LITIGATORS CORNER:

The Jury: A Better Decision-Maker

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The jury is in jeopardy. Many of us who follow the patent decisions of the Federal Circuit believe that the Court's decisions over the past few years in the areas of the doctrine of equivalents, prosecution history estoppel, and claim construction are motivated by the belief of some of the circuit judges that juries simply cannot handle patent cases. These cases, we are told, are too complex, and juries are too prone to emotion. See, for example, *Cybor Corp. v. Fas Technologies, Inc.*, 138 F.3d 1448 (Fed. Cir. 1998), where Judge Mayer took issue with the majority's view of juries. Evidently we, as citizens, can be trusted to fly airplanes, safe-guard nuclear weapons, navigate ships, devise great inventions or study deadly viruses, but we are not competent to make rational judgments about our peers. A prominent West Coast lawyer says that we need specialized patent courts. A prominent East Coast lawyer recently said the same.

Is it true that juries cannot handle the complexity of their job? Or is it just more lawyer folderol? Are juries bad because they consist of non-lawyers, or because they are diverse, or because they are swayed by factors other than the evidence, or because they aren't as educated as lawyers, or simply because they make too many inaccurate decisions?

I think those who condemn the jury are dead wrong. The jury isn't perfect; it is made up of humans. Nevertheless, its characteristics make it a superior decision-maker in our imperfect world. I do not mean to say that juries never misfire, and never make a mistake. I have seen a jury do so. But, even after that experience, I would still rather have a jury as the decision-maker in any case I try, whether I am representing a plaintiff or a defendant.

What are those characteristics that make a jury so effective? There are a number of them. One is ***immediacy***. We say justice delayed is justice denied. I say that a decision delayed — as is so often the case with judges — is much more likely to be a decision that is wrong, causing justice to be denied. A decision made when the facts are fresh in one's mind — as is the case with a jury — is much more likely to take all of the evidence, written and unwritten, into account.

The ***single purpose*** of a jury is another of its advantages; it has no job but the one at hand: to decide. Once it makes that decision, it ceases to exist. A third virtue of the jury is its ***multiple membership***; a jury as a whole can remember what one of its individual members has forgotten. A jury is therefore more capable in this respect than is an individual.

A fourth advantage is a jury's ***sense of duty***. The fact that a person takes time off from work for jury duty, and that jury duty is considered one's serious civic responsibility gives it that sense of duty. Yet another advantage is a jury's ***sense of freshness*** for the task. Last, a jury — being made up of a combination of different talents and backgrounds — has ***common sense***, a form of intelligence lacking in lawyers, and which our legal training seems to beat out of us.

In this article, I will elaborate on just one of the advantages of a jury over a judge as decision-maker: immediacy. In future articles, I will discuss other advantages.

Why is immediacy so important? Because it increases the chances of a correct decision. We all know how much better our recollections are about what happened yesterday than about what happened a year ago today. There are many fine judges who work hard to reach just decisions. But let me give you an example of the consequence of delay. In one of my cases, we prosecuted a drug dealer in a bench trial before a judge in the Northern District of Illinois. Our evidence was solid. We had surveillance of the defendant, and an undercover DEA agent spoke to the defendant and bought drugs from him. Our evidence went in smoothly. When the bench trial was over, we and the agents figured we had convicted the defendant. We went home happy, expecting a good decision from the judge.

We shouldn't have been so confident. About six months later, we were stunned by a ruling acquitting the drug dealer. I read the ruling, which made no mention of the testimony by the undercover agent. Putting two and two together, I called the court reporter. He told me he had transcribed most of the testimony for the judge but, because he was busy working on another trial, gave the judge his tape recording of the undercover agent's testimony.

From there, it was not hard to figure it out: our judge had forgotten everything. To rule on the case, he had the testimony transcribed because he could not remember any of it. He didn't have a clue. He did not remember what he did not remember: the testimony of the undercover agent. Not having a transcript of that testimony, his mind re-wrote the trial for him. The judge ruled as though the undercover agent did not exist, did not buy drugs from the defendant, and did not testify. That's why he acquitted the drug dealer.

I have seen several articles and studies which analyze whether and why a group is superior to an individual as a decision-maker. Most I have read conclude that a group is better, in part because it has better recollection. But the odd thing I have noticed is that nothing I've seen so far compares the quality or accuracy of a timely decision by a group with a delayed decision made by a single person exposed to the same facts. Common sense, as well as my anecdotal experience, suggests to me that the delay is crucial.

There is a natural reluctance on the part of some judges to make decisions. One of our judges in this district used to be the subject of a joke in the U.S. Attorney's Office. We said that, if a half-dozen 747s, all low on fuel, were circling O'Hare in a driving rain, Judge So-and-So would take briefs on who should land first.

We had a patent case before another judge in our district. It seemed as though every time we went to court, even at the instigation of the judge for a status hearing, the judge revealed reluctance to address the case, or bring it to a conclusion with

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meaningful decisions. Our judge's usual comment when our case was called was, "I don't have time for this case!" or "What's going on here?" The judge's desire to avoid decision-making was palpable. The author Tony Hillerman writes good mystery novels with Navahos as characters in his books. In one, he described how the Navaho term for a lawyer translated as "He-who-talks-fast." I guess some judges might be "He-who-decides-never."

Procrastination is a human failing. It is human to want to put off important decisions, especially if they concern unpleasant or difficult matters. Who wants to go to the dentist, or get a medical test that might result in bad news, or write a will or buy a burial plot? When we were children, who wanted to do homework? We avoid or postpone these moments of action and decision. Who of us wants to be the one responsible for putting someone in jail? A federal judge I knew said it was hard to sentence someone to jail, because it would cause harm to a whole family. He knew the real responsibility was the defendant's, but that still did not entirely eliminate the reluctance to impose sentence. When I was on a jury where the defendant was quite clearly guilty of armed robbery, we jurors did not lightly come to a verdict.

There is a human tendency to want to avoid the difficult job of learning new things, too. It is hard work to be awash in a sea of unfamiliar facts, and have to make sense of them. Imagine how the jury in the criminal case against Arthur Andersen felt. Most of us feel we were done learning when we escaped from school. A fact-finder in a patent case is confronted with exactly the same problem. I believe that many judges find patent law unfamiliar, and they know the high reversal rate in the Federal Circuit. On top of that, there are unfamiliar facts, too, with technology a judge has probably never seen before.

Unlike judges, a jury does not have the misbegotten luxury of procrastination. It must make its decision immediately. It cannot delay. And immediacy lends itself to better recollection of all of the evidence. The testimony is fresh. The demeanor of the witnesses is fresh. The jury can see who the witness is looking at, and who the witness refuses to look at. Hesitancy in answering is remembered. A change in the tone or volume of a voice can be seen and remembered. Is the witness insolent or a smart aleck? Kalven and Zeisel relate the demeanor of a defendant in a report of a criminal case at page 388 of their book, *The American Jury*:

> Defendant made a very poor witness . . . Defendant fell down on cross-examination. . . Too eager, gave too many details. . . Did not give clear answers.

All of these things are important to judging the credibility of a witness. But they are not part of any record. They are only a transitory, fleeting part of memory. The judge in our drug case could not even remember the existence of the undercover DEA agent, no less his demeanor during testimony — or the testimony itself; that is why he wanted a transcript. But a jury, deciding immediately after hearing the testimony, is going to remember. We insure that a trial is conducted with as many live witnesses as is possible. The reason we do so is obvious: things which do not wind up in a dry paper record are important to a just decision.

Immediacy is important to a good decision. But only a jury is compelled to make an immediate decision. A very good judge, realizing the benefits of promptly analyzing the facts, may render a quick decision, but he is not forced and required to do so, as is a jury. That, in my opinion, is just one of the reasons why a jury is a superior decision-maker. If you are a good enough lawyer to want a just and correct decision, stick with a jury. IPT