about closing arguments. Very, very few comments about opening statements. So back to your psychology classes and the concept of recency—that seemed to come through on the jury questionnaires: closing arguments certainly matter, and here are some comments that we got. And just to note, more than three times as many jurors commented on the closings versus openings. Not that openings aren't important. I don't want you to walk away from this thinking they're not important. But closings, in jurors' minds, have a significant place in the trial.

So here are some of the comments:

"Gave profound closing statement."

"Great summation by prosecution."

"Convincing closing arguments based on evidence."

The closing argument "connected all the dots" and the "summary visual was very helpful."

"Good closing arguments really helped solidify the case."

"I appreciated the organized outline of various elements of the case in the opening and closing statements."

So your closing arguments are important to the jury. You should make sure you put the appropriate time into them. Make sure you're not repeating yourself. This is one of your opportunities to convince them.

The other interesting fact that came through in the jury questionnaires is that jurors like technology. This was particularly interesting to me because I have seen this evolve over the years. I was, back in the 90s, one of the Whitewater prosecutors who tried the governor of Arkansas and Jim and Susan MacDougal in Little Rock, Arkansas.[4] And I distinctly remember, when we were putting displays together and charts together to show the jury, that we didn't want to use electronics. We didn't want to put them on a computer and display them because we didn't want them to look too fancy to make it look like we were the big government. When I was at the U.S. Attorney's Office, the same concern came through. We consciously did very simple graphics, instead of putting the extra into something that would have looked a lot nicer on technology.

4. *See* U.S. v. MacDougal, 906 F. Supp. 499 (E.D. Ark. 1995).

But that has changed. Now jurors like technology and expect technology. And if you think about it, it makes sense. Think about the world that we live in. I'm sure all of you who are watching could reach somewhere and probably put your right hand on your phone and your left hand on either your laptop or an iPad or a tablet of some type. It's the world that we live in. We're used to getting things through technology. And so are jurors. And you think about learning at school, think about your own law school. We learn a lot through technology in a way that we didn't before. So it makes sense, the jurors like it and you can make effective use of it. Here are some comments the jurors gave us:

"Showing evidence on the screen." That was one of the things they liked.

"The TV screen by the jury box" and "PowerPoints."

"Clear visuals."

"Good visual" and "evidence on the screen."

"Use technology."

"I appreciated the display of evidence."

"PowerPoints, and visuals."

"Use of technology during the trial to focus on very specific aspects of the case."

"Use of technology helped."

So when you're getting ready for trial, think about how you can effectively use technology. And jurors, I was surprised by this, but jurors really like PowerPoints in closing arguments. They help them understand the case and they can be a very effective way to summarize your evidence for them.

Finally, the last question on the questionnaire was open-ended: "Anything else you want to say?" I particularly enjoyed the responses to this question because what they showed is that most jurors really had a great sense of pride from sitting on juries. So often during jury selection, you get potential jurors where it's very clear they don't want to serve. And many jurors go into it thinking, "Oh, no, I'm going to have to take a week away or two weeks away from my job, from my family, from my everyday life." And there's an angst about it and maybe even a little bit of reluctance. But I have found in trying many cases that through the course of the trial, juror attitudes change, and by the end of the trial, the jury feels really good about what they have done, and they have pride in our system and pride in what they have done. That pride came through in these comments.

Here are some of the things that they said:

"This was my first time being on a jury or doing jury duty. It was cool to see how the system works and to be a part of it."

"It was a great experience. I initially had a problem with it, but later found I was participating in something great and necessary."

"Great American experience and privilege."

"This was not even close to a root canal. It was a great experience."

"This experience confirms my understanding of the federal judicial system and was a great experience."

"It was an experience that everyone should have as an American citizen. It has changed my view of how our justice works in the most positive way."

"It was my first time selected to a jury, so it was all new and interesting and makes me feel good to be a citizen of the United States."

Jurors often get a negative rap when people are talking about trials, but that has not been my experience at all and these comments certainly reflect that. I have found, in the federal system at least, that jurors take their jobs very seriously. They want to do the right thing and they try very hard to do it.

So a couple of takeaways from the jury questionnaires. As one juror said: "Treat us like we have a brain." Jurors are smart, you should treat them like they are.

"Don't repeat."

"Be civil to each other." I'm sure you've heard during law school about the lack of civility, or some problems with civility in the courtroom, and that comes through in the jury questionnaires. It is very, very important to be civil to everybody involved in the trial process.

Do not waste their time. Be prepared, be organized, and don't repeat. Use technology and use it effectively. And finally, jurors have confidence in the system and really do enjoy and feel good about what they've done at the end of the trials.

So Professor Capra, I'm happy to take any questions.

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DANIEL CAPRA: Thank you Judge St. Eve, just such a wonderful presentation. I have a lot of questions here that were sent to me. I'll try and go through a few. The first question is from a second-year student: "In civil procedure during my first year, my class had a long discussion on the arguments for and against our jury system in the United States. Some believe that juries are too easily swayed by nonsubstantive arguments or appeals to emotions. But your findings seem to be positive evidence to the contrary." Do we need to worry about juries kind of going off on emotional tangents or misinterpreting evidence or getting too easily confused?

JUDGE AMY ST. EVE: My experience is in the federal system. I have found, and not just through these questionnaires but based on going back and talking to jurors after every trial, that jurors really want to do the right thing. They can differentiate among the different types of evidence that are presented, what's relevant and what isn't, and they really do try to follow the judge's instructions on the law. They want to get it right and it means a lot to them.

DANIEL CAPRA: Thanks. I have one question that's related to success for law students. "How do you think law schools can help ensure that law students are entering into practice and litigating with good professional habits? Given many of the critiques of the lawyers' performance in the cases you have here, what can be done in law schools to help train students to avoid these problems?"

JUDGE AMY ST. EVE: Well, I think it is important for law schools to teach civility and the importance of being civil to each other, being civil to opposing counsel. What young lawyers sometimes learn when they go into firms is they get into disputes with opposing counsel and then get into what I will call the nasty email exchange, which sets a tone for the case going forward that can be so detrimental. So I tell lawyers, if you're working at a firm, and you're working on some yucky discovery dispute and an opposing counsel really irritates you some way or the other, and you sit down and you type out what you think is a sharp and sassy email back to the person: before you press send, what you should ask yourself is, "Would I want some judge reading this someday?" And if the answer is no, then, it's great you typed it out from a cathartic standpoint; it might make you feel better. But go back and edit it. You shouldn't send anything to your opposing counsel that would embarrass you if a judge read it someday. Remember that what you write might well end up before a judge. Trust me, I have read many, many emails that I'm sure lawyers wish they had never sent. So I understand that it could release some tension if you actually type it out, but go back and edit it; and if you are so emotionally wrapped up and mad that you can't do it, then ask one of the other lawyers at your firm or one of your friends to read it for you.

DANIEL CAPRA: Okay, next about time wasting. Jurors seem very concerned about time wasting and a student asked, "sometimes what you need to do at trial might seem to a jury to be time wasting, for example, laying foundations for chain of custody, preparation for particular questions, marking exhibits, and the like." And what the student wonders is how a lawyer can communicate to the jury that while it seems to be wasting time, it's something that you need to do under the rules of evidence. What are your thoughts, Judge St. Eve?

JUDGE AMY ST. EVE: The questionnaires and discussions with jurors have not reflected that those types of foundational requirements bother them. They realize you need to lay your foundations. If they don't realize it initially, by the tenth time you have to do it, they will realize that there's a process you have to follow. But just be organized and prepared in how you do that. So if you have exhibits that you're going to admit, make sure they're premarked. Make sure you're not marking them as you're going through and looking back and saying, "Well, what number am I up to now?" Make sure that you do everything you can to be prepared in advance, to take those necessary steps that you have to in the courtroom.

DANIEL CAPRA: Next, an issue about treatment of stipulations. In *Old Chief v. United States*,[5] Justice Souter said juries probably wouldn't like stipulations because they'd rather hear a story than a stipulation; but your survey seems to indicate to the contrary. What should a lawyer consider in terms of whether to accept a stipulation or not, given the jury's expectations?

JUDGE AMY ST. EVE: I think in considering whether or not to stipulate to it, multiple factors must be taken into account. One question is, would you

5. 519 U.S. 172 (1997).

rather present this through a witness? Do you have a particularly compelling or sympathetic witness such that you think whatever you're going to stipulate to, whatever effect, might get lost without that witness's testimony? Is it going to be more powerful if it comes from that witness? Sometimes if it's something that is not going to be helpful to your client, you might be better off to stipulate to it if you know it's going to be proven anyway. The perfect example of that is a felon in possession trial, where you have to prove that the defendant is a felon who is possessing a firearm. Well, a lot of times defense lawyers will stipulate that the defendant is a felon, because it'll be a one or two sentence stipulation that he's a felon; because you know they're going to prove it, and it might come in in such a way that doesn't make your client look that good. It will come in in a better fashion if it's stipulated to. So it's very fact dependent and case specific. You just have to think about, am I better off to have this presented through a live witness? Or is it going to be better for my client if I just agree to it?

DANIEL CAPRA: Along the lines of what jurors can understand, a couple students asked, in your experience, do you think that limiting instructions to juries really work? And are there times when giving a limiting instruction actually harms the party that it's intended to help?

JUDGE AMY ST. EVE: I do think limiting instructions work. I do think jurors really want to follow the law and want to follow what the judge tells them that they must do. So yes, I do think, for the most part, that they are helpful and certainly helpful if they're repeated a couple times, when you admit the evidence and then again at the end of the case, just to remind the jurors. Are they ever harmful? I can't think of a specific example of it being harmful, other than it might highlight that particular piece of evidence.

DANIEL CAPRA: That was the question, that it might highlight the evidence and that maybe it's just better to just let it go.

JUDGE AMY ST. EVE: Exactly. So I think, again, depending on what the evidence is, you need to think, should I just let this come in? Especially if it's a lengthy trial, should I just let this come in and they're not going to remember it, or do you want to bring out that limiting instruction that will highlight it?

DANIEL CAPRA: Right. Now we have a number of questions about COVID-19, and they're in some ways related to your talk because COVID-19 affects jury trials and raises questions about how to deal with jurors during a pandemic. We would like your thoughts on how courts are or should be addressing the COVID-19 issue. I know you're on the appellate court now and the issues for COVID-19 are different, but you are an experienced trial judge. What are your thoughts and how do we work through COVID-19 in the future? And the follow-up question would be about Zoom trials and whether they can work. You can take any of that in whatever order you want.

JUDGE AMY ST. EVE: Sure. So as you know, I'm on the Court of Appeals now and have been since 2018, so going to Zoom and doing virtual arguments has been a much easier transition for us than it has been for the district court and the trial judges. Illinois went to stay-at-home in mid-

March. We were one of the first states to go and we immediately switched at the Seventh Circuit to telephonic arguments and then to Zoom arguments. I was very proud that we were able to do that quickly, seamlessly, and without having to reschedule any arguments.

DANIEL CAPRA: At the appellate level, did you think the Zoom arguments were about as effective as arguments in person?

JUDGE AMY ST. EVE: I strongly preferred the Zoom to the telephone, because you can see the lawyers. But in my view, nothing replaces actually being in the courtroom. I generally have been going into the courtroom on the days that I have argument, even though the lawyers aren't in there; but I do prefer, maybe it's more of a human element, actually having everybody in the courtroom.

COVID-19 has been much more challenging for the district courts because of the number of people who come into the courtroom on any given day—the lawyers, the witnesses. In ordinary times you could have thirty cases in one day and have courtrooms full of people, which you just can't do now. So in Chicago, we have gone to doing most things at the District Court on video, including sentences and changes of pleas with the consent of the defendant. A lot of hearings have taken place on Zoom. Trials have started taking place in person. We've had, I'd say, half a dozen criminal trials in Chicago with COVID-19. We only have two courtrooms that are big enough to accommodate social distancing with jurors in a criminal case. For civil cases, we have a lot more because you don't have to have twelve jurors, plus two alternates usually. But the criminal cases are slow going because of the limited number of courtrooms that we have that can accommodate them. So they are going, it's just much more complicated.

DANIEL CAPRA: How do defense counsel and the defendant communicate? I guess they're both at the table then, communicating with masks on?

JUDGE AMY ST. EVE: Yes.

DANIEL CAPRA: Everybody's got a mask on?

JUDGE AMY ST. EVE: Everybody has a mask on.

DANIEL CAPRA: That's how they testify.

JUDGE AMY ST. EVE: Socially distanced.

DANIEL CAPRA: Interesting. What do you think about the possibility of Zoom trials in the future? Any thoughts on that?

JUDGE AMY ST. EVE: I think, this period of COVID-19 is going to make all of us rethink what can we do that will be more cost efficient and time efficient, with technology rather than having everything in person. I personally don't think that trials will ever go, post-COVID-19, to a general practice of Zoom trials. I would be surprised, because you get so much more out of having everybody in the courtroom watching what's going on in the courtroom: credibility determinations, being able to see a witness up close. I think there's something that's lost by presenting trials on Zoom. I haven't presided over any, but this is just based on my experience of presiding over trials in the courtroom. I think there will be some changes made where more

hearings might be presented via video, or lawyers don't have to travel as much because they can appear by video, but I don't think trials will ever go remote or that that will be a general practice.

DANIEL CAPRA: I saw a mock Zoom trial, and all the jurors are in their own separate little electronic cubicles. And they have to communicate in a waiting room or in a breakout room, which seems rather odd and not like a real juror exchange. But the thing that was most remarkable, I thought, is that everybody's on the grid in a Zoom gallery and the judge is just this little square, just this little square among all the others in the grid, which understates the trial court's authority, it seems to me.

In your trials in the Northern District, what are they doing for public access? Are they putting them on YouTube or something like that?

JUDGE AMY ST. EVE: For Seventh Circuit arguments, they're all on YouTube. So you can listen to all of our arguments. On the public access, for some of them that have had attention, there's been an overflow courtroom, an empty courtroom, that they could go and sit in, socially distanced. And I'm not sure if they're on YouTube or not. I think the overflow courtroom has been the main access for the public.

DANIEL CAPRA: So do you think that this broader grant of public access will have some impact on the general federal position about broadcasting trials?

JUDGE AMY ST. EVE: That's an interesting question. There's been an attempt by some to get cameras in the courtroom for a long time that hasn't made progress. So I don't know if this will move the needle on that.

DANIEL CAPRA: Thanks very much. Now we're going to segue to questions of a broader nature. As you've been a district judge and a circuit judge, I think everybody would like to know kind of what the differences are? You don't have to say which job is more fun, but I guess what the challenges are of these two positions and how does your approach differ?

JUDGE AMY ST. EVE: Sure. They're fun in different ways. The District Court has much more of a human element. There's a lot going on. I could come in at the District Court on any given day and have thirty to forty motions that have been filed the day before that need some type of resolution. You're in the courtroom every day. You have witnesses coming before you. You have lawyers coming before you. There's a lot more action at the District Court.

At the Court of Appeals, you don't have that same action; but compared to what I did at the District Court, I say, now there's nothing I can do now, from start to finish, in twenty minutes. I used to be able to get a lot done very quickly at the District Court. Because, of those thirty motions that come in, ten of them might be requests for extensions of time to either file discovery or to respond to something, which you can look at and you can rule on pretty quickly. Whereas now, even the motions we get when I'm on motions duty at the Court of Appeals, there's nothing that I can sit down and resolve that quickly. In the Court of Appeals you have a confined record, so you're not taking witness testimony or seeing the witnesses, but the legal questions are

more challenging. Certainly at the District Court, I would see challenging legal questions, but not in every case; but the ones that are getting appealed are getting appealed on the challenging questions.

DANIEL CAPRA: How about the collaborative aspect of appellate court work? Does it take time to get used to the collaborative aspect of the Court of Appeals? As opposed to when you were a district judge, and you ran the show?

JUDGE AMY ST. EVE: That's actually been delightful to have, that now everything we do is in a panel of three. So on some of these tough questions, it's great to have my colleagues to talk through the issues with.

DANIEL CAPRA: Interesting. I was on a Rules Committee call with Judge Frank Hull today and she said, you know, the thing about being a court of appeals is you actually don't look for the truth, you just look for error. I thought that was good take on the job. In the district court they look for truth and in the appellate court, they just look for error. That's a difference.

On another topic: Can you talk about your thoughts and your research on how to control social media in trials?

JUDGE AMY ST. EVE: Oh, so social media, again, during the course of my role at the District Court, I saw social media evolve. I'll go back to the 90s, when I tried the Whitewater trial in Little Rock, which was a very highly publicized trial. It had lots of attention because President Bill Clinton ended up testifying in it, so there was a lot of media surrounding it. But the biggest worry we had, and the judge had with the jury, was that they would watch or read or listen to the news, because that's what was covering the trial.

So every day, the judge would question the jury and make sure that they hadn't read or heard or listened to any news stories the day before. And that was true for my first maybe six to eight years on the bench. The media and the news was the big concern. But then probably around 2008, 2009, 2010 you started hearing concerns about social media and jurors posting things on social media when they're sitting on a jury; or getting comments from outsiders on social media, or having others do research on sitting jurors through social media.

So suddenly, the concerns of outside influence have just expanded exponentially, in a way that's very difficult for courts to police. We can't look at everybody's Facebook and Instagram and it's very, very challenging to regulate. But it's important that we do whatever we can to discourage jurors from communicating in any way on social media about the trial, for purposes of fairness. So, one of my research questions in the questionnaire was, were you tempted to use social media? And if so, why didn't you? Or something along those lines. And the overwhelming response was that many people were tempted to, but they had been told over and over not to and that they had been told why—because of the consequence that you might have to have a new trial. And because of that, they didn't.

Now, can you police everybody and be sure that everybody doesn't post something or say something on social media? That's hard to do, because social media is a way of life for us now. With jurors when they come in, it's

their way of life too. They may not know that it's wrong to communicate about a jury on social media. So they have to be educated by the judge, and they have to be told what the consequences might be if they do post something or somehow are influenced through social media.

DANIEL CAPRA: And you continue that reminder through the trial I assume? You refresh recollection?

JUDGE AMY ST. EVE: From jury selection through the time of deliberation. Repeatedly, every day. I would tell them every day when they went home.

DANIEL CAPRA: I wonder if it's cause for challenging a juror that they are an Instagram influencer or something like that, might that actually be cause for disqualification?

JUDGE AMY ST. EVE: It might be a question to add to the voir dire, to try to get a sense of it. And I did ask my jurors, I asked everybody, do you use social media? Or do you have a Facebook or Instagram or a LinkedIn account? I asked every juror that. And then I asked them, are you active on it? Because some people would say, "Well, yes, I have a Facebook, but I haven't used it in three months."

DANIEL CAPRA: I guess if their answer is no and no, you wonder what rock they were living under for all this time too.

JUDGE AMY ST. EVE: Yes, I saw it was fairly generational.

DANIEL CAPRA: I have one more question, Judge St. Eve, and this is my question. Can you talk about your work on the Judicial Conference, what the Judicial Conference does, and specifically, because I'm here, the Rules Committee and your work on that, if you would?

JUDGE AMY ST. EVE: Sure of course, of course. So the Judicial Conference really is the body that helps run the judiciary and sets policies for the judiciary. The Judicial Conference has a number of committees. One committee is the Rules Committee, and it has advisory committees for each of the rules of procedure. So there's the Evidence Committee, the Civil Rules Committee, the Criminal Rules Committee, the Appellate Rules Committee, and the Bankruptcy Rules Committee. The Rules Committee, also called the Standing Committee, oversees all of the individual rules committees. And these are the committees that come up with those rules that the students have been learning about in each of those respective classes.

A new rule or modification to an existing rule starts in this committee process. And it's very much a process. When there's a rule change—I'll take Rule 23, the rules that were amended for class actions. That was a very involved process, which got a lot of input from practicing lawyers who commented on the implications of the changes to the rules.

It's a very deliberative process, a very important process, and it's important to vet those potential changes before they go into effect because we can't necessarily anticipate all of the ramifications of changing a rule. That's what the public and the lawyers are there to help us do, to make sure that the rule change is a necessary and appropriate change.

DANIEL CAPRA: Thanks, I did have one more question, if you would, about your work on cooperators. If you could just tell us what the issues are

about a person who is a cooperating witness, and has received a plea bargain, and what is or should be the public access to that plea bargain? I think the students would find that to be an interesting thing that you worked on.

JUDGE AMY ST. EVE: Sure, before I do that, I'll say on these rules committees most of the work is really done by the reporters like Professor Capra; that's invaluable to the judiciary and invaluable to the process.

As to cooperators. When I was on the Rules Committee, one of the things that I did and that I'm still doing in fact—I was on a call with the Bureau of Prisons this morning, Professor Capra—is there was an issue that was brought to our attention and various committees were pulled together to form a task force. Representatives from the Federal Criminal Rules Committee, the Standing Rules Committee, and the Committee on Court Administration and Case Management, formed a task force to address a concern and a problem that had come to our attention about cooperators who were being targeted and abused in prison because of their cooperator status.

Back to technology: the judiciary went on CM/ECF, I don't know if the students have familiarity with that, but in the federal system everything now is filed on, it's known to the public as Pacer, it's known in house as CM/ECF, or electronic filing. So all of your motions, your pleadings, your summary judgments, anything that you file with the court, those documents are filed electronically in our system and the public has access to that system unless something is filed under seal.

In criminal cases, when someone is a cooperator, it's often reflected in his or her plea agreement, which in many jurisdictions is filed on the public docket or in a sentencing transcript or in a plea transcript. In many jurisdictions, if that transcript is transcribed, it will then be filed on the public docket. So there was an effort by some to identify who the cooperators were who were serving time in prison and then other inmates would target them because they were cooperators and may have testified against a fellow gang member, may have testified against a buddy; or they just didn't like the fact that they were cooperators with the government, and so they were being targeted.

So for the task force that had been put together, our question was what can we do as the judiciary to help protect cooperators who are serving time in prison so that they are not targeted? And one of the big questions was how do we limit public access to this information yet still, under the First Amendment, make sure that the public has access to court documents that they're entitled to see? So that's what the task force worked on.

DANIEL CAPRA: That's extremely interesting and very difficult. And I want to thank you for all of us, Judge St. Eve, for appearing at Fordham virtually. We appreciate it greatly, and I know everybody was thrilled to have you here. And thanks so much for this great presentation.

JUDGE AMY ST. EVE: Well, thank you for having me. I wish I could be there in person, but I really appreciate it. It's an honor to be here and talk to everybody and it was so nice to see you, Professor Capra.