

TRIAL BY JURY IN THE UNITED STATES



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SUMMARY

The Republic of Moldova is considering the adoption of trial by jury in select criminal cases. The following article is intended to contribute to the discussion of that proposal. The article will briefly describe the history of juries under the English common law and as adopted by the United States. It will then outline some of the basic procedures in trials by jury as currently practiced in the United States federal court system.¹

Key-words: *liberties of the people, United States Constitution, Trial Procedure, jury system, criminal cases, Verdicts, member of the jury.*

History of Jury Trials

The English colonists who came to the American continent brought with them the legal traditions of their mother country, including the jury system. Originally, English juries were a group of men who had personal knowledge of the matter in dispute. The jury acted as an advisory body to aid the court. Over time, juries developed into triers of fact who considered evidence presented by others. By the seventeenth century, as English settlers began to arrive in the American colonies, the jury system was firmly entrenched as a safeguard for persons accused of crimes.² In the Eighteenth Century, the eminent British jurist Sir William Blackstone praised the institution of trial by jury as part of a "strong and two-fold barrier...between the liberties of the people and the prerogative of the crown" because "the truth of every accusation...[must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion".³

¹ The procedural rules and practice governing juries in the state courts are substantially similar to those in federal district courts, but vary among states in some details.

² Cornell University Law School, *CRS Annotated Constitution*, "Right to Trial by Impartial Jury," https://www.law.cornell.edu/anncon/html/amdt6frag3_user.html (hereinafter "CRS Annotated Constitution"), p. 1.

³ W. Blackstone, *Commentaries on the Laws of England* *349 -*350 (T. Cooley 4th ed. 1896), quoted in *CRS Annotated Constitution*, p. 1. The second component of the "two-fold barrier" was the requirement of criminal indictment by a grand jury.

PROCESUL CU JURAȚI ÎN SUA

SUMAR

Republica Moldova examinează procesul cu jurații numai în anumite cazuri penale. Articolul de mai jos intenționează să contribuie la discuții pe marginea unei asemenea teme. Articolul, pe scurt, descrie istoria juraților în temeiul dreptului comun englez adoptat de către SUA. Acesta va schița unele proceduri de bază în procesele cu jurați practicate recent în sistemul instanțelor federale din SUA.

Cuvinte-cheie: *libertățile oamenilor, Constituția SUA, procedura procesului, sistemul juraților, cazuri penale, sentința, membrul juraților.*

When the thirteen American colonies broke from Great Britain, among the charges leveled against King George in their Declaration of Independence was the accusation that the King had supported legislation "depriving us in many cases, of the benefits of Trial by Jury".

The Constitution and Bill of Rights⁴ adopted by the newly established United States of America expressly preserved the right to trial by jury in Article III of the Constitution, which established the judicial power, and in Amendments VI and VII to the Constitution. Article III, Section 2, provides in relevant part: "The Trial of all Crimes, except in Cases of Impeachment;⁵ shall be by jury..." Amendment VI further safeguards the right to trial by jury in criminal cases. It states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..." Amendment VII preserves the right to trial by jury in suits "at common law."⁶

The primary value of the jury system is that it acts as a protection of the individual against the power of the state. The ideal jury is a representative cross-section of the community. In criminal cases it constitutes a buffer between the government and the defendant. Prosecutors have tremendous power in deciding whether to prosecute a criminal defendant and determining what charges to pursue. There exists a risk that some Judges

⁴ The Bill of Rights comprises the first ten Amendments to the United States Constitution, which were drafted and ratified shortly after the Constitution was adopted.

⁵ Impeachment refers to the process for removal of high government officials from office, including the President, by act of Congress. See, Constitution Art. II, Section 4.

⁶ Amendment VII states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

may at times be inclined to grant excessive credibility to the prosecutor in determining the guilt of the accused. The jury system counters that risk. The prosecutor's discretion to pursue criminal charges is tempered by knowledge that the defendant has an absolute right to trial by jury, and the prosecutor will be required to prove guilt beyond a reasonable doubt to a jury of ordinary men and women chosen from the community. Similarly, in a civil lawsuit the jury acts as the voice of the community in making such determinations as whether the defendant in a tort case acted negligently and what damages the plaintiff is entitled to recover. The potential for judicial corruption is greatly reduced by interposing a panel of twelve independent jurors as a key element in the decision-making process. Trial by jury thus contributes to public confidence in the judicial system and strengthens the rule of law.

Extent of Right to a Jury

At the time The United States were established, Great Britain had developed two parallel court systems, the common law courts and the Chancery Court. Actions brought in the common law courts were primarily to recover money damages or possession of property. The common law courts, however, developed over time a number of highly technical formalities which restricted the relief available, and plaintiffs frequently were unable to obtain an adequate remedy at law. Consequently, the Court of Chancery developed as a complement to the common law courts. The Court of Chancery heard matters for which the common law was inadequate. The Chancery Court was said to be a „court of equity,” and it could fashion relief more flexible than that available at common law. For example, a claim for injunctive relief was not recognized at common law, but it could be obtained through an action “in equity” before the Chancellor.

The courts of chancery and common law were eventually merged in the United States. The distinction between law and equity is preserved in the United States Constitution, however, in that the right to trial by jury does not extend to civil actions in which an equitable remedy is sought.⁷ To determine whether a right to trial by jury is available in a civil action, the court compares the dispute in which a jury is demanded to actions available in the eighteenth century English common law courts. If the relief sought is not of the nature recognized at common law there is no right to trial by jury.⁸ For example, the right to a jury exists in a civil

action seeking money damages in tort⁹ or for breach of contract, but there is no right to a jury if the plaintiff seeks an injunction¹⁰ or disgorgement of improperly obtained profits.¹¹ Neither does the right to trial by jury extend to all matters arising under criminal laws. As interpreted by the United States Supreme Court, the constitutional right to trial by jury in criminal cases does not attach to “petty” offenses, which generally means any crime for which the punishment is not more than six months imprisonment.¹²

A criminal defendant charged with a serious, *i.e.*, „non-petty” offense may only waive the right to a jury trial in writing and with the consent of the government. The court must then approve the waiver.¹³ Before accepting the waiver of a jury, the court will typically question the defendant and his or her attorney to determine that the waiver was made voluntarily, knowingly and intelligently.¹⁴ Similarly, before accepting a plea of guilty in a criminal case, the court will question the defendant and counsel to determine that the defendant is advised of his/her constitutional rights, including the right to trial by jury, the right to confront the defendant's accusers, and the privilege against self-incrimination.

A party to a civil action must make a timely demand for a trial by jury or it is deemed waived.¹⁵ Once a timely demand is made, however, all parties must agree to a subsequent waiver of a jury. The rationale behind this rule is that failure to demand a trial by jury in a civil action does not constitute a waiver if the failure was in reliance on a demand made by another party.¹⁶

Voir Dire

Voir Dire is the process by which the court selects the jury from a panel of prospective jurors who have been served with a court order to appear at trial for potential jury service. The process is intended to determine that the members of the jury are qualified,

⁷ For example, United States Bankruptcy Courts are primarily courts of equity and, with limited exceptions, disputes arising under the Bankruptcy Code are tried to the court rather than to a jury.

⁸ See, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 346-55 (1998); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996).

⁹ An exception to this rule is tort claims against the United States Government under the Federal Tort Claims Act. In waiving sovereign immunity by statute, the United States did not grant claimants the right to trial by jury in claims against the government. See, 28 U.S.C. Section 1346.

¹⁰ See, *Dombeck v. Milwaukee Valve Co.*, 40 F.3d 230 (7th Cir. 1994).

¹¹ *S.E.C. v. Rind*, 991 F.2d 1486, 1492-93 (9th Cir.), *cert. denied*, 510 U.S. 963 (1993). In a disgorgement action by a federal agency the government does not seek to recover money damages recognized at common law, but seeks to prevent unjust enrichment.

¹² *Baldwin v. New York*, 399 U.S. 66 (1970); *Frank v. United States*, 395 U.S. 147, 148 (1969).

¹³ Federal Rules of Criminal Procedure (Fed. R. Crim. Proc.) 23(a).

¹⁴ See, *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994) (in depth colloquy between the court and the defendant was required for waiver of a jury trial where the court had reason to believe the defendant may have been mentally or emotionally unstable).

¹⁵ Federal Rules of Civil Procedure (Fed. R. Civ. P.) 38.

¹⁶ See, *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 832 (9th Cir. 1963).



and that they are free from bias or prejudice. The basic qualifications to serve on a federal jury are established by statute.¹⁷ A juror must be a United States Citizen and a resident for one year in the judicial district where the court sits. A juror must be at least eighteen years of age, understand the English language, and be mentally and physically capable of jury service. A juror must not have been charged or convicted of a felony unless the juror's civil rights have been restored. At the commencement of voir dire, the court questions the prospective jurors whether they meet the above qualifications and will excuse anyone who does not meet the statutory requirements.¹⁸ Questionnaires may also be handed out to the prospective jurors to elicit basic information.

The precise procedures used in voir dire vary with individual judges. Direct attorney participation in voir dire questioning is left to the discretion of the court.¹⁹ Attorney participation may be by oral and/or written questions. The court typically will invite the prospective jurors to stand one at a time tell a little about themselves, such as their education and occupation, and the sources they use to get news – such as television, internet, or magazines. If the case has received media attention, the court may ask whether anyone on the panel has read or heard about the case. If so, the court may privately ask follow up questions to determine whether the prospective juror has been biased by media reports. The court will ask whether the prospective jurors know any of the parties, the attorneys, or witnesses. The court typically asks further questions to determine potential bias, such as whether the prospective jurors or anyone they know has ever been involved in a similar situation to that in dispute. For example, in a personal injury lawsuit, the judge may ask whether anyone on the jury panel has ever been injured in an accident or a party to a lawsuit. In a criminal case, the court may ask whether anyone on the panel has ever been the victim of a similar crime, or whether they know anyone who has. If a police officer will testify at trial, the court may ask whether any of the prospective jurors, or anyone they know, has ever been involved in law enforcement. The court may also ask whether the prospective jurors would be inclined to give the testimony of a law enforcement official any greater or lesser weight solely because of the witness's occupation. The court may ask whether anyone on the panel knows any of the other panel members. That question is intended to determine whether there is a

risk that anyone on the panel may be inclined to give undue deference to another member of the jury. The court will typically ask whether the prospective jurors would be willing to follow the instructions on the law that the court will deliver, even if the juror disagrees with the law. The court also asks whether there is any other reason why the prospective juror would not be able to render a decision free of bias or prejudice. Based on the answers to these questions, either of the parties may ask the judge to excuse a member of the jury panel „for cause,” such as bias, relationship with any of the parties, or pecuniary interest in the outcome. The court may also excuse a prospective juror if service on the jury would cause extreme hardship. The names of jurors can be kept confidential, particularly if the judge determines that confidentiality is necessary for the protection of the juror. The judge should explain that anonymity is not a reflection on the defendant and that it has nothing to do with guilt or innocence.²⁰

In addition to objections to prospective jurors for cause, each side in the case is given a number of “peremptory challenges,” which means that the party may object to a member of the panel for any permissible reason, even though there is no actual bias or other legal justification to excuse the juror for cause. A trial attorney uses peremptory challenges to try to exclude jurors whom the attorney believes would not be sympathetic to his or her client. The number of peremptory challenges varies according to the nature of the case. In civil cases, the number of peremptory challenges is typically three for each side.²¹ In criminal cases, the number of peremptory challenges varies according to the seriousness of the crime charged. The number varies from three for each side up to twenty in capital cases.²² Peremptory challenges may not, however, be exercised based on impermissible criteria, such as race or gender.²³

Trial Procedure

In civil actions brought in federal courts, the number of jurors may be no less than six and no more than twelve. The verdict of the jury must be unanimous unless the parties otherwise stipulate.²⁴ In criminal cases twelve jurors are required unless a fewer number is stipulated.²⁵ Additional alternate jurors may be seated, who will only participate in deliberations if any of the regular jurors is unable to complete his/her service.²⁶ Verdicts by the jury in criminal cases must be unanimous.²⁷

¹⁷ See, 28 U.S.C. Section 1865(b).

¹⁸ The usual practice is for the judge to ask general questions to the entire panel and ask for a show of hands if there are any concerns. The court may then conduct a private interview in the presence of counsel to inquire into the details if a question is raised.

¹⁹ Fed. R. Crim. P. 24(a); and Fed. R. Civ. P. 47(a). For purposes of this article it will be assumed that questioning is done solely by the court.

²⁰ See, Jury Instructions Committee of the Ninth Circuit, “A Manual on Jury Trial Procedures” 2004 Ed., 40-41.

²¹ Fed. R. Civ. P. 47(b); 28 U.S.C. Section 1870.

²² See, Fed. R. Crim. P. 24(b).

²³ *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

²⁴ Fed. R. Civ. P. 48.

²⁵ Fed. R. Crim. P. 23(b).

²⁶ Fed. R. Crim. P. 24(c).

²⁷ Fed. R. Crim. P. 31(a).



At the commencement of the case, the court instructs the jury on preliminary matters, including an instruction not to discuss the case with anyone, including each other, until all of the evidence is in and the jury is sent to deliberate. Other preliminary instructions may include the role of the judge, jury and lawyers; the nature of the case; the order in which trial will proceed; note-taking; the applicable burden of proof; the nature of direct and circumstantial evidence; the believability of witnesses; and other matters that are likely to come up during the course of the trial. Model jury instructions have been prepared in various jurisdictions that cover such standard topics. The court has discretion to permit note-taking by jurors. If note-taking is allowed, the jury is instructed to leave the notes in the jury room or courtroom when court is not in session, and that the notes will be destroyed by court personnel after the trial. The court has discretion to permit written questions by jurors to be submitted to the judge during the evidentiary phase of trial, but such questions are generally discouraged.

During the course of trial the attorneys conduct the questioning of witnesses. The court may also ask questions if necessary to clarify testimony. The court must exercise great caution in its questioning, however, not to infer from the questions that the court has an opinion that could prejudice the jurors. Following any questioning by the court, the judge may give a cautionary instruction to the jury, telling them not to draw any inference from the judge's questions and reminding them that they are the sole triers of fact. Similarly, during the course of trial the court may give curative instructions as may be necessary. For example, if testimony is stricken the court should instruct the jury to disregard the answer.

At the close of evidence the court instructs the jury on the applicable law that should govern their deliberations. Instructions include procedures to follow during deliberation, the definition of key legal terms, and the elements of the criminal charge or civil cause of action and applicable defenses. Parties may file written requests for instructions, supported by legal authority. Counsel are given an opportunity to object to requests submitted by the opposing side, outside of the presence of the jury. Instruction conferences with counsel are often held in the judge's chambers. Jury instructions should fairly and adequately cover the issues presented during trial and not be misleading. Instructions may be given before or after closing argument by counsel. It is also permissible to give some instructions before closing argument and then supplement after argument by specific instructions on deliberation.²⁸ The court should send a copy of the instructions with the jury for reference during deliberation.

During deliberation the jury may submit written questions to the court. The court gives written copies to counsel and takes comments. The court then tells the attorneys how the court intends to respond and gives opportunity to object. If necessary to clarify confusion or misperception, supplemental instructions on the law or procedure may be given to the jury. The judge should not, however, communicate with the jury outside the presence of the attorneys.

The court has discretion to read portions of the trial testimony to the juries if requested. The court should give a cautionary instruction, however, to consider all of the evidence. Transcripts of the trial testimony should not be provided to the jury.

If the jury indicates it is unable to reach a unanimous decision, or in other words is „deadlocked,” the court may question the jurors to determine whether further deliberation may be helpful. It is permissible for the court to charge the jurors to reconsider their opinions and continue to deliberate. Such an instruction, however, is usually not given more than once. If the jury is truly deadlocked, the court may declare a mistrial. In that instance, a new trial is conducted at a later time with a new jury.

In civil cases, the jury may be asked to fill out a form of „special verdict” consisting of a series of questions. Such special verdicts may include such questions such as whether the defendant was at fault in causing injury to the plaintiff; if so, the degree of fault and value of the damages suffered by the plaintiff. Special verdicts are rarely used in criminal cases. Rather, a „general verdict” is used, which simply indicates guilt or innocence of the charged offenses.

Following trial, communication with the jurors is discouraged, and in some jurisdictions it is not permitted without leave of court.

Closing Observations

Jury trials, while valuable, are time consuming and expensive. If every, or even most civil and criminal actions in the United States resulted in a jury trial the judicial system would quickly break down. In practice, the great majority of legal actions in the United States are resolved before trial, through private settlement in civil cases or through a court approved plea agreement in criminal cases. Mediation of civil cases is becoming increasingly common, which facilitates settlement. Where the parties are not able to resolve their disputes short of trial, however, the jury system provides valuable protections. The jury acts as the sole trier of fact, and facts determined by the jury can only be overturned in very exceptional circumstances. The jury limits the power of the court and contributes significantly to public trust in the judicial system.

²⁸ See, Fed. R. Crim. P. 30(c).

