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LITIGATORS CORNER: The Wisdom of Juries



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The April 12 issue of *The Patent, Trademark & Copyright Journal* reports on a conference where judges expressed concern about the ability of juries to comprehend the facts of patent cases. One judge said a particular case was too much for him, much less a jury, to comprehend and that Europeans are horrified that we use juries in patent cases. But some of the same judges also stated that juries usually get it right most of the time. The same article points out that, according to the CAFC, judges are wrong fifty percent of the time in their claim construction rulings on patents.

The comments about the unreliability of juries don't square with the results — or with the apparent unreliability of decisions by district judges. And I don't know about you, but

I'm getting tired of hearing that our patent system should be run just like Europe's because the latter is, well, European.

The distrust of juries isn't based on sound reasoning. In their article, "Planned Obsolescence: *Markman* and the Role of the Trier of Fact in Patent Litigation" (*Bar Association of Metropolitan St. Louis Journal*, Fall 2000), J.B. Clark and M.L. Cutler describe judges' distrust of juries as a signal of the "top-down paternalism" that infects modern patent litigation. I think the St. Louis lawyers have a point. We distrust juries because we believe they don't have our legal education and our legal skills, and just aren't smart enough to make a good decision. What is more, some who knock juries haven't spent much time thinking about how they go about doing their job, and why a group is psychologically and functionally different from a single person.

In my September, 2000 *IP Today* column, "If You Are Looking for Justice, Try a Jury," I wrote about my experience as a juror in an armed robbery case. That case was simple, but I am convinced that the same things that make a jury a superior finder of fact in a simple case also make it a superior finder of fact in a complex one.

The modern jury, when given the right equipment by the lawyers and the court, is capable of making an equitable decision. In fact, it will generally make a better decision than can be made by a single person acting as a finder of fact, whether a judge or a special master.

JURIES ARE FOCUSED

Why is a jury better? First, it isn't jaded. A jury approaches its task with a sense of freshness and the keenest awareness of its common duty. As I pointed out in my earlier column, a jury exists for one reason: to make a decision. It comes into existence to make that decision, does no other business while it makes that decision, and ceases to exist once that decision is made. It is devoted to one job, and one job only.

A judge simply can't do the same thing; the distractions are nearly impossible to avoid. If our office is any guide as to what goes on in a judge's office, there are constant interruptions, which make any concentrated effort to think difficult. In our office, telephones ring, and other lawyers and staff people stop by with questions. There is no such thing as an uninterrupted train of thought. My guess is that judges are in much the same boat. They have one hundred, two hundred, even three hundred cases to worry about. They have motions to rule on, pretrial conferences to conduct and rulings from magistrates to review. And all this "stuff" competes for their attention.

Not so with a jury. Their concentration is extraordinary. Juries are dedicated to one exclusive task: deciding the facts in the case before it. There aren't any competing tasks during a jury's workday.

A JURY IS A GROUP

Why else is a jury better? Because it is a group. Its cumulative powers to observe and recall are much better than those of a single person. One person will take note of some things, while another focuses on slightly different things. Imagine how much more credible the case is when several eyewitnesses recognize the bank robber. Several witnesses, with different vantage points, all notice slightly different things. One notices the robber's height, another notices the color of his clothing, another remembers his voice, and yet another remembers what kind of gun he was holding. The cumulative recollection is powerful. That is what a jury can do that no individual can do.

Next, a crucial element in any trial is the decision about whom to believe. The finder of fact must assess the credibility of witnesses whose testimony is in conflict. Juries can do this better than anyone, because credibility determinations are the essence of everyday judgments we all must make in conducting our own affairs. These judgments have nothing to do with the law. We are all experienced in deciding whether we will rely on or do what a doctor tells us, or what a salesman says, or whether to buy the house based on what the seller tells us about it. We make these important decisions all the time. A jury is well-equipped to make such decisions about witnesses. Judge Michel commented on the jury's superior ability in this area in an article, "Enabling the Jury to Apply Patent Law Rationally," published in the Spring 1999 Yale Symposium on Law and Technology. (See http://lawtech.law.yale.edu/symposium/99/speech_michel.htm).

A JURY IS SELF-CORRECTING

A jury is self-correcting: it pulls its members back from unreasonable points of view. You may remember the film, *Twelve Angry Men*. In it, some jurors were prepared to rely on the testimony of one eyewitness. But other jurors argued that it was apparent — though not made clear by the examining lawyer's questioning — that this witness had marks on his face from wearing glasses. He had gotten out of bed at night in response to a noise, and had looked through a passing elevated train into another building across the street. One of the jurors realized that the witness could not have had time to find and put on his glasses. His testimony about identifying the assailant was therefore compromised, since he could NOT have seen as well as he had claimed.

One of the standards of jury selection is to avoid picking a person who may dominate, or run away with, the jury. In other words, numbers provide some safety against an unreasonable decision. But who is the check on a single decision-maker? No one. If that single person becomes unduly focused on one piece of evidence, or one interpretation of the evidence, there is no one to say "That's goofy! Use your head!"

These corrections occur as the jurors talk to one other. A single finder of fact cannot do this. Talking to one's self does not compare to stating your views to others for their scrutiny, and then having to defend those views. Some of you who were teachers

may understand this better than others: having to explain to students what you have learned gives you a deeper and better understanding of what you seek to convey or teach. You see any flaws much more clearly, and more quickly. No single finder of fact has this luxury. This give and take is unique to a jury because it can only occur between different persons who have had the same opportunity and duty to observe.

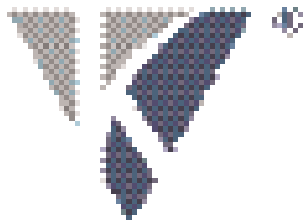
A JURY LACKS LEGAL TRAINING

The absence of a jury's legal training is a blessing, not a curse. If legal training is such an advantage, why do lawyers have to write proposed findings of fact and conclusions of law for a judge, who is trained in the law? Putting legal training into the mix as part of the fact-finder's capabilities creates problems, not solutions; it causes a loss of emphasis on finding the truth and an increase in ideological purity. Juries are not obsessed with the law. They are focused on using common sense and finding the truth. And, frankly, given the muddled thinking I see in many lawyers, legal training is not much of an asset. When we leave decisions to lawyers, what do we get? Brief after brief — with no conclusion. It is like the old joke about economists: if you laid all the lawyers in the world end to end, they still wouldn't reach a conclusion. A jury doesn't have that flaw. It has to make up its mind before it can go home.

One criticism of jurors is that they cannot grasp the technical subject matter of a typical patent case. But how many judges are engineers or chemists? And the makeup of the modern patent jury is likely to include people with a variety of educational and professional backgrounds. At least you have some chance to influence the composition of the jury; you have no such chance with the court.

The lawyer's obsession with ideological purity needlessly complicates a jury's job. One of the places where this occurs (in addition to the ones I mentioned in my earlier column) is in the jury instructions concerning the law. They are uniformly turgid, bloated, and confusing. Why use the word "anticipation"? It means nothing to jurors. To us lawyers, it means that the invention is old. Take, for example, the AIPLA model instruction on anticipation. It is legally accurate and neutrally worded. But it is too long. Here it is:

I will now instruct you as to the rules of law that you must follow in



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deciding whether or not the claims of the ___ patent were anticipated. First, [defendant] has the burden of proving anticipation by clear and convincing evidence.

Second, a [publication] [invention, public use, sale, patent, etc.] anticipates a claim if it discloses the claimed invention sufficiently that a person of ordinary skill in the art could take its teachings together with his own knowledge of the art and be in possession of the claimed invention. To establish that anticipation exists, [the defendant] must show that each of the elements recited in the claim was [disclosed] [embodied] in the particular item claimed to be an anticipation. If every element of the claimed invention is shown to be present in the prior [publication] [invention, patent, public use, etc.], the patent claim is anticipated.

Third, there is no anticipation unless every one of the elements of the claimed invention is found in a single [prior publication], [prior invention] [prior public use] [prior

patent], [prior knowledge] [prior sale]. You may not combine two or more items of prior art to make out an anticipation. You should, however, take into consideration not only what is expressly disclosed or embodied in the particular item of prior [publication] [invention, etc], but also what inherently occurred as a natural result of its practice. A party claiming inherency must prove it by clear and convincing evidence. It must show that the [process] [publication] [etc.] always inherently produces a [product] [process] meeting all of the claim limitations. In determining whether or not every one of the elements of the claimed invention is found in the prior [publication] [etc.] you should take into account what a person of ordinary skill in the art would have understood from his or her examination of the particular [publication] [invention, etc.]

But why can't we use this:

If you decide that a person of skill in the art would find every element of claim 1 in Defense Exhibit 1, the

January, 1988 article in *Dr. Dobbs' Journal*, then claim 1 is invalid.

The former is 308 words; the latter, 35. We lawyers like to mention all the buzz-words: “anticipation,” “inherency,” “embodied,” etc. But we aren't doing a jury any favors. As Judge Michel said, we give juries “excessively long instructions.” Amen.

I am not saying that my version is the right one; but shorter instructions are certainly better. Perhaps someday law schools will decide it is not beneath them to teach clear, simple writing instead of bloated rubbish. *Strunk & White* ought to be required reading. Simplicity of expression contributes to clarity of thought. We cannot keep encumbering juries with our desire for ideological purity and meaningless words, and then expect them to understand what they are to do — despite the obstacles we put in their path.

Juries are a fine institution. Judge Michel's article offered some ideas on how to help them. Let's hope people start doing so, instead of throwing up their hands and saying that juries just can't hack it. **IP**