

LITIGATORS CORNER: If You Are Looking for Justice, Try a Jury



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Like a tide flowing and ebbing, the popularity of juries in patent cases fluctuates. But I still believe in them. Although I was a federal prosecutor for seven years, trying all kinds of criminal cases, I was recently selected to serve on a jury in a criminal case. This experience confirmed some of my thoughts about juries — and surprised me in a few respects, too.

In Illinois, lawyers don't escape being called for jury duty. There are practically no exceptions. My summons said to report to the Criminal Court at 26th and California on Chicago's South Side. (This was the court depicted in *His Girl Friday*, the film based on *Front Page*, starring Cary Grant and Rosalind Russell). We were questioned in groups, and I was in the second batch. The judge asked me the same questions as he asked everyone else, and it came out that I had been a patent litigator for fifteen years. He finished my *voir dire* with the same concluding question: Was there anything else that I thought the parties should know about me? Confident that I was about to escape serving, I answered that I had been a federal prosecutor for seven years. "That ought to do it," I said to myself.

It did me no good at all. One of the defense attorneys asked me if my experience would prevent me from being fair to the defendant, accused of armed robbery. What was I going to say in front of all those people? That the defendant had to be guilty of something or he wouldn't be here? Of course not; I said that I could be fair, and indeed I meant it. I was accepted for jury duty.

LESSON #1: "JURY SELECTION" IS REALLY JURY DE-SELECTION

This leads to one of the first lessons I learned about juries when I began selecting them myself. We call it jury "selection." But it isn't "selection" at all. It is avoidance or de-selection. The whole point in picking a jury is not that you are selecting the people you want; rather, you are identifying the worst prospective jurors in the group and getting rid of them, for cause if possible, and otherwise by peremptory challenge. Who has a bias? Who isn't paying attention? Who looks hostile or unhappy at being required to sit on a jury? Who has the appearance of instability? Who might dominate the jury? Is one of your witnesses likely to rub a certain juror the wrong way? These are the people you are picking, but you are picking them so you can get rid of them. It gets highly subjective. It's not much of an exaggeration to say that some lawyers try to avoid having anyone with brains or education on a jury for fear that person will exercise too much leadership.

In our case, I probably was accepted because others were worse prospective jurors than I. For instance, there were three people who had family members or close friends who had been the victims of homicides. My background as a prosecutor was not such a negative factor for the defendant, especially compared to the possibility that another prospective juror had been face to face with someone with a gun, or had lost a loved one to extreme violence.

Our jury was eclectic: eight women, five men; four African-Americans, two Hispanic, seven white; some suburban, others from the city. There was a government employee, an apprentice plumber, a lawyer, a nurse, a college student, an adult education teacher, and a primary grade teacher. Our ages ranged from older adults to the young college student. There were lots of different backgrounds and points of view in one room. That is a great strength of a jury, which at its best, exhibits great common sense.

LESSON #2: MOVE YOUR CASE ALONG

We listened to evidence for only two days, and I am glad it wasn't longer. How any juror can stand a case that goes on, droning day after droning day, is beyond me. Had I been picked to serve on a jury for a trial that lasted months, I might have instigated a riot or fled the courthouse. The trial may be the most important thing in the world to you and your client, but a jury just wants to do its job and go home. From that, another lesson emerges. With any factfinder, you must **move your case along at a good pace**. Pick and choose what you want to present. Don't try to prove that the invention is anticipated or made obvious by fifty different references, or even ten, or even five. Don't try to prove infringement of thirty or forty claims. Don't have repetitious testimony. Don't overwhelm the jury with hundreds or thousands of exhibits. Don't drone on with cross-examination. Get what is useful. Throw your punches. Then sit down.

LESSON #3: DON'T WASTE THE JURY'S TIME

Delays, especially unexplained ones, made us jurors impatient. We wanted to be doing something. When we weren't, we began speculating on what the reason for the delay was, and wishing it was over. We didn't like showing up at 10:00 a.m. and not hearing testimony until 11:45 a.m. It irked us to stand around. The third lesson is: do everything you can to **avoid wasting the jury's time** with things that require side-bars or recesses.

LESSON #4: DON'T OVER-EMOTE

We didn't care for over-emoting, either. Both sides came in for some criticism for overdoing it a bit in their closing arguments. It reminded me of a local defense attorney, who became known as "Cryin' Jim Smith" (I've changed his name) because of his ability to turn on the waterworks in front of a jury. Any emotion — and there can be some even in a patent case — should be limited and at the right time. Otherwise the jury comes to the right conclusion: you're acting. If the jury decides you are an actor, your credibility is a long way toward being shot, and your case won't be far behind.

LESSON #5: PICK ONE THEORY AND STICK TO IT

You must be consistent about your theory, so pick one and stick to it. Our case involved an armed robbery in a Sears parking lot in broad daylight. The robber leaned into a woman's car and stuck a gun in her neck. The eyewitness, another woman who was driving into the same parking lot, saw the frightened victim, the robber and his gun. She saw the robber take the victim's purse and drive away in his own car. She bravely followed him for four blocks and got his license plate number. The police traced the car to the defendant's former wife.

The defense made the mistake of arguing inconsistent theories, and we noticed the inconsistency. It was a factor we discussed in our deliberations. The defense argued that the eyewitness was mistaken or lying about her ability to remember the license number. But the defense also argued that the car was driven, not by the defendant, but by another man living with the defendant's former wife. The Federal Rules of Civil Procedure allow you to plead inconsistently; but some lawyers seem to think that you can therefore try a case with inconsistent facts. It doesn't work. Trying to prove the car wasn't at the robbery is at odds with proving that it was there, but was driven by someone else.

LESSON #6: JURIES TAKE THEIR JOBS SERIOUSLY

There was a sense of duty among us. As Chesterton wrote, in the days before women could serve on juries, "Put twelve men in a room and the Holy Ghost descends." We talked about a procedure for voting. We wanted to think about the evidence, even though there were only a handful of witnesses. Some of us wanted to consider whether the lack of fingerprints was significant. All of the jurors took time to discuss questions some of the jurors had about the evidence, even though it was early evening.

Many lawyers would probably be surprised that we followed the judge's instruction not to discuss the case until deliberations. But no one commented on the evidence. Instead, we made small talk while we were waiting, or read a book. The defendant, the witnesses, and the evidence went undiscussed until after we began deliberations.

Every lawyer and judge involved in the criminal justice system believes that the jury ignores an instruction that the defendant has the right not to testify, and that the jury is not to infer anything negative from a defendant's decision not to testify. But our jury obeyed it.

We did not comment on the defendant's failure to testify, and it played no observable role in our deliberations. Maybe juries aren't as cynical as judges, lawyers and litigants.

Our cumulative recollection of the events in this case convinces me that a jury is superior to a single fact-finder. When one of us remarked that a certain witness hadn't been asked whether she had seen the defendant wearing handcuffs in a line-up, another juror immediately spoke up and reminded us that the defense had questioned the witness about this on cross-examination. One juror commented on the absence of fingerprints, but other jurors responded that there was no testimony that the robber had touched any surface on the victim's car and, of course, that fingerprints on the former wife's car would not be meaningful since the defendant had prior access to that car. This kind of interaction and self-correction is impossible with a single fact-finder.

Yet another advantage accrues from the nature of a jury. Unlike a judge, we didn't have a docket. We were a single-purpose, limited-lifetime organization. Our only job was to pay attention and then decide. We had the huge benefit of the immediacy of our impressions and the recollection of the facts. We had no chance to forget them before we began to make our decision. We simply could not go home until we had made up our minds, and that is another wonderful benefit a jury has over a judge. We had no interruptions: no telephone calls, no meetings, no voicemail, and no email. Our powers of concentration were given every support. Our only goal was a decision.

A judge, on the other hand, has a hundred or more cases competing for his or her attention. The case may be decided months down the road when the facts are so stale and so forgotten that the court has to get a transcript to remember the testimony. Or maybe law clerks, who didn't even hear the testimony,

will have to gather the facts for the judge. The immediacy of the impressions will be lost. The grasp over the facts as a whole, with the ability to quickly relate one to another, or to see contractions or corroboration between different witnesses or facts, will also be completely lost. I still remember a bench trial where I prosecuted a man for drug dealing. The judge, trying to remember the facts three months later, forgot to order the entire transcript and therefore did not remember the undercover agent's testimony. He wrongly acquitted the defendant.

Single fact-finders can become myopic. Judges sometimes head down legal cul-de-sacs that would not trouble a jury for a moment. In one of my prosecutions, a usually excellent, highly respected judge decided a defendant had been entrapped — that is, the predisposition to commit the crime had been planted by the agents in his naive mind. Yet that defendant forced the undercover agents to exchange their money, because he would not accept marked money in payment for the drugs he was selling. He was in fact a skillful and experienced drug-dealer who knew how to flush out the police, and yet this judge decided he was not disposed to deal drugs until he met the agents in our case. Any juror who makes a similar decision is going to have to persuade other reasonable people that he is correct. The jury self-corrects. A single fact-finder cannot.

My conclusion: We are, on the whole, better off with juries. If there is too much complexity for a jury to handle, there is probably too much complexity for a judge to handle. But too much complexity is your fault as the attorney. The first job of a trial lawyer is to simplify. If you do, and if your cause is good, trust a jury. **IPT**