



# The American Jury

By Dicky Grigg, Guy D. Choate, Dan Worthington, and Tim Newsom



## Promoting jury trial system to the community

The American Jury presentation began through the Law Rules Committee of the Texas Chapters of the American Board of Trial Advocates chaired by Dicky Grigg of the Austin Chapter. The presentation was originally inspired by Gary K. Smith of the Tennessee Chapter. Gary developed a similar program that he used when he served as president of the Tennessee Bar Association.

Our goal was to develop a presentation that would appeal to laypeople and educate them on how the right to trial by jury is the foundation of the Constitutional freedoms we enjoy as Americans. Dicky was the lead author of the original presentation. Dan Worthington of the Rio Grande Valley Chapter was the first to speak on how the Second Amendment was subject to the same types of attacks as the Seventh Amendment. Dan's novel approach became the key to bringing the Constitution to life in Americans' living rooms. Guy Choate of the Central West Texas Chapter developed the original PowerPoint presentation that vividly illustrated our message.

All of the authors then added their own personal touches to the presentation. Once the presentation was ready, I contacted organizations throughout this area and asked to present it. In the past year, I have given the American Jury presentation a dozen times, including civic organizations, labor unions, Boy Scout troops, and continuing education seminars.

While the American Jury presentation was developed by members of ABOTA, it belongs to all Americans. It is our duty as ABOTA members to deliver it to them.

— By Tim Newsom

*Tim Newsom is the past president of the Amarillo Chapter of the American Board of Trial Advocates and past president of the Amarillo Area Bar Association.*

### Constitution is the Contract with Our Government

**W**e have on the table a handout. It is a pocket Constitution that we will work into our program today. It will take you 20 minutes to read. This is our contract with our government, and something that regretfully seems to be less important every day that marches forward. So with that I want to talk with you about the American Jury, and the Seventh Amendment right to jury trial in a civil case.

#### Second Amendment

What I like to do is to start off by talking briefly about the Second Amendment. The Second Amendment, of course, we know is our right to bear arms. I doubt there are any of you that believe we should repeal the Second Amendment. However, there was a recent article in the *Seattle Times* and it stated that

the Second Amendment is no longer relevant. The reason our Founding Fathers put it in for our protection no longer exists and it ought to be taken from us.

[You might say, well Seattle is just a bunch of dope heads anyway and who cares what they do in Seattle where, of course, now you can go on any street corner and buy a joint. Then I saw that a professor at the University of Texas at Austin also believes that the Second Amendment does not mean what we have all been educated to know that it means. But, of course, at UT they are a bunch of hippies anyway. What do we expect out of Austin? Texas A&M is not to be left out. A full-time professor says the time has come to repeal the Second Amendment.]

The reason I mention the Second Amendment before we talk about the Seventh and the right to a jury trial is because the same reasons that people give today for taking away the right to a jury trial are the reasons that people will give you for taking away the Second Amendment

right. I will also tell you that the Second Amendment is protected by the Seventh Amendment, and we will talk about how the Seventh protects the Second a little later in this presentation.

#### Seventh Amendment

When our Founding Fathers met in Philadelphia they insisted that we have a Bill of Rights that provided for the right to trial by jury. As stated by Thomas Jefferson, the jury is “the only anchor yet imagined by man, by which a government can be held to the principles of its constitution.”

As you well know, the first 10 amendments to the United States Constitution comprise the Bill of Rights. The Ninth Amendment generally states this is not a complete list and that we may pass additional amendments. The Tenth Amendment states whatever is not taken by the federal government is given to the states. That leaves eight substantive amendments. Of those eight, three amendments, almost half, provide for a jury system. The Fifth Amendment establishes the grand jury. The Sixth Amendment establishes the right to a jury trial in a criminal case. The Seventh Amendment establishes the right to a jury trial in a civil case.

The right to trial by jury is not only in the Fifth, Sixth, and Seventh Amendments to the Bill of Rights, but is also in Article III of the Constitution, which states, “The Trial of all crimes, except in cases of Impeachment, shall be by Jury.” U.S. CONST. ART III.

The right to trial by jury was so important to the framers that they insisted on placing it in both the body of the Constitution and the Bill of Rights. The Texas Constitution likewise guarantees an impartial jury to a person accused of a crime and, as applied to civil cases, states the “right of trial by jury shall remain inviolate.” TEX. CONS. ART. I, §§ 10, 15. If you believe in the Constitution of the United States and of our state, then you must believe in the right to trial by jury. Period.

How we got here is vital to know.

## Magna Carta

So where do we start? The Magna Carta was passed in 1215 because King John, as with all kings, was a tyrant. But, King John was particularly bad. And so even the Nobles of the Land of Gentry demanded that a written contract be put together to guarantee the rights of the citizens against the king. So, Magna Carta is one of the first documents that gave us the first right to a jury trial. From the Magna Carta in 1215 you can draw a direct line to our Constitution that was ratified in 1789.

I want to talk with you about two cases that predate the formation of the United States of America and provided the movement to the right to jury trial.

### Crown v. William Penn

The first is Crown v. William Penn. In 1670, William Penn was a man in his late twenties. He was leader of his Quaker church in London. One Sunday, William Penn, as a lot of us do, went to church. When he arrived he found soldiers had barred and chained the doors of the church. So, William Penn and the congregation held their service on the street in front of the church. The King, called King Charles II, believed if you did not worship in his manner you were a traitor. So after the service, the King sent soldiers into the crowd. They arrested William Penn, shackled him, and took him to Newgate Prison in London.

Now in 1670, Newgate Prison was known for its brutality. And shortly after Penn was in prison he is brought to the Old Bailey for trial. And when he is brought in, Penn asked the Lord Mayor who was presiding over the trial, "What have I done?" Well as tyrants and their lackeys tend to be, Lord Mayor did not like to be questioned. He had William Penn gagged, bound, and placed into a cell before the courtroom and denied the opportunity to defend himself.

The case proceeded rather quickly with only the King putting on evidence of William Penn's alleged treason. After a couple of

soldiers testified about what they had heard, the Lord Mayor turned to the jury and said, "Please go deliberate and return a verdict of guilty against William Penn." So the jury goes down the hall to the deliberation room. It is a little unclear 350 years later whether it was a man named Thomas Vee or Edward Bushel, but one of those two men was elected as foreman. We know they were both on the jury. We know that Mr. Bushel had with him a copy of the Magna Carta.

Now in 1670 most people were not literate. People could not get a copy of their contract from the government off of Amazon.com. Think about what it meant to Mr. Bushel that he carried that with him. And so he goes into the deliberation room. And they sit down and he said, look, this is not the way a trial is supposed to be. We are supposed to decide the case, not the judge. They talk about it for a couple of hours and the Lord Mayor is growing impatient. The Lord Mayor sends the bailiff to retrieve the jury. He puts them in the box and he said, "Have you reached a verdict of guilty?" Mr. Bushel rises, having been elected foreman, and says, "We have not." The judge said well you are going back to deliberate. One of the jurors asked, "Can we have some water?" The judge said no. No food, no water until you return a verdict of guilty. And off they go. They spent well into the night. About 10 hours later the judge has them brought back into the courtroom and he asked have you reached a verdict of guilty. And Mr. Bushel rises and says we have. We find William Penn guilty of speaking on Gray Street, which was the street in front of the church. But, of course, that was not the crime. The judge exploded and had the entire jury arrested and put into jail for 24 hours with no food and no water and instructed to return with the verdict of guilty.

They returned the next day and did not deliberate very long. When they came forward, Mr. Bushel rose and announced that they had found Mr. Penn not guilty. It would be an okay ending except the judge was unhappy. He fined the jurors a year's salary and had them imprisoned until they paid for contempt.

One of the things I had forgotten to mention is when Mr. Penn had arrived for court that first day, he removed his hat. The judge ordered the clerk to place the hat back on his head, and the judge then fined Mr. Penn for wearing his hat in the courtroom and fined him a year's salary. Both Mr. Penn and the jury were shipped off to prison.

The courtroom was packed. This was a very important trial at the time, but we did not have CNN or Fox or any of the other news channels to cover it. We did not have instant feedback all throughout the day. And so it took about three months before word of the jurors' imprisonment leaked out and a lawyer traveled from outside of London and was able to secure the jury's release.

### Crown v. Peter Zenger

The second case is Crown v. Peter Zenger. The King appoints William Cosby to be governor of New York. It is 1732 and there was an interim Governor serving—a man named Governor Van Damme. Cosby arrives and says, "I want half the salary you were paid waiting for me to arrive." Van Damme tells him probably something similar to Van Damme's name. And the answer was no. Governor Cosby decides he will sue Van Damme. Cosby appoints a three-judge panel and two of the three judges will be named and appointed by Governor Cosby. What a shock, it comes out 2 to 1 in favor of Governor Cosby and against Governor Van Damme and then to make sure that it is sealed, Governor Cosby fires Chief Justice Morrison who was the lone dissent in the three-judge panel. Chief Justice Morrison decides that there needs to be a way to communicate to the American people, particularly the New Yorkers, the abuses of Governor Cosby. So Morrison forms a newspaper called *The New York Weekly Journal*. But, he has to have a printer. Regretfully, there were no Kinkos; there was not a Kindle or smart phone, all the ways we take for granted today that we communicate.

And so Chief Justice Morrison found a man named John Peter Zenger. John Peter Zenger was a

small businessman, an immigrant from Germany who bought a printing press and started inking out a living.

When they start printing this newspaper in 1735 the truth was not a defense and if you said something critical of the government, particularly the King or his appointed lackeys, you would find yourself in prison. True or not.

What they will tell you historically is the truer the statement, the harsher the punishment. Mr. Zenger, who is trying to make a living simply running a printing press, finds himself under the full weight of the King of England. He hires a lawyer to defend him. Governor Cosby has the lawyer disbarred. He hires a second lawyer. Governor Cosby has the second lawyer disbarred. Governor Cosby then appoints a brand new lawyer known to be loyal to the king to defend Mr. Zenger in the libel case. Thankfully, the lawyer was also loyal to his client.

As they arrived for trial, the presiding judge, also a Governor Cosby appointee, starts trying to pack the jury with loyalists. The young lawyer knew enough to object and to fight it and he did a good job. When it finished, the judge threw up his hands and let the jury be seated fairly. One can assume because he thought it was a kangaroo court, the fix was in, and what did it really matter who was seated as a juror. So they get the jury in the box and as they start trial the young lawyer stands up from the counsel table and announces to the court that he is withdrawing. From the crowd rises a man named Andrew Hamilton (sounds like he ought to be one of the Founding Fathers, but he is not), but at the time he was one of the top lawyers in the country.

Andrew Hamilton rises and takes the place of the young lawyer. They have the trial. The jury is out less than an hour. A complete acquittal of Mr. Zenger. The judge explodes in anger. But from that day forward the King of England, particularly in the United States, stopped using libel as a way to squelch dissent. And as you read about the John Peter Zenger trial, a lot of historians will tell you that

beyond the Boston Tea Party in 1773 and Lexington and Concord in the spring of 1775, these 12 jurors in 1735 standing up to the King were really the start of the American revolution, because it told the King that the citizens of the United States would simply not stand for it. The courage they showed was one of the reasons why I think it is an important case to talk about.

What do the William Penn and John Peter Zenger trials have to do with us today?

### **SEC v. Mark Cuban**

Let me talk a minute about SEC v. Mark Cuban. Mark Cuban is a pretty polarizing guy. Cuban was sued by the federal government for insider trading. Every expert that looked at it said it was not true, it was a gross governmental overreach; but, nevertheless Mark Cuban is forced to trial by the United States government. Cuban won. Now we do not have a king, but nevertheless we have a government who is out to get someone and they believe he did it and they are not going to listen to whether he did or he didn't. *The Wall Street Journal*, hardly a liberal newspaper and hardly a friend of jury verdicts, wrote, "One of the virtues of the jury system is that it invites the average person's common sense to check on the excess of the law enforcers" — the government. The Cuban trial was in January 2014. Even in modern times, we still have our government overreaching in civil cases.

### **West Texas Small Business**

In June of 2015, we picked a jury that would decide the future of my client's 30-year business—one he and his business partner built from the ground up. My client is a small mom-and-pop swimming pool builder. The pool builder was sued by an unhappy customer. This was the first lawsuit in the pool builder's history. The customer is a billionaire oil and gas man. The customer wanted the backyard pool—a \$600,000 oasis—torn out and rebuilt. The customer also wanted our client to pay all legal fees. The customer wanted more

than \$1 million in damages and fees, and had more than enough money to push the case with expensive experts from the West Coast. Our client wanted to be paid the balance left on the contract, \$77,000, and its attorney's fees. If the customer won, our client would have to close its doors. It was literally a "make-or-break" lawsuit.

As the jury was seated, one of our clients said, "You mean to tell me, that the future of our business is in the hands of a 19-year-old unemployed young man?" We told our client the 19-year-old and the others sitting in that box were an American jury that would level the playing field against this billionaire and give our clients' company its only chance of survival.

After an eight-day trial, we listened to the judge read the verdict. A complete victory for our client. Our client won across the board. The customer got nothing; the jury awarded our client its last unpaid bill and all attorney's fees. It was an overwhelming win.

Our client had the entire trial team take a picture at the courthouse. A couple of weeks later, our client gave us the same picture with this written at the bottom: "Picture taken moments before the just and righteous 12-0 verdict delivered by an American jury... [Our client] will be forever grateful to [each trial team member including our trial technology assistant and stated all of our names] and for the service of 12 good citizens who dedicated eight days of their lives to serve our system."

I did not write those words. I had no input in those words. They are words written by a business owner whose entire career was saved by an American jury.

You never know when your opponent will be wealthier, smarter, or more influential than you. The American jJury levels the playing field for all of us.

### **Where Have the Trials Gone?**

Despite the sound, historical reasons for trial by jury and these modern-day stories, we are seeing a stark decline in jury trials. In 2002, there were 2,031 civil jury trials in Texas. We are down to 969 or

1,000. So, as the population has gone up, the jury trials have been cut in more than half and there are a lot of reasons for that we are going to talk about. Why?

### **Federal Preemption**

Federal preemption means that if a regulatory agency approves a drug, a product, a railroad crossing, their decision cannot be questioned. Bureaucrats in Washington, not local citizens, determine if a product is safe. You are forced to accept, as the final word, regulations from agencies that are influenced by the very special interest groups they regulate. The regulators often come from the regulated industry and intend to return to it. True examples of the fox guarding the hen house.

### **Legislative bodies passing laws to limit the power of the jury**

Unfortunately, money — big money — is pervasive in our legislative process. Because of the need to raise huge amounts of money for campaigns, elected officials are more and more beholden to special interest groups. Because the U.S. Supreme Court recently struck down limits on contributions that corporations and individuals can make to political campaigns, big money will play an even greater role in elections.

Special interest groups, political action committees and highly-paid lobbyists are successfully chipping away at the right to trial by jury. These groups are too clever to launch a frontal assault on the Seventh Amendment; in fact, they give lip service to jury trials. But bottom line — what do these special interest groups want? Special treatment for their members. They want laws passed that allow them to avoid responsibility.

### **Appellate Courts Disregarding Jury Findings**

The Founding Fathers did not trust politics. They tried to establish a judicial branch that was free of politics. In states like Texas, where judges are elected, politics is a necessary evil. Judicial races on the

appellate level are expensive and almost always won by the candidate who raises the most money. In Texas, and in many other states, the largest donors to judicial campaigns are special interest groups that do not want juries examining their conduct — insurance companies, large manufacturers, big oil companies. Like anyone who donates to a political campaign, these groups fund candidates that agree with their political philosophy — candidates that do not trust juries. Their candidates usually win.

Appellate judges that do not trust juries often substitute the outcome they desire for the decision made by the jury. When a jury determines that a manufacturer, an insurance company, or a government entity is responsible for damages and must pay for the harm they have caused — many times an appellate court will disregard the jury's findings. A study by the University of Texas Law School a few years back showed consumers lost more than 90% of the time before the Texas Supreme Court. When this happens, your right to a jury trial has been rendered meaningless.

### **Mandatory Arbitration**

Do you have a cell phone? A credit card? Then you have agreed to arbitration and probably did not know it. In arbitration, a professional arbitrator or a panel of arbitrators decides the case, not a jury. There is nothing wrong with arbitration if it is an arms-length transaction. If both parties make a knowing and informed decision to have an arbitrator, not a jury, decide their case. But there is something wrong if you are forced to forfeit your right to a jury trial by signing contracts that, as consumers, we really have no choice but to sign. Contracts with banks, credit card companies, stock brokers. Consumers are required to sign these agreements before any dispute even exists.

Many of you have waived your right to a jury without even knowing it. How can that be an informed consent on your part?

Often when a consumer is forced to arbitration, he or she start out behind. Even if the arbitrator is fair-

minded, he may be subconsciously, predisposed toward the business.

First, like all professionals, he wants to stay employed, to be hired again. Who is going to have the greater need for his repeated services, the consumer or the business?

Second, arbitrators tend to compromise, to split the baby. So, even if you have a valid claim, your chances of receiving full justice are slim. It is you, the consumer, that suffers.

So for Captain Crunch or General Mills, they had a policy that said if you got to our Facebook page and like us, you agree to arbitrate any dispute you had with Captain Crunch through General Mills. Well, people rose up because they will take arbitration in buying a car, their phone, but not their children's cereal. And so that got rolled back after a social media firestorm.

### **Revisit the Second Amendment**

Most people acknowledge they believe in the Constitution, but will ask if the right to a jury trial is that important, because most people have never needed one. Let's go back to where I started — the Second Amendment. None of us want to give up our right to own a gun. Nor do any of us want the Second Amendment rights-restricted. As the argument goes, a slight restriction now will result in wholesale abolition later. Of course, any faction desiring to restrict our Second Amendment right will not promote an all-out weapon ban; they will restrict our rights in creative ways that stay under the radar to most citizens who will only realize the magnitude of the restriction after it becomes law.

What entity has the power to stop a creatively disguised unconstitutional restriction on your right to bear arms? The answer is a jury of your peers. Do not take my word for it. The National Rifle Association has a division that performs that very task by enforcing the Second Amendment through use of the Seventh Amendment. See Brett Emison, "Defending the Second Amendment," *Kansas City Legal Examiner* (February 14, 2013). In addition, the NRA website asks people to sign a "Declaration

of Individual Rights” that lists all fundamental rights bestowed upon American citizens in the Bill of Rights, including the right of trial by jury.

Let me give you another example, this time with the First Amendment. In the mid-1990s, cattlemen in Amarillo sued Oprah Winfrey and her talk show guest Howard Lyman for comments they made on national television about beef and mad cow disease. Oprah and Mr. Lyman did not defend that case on whether mad cow disease was scientifically valid. Oprah and Mr. Lyman defended that case as an infringement on their First Amendment rights to freedom of speech. The jury agreed and found Oprah and Mr. Lyman not liable.

### **The U.S. Constitution: Read it**

In conclusion, please take your copy of the Constitution. Read it. You can read through it in 20 minutes. When you are at the ballgame, restaurant, or coffee shop, and the topic of lawsuits and jury duty comes up, pull out your pocket Constitution and tell your friends that juries are protecting their rights to own a gun, have freedom of religion, and have freedom of speech.

When you are summoned to jury duty, go. Recently, former President George W. Bush went to jury duty in Dallas County just like the rest of the Americans that were summoned that day. And, you know what, if President Bush had been selected to be on the jury, he would have gotten one vote just like the other eleven jurors. A former president, the most powerful position on the planet, and he gets one vote just like the rest of us.

The fundamental rights given to us by the Bill of Rights—freedom of speech, freedom of religion, the right to bear arms, and the right to trial by jury, just to name a few—are dependent on one another. We cannot pick and choose the fundamental rights to enforce. “We must preserve and protect each fundamental right if we are to protect any of them.” We must fight for our fundamental rights just as Americans have done for over 230 years. ■

## **Excerpts from an interview with the Amarillo Globe News:**

“If you believe in the Constitution of the United States and of our state, then you must believe in the right to trial by jury. Period,” said Tim Newsom.

“The number of jury trials in Texas has dropped by nearly 37% in the last 13 years even as the population has exploded,” Newsom said. He attributes this decline to a number of reasons, but highlights the impact that money and influence have on legislators who have the power to limit the power and responsibility of juries.

“We cannot rely upon business and insurance interests to preserve jury trials, because business factions consider the jury as an uncontrollable risk to their business model,” Newsom said. “Politicians are reliant on donations and financial support to win re-election,” Newsom said, “and often rely on these anti-jury backers to help them get there.”

“Judges on appellate courts also bear some blame for substituting their judgment in place of a jury,” he said.

A University of Texas Law School study showed consumers lost over 90 percent of the time before in consumer law cases in the Texas Supreme Court.

“With the erosion of the jury trial follows the erosion of other fundamental rights enjoyed by Americans such as freedom of speech and the right to bear arms,” Newsom said. “If American citizens sit idly by and allow jury trials to continue on a declining course, then jury trials run the risk of extinction on Earth.”

One of several solutions is to educate voters and potential jurors on the consequences of a declining jury system.

Newsom handed out pocket Constitutions to attendees.

*Source: Aaron Davis, Amarillo Globe News, March 31, 2016*