

PRESENTING THE COMPLEX CASE TO A GEORGIA JURY OUTLINE

I. The Jury System

A. Examining the Effectiveness of the Jury System

The jury system, which is the subject of this seminar, is a perhaps the most precious of rights found in our Constitution. The Founding Fathers adopted this device from England where it had been a part of English jurisprudence for hundreds of years. With such an impressive tenure, there should be no surprise that in 21st century America the jury's role is constantly being re-examined and often criticized. As a now long ago former law student, I never questioned that this fundamental institution would (or should) continue to be the predominant method of resolving civil disputes in our country. Rather, initially as a student and for the last 20 years as a trial lawyer, my exclusive focus has been to comprehend its ways and to shape its outcomes. Those lessons in large part form the core of this seminar.

During the last 20 years, the complexity of litigation has increased in sync with the technological advances in computers and the software that runs on them. Aided by these tools, businesses have successfully marshaled and mastered multitudes of facts and figures allowing them to vastly increase the speed and scale of "the normal course of business." Lawyers too, on both sides of the bar,

soon grasped how to take advantage of these advances.¹ Our litigation support consultants today will help us explore how advocates can best use these tools effectively to persuade jurors.

Our civil jury system, however, has changed very little in this respect over the last 20 years. As jurors have been asked to evaluate and judge ever more technical and complex subject matters, the aides made available to jurors have not kept pace, although increased flexibility exists today. Consequently, the trial lawyer is required to communicate with increasing clarity and effectiveness with jurors. As lawyers, we must take advantage of increased flexibility to fashion the trial processes to match the demands of the cases we try. Our trial consultants today also will offer their insights on how best this can be accomplished.

The history of how the jury system came to its pre-eminent place in American jurisprudence is a logical starting point of any analysis of its effectiveness. For unless we understand why juries were vested originally with this responsibility, we might overlook the extent to which they are or are not meeting the expectations for their intended role. Fortunately, many able scholars have compiled this history, and I will borrow liberally from their work.

Juries go back to the reign of King Henry II of England.² They had been in existence for nearly 700 years before becoming the foundation of the American

¹ See generally F. Galves, Where the Not-So-Wild Things Are: Computers In The Courtroom, The Federal Rules of Evidence, and the Need For Institutional Reform and More Judicial Acceptance, 13 Harv. J.L. & Tech. 161 (2000).

² E. Sullivan & A. Amar, Jury Reform in America--A Return to the Old Country, 33 Am. Crim. L. Rev. 1141, 1165 (1996).

legal system.³ The Founding Fathers were familiar with the importance of jurors to the original thirteen states as the right to trial by jury is the only right mentioned in every state constitution between 1776 and 1787, where it served as a bulwark against England's crown appointed judges.⁴ Nevertheless, as originally proposed, the Constitution omitted a right to civil jury trial.⁵ Some Founders viewed juries, with their unpredictable rulings, as a threat to the rights of creditors and thus a threat to the newly formed economic system.⁶ The state conventions balked at ratifying this version of the Constitution and the Seventh Amendment was added to the Constitution, "preserving" the right to civil jury trial.⁷ In attempting to "preserve" this right, the Supreme Court typically has examined practices in English common law courts before 1791.⁸ The Supreme Court chose English jury practice as the point of historical reference because use of the civil

³ Id. at 1166. Originally jurors in England didn't determine cases. Rather, they acted as witnesses and the first person that collected twelve witnesses that supported his or her case, won. Id.

⁴ 33 Am. Crim. L. Rev. at 1146.

⁵ C. Murphy, Determining Compensation: The Tension Between Legislative Power and Jury Authority, 74 Tex. L. Rev. 345 (1995).

⁶ Id. at 397-98.

⁷ Id. at 398-99; U.S. Constitution Amendment VII.

⁸ 74 Tex. L. Rev. 345 at footnote 71, citing Dimick v. Schiedt, 293 U.S. 474, 476 (1935), Baltimore & C. Line v. Redman, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the [Seventh] Amendment was adopted.").

jury varied so widely among the states at the time of the adoption of the Seventh Amendment.⁹

Some of the Founders believed that the jury was superior to the judge in finding facts because the jury was composed of several individuals with varying backgrounds.¹⁰ Many modern commentators agree with this point of view.¹¹ Because the jury is composed of persons with a variety of backgrounds and training, it arguably is a better decision maker than the judge with respect to finding facts, drawing inferences, and making predictions. The risk of error in attempting to find the truth may be minimized when the deliberative body is a jury, rather than a judge, because the jury consists of many people who must debate and agree on the verdict.¹²

History also advises us that the judge was believed to be no more capable than the jury of ascertaining the "correct" amount of damages when damages were not certain.¹³ Before the adoption of the Seventh Amendment, English juries had

⁹ 74 Tex. L. Rev. 345 at footnote 36 citing Capital Traction Company v. Hof, 174 U.S. 1, 8, 6-8 (1899)(concluding that the Framers "had in view the rules of the common law of England, not the rules of that law as modified by local statute or usage in any of the States.").

¹⁰ C. Murphy, Integrating The Constitutional Authority of Civil and Criminal Juries, 61 Geo. Wash. L. Rev. 723, 745 & n.99 (1993).

¹¹ 74 Tex. L. Rev. 345, 361 & n. 74 & 75.

¹² Id., citing D. Broeder, The Functions of the Jury: Facts or Fictions? 21 U. Chi. L. Rev. 386, 388-389 (1954)(noting that fact-finding by the jury may produce fewer errors than fact finding by a judge); K. Clermont & T. Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1152-53 (1992) (noting that empirical research "suggests that a jury could even out perform a judge, because the judge is also human and groups typically out perform individuals by virtue of superiority in such tasks as recall of facts and correction of errors.").

¹³ 74 Tex. L. Rev. at 364.

long assessed compensatory damages.¹⁴ A judge's power to disturb an award was limited to granting a new trial only if the jury's award was excessive and outrageous.¹⁵

Some Founders also believed that the jury would be less susceptible to bias than a judge.¹⁶ Moreover, empirical research suggests that a jury is generally unbiased and competent compared to a judge.¹⁷ Whether elected or appointed, judges are not infallible, and among judges, there is not unanimity on any subject.¹⁸

Finally, the Founders saw this preference for jury trial as the protector of individuals.¹⁹ One of the reasons why a constitutional guarantee of a civil jury trial was insisted upon was to guard against unwanted legislation passed by a misguided legislature.²⁰ At both the Constitutional Convention and the ratifying debates, many of the Founders called for a constitutional provision for civil jury

¹⁴ 74 Tex. L. Rev. at 360.

¹⁵ Id. at 364 & n. 88, citing R. Helmholtz, Damages in Actions for Slander at Common Law, 103 La. W. Q. Rev. 624, 635-38 (1987) (stating that by the 17th century, English judges recognized that the jury was the appropriate institution to determine actual damages resulting from a slander because actual harm, unlike harm of a "great general reputational sort," was not within the direct knowledge or "conscience" of judges.)

¹⁶ 74 Tex. L. Rev. at n. 74.

¹⁷ 77 Cornell L. Rev. at 1152.

¹⁸ 33 Am. Crim. L. Rev. at 1157-1158.

¹⁹ 74 Tex. L. Rev. at 399 & n. 237.

²⁰ 74 Tex. L. Rev. at n. 192, citing C. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 664 (1973).

trial; the legislature simply could not be trusted to protect the right of jury trial in civil cases.²¹

My personal experience has been mixed. As for negative experiences, one particular jury comes to mind from a lender liability case pending in federal court in rural Tennessee in 1990. Our client, the plaintiff, alleged that defendant, a financing company, terminated its receivables financing vehicle prematurely and without legitimate grounds. One notable male juror had never had a bank account, still lived with his parents at age 45, and proudly wore the cow skin jacket he had made with his own hands. Only one other person had ever been employed outside the home, and his experience was limited to starting a small business. None had a college degree. Although I couched my theme to this jury in the simplest of terms-that is, that is a person's word is his or her honor- I suspected that this jury would have little propensity to award economic damages in the millions of dollars actually suffered by our client. I certainly felt that they were over-matched by certain aspects of the case.

In contrast, we tried a libel case for six weeks in Dekalb County Superior Court in 1994 for the plaintiff, a former president of an international energy company that was one of the finalists bidding to purchase an operating power plant from the Portuguese government. The public company defendant suddenly announced in a press release that it fired plaintiff for purportedly engaging in "illegal and unethical business practices", i.e., efforts to bribe the Portuguese

²¹ 74 Tex. L. Rev. at n.193.

government, and handed the SEC the results of an internal investigation which concluded, among other things, that the plaintiff had violated the Foreign Corrupt Practices Act. The jury had to determine whether plaintiff was covertly funneling fabricated expense reimbursements to the company's Portuguese joint venture partner knowing that it would use the money for bribing Portuguese officials, as alleged by defendants, or whether plaintiff was acting legitimately in requesting the accounting department to pay promptly any "proper" expenses.

Add to the mix plaintiff's circumstantial evidence of the existence of a "back channel" by which the company's attorneys, who had handled all the major negotiations with the Portuguese joint venture partner and the Portuguese government, and witnessed the Portuguese joint venture partner allegedly demanding bribe money while plaintiff was out of the room, attempted to prevent the payment of the invoices without plaintiff's knowledge of their involvement. Defendants also orchestrated plaintiff's firing because they correctly feared he intended to replace them as counsel for the company. Finally virtually every witness but for the plaintiff was still employed by the corporate defendant and testified as favorably as they could for the corporate defendant. This was a complex set of facts. By the effective use of technology in the courtroom, and having as a juror a former big six CPA, this jury understood the case and awarded plaintiff \$3 million in compensatory damages.

Similarly, we picked a jury in Dekalb County Superior Court in 1995 for the defendant, the chairperson of a women's studies program, in a suit where a

former graduate student and friend had sued her for sexual harassment. After failing to complete her doctorate with another professor, plaintiff, a mother and wife and business owner, requested defendant to act as her adviser. Defendant accepted. Given their similar ages and apparent similar interests, the two also became friends, shared meals and entertained together. When plaintiff failed to find a job after the award of her doctorate degree, defendant offered her a job as an administrative aide in the women's studies office. Within 5 weeks of starting this new position, plaintiff was demanding that the defendant be fired for sexual harassment.

The only allegation of a touching involved a hug at a local restaurant which defendant treated as a reconciliation among friends after an unpleasant exchange and the plaintiff silently regarded as a sexual advance. However, plaintiff painted the entire relationship as "abusive" because she was forced against her will to work for, socialize with, and to do any of the things that she did with defendant. If plaintiff did not do these things, she claimed that defendant with her national stature would black ball plaintiff in the academic community. With Courtroom T.V.'s cameras posed to record the trial, a jury of 10 women and 2 men was selected. The men, in their 50's, were unremarkable and did not appear to possess any leadership qualities that would suggest that they would lead the outcome of the deliberations. On the other hand, the majority of the women were working women who had worked in support roles all their lives. We believed that

they knew what sexual harassment was, and the case immediately settled once the lawyers had had an opportunity to examine the jury.

Overall, I have found that jurors determine disputes in many circumstances as well as judges and in some instances they do better. See pages ___ below. I remain a staunch proponent of the current jury system.

Despite this history and my experience, lawyers and other constituencies have clamored for jury reform. The impetus for jury reforms seems to be the perception that "runaway juries" are threatening the economic viability of health care, business and insurance.²² The phrase "runaway jury" has become popular with some members of Congress and become the title of a John Grisham novel.²³ It is difficult to assess whether or not the system requires reform. Every study that suggests that reform is unnecessary, is matched by a report taking a contrary point of view.²⁴ Settling this dispute is beyond the scope of this paper.²⁵

²² 74 Tex. L. Rev. at 347 & n.5.

²³ See, e.g., 141 Cong. Rec. S28 (daily ed. Jan. 4, 1995)(statement of Sen. Hatch)("The uncertainty of an excessive punitive damage award by a runaway jury cripples our business community and diverts resources that could be better used for research and development."); Newt Gingrich, et al. Contract With America 154 (Ed Gillespie & Bob Schellhas eds., 1994) ("These [proposed legal] reforms reduce the threat of runaway jury verdicts."). Id.

²⁴ See, e.g., T. Eaton, Another Brick In The Wall: An Empirical Look at Georgia Tort Litigation in the 1990's, 34 Ga. L. Rev. 1049 (2000) (concluding that there is no evidence of a 'tort crisis' in Georgia or nationwide); N. Vidmar & J. Rice, Assessment of Non-Economic Damage Awards In Medical Negligence: A Comparison of Jurors With Legal Professionals, 78 Iowa Law Review, 883-896 (1993) (A common misperception is that juries are more generous than judges in awarding non-economic damages against "deep pocket" defendants.)

²⁵ See generally, S. Daniels & J. Martin, Civil Juries and the Politics of Reform, Northwestern Univ. Press (1995).

Some of the jury reform positions do offer useful examples of how a judge in a particular case, with the agreement of the parties, might implement measures to improve the jurors' understanding of their role and to facilitate their understanding of the facts being presented at trial. These measures are discussed below.

Use Preliminary Jury Instructions

After selecting the jury but before opening arguments, the judge can give preliminary instructions. Such instructions will explain the trial procedures, the jurors' role, define burdens of proof and technical or complex terms and should educate the jurors regarding the substantive law and the facts of the case. The court can also define and explain the parties' claims and the anticipated defenses. The jurors also could be provided juror notebooks that contain the preliminary instructions as well as selected exhibits, matters stipulated or not otherwise in dispute, such as expert's vitae, short statements of the parties' claims and defenses and chronologies. See also ABA Litigation Section's Civil Trial Practice Standards 2 & 5(b) ("ABA Civil Trial Standards") at www.abanet.org/litigation. The parties should be allowed to supplement the materials as the trial progresses. The Court should collect them at the end of the day.

Pros: One commentator endorses this tool for several reasons. Having an explanation of the burdens of proof and other controlling legal concepts before

hearing the evidence is likely to eliminate confusion prior to final deliberations.²⁶ Second, this prior explanation should foster increased levels of attention and re-enforce the retention of information.²⁷ Finally, this should reduce juror error in applying the wrong law to the facts.

Cons: Critics point to several problems with judges serving in this role. First, they exacerbate the tendency of jurors to make premature decisions. Second, the judge is focusing the jury on the same primary issues thus causing jurors to ignore other relevant facts and pieces of evidence and can be an oversimplification of the legal issues involved. Third, it causes more preparation for the parties and the judge and may require the court to make premature rulings that may later be erroneous.²⁸

Allow Jury Note-Taking

Juries should be allowed in a civil case to take notes for purposes of assisting them in the recall of evidence. See ABA Civil Trial Standard 3 (1998).

Pros: Jurors may sharpen their concentration. It can serve to refresh recollection.²⁹

²⁶ J. Shtabsky, A More Active Jury: Has Arizona Set The Standard for Reform with Its New Jury Rules?, 28 Ariz. St. L.J. 1009, 1016 (1996).

²⁷ Id. at 1017.

²⁸ Id. at 1017.

²⁹ 28 Ariz. St. L.J. 1009, 1018 (1996).

Cons: Jurors may miss important testimony while writing. They may focus more on what is said, rather than the demeanor and behavior of the witness. They may record items admitted inadvertently. They may attach too much significance to the words because the words are in writing. They may attach too much significance to the note taker simply because he or she was the scribe.³⁰ An instruction should be given to the jurors that those who do not take notes should rely on their recollection, not someone else's notes.³¹

Allow The Jury To Ask Questions During Trial

As one commentator has stated, "It is common sense to allow the jury to ask questions of witnesses as the trial progresses. Having an opportunity to clarify a disputed point of fact while the witness is on the stand will allow the jury to function on a more informed basis"³² In England, a juror can give the judge a written question for a witness. The judge in his or her discretion (after argument from counsel out of the jury's presence) is allowed to ask the question. England has experienced no major problems using this process.³³ One notable exception to the rule prevalent in America is the criminal justice system in the U.S. Military which allows a juror to submit written questions for a witness

³⁰ Id. at 1019.

³¹ J. Shoop, ABA Section Says Jury Reforms Should Be Standard Practice; ATLA Criticizes Proposals, 34-Feb Trial 86, 87 (1998).

³² E. Sullivan & A. Amar, Jury Reform In America-A Return To The Old Country, 33 Am. Crim. L. Rev. at 1142.

³³ Id. at 1143.

to the judge, who rules on whether the question is allowed.³⁴ The ABA Standard 4 allows either the judge or the lawyer to ask the question, although the court must take care to avoid the inquiring lawyer from gaining some form of advantage from aligning him or herself with the question's author. The questions should be reserved only for important points and should come at the end of a witness's examination.

Pros: Allows juror to clarify important matters and eliminate confusion. It focuses the parties on issues of concern to the jury. It allows relevant information to be revealed that the lawyers inadvertently failed to elicit.³⁵

Cons: It can disrupt trial presentation and trial strategy. Jurors can become pre-occupied with crafting questions and not listening to evidence. It can give jurors too much control as they consider issues or facts not introduced by the parties.³⁶ ATLA proposes that only the judge be allowed to ask the question as the lawyer asking such a question might garner juror support simply from serving in that role.³⁷

³⁴ 33 American Criminal Law Review at 1141 n.5. See also ABA Civil Trial Standard 4.

³⁵ 28 Ariz. St. L.J. 1009, 1020-1021.

³⁶ Id. at 1021-1022.

³⁷ 34-Feb Trial at 88.

B. Can You Truly Find A Jury Of Your Peers?

The Federal and Georgia constitutions guarantee a right to trial by jury.³⁸ While not explicit, the guarantee of an impartial jury has been interpreted to require a representative jury.³⁹ The Federal Jury Selection Act of 1968 also specifically requires that courts randomly select the jury from a "fair cross section of the community."⁴⁰

To that end, lawyers have been exercising peremptory challenges to jurors that they could not dismiss for cause. Historically, lawyers have relied on instinct and intuition when selecting jurors. In contrast "for cause" challenges which are available without limits, the parties have a limited number of peremptory challenges: 3 per side in federal court and 6 per side in Georgia courts.⁴¹ Many lawyers chose jurors based on various stereotypes and generalizations concerning the jurors' race, gender, religion, culture, occupation, appearance, age, political beliefs or other personal characteristics.⁴² For example, Clarence Darrow reportedly believed Jews, Irish persons, Unitarians,

³⁸ U.S. Const. Amend VI ("In all criminal prosecutions, the accused shall enjoy the right to... trial, by an impartial jury of the state and the district wherein the crime shall have been committed"); U.S. Const. Amend VII (In civil suits, the right of trial by jury shall be "preserved"); Ga. Const. Art. 1, Sec. 1, Para. XI.

³⁹ The right to an impartial juror is guaranteed to both the litigant and the potential juror by the Fourteenth Amendment. Holland v. Illinois, 493 U.S. 474 (1990).

⁴⁰ 28 U.S.C. § 1861 (1994). The method by which the federal district court for the Northern District of Georgia selected jurors and jury foreman was attacked under the Federal Jury Selection Act in a series of antitrust cases in the early 1980's in U.S. v. Browning-Ferris Industries, Inc., and U.S. v. Northside Realty, 510 F. Supp. 668 (N.D. Ga. 1981) rev'd sub nom. U.S. v. Bearden, 659 F.2d 590 (11th. Cir. 1981). One of the results is that the number of business and professional persons in the jury pool has increased because the jury clerk has applied strictly the rules regarding excusal from jury service.

⁴¹ 28 U.S.C. § 1870 (1994); Naimat v. Shelbyville Bottling Co., 240 Ga. App. 693, 524 S.E.2d 749 (1999).

⁴² M. Lane, Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying The American Legal System, 32 Suffolk U. L. Rev. 463, 468-469 (1999).

Universalists, and agnostics generally sympathized with the defense, while Lutherans, Baptists, and Presbyterians generally sided with the prosecution, and Abramson attributes to F. Lee Bailey the assertion that heavy, jovial people are pro-defense, whereas underweight and delicate people are pro-prosecution.⁴³

Today decision making based on race and gender stereotyping⁴⁴ is expressly disallowed by Batson⁴⁵ and its progeny, but there is another source of purportedly more reliable predictors, social science. Social science in the form of the jury or trial consultant has become an essential component of many large and complex cases. Its genesis can be traced to the Harrisburg Seven trial, U.S. v. Berrigan, in 1971 where Columbia University sociologist Jay Schulman and a team of social scientists dedicated themselves to finding sympathetic jurors for a group of Vietnam War protestors accused of conspiring to destroy selective service records and to kidnap Henry Kissinger.⁴⁶ The trial ended in a hung jury. From its roots in a liberal cause, the consulting business has veered hard right where today it is the tool of choice for corporate America and well-heeled criminal defendants. One commentator reports that a Boston trial lawyer said, "no self-respecting

⁴³ J. Abramson, We, The Jury at page 147.

⁴⁴ As Gloria Steinham said, "The first problem for all of us, men and women, is not to learn, but to unlearn. We are filled with the popular wisdom of several centuries just past, and we are terrified to give it up. Patriotism means obedience, age means wisdom, woman means submission, black means inferior. These are preconceptions imbedded so deeply in our thinking that we honestly may not know that they are there." G. Steinham, The First Problem For All Of Us Men and Women Is To Unlearn, New York Times, 26 August, 1971.

⁴⁵ Justice Thurgood Marshall, in Batson v. Kentucky said that, ending racial discrimination in jury selection "can be accomplished only by eliminating peremptory challenges entirely." 476 U.S. 79, 103 (1986).

⁴⁶ F. Strier, Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Issues and What, If Anything, To Do About It, 1999 Wis. L. Rev. 441, 442 (1999).

trial lawyer will go through the process of jury selection in an important case without the assistance of highly paid trial consultants", while a New York counterpart adds, "It's gotten to the point where if the case is large enough, its almost malpractice not to use trial consultants."⁴⁷

In an attempt to identify an ideal juror, jury selection consultants employ a variety of techniques derived from social science.⁴⁸ After conducting a communal attitudinal survey to ascertain attitudes and bias in the geographic area,⁴⁹ trial consultants generally construct a model of a potential juror favorable to their client's case, use this knowledge to chose a jury panel to fit this characterization, predict the outcome of the case, and instruct attorneys on the best way to present evidence during trial.⁵⁰

Not surprisingly, a controversy has arisen regarding whether trial consultants have advanced the art of selecting jurors to the point that they can pick a favorable jury, rather than the impartial jury as required by the Constitution, particularly in a case where the opposing side does not utilize such a resource.⁵¹ Judging from these business' marketing materials, their proliferation in numbers and use and the attention paid them by the

⁴⁷ Id. at 443.

⁴⁸ 32 Suffolk U. L. Rev. at 472.

⁴⁹ This tool is described in more detail at 1999 Wis. L. Rev. at n.30.

⁵⁰ 32 Suffolk U. L. Rev. at 472.

⁵¹ 1999 Wis. L. Rev. 441, 32 Suffolk U. L. Rev.463. Certain commentators cite Spivey v. State , 253 Ga. 187, 319 S.E. 2d 420 (1984) for the proposition that an indigent defendant's constitutional rights in a death penalty case were not violated when the trial court refused to appoint jury selection experts on his behalf. A close reading of the case reveals, however, that the defendant "was assisted during jury selection by two individuals, at least one of whom was a member of the National Jury Project." 253 Ga. at 201, 319 S.E.2d at 434.

media,⁵² one would conclude that they are quite successful. On the other hand, there is little empirical evidence that these consultants materially affect the outcome of cases and the empirical studies generally find that facts remain the primary basis upon which juries decide cases.⁵³ One critic, Franklin Strier, suggests that despite the fact that trial consulting defies accurate empirical study, several inferences about the superior efficacy of jury 'science' over traditional methods can be drawn.⁵⁴ While acknowledging that every study suggests that the evidence presented remains the primary determinant of jury verdicts, "jury consultants may well offer the most valuable and cost effective assistance when they help the attorney develop a persuasive method for presenting evidence."⁵⁵ Regardless of the effectiveness of trial consultants, critics clamor that the use of such

⁵² Litigation Sciences Inc., a market leader, at one time claimed a 96% accuracy rate in predicting the outcome of a case and claimed that 80% of their clients receive a favorable verdict. 32 Suffolk U. L. Rev. at 477. Today the industry is estimated to have over 700 practitioners and over 400 firms with its own trade association, the American Society of Trial Consultants (ASTC). 1999 Wis. L. Rev. 441, 444-445 n.13 & 14. They even exist on-line. Cyberjury is a free Web site listing trial consultants. Sci-Jur is another on-line consulting service operated by the University of Nebraska Law and Psychology. See 1999 Wis. L. Rev. 441, 442 n.1 for examples of recent unpopular jury decisions, such as the O.J. Simpson and Menendez brothers trials, that are attributed to the use of jury consultants by the defense. Notably, the prosecution in the Simpson case refused to follow the advice of its trial consultant, Donald Vinson. *Id.* This was not the last error the prosecution team would make.

⁵³ 32 Suffolk U. L. Rev. at 464, 477-478.

⁵⁴ 1999 Wis. L. Rev. at 447.

⁵⁵ 1999 Wis. L. Rev. at 461-462; Strier persuasively points out several ways that jury consultants provide a benefit in jury selection that provides an alternative to the lawyer relying simply on intuition and stereotype. The consultant (i) brings external information that is case-specific and tested by persons in the community, (ii) relies on statistical analysis and data rather than the bias and mere intuitions of human behavior, (iii) use multiple factors, all which must agree before inferences are drawn, (iv) usually performs its task within a team, with the correlated benefits of consultation and feedback, and (v) has a trained set of eyes unburdened by the other demands of trial dedicated to observing verbal and non-verbal behavior of potential jurors in the courtroom. 1999 Wis. L. Rev. at 446.

consultants should be banned because public confidence in the jury system is tainted by the perception that this group is manipulating juries and outcomes.⁵⁶

Some critics also have proposed the abolition of peremptory challenges to prevent parties and consultants from "stacking the deck" for a favorable outcome.⁵⁷ That result is undesirable for many reasons. First, voir dire often does not provide adequate opportunity to create grounds for a cause challenge whether due to judicial restrictions or due to potential jurors' lack of candor. In that event, the peremptory challenge offers a valuable alternative means to dismiss a juror sincerely suspected of bias.⁵⁸ Second, judges do not always correctly evaluate "for cause" challenges.⁵⁹ Finally, lawyers would be forced to question prospective jurors more aggressively in order to establish the grounds for a cause challenge. This would make the already uncomfortable process even more distasteful to prospective jurors.

Until one can establish that the efficacy of trial consultants in selecting favorable juries, there is no reason to consider the severe action of abolishing peremptory challenges. And in those exceptional circumstances under which it is impracticable for the party seeking the information to obtain these opinions on the same subject by other

⁵⁶ Id.

⁵⁷ 32 Suffolk U. L. Rev. 463 n.59.

⁵⁸ 1999 Wis. L. Rev. at 484.

⁵⁹ See Judge Morris B. Hoffman, Peremptory Challenges, 3 Green Bag 2d 135, 139 (2000)("So why do lawyers love preemptory challenges? There are many possible explanations. My guess is that there are two basic ones: 1) they are fun; and 2) judges are so bad at challenges for cause that lawyers need preemptory challenges as a safety valve. I won't address the second point at length, except to say that I agree").

means, Rule 26 does allow a court to order the production of other party's scientific jury selection materials, which normally are protected by the work product doctrine.⁶⁰

I conclude this section with the comments of Michael J. Saks on the subject of the fairness of allowing experts to consult with lawyers for the purpose of selecting a jury.

If both sides have social help, scientific jury selection would make the goal of impartial jury decisions more attainable than has ever before been possible. But, the critics would interject, the presence of such expertise on both sides is a fantasy that ignores the realities of justice in America. Today only the wealthy and celebrated have such help, and tomorrow the only additional people to have it will be prosecutors, and they will use it routinely. But it does not demonstrate some evil inherent in scientific jury selection. It points instead to a fundamental inequity in our courts.

1999 Wis. L. Rev. at 475 citing M. Saks, Social Scientists Can't Rig Juries, in the Jury Box: Controversies in the Courtroom 55 (Lawrence S. Wrightsman et al. eds., 1987).

C. Alternatives To The Jury System

1. "Expert" Juries

⁶⁰ Strier also argues that allowing discovery of consultant surveys "would vastly mitigate, if not eradicate, the competitive advantage of hiring a consultant. Release of the survey findings would plausibly increase the chances of impaneling an impartial jury, and relieve the perceived and actual unfairness of one-sided use of such information." 1999 Wis. L. Rev. at 485. He fails to address the issue of sharing the cost as a condition to such access. See Fed. R. Civ. P. 26 (b)(4)(C)(ii) and O.C.G.A. § 9-11-26(b)(4)(C)(ii).

As the subject matter of disputes has become more technical and complex, many lawyers have suggested that blue ribbon or "expert" jury panels are needed in order that the jury actually understands the facts.⁶¹ One commentator⁶² posed the issue thusly,

For example, Dolly the 'cloned' sheep, DNA 'fingerprints', genetic engineering, lasers, and computer chip innovations represent a growing list of modern complex technology. When disputes involving such technology arise, how can the average juror understand it?

Of course, this has drawn criticisms of "elitism and class bias."⁶³ There exists some historical precedent for expert juries.⁶⁴

As a practical matter, the tyranny of a wrong result is not eliminated by the use of "experts". You may simply have a more opinionated fact finder who understands the specialized facts or circumstances of the litigants. Let us consider one example: Latrell Sprewell's attack on his coach, P. J. Carlesimo as described below.⁶⁵

[A]s everyone on the planet knows, Sprewell and Golden State Warriors coach P.J. Carlesimo had an altercation, which led to an attack by Sprewell on Carlesimo. The league ejected Sprewell for a year, with Sprewell grieving the

⁶¹ See, e.g., J. Stempel, A More Complete Look at Complexity, 40 Ariz. L. Rev. 781, 839 (1998), C. Fournier, The Case for Special Juries in Complex Litigation, 89 Yale L.J. 1155, 1172-76 (1980).

⁶² F. Galves, Where the Not-So-Wild Things Are: Computers In The Courtroom, The Federal Rules of Evidence, and the Need For Institutional Reform and More Judicial Acceptance, 13 Harv. J.L. & Tech. 161, n. 30 (2000).

⁶³ L. Jacobs, Giving Lie to Antiquated Notions About Scientific Evidence, 22 Am. J. Trial Advoc. 507, n.62 (1999).

⁶⁴ 40 Ariz. L. Rev. 781 n. 170.

⁶⁵ 40 Ariz. L. Rev. 781 n. 142.

punishment, which resulted in arbitration under the ABA Players Association's agreement with the league. Arbitrator John Feerick, Dean of Fordham Law School, heard extensive testimony, including uncontested information that Sprewell had gone to the locker room after the first serious altercation and returned 20 minutes later to attack Carlesimo with renewed zeal. Amazingly, Feerick found Sprewell's conduct not to be premeditated, suggesting that the use of legal experts for juries hardly removes accusations of irrational fact-finding (Feerick's determination was widely criticized in the press).

2. ADR

Alternate dispute resolution ("ADR") mechanisms are often substituted for traditional court decision-making and jury trials. These approaches can assist litigants facing a complex trial, but not in many circumstances or cases. Because the primary goal of ADR is to speed up and to reduce the cost of the resolution process, reaching more "correct" decisions, that is outcomes that are satisfactory to an objective neutral standard, are not frequently the result of employing these mechanisms.⁶⁶

Certain ADR mechanisms offer a meaningful way to address the complaint that lay jurors are inadequately trained or sophisticated to decide complex factual, scientific or medical questions. In particular, arbitration allows the parties to prescribe the qualifications of the adjudicator(s) either by means of a pre-dispute agreement, or by an

⁶⁶ D. Hensler, Science In The Court: Is There A Role For Alternative Dispute Resolution?, 54 SUM Law & Contemp. Probs. 171, 179 (1991).

ad hoc agreement reached after the dispute arises, effectively substituting expert decision makers for lay jurors. Arbitrations have also played a role in some mass tort settlements.⁶⁷ But in those cases, arbitration was utilized as a mechanism for assessing damages, not deciding disputes about the underlying scientific issues regarding causation.⁶⁸ Until a consensus is reached with the particular disputants on the general principles that ought to guide dispute resolution in that area, usually the principles regarding causation, the likelihood of extensive use of arbitration as a means to achieve a complete resolution of a complex mass tort claim seems limited.⁶⁹

Expert panels, which are selected by the parties from a list provided by the court, serve primarily in an advisory role, but can have the impact of an expert decision maker should they appear at trial and testify. Expert panels are used by the federal court in the District of Connecticut. These panels can assist the attorneys, parties and experts in assessing the substantive evidence and the likelihood of success at trial. These substantive experts consider evidence submitted by both side and may conduct further investigations on their own.⁷⁰ The judge then convenes a conference with parties, attorneys, and their experts at which the neutral experts give their assessment of the strengths and weaknesses of each side's case. This assessment is then used as a basis for

⁶⁷ For example, under the Robins bankruptcy settlement agreement, one option for Dalkon Shield plaintiffs is to refer their claims to arbitration. The Manville Trust also offered arbitration as an option to asbestos claimants, as does the privately subsidized Center for Claims Resolution. Id.

⁶⁸ 54 SUM Law & Contemp. Probs. 171, 185-186.

⁶⁹ Id. at 189.

⁷⁰ Id. at 180.

settlement discussions. If the parties do not settle, the neutral experts may appear at trial.⁷¹

Certain other ADR mechanisms can offer the ability for the parties to settle on their own terms and to, for example, implement remedies beyond monetary damages-- by setting up funds for future environmental testing, epidemiological studies or ongoing physical exams of class claimants--which might afford the plaintiff more complete and meaningful relief.⁷² In these conciliatory ADR procedures, the neutral third party uses his or her wisdom, stature or knowledge of the subject matter to persuade the parties to resolve their disputes, but he or she does not dictate the outcome. These mechanisms include settlement conferences (with and without the judge), and mediations. Courts have shown a propensity to apply innovative settlement techniques to dispose of mass tort litigation. The judge utilizes medical and scientific evidence systematically to develop a settlement agreement or formula that applies to multiple cases.⁷³ Some have been successful and others have not.⁷⁴ Mediation's advantages are well documented.

⁷¹ Id., citing R. Zampano, Settlement Conferences with Experts in Center for Public Resources, ADR and the Courts at 251.

⁷² 54 SUM Law & Contemp. Probs. 171, 185.

⁷³ Id.; In the cases such as the asbestos litigation in the Northern District of Ohio, the Jenkins asbestos class action in East Texas and the Dalkon Shield bankruptcy litigation, aggregate settlement amounts were determined by analyzing the relationship between outcomes in previous cases and the nature of the injury and the clinical evidence. Id.

⁷⁴ Compare Francis McGovern's experiences in the Native American tribal water rights and the Ohio and Jenkins class action asbestos litigation (Id. at 190-191) with Judge Weiner's experience in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

Similarly, summary jury trials where third party expert neutrals serve as the jury pool members can also influence the parties to settle. Unlike expert panels, however, the neutral experts will not appear at trial.⁷⁵ Given the exclusive advisory nature of this later process, it often is not worth the extra effort to undertake. Minitrials-- which differ from summary jury trials in that the parties' presentation is only for the benefit of themselves, and not an expert jury--is another form of conciliatory ADR mechanism that is regarded as appropriate for complex litigation.⁷⁶ Id.

ADR's role as a means of handling complex cases will continue to be limited until there is a judicial resolution of the underlying dispute's causation and scientific issues.

3. Summary Judgment Practice

Motions for Summary Judgment in the federal court system are excellent opportunities to have the court reject flawed expert opinions. Federal judges have embraced their heightened role as gatekeepers to the jury of expert opinions in the wake of the *Daubert-Joiner-Kumho Tire* trilogy. Notably, a request for a *Daubert* hearing must be made in a timely fashion or the objection is waived. Webster v. Fulton County, Ga., 85 F. Supp. 2d 1375 (N.D. Ga. 2000)(rejecting a challenge to plaintiff's experts as untimely filed within a matter of days before trial; request should be filed within a reasonable time after the close of discovery and well in advance of the first time a case appears on a trial calendar).

⁷⁵ 54 SUM Law & Contemp. Probs. 171, 181.

⁷⁶ Id.

Federal Rule of Evidence 702 established three tests, each of which must be met, before a witness can testify as an expert in federal court.⁷⁷ The first, the knowledge test, requires that the subject matter of the testimony be "scientific, technical or other specialized knowledge." The second, the helpfulness test, requires that the proffered testimony assist the judge or jury in understanding the evidence or determining a fact in issue. The third, the qualifications test, requires the witness be qualified as an expert by "knowledge, skill, experience, training or education."⁷⁸

The knowledge test requires that the expert use valid facts and draw valid conclusions. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993). In *Daubert*, the Supreme Court emphasized that the validity analysis focuses on how experts reach their conclusions. In a later case, the Supreme Court further developed this point by stating that the expert must explain "the how and why" behind his or her conclusions so that the trial court can determine if the expert has reached his or her opinion by valid reasoning. General Elec.Co. v. Joiner, 522 U.S. 136 (1997). Validity must be established for all experts, even those who rely on experience. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999); U.S. v. Paul, 173 F.3d 906 (11th Cir. 1999). If the expert's

⁷⁷ Fed. R. Civ. P. 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

⁷⁸ Scientific Evidence Review, ABA Monograph 4, page 8 (1999).

testimony fails this test, the testimony is deemed inadmissible, for the knowledge test assumes that invalid reasoning cannot produce a reliable conclusion.⁷⁹

Valid reasoning, however, does not always produce a reliable or relevant result. Thus, the second test, the helpfulness test, answers the inquiry whether there is sufficient reliability and relevance that the expert's conclusion should be shared with a jury. The commentators have stated this test as follows, "the guiding principal must be *Daubert's* expectation that hypotheses that can be tested will be tested."⁸⁰ See also Allison v. McGhan Medical Corp., 183 F.3d 1300 (11th. Cir. 1999)(rejecting the admissibility of plaintiff's causation experts)

The third test, the qualifications test, is traditional and requires no further explanation here.

For cases applying *Daubert* in federal district courts of Georgia, see In re: Polypropylene Carpet Antitrust Litigation, 93 F. Supp. 2d 1348 (N.D. Ga. 2000)(Judge Harold L. Murphy)(holding industrial economist's testimony was admissible regarding market conditions consistency with the existence of a price fixing conspiracy; holding that econometrician's testimony was admissible regarding multiple regression analysis damage model); Webster v. Fulton County, Ga., 85 F. Supp. 2d 1375 (N.D. Ga. 2000)(Judge Thomas W. Thrash, Jr.)(rejecting a challenge to plaintiff's statistician's use of multiple regression analysis); Baker v. Smith and Nephew Richards, Inc., 1999 WL 1129650 (N.D. Ga. 1999)(Judge Richard Story)(rejecting the testimony of plaintiff's

⁷⁹ ABA Monograph 4 at page 9.

⁸⁰ ABA Monograph 4 at page 10, citing D.Faigman, Making the Law Safe For Science: A Proposed Rule For The Admission of Expert Testimony, 35 Washburn L. J. 401, 427 (1996).

causation experts) and Dale v. General Motors Corp., 109 F. Supp. 2d 1376 (N.D. Ga. 1999)(Judge Julie E. Carnes)(rejecting the proposed testimony from plaintiff's seat belt expert); O.L. McClendon v. Georgia Kaolin Company, 841 F.Supp. 415 (M.D. Ga. 1994), (Chief Judge Wilbur D. Owens, Jr.) (rejecting testimony of geologist on grounds that expert was unqualified and his methods unreliable); White v. Chicago Pneumatic Tool Co., 994 F.Supp. 1478 (S.D. Ga. 1998) (Judge John F. Nangle) (accepting the testimony of a carpal tunnel syndrome expert); Everett v. Georgia-Pacific Corp., 949 F.Supp. 856 (S.D. Ga. 1996) (Judge Anthony A. Alaimo) (rejecting the testimony of expert in toxicology).

Georgia State Courts

The Georgia Court of Appeals has rejected arguments based on *Daubert* noting that Georgia has not adopted Federal Rule of Evidence 702. Norfolk Southern Railroad v. Baker, 237 Ga.App. 292, 514 S.E.2d 448 (1999); Orkin Exterminating Co. v. McIntosh, 215 Ga.App. 587, 452 SE2d 159 (1994). Rather, Georgia's standard is found in O.C.G.A. § 24-9-7 which provides:

The opinions of experts on any question of science, skill, trade or like questions shall always be admissible; and such opinions may be given on the facts as proven by other witnesses.

Thus, in Orkin Exterminating Co., the court rejected defendant's reliance on *Daubert* in support of its argument that plaintiff's expert testimony was "outside the mainstream of scientific thought," Id. at 592. Rather, the court tested the particular scientific procedure

or technique by the "verifiable certainty" standard. Id. at 593. Provided an expert witness is properly qualified in the field in which he offers testimony, and the facts relied upon are within the bounds of the evidence, the court held that "whether there is sufficient knowledge upon which to base an opinion or whether it is based on hearsay goes to the weight and credibility of the testimony, not its admissibility." Id. at 592-593.

The Georgia Courts have consistently applied the "verifiable certainty" standard first enunciated in Harper v. State, 249 Ga. 519, 292 SE2d 389 (1982). The Harper court specifically rejected the general acceptance test set forth in Fry v. United States, 293 F.Supp. 1013 (D. D.C. 1923). The Harper court reasoned as follows:

In determining whether a given scientific principal or technique is a phenomenon that may be verified with such certainty that is competent evidence in a court of law, trial courts have frequently looked to see whether the technique has gained general acceptance in the scientific community which recognizes it....After much consideration, we conclude that the Frye rule of "counting heads" in a scientific community is not an appropriate way to determine the admissibility of a scientific procedure in evidence....We hold that it is proper for the trial court to decide whether the procedure or technique in question has reached a stage of verifiable certainty, or in the words of

Professor Irving Younger, whether the procedure "rests upon the laws of nature."

Id. at 525.

D. Challenges Raised When Presenting Complex Subject Matters To A Jury of Lay Persons

- 1) Ability to comprehend complex facts
- 2) Ability to devote the length of time necessary before competing interest embitters juror
- 3) Foibles of memory
- 4) Sufficiency of commitment to complete the difficult task
- 5) Boredom
- 6) Other motivations, such as attempts to garner personal attention and
- 7) Cynicism

E. Using Focus Groups, Mock Trials and Consultants To Find The Jury You Need

Trial consultants' tools are referred to as "jury science" and are extensively described in numerous books, articles, and trade publications.⁸¹

⁸¹ See, e.g., D. Sahler, Scientifically Selecting Jurors While Maintaining Professional Responsibility, Alb. L.J. Sci. & Tech. 383 (1996), C. Bennett & R. Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics in Civil and Criminal Litigation (1993), J. Gobert & W. Jordan, Jury Selection: The Law, Art, and Science of Selecting a Jury (2d ed. 1990), D. Gidmark, The Verdict on Surrogate Jury Research, A.B.A. J., Mar. 1, 1988.

Frank Strier explains their work as follows:

In essence, the trial consultant performs a marketing function in two basic ways. First, a target audience is identified, that is, those who will be most receptive to the client's case, in much the same way marketing experts would test public receptivity to new consumer products. Then, a strategy is devised to help persuade the jury qua customers to 'buy' the client's product by emphasizing those case-specific factors having the most appeal to the particular individuals on the jury. While all of this transpires within the context of a legal process--pretrial and trial activities--a marketing perspective decidedly informs the consultant's perspective. 'Like it or not,' write Bennett and Hirschhorn, the authors of one of the more popular texts on trial consulting, 'you are selling a product, and it is important to know what real people, in this instance, the jury, think of your goods and sales pitch.'

1999 Wis. L. Rev. 441, 445.

A tool borrowed from the marketing industry is the focus group. It is a group representing a cross-section of the community having demographic characteristics similar to the projected or actual jurors assembled to test specific parts of the attorney's case. For example, the group's reactions to opening or closing arguments, a particular witness, a demonstrative aid or the theory of the case are commonly gauged. After the group deliberates (often viewed by the trial team via closed circuit TV) and gives their joint reaction, further insight may be gained by interviewing individual members in detail about the factors which weighed in their decision, and about what they did and did not

like or understand. This information, when identified with particular personalities and demographic types, may greatly facilitate jury selection and decisions as to the best approach for presenting evidence at trial. The focus group can easily be expanded to a full-blown mock trial.⁸²

Trial themes, problem facts, and other thorny trial issues are routinely tested by a mock trial.⁸³ Just as new products are tested on the local level before their introduction on a national scale, so can a case be tested by a mock trial. Mock jurors are selected, observed and later interviewed in the same way as are focus group members. The difference is that a mock trial can be a full dress rehearsal, including voir dire of the panel, opening arguments, witness testimony for each side, closing arguments, judge's instructions, and jury deliberations. The entire panoply of variables that can emerge during the trial may thereby be exposed. However, valuable mock trials may be in shaping jury selection and trial strategy, they tend to be commensurately time-consuming and expensive.⁸⁴

F. Preparation

1. Why?

The ability to be cool, confident and decisive in a crisis is not an inherited characteristic, but is the direct result of how well the individual has prepared himself [or herself] for battle.

⁸² 1999 Wis. L. Rev. 441, n.31.

⁸³ See generally, R. Clifford, Mock Trials Offer Virtual Reality, Nat'l L. J., Feb. 27, 1995, at B8.

⁸⁴ 1999 Wis. L. Rev. 441, n.32.

Richard M. Nixon Six Crises 1 Epigraph (1962). The insights and benefits that a panel of experts can bring to your case can only be taken advantage of if one is adequately prepared.

2. How

In the complex case, you must from the beginning:

- a. identify the themes of your case preferably by the time the answer is filed;
- b. create an important document file organized chronologically, and
- c. create a chronology cross-referenced to the documents and events.

From the outset, a fact recitation should be created and maintained which reflects the major themes of your client's position. From this document, your opening and closing arguments ultimately will evolve. Whenever a brief is required, the fact section will already be in an advanced stage of preparation allowing the effective delegation of legal issues to lawyers who may have had little prior association with the case. This document later will be useful to you and/or your jury consultants in witness preparation and voir dire.

Simultaneously, a team must begin delving into the documents and start the ongoing process of identifying, assessing, recording, and prioritizing them in a reasonably retrievable manner. This process will produce two important tools: the chronology and the important document file organized chronologically. We recommend that the chronology be maintained in a spreadsheet such as Excel where the information can be sorted and analyzed. This simple user-friendly application also allows the chronology to

be accessible on a laptop in deposition and can be revised virtually as the testimony is being taken down by the court reporter. These tools will be useful in organizing your evidence in such a manner that multi-media and demonstrative evidence consultants can assist your client in creating an effective presentation.

Also you must decide whether electronic evidence is important to your case, for in the event it is, the specialized notice to the opposing party regarding preservation of electronic evidence in particular and discovery requests regarding the computer infrastructure of the opposing party should be utilized.⁸⁵

Conclusion

In summary, a jury trial is a precious thing. Nurture the jury. With preparation, planning and creativity, a lawyer can bring the truth to the jury and earn the jury's understanding and appreciation. That is the road to victory.

⁸⁵ See generally Discovery of Electronic Evidence, Atlanta Bar Association CLE Seminar Materials (Nov. 9, 2000).