INSIDE: How Far Will Runaway Juries Go • Jury Reform: What We Need and Why

Delaware Lawyer

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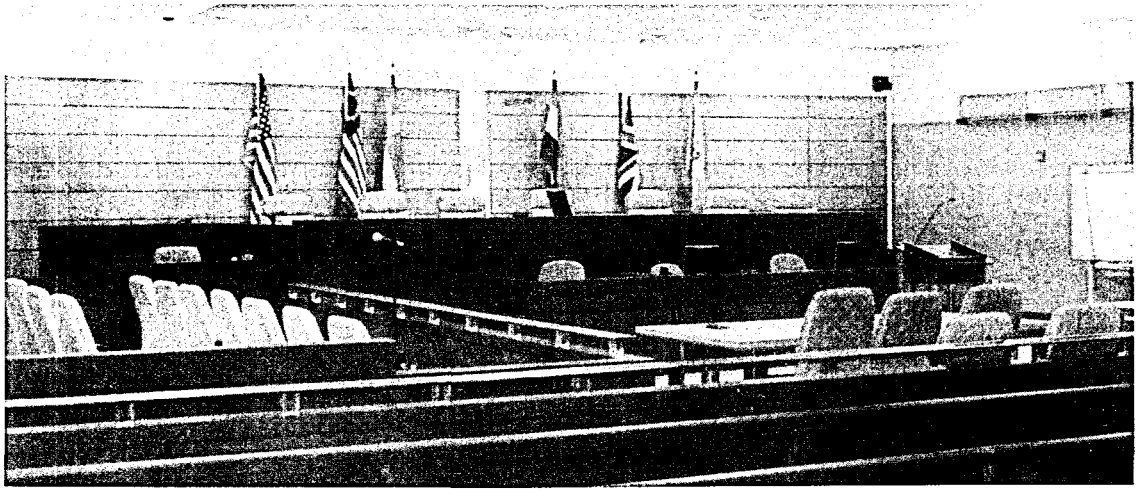

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Attention Law Offices

New Castle County Clerk of the Peace has finished a records conversion project of all marriages from the past century to date. Certified copies of marriage records are once again available at the city/county office building in Wilmington, 800 N. French Street, 2nd floor. To expedite processing, telephone 395-7787 with your request. Certified copies of marriage records are $10 each. It is our pleasure to serve you.

–Ken Boulden, Clerk of the Peace

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Gregory A. Inskip

In 1670, William Penn (then 26 years old) and William Mead were prosecuted in London for preaching their Quaker faith. The jury acquitted them but the court insisted upon a conviction, "Gentlemen, you shall not be dismist till we have a Verdict, that the Court will accept; and you shall be lock'd up, without Meat, Drink, Fire and Tobacco; you shall not think thus to abuse the Court; we will have a verdict, by the help of God, or you shall starve for it."[1] The jurors were remanded to harsh confinement in Newgate prison with "not so much as a Chamberpot, tho' desired." Four held out for acquittal. Two months later they were released on a writ of habeas corpus by Chief Justice Vaughan of the High Court, whose decision established the freedom of jurors to vote their conscience.[2]

Penn and others brought juries to America, where they are still regarded as a bulwark of individual liberty and the best opportunity most citizens have for public office. The thoughtful essays that follow illuminate enduring strengths of the institution as well as weaknesses to be addressed.

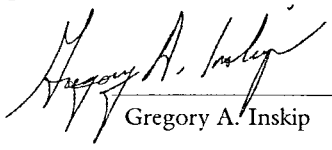
Patricia Refo chaired the American Jury Project of the American Bar Association, on which Mark Curriden also served. They introduce the Principles that the ABA adopted this year for selecting representative juries and for making service more convenient, effective and rewarding.

Phillip Stone practiced for many years as a Virginia trial lawyer and now serves as president of Bridgewater College. He describes how Abraham Lincoln's practice as a jury lawyer prepared him to communicate with citizens and to lead the nation through civil war.

Lincoln found that preparation, honesty, and respect for jurors as people were essential qualities in a trial lawyer. A century and a half later Eugene Maurer, Jr. derives the same lessons from his criminal defense practice here in Delaware.

Mr. Maurer, like many trial lawyers, chafes at the limited role Delaware lawyers are allowed in juror voir dire. A different perspective is expressed by Walter Olson of the Manhattan Institute, who cites civil cases in which lawyer manipulation led to unrepresentative juries and to irrational, unjust verdicts.

Ms. Refo and Mr. Curriden note that academic research offers insights for enhancing jury performance. One example is the work of professors Hans and Kaye, Judge Dann and colleagues on ways to help juries understand scientific evidence (including checklists, notebooks, and tutorials), the subject of the concluding essay. Jurors may get better support in the 21st century than they got in the 17th.



Gregory A. Inskip

1 *The Tryall of William Penn and William Mead, at the Sessions held at the Old Baily in London, the 1st, 3d, 4th, and 5th of September, 1670. Done by themselves.* Reprinted Boston: Marshall Jones Co., 1919; available online at http://65.189.131.11/webmirror/library/RnP/Denominations/Quaker/Penn,%20William/The . . .; another version is at http://tarlton.law.utexas.edu/lpop/etext/penntrial.html.

2 *Case of the Imprisonment of Edward Bushell for alleged Misconduct as a Juryman:* 22 Charles II.A.D. 1670 (Vaughan's Reports 135); Howell's State Trials, Vol. 6, Page 999; available online at http://www.constitution.org/trials/bushell/bushell.htm.

Stephanie Albertson

is a Criminology Ph.D. candidate at the University of Delaware, with a concentration in jury decision-making. In addition to juries, she has conducted research on drug courts, sentencing disparities, and community policing, and has been involved in independent consulting for juvenile detention and adult correctional facilities. She received her M.A. from Loyola University, Chicago and her B.A. from Purdue University.

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B. Michael Dann

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Valerie P. Hans

is currently Professor of Sociology and Criminal Justice at the University of Delaware. She received her Ph.D. in social psychology from the University of Toronto in 1978. Author of *Business on Trial: The Civil Jury and Corporate Responsibility* (Yale University Press, 2000) and coauthor of *Judging the Jury* (Plenum, 1986), Professor Hans has conducted research and written widely about the jury system. She will be joining the faculty at Cornell Law School in 2006.

David H. Kaye

is Regents' Professor of Law at Arizona State University. He also has taught at Cornell, Duke, Virginia, and other universities here and abroad. Professor Kaye has served on committees of the American Statistical Association, the National Academy of Sciences, and the National Commission on the Future of DNA Evidence. His publications include nine books and over 100 articles, reviews or letters in journals of law, philosophy, medicine, genetics, and statistics.

Eugene J. Maurer, Jr.

has, in his 30 years of criminal defense practice, represented clients in hundreds of cases, including high-profile capital murder trials. He has been among the first to learn and develop defense practice on novel issues such as diminished capacity due to post-traumatic stress disorder and identification of criminal suspects with DNA evidence. Mr. Maurer is a Fellow of the American College of Trial Lawyers (since 2003) and is a past Chairman of the Criminal Law Committee of the Delaware State Bar Association. He has been an instructor on Criminal Practice at Widener University School of Law and on Criminal Law at the University of Delaware.

Walter Olson

is Senior Fellow at the Manhattan Institute and author of *The Rule of Lawyers* (St. Martin's, 2003). His earlier books include *The Litigation Explosion* (Dutton, 1991) and *The Excuse Factory* (Free Press, 1997). *Investor's Business Daily* has called him "perhaps America's leading authority on over-litigation." *The Washington Post* has dubbed him an "intellectual guru of tort reform." He has appeared often before

Congress and advised many public officials. His writing appears regularly in major newspapers and he appears often on policy-oriented television programming. He runs several Web sites, including Overlawyered.com and the Manhattan Institute's PointOfLaw.com.

Patricia Lee Refo

is a Partner at Snell & Wilmer in Phoenix, Arizona, where she concentrates her practice in complex commercial litigation. She is Chair of the American Jury Project of the American Bar Association, and the Immediate Past Chair of the 76,000 member ABA Section of Litigation. By appointment of Chief Justice William Rehnquist, she has served since 2000 as a member of the Advisory Committee on the Federal Rules of Evidence for United States Judicial Conference. She is a Fellow of the American Bar Foundation, the ABA Section of Litigation, and the Arizona Foundation for Legal Services and Education. *The National Law Journal* recently named her to its Editorial Board. Her articles have appeared in numerous publications, and she has been a featured speaker at more than 70 continuing legal education programs across the United States and abroad.

Phillip C. Stone

is the President of Bridgewater College in Virginia, a position he has held since 1994, following a 25-year career as an attorney. A trial lawyer for much of that time, he is an elected Fellow of the American College of Trial Lawyers and the International Society of Barristers. He served as President of the Virginia Bar Association and the Virginia Association of Defense Attorneys. He is the founder and president of the Lincoln Society of Virginia and for the past 29 years has lectured on Lincoln's birthday in the Lincoln Family Cemetery in Virginia, in which five generations of Lincoln's relatives are buried. He is a frequent speaker on Abraham Lincoln and his Virginia connections. He gave the keynote address to the 2005 Law Day Luncheon of the Delaware State Bar Association on the topic "The American Jury: We The People in Action."

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A REPORT FROM THE PRESIDENT OF THE DELAWARE BAR FOUNDATION

Harvey Bernard Rubenstein

The mission of the Delaware Bar Foundation is a diverse one and embraces improving the administration of justice, promoting study and research in the field of law, fostering knowledge of citizenship rights and responsibilities, and enhancing public respect for the rule of law. However, the essential purpose which has occupied the foundation from its beginning is the funding of legal services to the poor, and the key component of that program has been IOLTA (Interest On Lawyer Trust Accounts).

The IOLTA program was created by Supreme Court Order on September 29, 1983. Over the ensuing years, IOLTA has raised some $17 million for grantees, which principally include CLASI, LSCD, and DVLS. Those lawyers who have participated in the program truly have served the profession and the cause of equal justice. But for now the years of plenty are gone. The interest rates are down, and so is the IOLTA income. The foundation's reserve fund, carefully nurtured in the past, is no more, and the annual shortfall is a matter of continuing concern. This is not to say that the bar's non-IOLTA contributions are unimportant. They are. Indeed, the last grant cycle included a supplement of $26,000 in non-IOLTA money collected through the foundation's appeal letters and annual dues. The foundation also receives contributions from speaker fees for non-bar association seminars, which last year came to over $4,500.

The foundation's endowment fund under the mantra of "Let Right Be Done" will soon enter into an aggressive campaign. Thus, far, it has obtained more than $20,000 through the generous contributions of Delaware lawyers, with more than $3,000 of that amount derived from the book "Rounding Third." Much credit goes to Donald F. Parsons, Jr. and Karen L. Valihura and their committee in establishing and promoting the fund. Yet if the fund is to reach its potential as a long-term solution to the financial needs of the foundation, funding to a significantly higher level must be realized through substantial contributions and bequests.

The foundation also operates as a creative catalyst. The granting of over $20,000 as start-up costs for the Combined Campaign For Justice proved invaluable to the success of its initial campaign and resulted in more than double the amount of money raised in previous years by the individual agencies. Additionally, the foundation strives to unite the work of the providers in areas — for example, domestic abuse and immigration — where duplication of effort can be avoided and legal services can be coordinated.

On April 27, 2005, Justice Randy J. Holland, who was the judicial member of the foundation's board of governors for a number of years, received the foundation's award at the bar association's law day ceremony. Justice Jack B. Jacobs is now the Supreme Court's judicial member, and his wise counsel and guidance is greatly valued, as is the court's steadfast commitment to legal services for the poor.

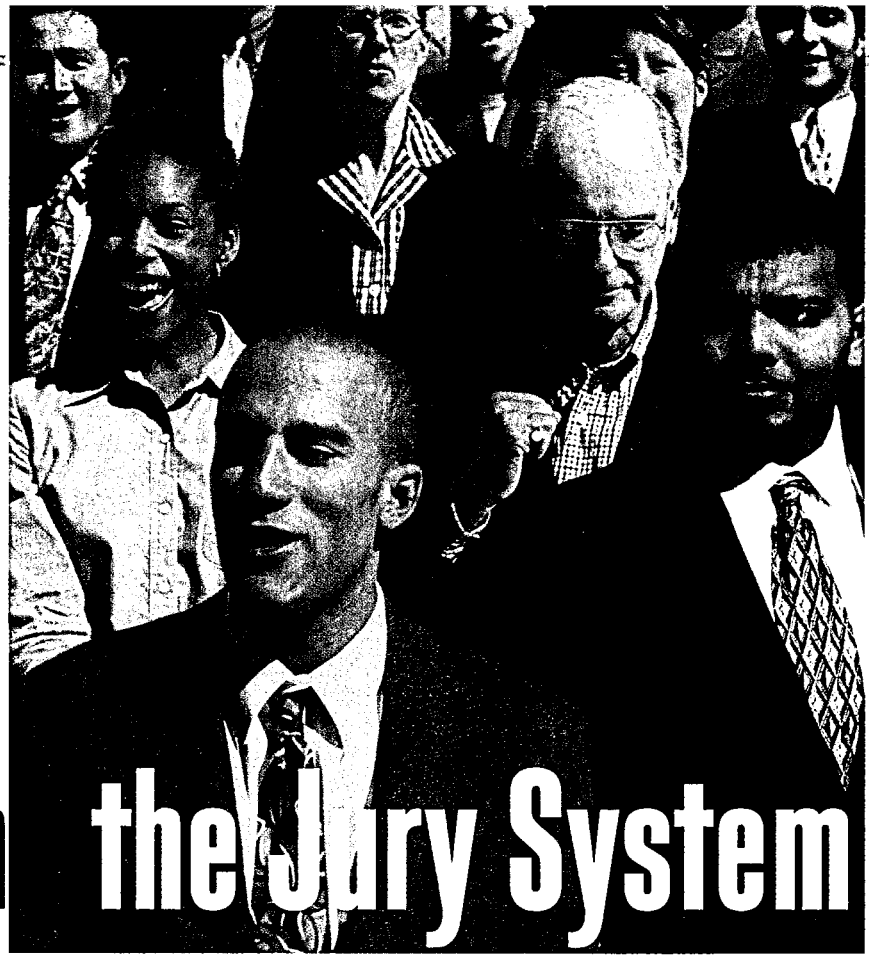
I take this opportunity to commend the General Assembly for funding legal services to the poor through its operating budget for the current year. This groundbreaking line-item contingent grant of $275,000 for civil indigent services is gratefully acknowledged and appreciated. I make particular mention of Sen. Nancy J. Cook and Rep. Joseph G. DePinto, co-chairs of the Joint Finance Committee, as well as Evelyn Nestlerode, senior legislative analyst in the Office of the Controller General, whose support for the foundation's request was unwavering. Special recognition must be given to Rep. Robert J. Valihura, Jr., who effectively guided the foundation through the budgetary process.

Not forgotten, of course, is the task reliably undertaken by the board of editors of *Delaware Lawyer*. With Richard A. Levine as managing editor, the foundation publication has created an intellectual vitality that has enabled it to sustain a high standard of excellence. A foundation website, which would enable issues of *Delaware Lawyer* to be placed online, is being planned.

Established in 1981, and continuing through the years under the presidencies of Harold Schmittinger, Victor F. Battaglia, O. Francis Biondi, and Bruce M. Stargatt, the foundation celebrates its 25th anniversary in 2006. As it proceeds into the next quarter century of service, the foundation, with the loyal support of the bar, stands ready to meet the challenges before it.

FEATURE

Patricia Lee Refo
Mark Curriden



Revitalizing the Jury System

For many Americans, jury service is their only opportunity to actually participate in the government.

Every day, tens of thousands of Americans file into courthouses from Anchorage to Wilmington to help resolve our nation's disputes — civil and criminal. The citizen jury system has been the backbone of the American justice system since Thomas Jefferson declared it as one of our inalienable rights in 1776. But 230 years later, the health and welfare of our jury system is less than self-evident.

At every turn, it seems, the American jury is under attack. Some say juries are too soft on criminals and too harsh on corporations. Others believe that juries decide cases based on racial prejudices or ignorance. There are a few who contend that the jury system is outdated and is no longer a logical means of resolving our communities' differences. Nearly everyone agrees that jury trials have become too expensive and that the jury system is showing signs of age and needs repairing.

The result is that the number of jury trials — civil and criminal, state and federal — has declined during the past four decades. In 2002, less than 2 percent of all civil cases in federal court ended in a trial — down from 11 percent in 1962, according to a groundbreaking study by Marc Galanter, a professor at the University of Wisconsin School of Law.[1] Professor Galanter found similar results in the state courts. At the same time, public participation in the jury system also has been plummeting in many jurisdictions. Too many citizens just ignore their juror summons when it arrives in the mailbox.

Earlier this year, a Texas Supreme Court justice told an audience of academia, "It is time we ask ourselves, just why is it that we continue to use juries anyway?"

The short answer, of course, is that the "right to trial by jury" is one of the rights enumerated in the Declaration of Independence. It occupies two amendments in our Bill of Rights and is guaranteed in 49 state constitutions.

It is not just a cornerstone of democracy. It is, as Thomas Jefferson wrote, "the only anchor yet imagined by man by which a government can be held to the principles of its constitution."

While that answer should and does suffice, there are additional reasons why the jury system remains vital. For all the criticisms, citizen juries continue to provide a key element to our system of justice: public confidence. According to an ABA survey in 2001, 70 percent of Americans stated that the jury is the most important element adding legitimacy to criminal and civil cases. A poll of more than 400 federal judges in 2000 by *The Dallas Morning News* found that they, by a margin of four-to-one, would want a jury, not a fellow judge, to decide their court case. Equally important, for many Americans jury service is their only opportunity to actually participate in the government. The vast majority of jurors leave their jury experience with positive feelings about our justice system.

When Robert Grey was elected president of the American Bar Association, he made revitalizing the jury system his top priority. "The jury of 12 ordinary, randomly chosen citizens from our community, remains to this day the biggest check on abuse of power in America," Grey told students at Georgetown Law Center in February.

With the goal of strengthening and reinvigorating our jury system, Grey created the American Jury Project (AJP). He appointed 23 lawyers, judges, former jurors, court administrators, and experts in jury studies and jury reform. The AJP's objective was to develop a series of principles designed to preserve and enhance the jury system. For nine months, the team worked tirelessly to research, debate and develop standards, with input from lawyers, judges and other interested parties from all over the country.

In February 2005, the AJP presented to the ABA House of Delegates the ABA Principles for Juries and Jury Trials (Principles).[2] The House, meeting in Salt Lake City, overwhelmingly approved 19 basic principles as official ABA policy, replacing previous jury standards established by the Judicial Division, the Criminal Justice Section, and the Section of Litigation.

The Principles address virtually every aspect of the jury system, starting from who should be eligible to be called for jury service up through what the judge should say as she is sending the jury home after they have reached their verdict. The Principles are a comprehensive set of best practices, which we hope will spur courts across the country to examine their own jury practices and strive to bring the jury trial into the 21st century. The Principles are firmly rooted in, and supported by, social science research and are designed to improve juror conditions, juror culture and juror comprehension.

Studies show that the single biggest reason people do not show up is because they cannot afford to take off from work to serve.

In this article, we will examine two aspects of the Principles: efforts to increase public participation and diversity in the jury system, and steps designed to improve the effectiveness and experience of jurors during the trial itself.

How We Treat Prospective Jurors

Patrick Higginbotham, a judge on the U.S. Court of Appeals for the Fifth Circuit, was recently called to jury duty in Dallas Municipal Court. He arrived at 8:30 a.m., as demanded on the summons. He sat with several dozen other prospective jurors in a small room, waiting for several hours without coffee, soft drinks, or even a newspaper or television for entertainment. "Finally, a guy in a black robe, I presume he was a judge, came out and told us how important we were, and then he disappeared and we never saw or heard from him again," Judge Higginbotham said later. "Not a single one of us was ever called to a courtroom. It just wasn't a pleasant experience."

Addressing Judge Higginbotham's experience is one of the key goals of the Principles by making jury service a more attractive and more satisfying experience. The Principles recommend that courts re-examine their jury management procedures by limiting people's term of service (one-day, one-trial is preferred), calling only the minimum number of jurors necessary, and minimizing their waiting time. It is extremely important that judges, lawyers and court personnel keep the jurors in mind when making decisions regarding scheduling and time management. Jurors are forced way too often to sit idle in an adjacent small room while the lawyers and judge deal with legal or administrative matters.

In addition, courts should look at upgrading their jury facilities to make them more comfortable. Several courts now offer additional phone lines and data ports for jurors to be able to go online while they wait in the juror assembly room. A padded chair and a cup of coffee would be a huge improvement in many courthouses. And jurors need to be told what is expected of them and allowed to communicate with court personnel if they have problems with daycare or work.

Improving Summons Response Rates

A huge problem facing many jurisdictions is the declining public participation rate. Many larger cities report that fewer than one in five people summoned to jury service actually show up. There are many explanations for the decline in public participation, ranging from increasing indifference and dissatisfaction with the jury experience to outdated mailing addresses and too many professional exemptions (the Principles recommend that all exemptions be eliminated so that as many people as possible have the opportunity to serve). However, studies show that

the single biggest reason people do not show up is because they cannot afford to take off from work to serve. Many prospective jurors are hourly wage earners or are self-employed. If they do not go to work, they will not be paid.

Juror pay across the United States ranges from $6 a day in Missouri to $50 a day in Utah, Colorado and Wyoming. In many states, juror compensation doesn't even cover the cost of parking downtown near the courthouse. In addressing this issue, the Principles recommend that jurors "receive a reasonable fee" for their service. At minimum, courts should cover expenses such as parking, lunch and child-care.

New York increased juror pay from $10 a day to $40 a day in 1996. The results were astonishing: public participation more than tripled in just two years. Texas, which paid $6 a day, had not increased juror pay in 51 years. But in May, the Texas Legislature, citing the new ABA Principles, increased it to $40 a day starting the second day of jury service. We understand the implementation of many of these principles will cost money and that money is tight. However, we believe the preservation and enforcement of the Sixth and Seventh Amendments to the U.S. Constitution are well worth it.

The Principles also address another alarming trend: Recent studies in Florida, Georgia, Texas and other states show that Latinos, young adults, and lower-income, hourly wage earners are significantly under-represented in the jury system. In Houston, Texas, for example, one-third of the citizen population is Hispanic. However, only eight to 10 percent of the people showing up for jury service are Hispanic. Besides raising substantial constitutional concerns, it undermines public confidence in the system when Hispanic or African-American defendants or victims look at the jury pool that will decide their case and see a group of people who look nothing like they do and have had none of the life experiences they have had.

The AJP recognized the U.S. Supreme Court requirement that jury pools must be a "representative cross section of the community," as well as

the need for inclusiveness and diversity to ensure public confidence in the system. As such, the Principles call for courts to summons jurors from at least two source lists that are inclusive of the entire community and to examine the those lists at least once annually to make sure that the addresses are regularly updated. In addition, courts should periodically review the make-up of the assembled jury pools from which juries are selected to ensure that they also fairly represent the community.

Juror Privacy

We also recognize the importance of balancing the need — and constitutional requirement — that all court proceedings, including voir dire, be open to the public against the desire to provide increased privacy protection for jurors. Jurors should not have to surrender their privacy at the courthouse door. The Principles state that courts should keep personal information, such as home addresses and social security numbers, confidential, and that jurors should be told how the information they give about themselves will be used, who will have access to it, and how long it will be kept. We also encourage judges to better police lawyers in their questioning of jurors about private information.

Bringing the Trial Into the 21st Century

We propose a number of innovations to the trial itself — some widely used, some fairly novel — that can help jurors better understand, process, remember, and evaluate the information they learn during the course of the trial.

Jurors should be given instruction at the beginning of the trial about the basic legal principles that govern the claims and defenses. The "old fashioned" method of saving instructions until the bitter end really doesn't make much sense. The jurors need context in order for the evidence they hear to have meaning, and preliminary instructions provide that.

Of course jurors should be allowed to take notes, but there are still courtrooms where that is not permitted. Why? How can we reasonably expect people to remember everything they hear from the witness stand over several days — or weeks? The judge takes notes. You, as the trial lawyer, take notes. So should the jurors. There is no evidence that note-taking causes mischief, and there is ample reason to believe that notes help jurors do their job better. Once the trial is over and the verdict rendered, we recommend that the notes be collected and discarded.

In civil cases, jurors should ordinarily be allowed to ask questions. Questions have been permitted in some courts for many years, and the results show that it is indeed a helpful innovation. Most questions they ask are allowable, and often they are quite insightful. Jurors do

not ordinarily try to become Perry Mason with their questions, and if they do, a reminder from the court about the proper role of juror questions serves to stem the tide. The questions should be written, and the court should allow counsel the opportunity to object, or suggest modifications, to the question. If the question is appropriate, the court may ask the question or permit counsel to do so, and should give all counsel the opportunity to ask appropriate follow up questions. We had a long debate over whether juror questions should be permitted in criminal cases and, ultimately, concluded that additional experience was necessary before we could recommend that juror questions in criminal cases should be permitted as a matter of routine.

There was consensus that many trials take too long, and that overly long trials are a deterrent to jury service and a misuse of the courts' resources. Our original draft, published for public comment in the fall of 2004, proposed a "rule" that except in truly extraordinary circumstances, no civil jury trial should last more than six months. Commenters worried that our "rule" would actually make things worse by somehow sanctioning any overly long trial so long as it concluded before the six-month mark. The final Principles provide that the court should confer with the parties and "impose and enforce reasonable time limits on the trial or portions thereof." Though there are many methods of establishing time limits, some courts have had particular success with the "chess clock" approach, in which each side is given a fixed amount of time to use during the trial. If sound is coming out of your mouth or the mouth of the witness to whom you have directed a question, your time is running. If unforeseen developments or the interests of justice require, the court can always modify the limits as the trial progresses.

The Principles state a preference, consistent with the applicable rules of evidence and procedure, for live testimony as opposed to videotaped testimony. We encourage the use of trial notebooks for the jurors, where they can keep copies of the instruction, selected exhibits and other salient papers. In appropriate cases, we advocate the use of other innovative techniques to increase juror comprehension, including minisummations, interim argument, and sequencing expert testimony. The Principles discourage bifurcated trials except where required by law or necessary to prevent unfairness or prejudice.

Perhaps the least-used innovation in the Principles addresses predeliberations discussions among the jurors: "Jurors in civil cases may be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence." This Principle is taken from Arizona Rule of Civil Procedure 39(f), which has been in effect for nearly 10 years. It frees jurors to talk about the only thing they have in common — the trial. Perhaps the principle simply legitimizes what happens even when the traditional "admonition" is given, for many veteran trial lawyers and judges believe jurors often talk about the case during the trial even when they are told not to. But juror discussions can have concrete benefits. Particularly in longer or more complex trials, juror discussion can clarify misunderstandings, aid juror comprehension and improve the accuracy of jurors' recall of the evidence. Researchers studying the Arizona innovation in action found no suggestion in the data that the opportunity to discuss the evidence before deliberations caused jurors to favor the plaintiff.

Even when the traditional "admonition" is given, many veteran trial lawyers and judges believe jurors often talk about the case during the trial when they are told not to.

The Principles stress that the court has a choice to instruct the jurors on the applicable law either before or after closing arguments. Instructions before closing can often be of meaningful assistance to the jurors because, like instructions at the start of a case, they provide context for what the jurors are about to hear. Whenever the instructions are given, each juror should be given a written copy of the instructions to use while the jury is being instructed and during deliberations. Ordinarily, exhibits that were admitted into evidence should be made available to the jurors during their deliberations along with an exhibit index so they can find what they're looking for.

The Principles are spurring many states to look with fresh eyes at a jury system that is hundreds of years old. Social scientists have learned a great deal about how people best learn and process information, how group decisions are made, and what tools help make that decision-making process informed and efficient. Applying that research to enhance our jury processes will serve the jurors, the parties and the American justice system. ◆

FOOTNOTES

1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. Empirical Legal Stud. 459 (2004).

2. *See* www.abanet.org/jury/principles.

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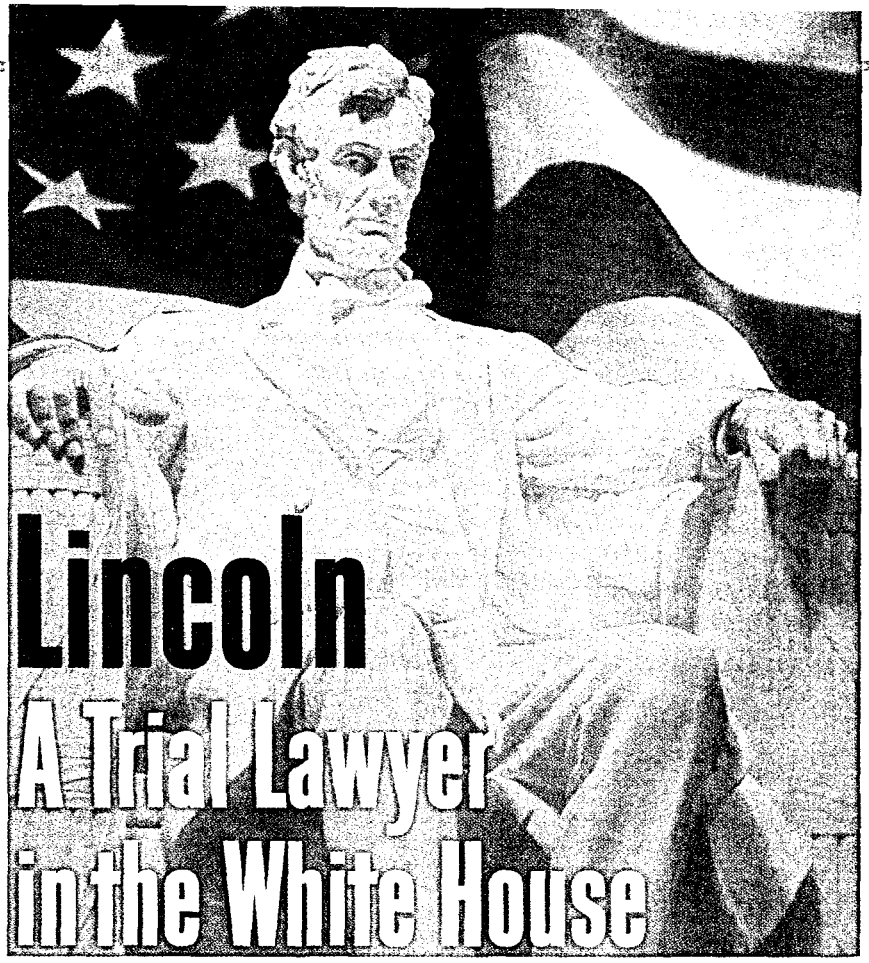

Abraham Lincoln
A Trial Lawyer in the White House

Sometimes it is said that Lincoln failed at everything he attempted until he was elected president. Far from it.

Historians consistently rank Abraham Lincoln, with George Washington, as one of the two greatest American presidents. Lauded at home and praised as one of the greatest figures in history by Lloyd George, Leo Tolstoy, and other notables around the world, Lincoln's reputation endures in spite of attempts to diminish him or to expose claimed deficiencies. Merrill Peterson in *Lincoln in American Memory*, identifies the heroic themes associated with the man: "Savior of the Union, Great Emancipator, Man of the People, The First American, and The Self-Made Man."[1] Lincoln is still remembered for his honesty, wisdom and compassion; for his unshakeable determination on core principles; for his visionary ability to see America as she could be if *all* her citizens were free and equal before the law; and for his eloquent speeches and outstanding prose. To all those accolades can be added yet another: Abraham Lincoln was the best trial lawyer ever to serve in the White House.

The story of Lincoln's "rags-to-riches" life is well known. His work and achievements as president during the Civil War are also universally known and almost universally acclaimed. Sometimes, in emphasizing the fact that he was a self-made man, it is said that he failed at everything he attempted until he was elected president. Far from it. By the time he was 35, he was one of Illinois' most important politicians. Elected to the Illinois legislature at the age of 25 without the benefit of financial resources, reputation, or family connections, he became the leader of his party, was elected to Congress, and almost defeated Sen. Stephen Douglas for the United States Senate. (It should be kept in mind that the state legislature selected United States senators. To win the seat, Lincoln would have had to carry his

party to majority status in the legislature.)

In the meantime, Lincoln had grown to be an outstanding and very successful lawyer. Notwithstanding a lack of formal education (less than two years by his own account), Lincoln was blessed with a keen and logical intelligence and a capacity for hard work. In 1837, through an intense self-study program and with the generous counsel and support of other lawyers, he embarked upon a 22-year career resulting in his becoming one of the best-known and most effective lawyers in the entire state of Illinois. Just a few months after he was licensed to practice, Lincoln, along with more experienced partners, defended a man accused of murder in what appeared to be an open and shut case of intentional homicide. Contending that the victim was wielding a dangerous instrument — a chair held up to defend himself from the drawn weapon of the defendant — Lincoln was successful in persuading the jury to acquit the defendant! Almost as impressive as his victory in those circumstances is the fact that his more experienced partners deferred to a very inexperienced colleague to make the closing argument in such an important and highly visible case. Having already become known in politics, his reputation for persuasion, speechmaking and argument gave his colleagues confidence in him as an attorney from the beginning of his practice.[2]

Like almost all lawyers of his day, Lincoln did both an office practice and court work. He was, however, known primarily as a trial lawyer, participating in more than 5,000 cases over 22 years.[3] Practicing in both state and federal courts and at both the trial and appellate levels, Lincoln regularly handled cases by referral or association with other lawyers. He established his credentials as a "lawyer's lawyer."[4] The circuit over which Lincoln traveled was huge. For weeks at a time, he was away from home, going great distances from court to court. In addition to a great volume of litigation, he handled a large variety of cases, both criminal and civil, for large corporations and railroads, but also for small shopkeepers and farmers; matters as significant as murder or as minor as the collection of small amounts of money. He was clearly among the most successful trial and appellate lawyers in Illinois, as the many lawyers and judges that knew him agreed. A close friend, Judge Davis, judge of the Eighth Judicial Circuit and later a justice on the Supreme Court of the United States (appointed by Abraham Lincoln), said, "In all of the elements that constitute the great lawyer, he had few equals."[5] Certainly no other American president was his match as a courtroom attorney.

Having already become known in politics, his reputation for persuasion, speechmaking, and argument gave his colleagues confidence in him as an attorney from the beginning of his practice.

John J. Duff, author of *A. Lincoln: Prairie Lawyer,* and himself a lawyer, described Lincoln's effectiveness before a jury:

It was his extraordinary power of persuasion in the final summing up to the jury, his aptitude for illustration in the vernacular and homely similes folks could understand, which, probably as much as any other feature of his trial work, so often tipped the balance in his client's favor and earned for him a reputation as a first-rate jury lawyer. Intuitively adept at the art of establishing contact with men in groups of twelve, he would proceed to project himself and his client's cause across to them, better than almost anyone practicing in those parts. Possessed of an analytical mind and the ability to express what was in it — qualities not often found in combination — he had a way of 'getting into the jury box.'[6]

Duff described the style of Lincoln and many of the trial lawyers in Illinois at that time:

Despite his ungainliness and rather homely face, Lincoln had what is known in the trade as 'courtroom presence.' Withal, his demeanor was on the conservative side — this in an age of Illinois law when restraint was not the dominant note, when lawyers were wont to pull out all the organ stops of courtroom dramatics. The technique of that day, with the old-time emphasis on histrionics and spread-eagle oratory, called for lawyers to thunder, bellow and whisper. They leaned chummily on the jury rail; they declaimed from across the room. And, into the bargain, they very frequently resorted to logic.[7]

Lincoln's exposure to "the common people," who, like his own family, were neither aristocratic nor rich but were hard-working farmers, shopkeepers, and manual laborers, developed his extraordinary ability both to understand and to communicate with anyone. In this light, his experience as a trial lawyer actually explains much of his style and his effectiveness as president. Lincoln's exceptional ability to communicate was fundamental to his success in both roles. As one scholar observes:

A summary of Lincoln's forensic and rhetorical style succinctly characterized the elements of his legal approach: 'simplicity and economy of language, empathy, illustrative anecdotes or analogies, calculated dramatic outbursts, a taste for verbal antitheses, and a talent for riveting audience attention on fundamental issues of logic or equity.' When he became president, Lincoln continued to apply these lawyerly characteristics to national matters of state.[8]

As president, Lincoln worked very much as he had as a lawyer: He patiently but doggedly stayed the course until he was victorious; he tried to compromise where he could but pursued victory on the fundamental issues; he was analytical and logical; he rarely lost his focus and composure; he used his expert

skills of persuasion to convince others to his position; and he conducted himself with utmost integrity. Those characteristics were evident in the way Lincoln practiced law; and he expressly acknowledged their importance. About 1850, he wrote out his thoughts for what makes a good lawyer. His list of qualities included:

1) Diligence: no procrastination; do the work promptly and thoroughly.
2) Practice extemporaneous speaking as "the lawyer's avenue to the public," but don't rely too much on speech-making.
3) Compromise disputes whenever possible.
4) Handle fees properly: don't overcharge, don't take too much in advance (it depresses effort).
5) Be honest and ethical.[9]

Lincoln especially emphasized the qualities of honesty and being a peacemaker:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal *winner is often a* real *loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opertunity* [*sic*] *of being a good man. There will still be business enough. Never stir up litigation. A worse man can scarcely be found than one who does this.*[10]

Lincoln's frequently used sobriquet, "Honest Abe," is illustrative of his lifelong reputation as a man of integrity. That reputation would of course be tested both in partisan politics and in the adversarial legal system. For Lincoln, there would be no compromise between his rigid standards of honesty and his duties as a lawyer. He put it this way:

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence, *and* honors *are reposed in, and conferred upon lawyers by the people, it appears improbable that their* impression *of dishonesty is very distinct and vivid. Yet the impression, is common — almost universal. Let no young man, choosing the law for a calling, for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you can not be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.*[11]

Lincoln's attitude toward the law was thoughtful and mature. The law was not simply a framework for some to make a living handling the grievances and disputes of others; rather, the law was the glue holding together our system of self-government, which had no match in the rest of the world. As a lawyer, Lincoln was deeply committed to the Constitution and a system of law that prevents society from drifting into anarchy. He was also guided by the aspirations and idealism expressed in the language of the Declaration of Independence and the American Constitution. For him, the Founding Fathers did not intend for slavery to be perpetual; they had simply made a compromise in light of existing circumstances in order to reach agreement on a Constitution. He believed that the idealism represented in the great documents manifested the intention of the founders that our society should eventually be free of slavery, that all persons should be equal before the law, and that each person should be free and independent. He thought that the United States Supreme Court's *Dred Scott*[12] decision (in which the court held that a slave is property, not a person) and the enactment by Congress of the Kansas Nebraska Act of 1854 (which appeared to permit slavery to expand into new states and territories) took the country backwards from the aspirational path toward a truly free society. Because they would have the effect of expanding slavery, he denounced both and sought to undo their effects.

Lincoln was indeed a president of the people. He trusted them, and he was not afraid for the future of the government if the common people supported it.

Lincoln made a commitment to Southerners before the war that he would not meddle with slavery in their states because it was protected by the Constitution. Even after the war broke out, Lincoln did not make a broad idealistic statement attempting to free all slaves. He employed a more conservative, lawyer-like approach. He based the Emancipation Proclamation on the narrow legal grounds of his military authority as Commander in Chief acting during wartime. His critics were substantially correct in saying that the Emancipation Proclamation "freed" slaves where Lincoln and the Union had no power (in the Confederate States) but did not even attempt to affect slaves in states where Lincoln and the Union were in control (the border states). It was his intent, however, to free the slaves. The fact that he emancipated slaves at all was driven by his pursuit of the idealism found in the founding documents; his method was driven by his training as a lawyer. As soon as the opportunity came, he proposed and strongly advocated amendments to the Constitution to abolish slavery forever, to confirm the rights of citizenship for freed slaves, and to assure their right to participate in government. He wanted those rights to be securely imbedded in law.

Lincoln's experience as a trial lawyer deepened his confidence in the people of his community and their ability to handle their own affairs. Seeing them at work in the courtroom as jurors strengthened his confidence. "Throughout his life, Lincoln maintained an utmost faith in 'the sober judgment of Courts' and the ability of the people to arrive at reasoned decisions that sustained the social order. For Lincoln, there was a dynamic and symbiotic relation between his thoroughly compatible legal and political activities."[13] Just as he had an uncanny ability to "read a jury" in the courtroom, he knew how to communicate with the American people during the bloody Civil War. He was indeed a president of the people. He trusted them, and he was not afraid for the

k: The Library of America, 1989),

245-246.

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Scott v. Sanford, 60 U.S. (19
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1. Merrill D. Peterson, *Lincoln in American Memory*, (New York: Oxford University Press, 1994), 27.

2. John J. Duff, *A. Lincoln: Prairie Lawyer.* (New York: Rinehart & Company, Inc., 1948), 51-61.

3. Allen D. Spiegel, *A. Lincoln, Esquire: A Shrewd, Sophisticated Lawyer in His Time.* (Macon, GA: Mercer University Press,

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future of the government if the common people supported it. It was this fundamental conviction that led him to fight the bloodiest war in American history: to save this last, great experiment. As he said in his first inaugural address, "This country, with its institutions, belongs to the people who inhabit it."[14]

Lincoln's way of thinking and acting; his singular ability to communicate; his ability to stay focused on the goal, not being distracted either by his own emotions or the actions of others; and his honesty, came out of his experience as a trial lawyer. His years working with juries as well as his experience in politics led him to so trust the people that he would do all within his power to assure that "government of the people, by the people and for the people, shall not perish from the earth." But Lincoln looked beyond the law as it then existed to the vision of America as it could be if *all* her citizens were guaranteed the God-given rights stated in the Constitution and the Declaration of Independence. He fought to fulfill the idealistic vision, and he succeeded.

Lincoln, when about to leave Springfield, Illinois in 1860 to take over his responsibilities in Washington, told his longtime law partner, William Herndon, not to change the "shingle" of the law firm of "Lincoln & Herndon, Lawyers." He indicated that he fully expected to return to Springfield and resume the practice of law. Lincoln, the consummate trial lawyer, using skills honed and developed in the courtroom, left a legacy unmatched by any other trial lawyer: He saved the Union, and he abolished slavery. And his reputation as a man of extraordinary integrity and wisdom endures. Because this outstanding trial lawyer was president, America not only remains one unified country but a country whose reality now comes closer to its original lofty ideals. ◆

FOOTNOTES

1. Merrill D. Peterson, *Lincoln in American Memory*, (New York: Oxford University Press, 1994), 27.

2. John J. Duff, *A. Lincoln: Prairie Lawyer.* (New York: Rinehart & Company, Inc., 1948), 51-61.

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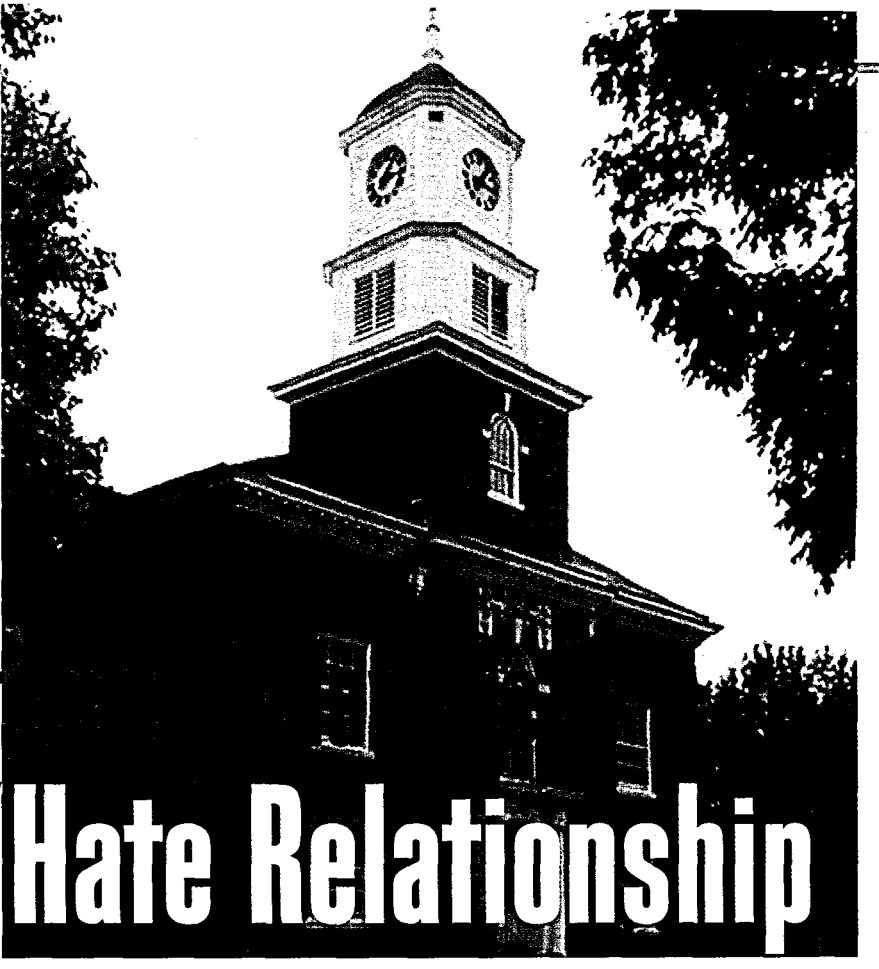
FEATURE

Eugene J. Maurer, Jr.



The Jury System: A Love/Hate Relationship

In spite of the unpredictability of the system, somehow, the jury usually gets it right.

I have been a criminal defense attorney in the state of Delaware for 30 years, having tried cases in front of juries for crimes as simple as disorderly conduct and as serious as capital murder. Such trials number in excess of 275, although I stopped counting long ago. These trials have lasted as short as two hours and as long as four months. My juries have deliberated as briefly as 10 minutes and as long as eight days. I have suffered all too frequently the agony of defeat and, on more occasions than I had expected, the blissful thrill of hearing a foreperson mouth the magical words of "not guilty."

One would think that such experience would lend itself to a considerable amount of expertise in understanding the dynamics of juries and how they go about their processes of decision-making. But, unfortunately, this is not the case. Juries remain as mysterious, majestic and befuddling to me today as they were when I stood weak-kneed and frightened before them 30 years ago. In fact, the only thing that I can say with confidence on the subject is that the sole predictability found in the system is its unpredictability in how decisions are reached. And, somehow, the jury usually gets it right.

The history of trial by jury in Delaware is rich and sacrosanct. The right to a trial by one's peers is enshrined in our state and federal Constitutions and has been well explained by Justice Holland on more than one occasion.[1] The right to trial by jury in Delaware is based on our state constitution and is distinct from and independent of the federal right to trial by jury.[2] Surprisingly, such a trial is available in Delaware for offenses as petty as speeding which, like other misdemeanor offenses, can be tried in the Court of Common Pleas. All other jury trials are conducted in Superior Court.

Essentially two things make jury trials in Delaware unique. First, the

relative homogeneity of the jury pool from which selection must be made differentiates our system from that operative in many states where large urban populations create more heterogeneous mixes.

Second, and perhaps more important, is the manner in which our juries are selected and the paucity of information available to counsel in making their selections. The jury panel as a whole will be questioned as to any preconceived notions they may have which could influence their ability to be impartial. Those voir dire questions, except in capital cases, are propounded to the jury pool by a clerk, after which those jurors indicating a potential bias will be questioned individually by the trial judge. Only those questions "reasonably calculated to ascertain prejudice" are permitted to be asked, and questions tending to "condition" the jury to one side's view are strictly forbidden.

As limited as this questioning may be, the role of counsel in jury selection is even more circumscribed. Counsel are not permitted to individually voir dire the jurors in order to unearth any preconceptions they might have; nor indeed are they permitted to inquire of the jurors in any manner. As well meaning as the court may be in its questioning, a dispassionate inquiry conducted in a non-probing fashion is no substitute for an advocate's incisive inquisition. Nowhere in the trial process is counsel's role more like that of a "potted plant." The final ignominy visited upon an advocate seeking to gain some insight into the psyche of those who would judge his or her client's case is the dearth of information provided on the jury. We know what the potential juror does for a living, what his or her spouse does for a living, whether they are associated with law enforcement or insurance companies and whether they have served on juries previously. That is basically the totality of the information provided.

This being the state of the law, what is a lawyer to do to gain some insight into the mental processes of those who will control his or her client's fate? I try to look for little things. I watch the juror's facial expression when his or her name is called by the clerk to try to gauge his or her interest in serving. I pay close attention to how the person is dressed, what he may be reading, whether she smiles upon eye contact and what body language he or she projects. Since I have no real choice, I will apply certain stereotypes, some of which have been borne out by experience. For example, "establishment types" are generally not good for defendants unless the defense may be technical in nature. In this respect, the nature of the defense dictates the type of juror you would like to select. I have found over the years that teachers are horrible jurors for the defense. I have also been persuaded by result and juror interaction that women are generally better jurors than men insofar as the defendant's position is concerned. There are hundreds of insights, real or imagined, that frame counsel's decisions in accepting or rejecting a particular juror. Many, like Tom Capano's notion that female jurors would be more sympathetic to him because of his charm, are simply wrong. When all else fails, I take a guess.

I have learned that, collectively, the jury is smarter than any one of us.

Having "selected" the jury, some minimal observations are in order as to how to best approach them. I have learned that, collectively, the jury is smarter than any one of us. Accordingly, efforts to sway their thinking by arguments that are in any manner disingenuous will always fall short. Delaware juries are conservative by nature and generally not susceptible to histrionics or "cute" lawyering. As with most things, a well-prepared, well-organized presentation calculated to keep the interest level high is most likely to be persuasive. Clever tactics that are high in style but low in substance may endear you personally to the jurors but won't win your case.

Most importantly, one should never try to be anyone other than himself or herself while trying a case. Tactics and styles that work for some will not work for others. Trying to assume a personality or style that is foreign to you will not only be uncomfortable, but also will be totally transparent. Be yourself and be sincere.

Finally, the jury should be treated with the utmost respect. Every move you make and every statement you utter should be calculated to persuade the jury of the soundness of your case and the integrity of your presentation. If you lose your credibility and concomitantly the confidence of the jury in what you are saying, confidence in your case will be fatally eviscerated.

No article about juries would be complete without a few examples to emphasize the serendipitous nature of the process. These experiences can remind us not to take ourselves too seriously. In a homicide trial many years ago, I had exhausted my peremptory challenges when the last juror selected was the former chief of the New Castle City Police. Applying conventional wisdom, I mustered all the legal acumen at my disposal in an effort to persuade Judge Longobardi to strike this juror for cause. My arguments were summarily rejected and the juror was seated. The jury ultimately deadlocked 9-3 and I learned post-verdict that my police chief was the primary dissenting voice in favor of acquittal. It turned out that he had been fired from the police force, held a grudge against authority and was not about to convict anyone for anything.

Similarly, a first-degree murder case began with the selection of what I thought was a disastrous jury for the defense. Persuaded in part by my misgivings about the array and in part by the evidence, I negotiated a mid-trial plea to murder in the second degree. I

returned to my office pleased with my perspicacity on human nature and with the excellent deal that I had negotiated on behalf of my client. I took a phone call from a person who I thought was a new client but who immediately identified himself in an exasperated tone as one of my jurors in the case. Why, he asked, did I plead the case out when my client had such a good chance of winning? Fortunately, that is not an experience that has repeated itself.

I am last reminded of a jury note that inquired of the judge in a murder-second-degree case what the jury should do if they had a reasonable doubt as to whether my client was present at the scene of the crime. The court, of course, dutifully and unhappily advised the jury that if they so found they should find the defendant not guilty. Hearing this I had my briefcase packed and was set to graciously accept my not guilty verdict, secure in the notion that the jury's note presaged an impressive victory. Four hours later, I sat glumly at the defense table as the foreman announced a guilty verdict to a lesser degree of homicide.

These anecdotes all illustrate the immutable truth that one can never be certain as to the predilections of a particular juror or the vicissitudes of a trial jury. It should be kept in mind that when we see a juror seemingly not paying attention to our argument, jurors nodding or shaking their heads in seeming agreement or disagreement, smiling or frowning or showing other body language from which we would like to draw inferences, we can't automatically assume these actions are reflective of what is actually going on in the juror's mind. A jury trial, like life itself, is an imperfect science rife with traps for the unwary. The trial lawyer needs to be ever mindful of the jury's presence and ever attentive to their needs in evaluating the evidence. One can never make assumptions as to what a particular juror or the jury as a whole is thinking. Lawyers can never let their guard down based upon "vibes" that they believe they are getting.

Lest the foregoing be viewed as an unduly pessimistic appraisal of our system of trial by jury, nothing could be further from the truth. The jury system, with all of its imperfections, remains the optimal method of securing justice for those charged with a criminal offense. For those who are trial lawyers, a jury trial represents the ultimate challenge of marshaling all of the skills that we have developed over the years to make a presentation to a jury that is persuasive and ineluctably appealing. Nothing beats a good jury trial, win or lose! ✧

FOOTNOTES

1. *See, e.g., Claudio v. State*, 585 A.2d 1278 (Del. 1991)

2. *Id.* at 1289-1298.

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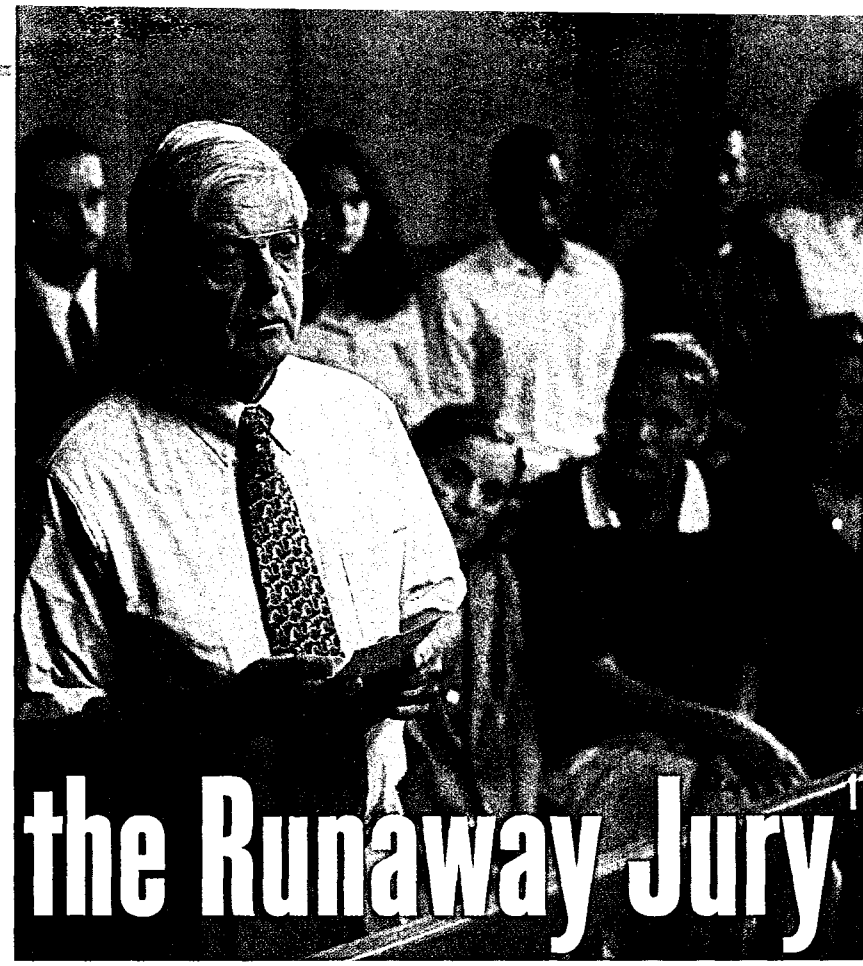

The Art of the Runaway Jury

Talk of "runaway" juries is sometimes dismissed as urban legend. For most of us, however, there is little doubt that the phrase captures a real phenomenon in the American courtroom.

Even by the standards of commercial disputes, the 1995 case of *O'Keefe v. Loewen* seemed more than usually dry and lacking in importance to those beyond the immediate participants. The Loewen Group, a funeral home operator based in British Columbia, Canada, had grown rapidly by buying locally owned funeral homes throughout the United States and then revamping their operations to take advantage of centralized purchasing and other efficiencies. When it purchased a number of local funeral homes in Mississippi, it proceeded to give a cold shoulder to competitor Jerry O'Keefe by terminating his exclusive right to sell funeral insurance through the homes. O'Keefe sued for breach of contract, and later added charges of fraud and antitrust violations following the collapse of an attempt to settle the suit by restoring him in part of the business.

The only thing that looked out of the ordinary about the dispute was that O'Keefe had engaged to argue his case one of the South's most flamboyant trial lawyers, Willie Gary of Stuart, Florida who has parlayed more than a hundred victories in $1-million-plus cases into a 40-room villa and a private jet named "Wings of Justice."

Loewen had already turned down an offer to settle the case for $4 million. On stepping into the case, one of Gary's first moves was to raise his client's demand to $125 million, a sum vastly exceeding any conceivable valuation of the family businesses being fought over. Over the course of a seven-week trial in Jackson, with Judge James Graves, Jr. presiding, Gary's team explored many matters that seemed only marginally relevant

to, sometimes even at odds with, their client's actual legal case. For example, they made sure the jury heard at length about Loewen's practice, when it purchased local funeral homes in a new market, of raising prices and introducing more expensive caskets and the like — "[t]aking advantage of the needy and downtrodden," as one of Gary's fellow counsel later put it. It was perfect for angering the jury, though it was much less clear how O'Keefe, who was a competitor, had lost anything by it, as he might have done if Loewen had instead started a price war. Gary took pains to establish, returning to the point again and again over three pages of trial transcript, that what company founder Ray Loewen in his testimony had modestly referred to a company "boat" would more properly be called a yacht. Later, a Loewen executive said the strategy was to "incite" the jury, "Much of the plaintiff's case was ... an attempt to paint our company as ruthless predators oppressing the poor people of Mississippi."

"Gary's presentation at trial," contends law professor Michael Krauss in his account of the case, "was almost entirely devoid of any legal argument regarding the law of contract." It had plenty of appeal in other respects, however. With his client on the stand, Gary drew out that O'Keefe had joined the U.S. armed forces after Pearl Harbor and won military honors. The relevance became clear later, when Gary told the jury that a man who had "fought for his country" was now willing to "stand up for America" against this rich foreign company. Men like O'Keefe "fought, and some died for the laws of this nation, and they're [Loewen] going to put him down for being American." By the time the plaintiffs' side had finished, you'd have thought we fought World War II against the Mounties.

At the end of it all, Gary asked the jury to award his client one billion dollars. The jury, probably thinking itself moderate, split the difference and gave him about half that, deciding that Loewen should pay O'Keefe $500 million, consisting of $100 million compensatory damages, including $75 million for emotional distress, plus $400 million punitive damages.

Judge Graves declined to set aside or reduce the verdict, which left appeal, in a state court system at that time considered extremely friendly to plaintiff's interests. But appeal itself was not practicable, because the Canadian company was unable within the requisite seven days to post an appeals bond, which under state law would have to total 125 percent of the size of the judgment, or $625 million. Its only remaining bargaining chip was the threat to declare bankruptcy. That induced O'Keefe to settle, for a sum variously estimated at $130 million and $175 million, depending in part on how one evaluates securities that changed hands. The legal setback dealt the company a blow from which it never recovered; once a favorite among American investors, it filed for bankruptcy in mid-1999.[2]

The term "runaway" juror is often misleading; most "runaway" jurors are behaving exactly as one side's lawyers have been carefully grooming and preparing them to do.

Talk of "runaway" juries is sometimes dismissed as urban legend, a myth circulated by sore losers who are indignant about paying out perfectly justified damage awards. For most of the rest of us, however, there is little doubt that the phrase captures a real and distinctive phenomenon in the American courtroom:

- *A jury in Hale County, Alabama, in 1999 directed the Whirlpool Corporation to pay $581 million, later cut by a judge to $300 million, in a dispute over the financing of a $1,200 satellite dish.*[3]
- *A locally influential Louisiana family sued ExxonMobil over contamination to a small portion of its land during longstanding industrial operations there; the oil company said the cost of doing a cleanup was $46,000, and the overall parcel of land as a whole was worth either $500,000 or $1.5 million depending on whom you believed, but in 2001 a jury ordered the giant oil company to pay the family $1 billion.*[4]
- *A New Orleans jury decided that the city should pay $51.4 million in the case of a young child who fell out the window of a streetcar while playing, sustaining a serious arm injury, despite protests from city lawyers that the accident could have been avoided had the girl's mother been supervising her properly. After the verdict, reported the* Times-Picayune *of that city, "a party-like atmosphere prevailed in the hallways" as jurors posed for photographs with celebrity attorney Johnnie Cochran Jr. and the judge.*[5]
- *In 1985 a Houston jury forced one of the nation's biggest American corporations into bankruptcy when it awarded $11.1 billion to the Pennzoil Corporation in a merger dispute with Texaco. Many business observers doubted that the true economic damages to Pennzoil from losing out on the underlying deal came anywhere near such a high sum, and some believed that the correct assessment of damages was zero. Following Texaco's resort to Chapter 11 bankruptcy, the case was settled with a $3 billion payment.*[6]
- *In* Engle v. R.J. Reynolds *a Miami jury awarded $145 billion in punitive damages, a sum amounting to more than twice the GDP of New Zealand, to punish tobacco companies for their sins against smokers in Florida (but not elsewhere); the individual plaintiffs parad-*

ed before jurors as representative of the class included a 44-year-old nurse who said she "had no idea there was anything wrong with cigarettes at all." A higher court eventually vacated the judgment by decertifying the smoker class.[7]

• *In* Anderson v. GM *(1999) a Los Angeles jury ordered General Motors to pay $4.9 billion, later reduced by a* judge *to $1.2 billion, over the rupture of a 1979 Chevy Malibu gas tank in a high-speed crash. The federal National Highway Traffic Safety Administration did not and does not consider the Malibu's gas tank to be defective in its placement, design, construction, or in any other way, and federal statistics from more than 20 years of real-world experience show the 1979 Malibu to be among the safest auto designs of its time, with an unusually low crash-fatality rate. Presiding Judge Ernest Williams, however, refused to allow GM to present evidence to that effect. A* Washington Post *editorial said the case exemplified "a kind of lottery in which clever trial lawyers and a few victims get very rich at the cost of society's confidence in the justice system."*[8]

Runaway-jury outcomes are rare among the universe of all litigated cases, of course, much as 8.0 earthquakes are rare among the universe of seismic events and crashes on takeoff are rare among the universe of aviation events. Their salience, however, does not depend on their achieving any very high frequency. Although many are reversed or reduced at later stages of litigation (though, on the evidence of cases listed above, the reduction is often to a still-scarifying level) they cast an influential shadow on the resolution of the great majority of cases that settle before any verdict.

They also make an indelible impression on the most significant class of defendants, namely the business community. The Canadian press buzzed after the Loewen verdict, the Montreal *Gazette* citing the propensity of some U.S. jurisdictions for producing "large punitive damages in seemingly minor cases." The financial press in Britain said a string of such decisions was likely to induce investors to demand higher returns on capital for investments exposed to U.S. legal developments. "The U.S. has, without comparison in the developed world, the highest degree of systemic risk posed by frequently arbitrary, severe and unquantifiable litigation," said one British financier.[9]

And yet it would be far from accurate to regard gigantic damage awards as merely random or unpredictable. They in fact occur disproportionately in certain courts, in cases argued by certain lawyers using certain methods, after trials that judges have managed in certain ways:

Juries seem far less likely to run away when the law governing their determinations — and the law of damages in particular — points clearly toward a given conclusion.

• **Runaway juries are a geographically distinctive phenomenon.** A high share of them originate in a relatively small number of jurisdictions around the country. Some of these are scattered around the Deep South and Gulf Coast, including the Texas Gulf Coast, Alabama, Mississippi, and nearby areas, as well as a few big cities such as Los Angeles and Miami. Most, though not all, of these jurisdictions have systems in which judgeships are elective.

• **A small corps of celebrated trial attorneys and their firms account for many such verdicts.** Certain highly successful trial advocates — Houston's John O'Quinn and Joe Jamail, the Beasley firm in Alabama, Willie Gary — repeatedly turn otherwise routine cases into high-ticket verdicts. Most of these advocates are known for their ability to control the emotional tone of trials, arousing sympathy or infuriating juries as the need may dictate.

• **Runaway juries do not necessarily "run away."** The term indeed is more often misleading than not, since it suggests that the juries in question are racing off madly as would a horse that is defying or ignoring the signals human caretakers are trying to send it. But quite the contrary is true: most "runaway" jurors are behaving exactly as one side's lawyers have been carefully grooming and preparing them to do. They are, in most cases, "running" *toward* a goal that trial advocates have portrayed to them as attractive. Which is why in seeking to account for exorbitant verdicts, the most relevant question to ask is usually not, "How could these jurors have been so irrational?" but rather, "How did the lawyers manage to make this outcome look reasonable?"

Why does the chance of a runaway verdict seem to go with the territory in some courtrooms and jurisdictions, while being genuinely rare and unexpected in others?

One important influence, of course, can arise from differences in substantive law, on its own and as reflected in jury instructions. Juries seem far less likely to run away when the law governing their determinations — and the law of damages in particular — points clearly toward a given conclusion, rather than being left muddled and indeterminate. Punitive damages, long awarded under hazy and open-ended legal standards that may more closely correspond to a jury's emotional state of mind than to any objective correlatives outside the courtroom, are thus one of the arch-occasions for runaway phenomena. By the same token, the U.S. Supreme Court's recent jurisprudence applying constitutional due process scrutiny to such awards, and the guidance it has provided as to their appropriate dimensions, are likely to go far in curbing the incidence of

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runaway verdicts.

Greater clarity and determinacy in substantive law, however, is only a needed start. Many runaway verdicts are preceded by curious and often insupportable rulings by judges on evidentiary motions, which result in the suppression of facts and theories material to defendants' case, the admission of prejudicial matter, or both. Before the jury's $4.9 billion verdict against GM in *Anderson*, for example, Judge Williams had not only excluded from evidence the federal statistics on the 1979 Malibu's overall crash safety, but also barred the company from introducing crash test data raising safety concerns about the alternate placement of the gas tank that the plaintiffs claimed would be better. Most remarkable of all, he excluded from evidence the fact that the driver of the other car, one Daniel Moreno, had been drunk (with a blood alcohol level of .20 "several hours later") and had been sent to prison. After managing to get Moreno's guilt and imprisonment excluded, plaintiffs proceeded to inform the jury that his fault consisted of "five seconds of bad judgment," whereupon the jury allocated to him only 5 percent of the responsibility for the injuries.

Such patterns are by no means unique. In *Engle*, the Florida tobacco class action, Dade County Judge Robert Kaye handed down numerous rulings favorable to the plaintiffs, admitting unorthodox expert testimony setting strikingly high valuations on the net worth and future economic prospects of the defendants; ruling that it was proper to place before the jury the companies' capacity to borrow funds to help meet a punitive damage award; declaring that in setting a basis for punitive damages jurors need not feel obliged to stop at a sum representing the tobacco companies' net worth; and barring the defendants from arguing that their earlier $246 billion settlement with the 50 states had punished them enough.

Evidence handling aside, "runaway jury" scenarios are far more likely to arise in circumstances where judges abdicate their responsibility to keep trials on track as exercises in reason rather than emotion, and where they cede wide-ranging control over such phases of trial as jury selection to the contending lawyers. Some examples, in order:

• **Lawyers' unprofessional arguments, demeanor and conduct at trial.** Officially, all American courts aim at policing the conduct of advocates so as to prevent outcomes predicated on emotion, prejudice, irrelevance, or illogic. In practice, they show an enormous spectrum between stringency and laxity when it comes to preventing lawyers from engaging in inflammatory language; "endorsement" of their clients' cases; badgering of witnesses; interruptions; parading of blatantly rehearsed or coached testimony; comments that mislead, distract or confuse; open appeals to sympathy or anger; and so forth. Standards on such matters can vary widely between different judges in the same locality. In transcripts of trials that result in runaway verdicts, lawyer misconduct of this sort can often be seen to have run rampant — not always reliably corrected on appeal.

One attorney commentator laments that final argument "has increasingly turned into a quagmire of personal character attacks, impermissible reference to non-record evidence, and blatant pleas to jurors' sympathies and prejudices."

The opening and closing arguments of trial, as the occasions in which lawyers speak directly to jurors, are particularly susceptible to demagoguery. Some courtrooms tolerate opening arguments asserting propositions there is no reasonable expectation of proving, as well as closing arguments that endeavor to slip across propositions unsupported by what has come before. One attorney commentator laments that final argument "has increasingly turned into a quagmire of personal character attacks, impermissible reference to non-record evidence, and blatant pleas to jurors' sympathies and prejudices." Some judges sit by while attorneys mischaracterize earlier evidence, compare opponents to murderers or Nazis, insist on logical inferences that are not in fact logically obligatory, address jurors by name, and so forth. Why do trial judges hold back? One reason, notes Professor David Bernstein of George Mason University Law School, is that they may expect tougher scrutiny from appeals courts if they take a hard line than if they let the lawyers have their head.[10]

• **Baiting of outsiders and foreigners:** In many liability cases a claimant is a local resident, while defendants are headquartered in a distant state or even abroad. Ideally, the dangers of prejudice present in such cases would be handled with utmost delicacy and sensitivity to avoid the slightest appearance of unfairness. But there is nothing delicate or subtle about the stoking of localist sentiment in the quest for large verdicts today. In the Texaco/Pennzoil trial, winning attorney Joe Jamail, addressing Texas jurors, made a repeated point of needling his opponents about their being from New York, where they did things differently. In North Carolina, jurors mulcted the British-owned Meineke muffler chain for $196 million, trebled by the court to nearly $600 million, in a franchisee dispute after a lawyer invited them to "send a message to foreign companies." [11] And while most of us don't consider Canada

a particularly exotic or sinister locality, O'Keefe's lawyers in the Loewen case hammered away persistently at the issue of nationality. Nor was the baiting confined to the courtroom. As Professor Krauss writes: "One ad placed by O'Keefe in local newspapers during the trial juxtaposed the Mississippi and American flags on one side of the page, and the Japanese (!) and Canadian flags on the other. Under the two foreign flags was written 'NO' and 'Loewen/Riemann' [Riemann was the local firm Loewen had bought in entering the local market]; under the domestic flags, 'YES' and 'O'Keefe.' " The funeral chain's Lawyers wound up lodging more than 50 objections to digs at its Canadian-ness, but they were consistently overruled by Judge Graves.

• **Overuse, and abuse, of voir dire.** Despite some grumbling from the bar, federal courts have generally followed the sound practice of empowering trial judges, rather than lawyers themselves, to address questions to potential jurors on topics that might lead to their disqualification or challenge. Many state courts, by contrast, put lawyers in the drivers' seat, with judges assuming at most a referee role. The dangers of this approach go beyond the greater cost and duration (and sacrifice of juror prospects' privacy) often associated with lawyer-driven voir dire. Where judges' control is lax, lawyers routinely use the process as a way to begin arguing their cases, planting assumptions and factoids that might or might not be admissible later at trial. Some courts even permit lawyers to "get a promise" from jurors, "If I show A, will you agree to conclude B?" "The psychological research is very convincing that getting a promise does in fact work," an enthusiastic jury consultant told Stephen Adler, author of the 1994 book *The Jury*.[12] "[I]f you give them positions, they adopt them." In the Loewen case, for example, attorney Gary invoked a "promise" he had extracted from them. "You said you'd do it, you did, members of the jury. ... I asked if anyone here, if you felt comfortable sitting on a case that could exceed $850 million, raise your hand, and without hesitation, all 12 of you, you raised your hands."

The use of peremptory and for-cause challenges of course has helped turn jury selection in high-stakes cases into a protracted and expensive stage of trial all by itself, vital to the outcome, which (to the astonishment of observers from overseas) may last longer than conventional trials themselves. In Florida's *Engle* tobacco action, the tweezing and fluffing of the jury pool went on for three months: in the end 800 prospects were sent home in search of the perfect 18, after having been quizzed on such matters as their reading habits and their views on seemingly unrelated issues such as gun control.[13] In a legal system which in other contexts claims to abhor discrimination and to provide a remedy for it, the major point of the $200-million-plus jury consulting business is to assist lawyers in engaging in discrimination, along lines of religion, marital status, age, and so forth (although, supposedly, no longer race or sex).

Much Law Day rhetoric expounds on the alleged similarities between the jury box and the ballot box; is it conceivable that we would exclude citizens from the voting booth because we think them likely to vote the wrong way?

Despite occasional flag-waving talk about the supposed representativeness of juries, there is ample reason to believe that lawyers routinely succeed at empanelling juries that are quite far from representative demographically of the communities from which they are drawn. Before the selection process ever begins, busy people have often dodged service, leaving a pool comprised disproportionately of retirees, the unemployed, and those who can be spared from their jobs. Nor is it safe to assume that the use of peremptories by lawyers on both sides somehow "balances out" to restore representativeness. A typical result of the selection process, after all, is the removal of any jurors with too strong a base of experience, knowledge or opinion about the case's subject matter — accounting, say, or automotive engineering. A dozen adults randomly rounded up off the street are actually more likely to include among them someone with medical expertise than the jury empanelled to hear a medical case after lawyers use their strikes. Selection manuals emphasize the importance of striking potential "opinion leaders" for the other side.

All this is bad enough; more troubling in many ways are the *for-cause* exclusions by which lawyers often prevail on judges to exclude potentially skeptical members of a jury. Some judges are willing to bounce juror prospects simply for having followed press reports about the events at issue — resulting in juries none of whose members may regularly read a newspaper. Worse yet, some judges allow lawyers to exclude jurors for expressing fundamentally political opinions about the state of the law and the courts. "There are too many high jury awards these days: AGREE/DISAGREE." Would giving either answer preclude a citizen from sitting fairly in judgment on a particular suit? Not at all: to hold an overall opinion is not to prejudge a single case. The intended effect of such questions is to provide a reason to exclude citizens with the "wrong" views from contributing to jury deliberations. According to coverage of the *Engle* trial in

the local press, the most frequent reason for dismissing jurors was that they were considered to harbor unacceptable prejudices on the subject of tobacco company liability — apparently typified by a former smoker of three decades who said, "I just think people are and have been well aware of the detriments of smoking. ... To come back after the fact, I find that somewhat ridiculous."[14] Much Law Day rhetoric expounds on the alleged similarities between the jury box and the ballot box; is it conceivable that we would exclude citizens from the voting booth because we think them likely to vote the wrong way?

Sound trial practices minimize the chance of "runaway" verdicts, while offering many other advantages as well. While Great Britain shares with us a tradition of lawyer-driven procedure, the differences are revealing, as another commentator notes:

The ... British judge maintains strict courtroom control. While allowing considerable latitude in questioning, he will not tolerate hectoring of witnesses, strident rhetoric, misrepresentation of evidence or dilatory motions and objections. If testimony is confusing, he will intervene with questions. Procedural motions and questions of law are ruled on verbally after the law books are handed up to the judge. Above all, a British judge has full power to comment on the credibility of evidence and is required by law to sum up the case for the jury. If there is a serious discrepancy between the evidence and the verdict the entire record will be reviewed on appeal.[15]

As for jury selection (juries are retained in Britain for criminal and a few civil cases) Great Britain in recent years has streamlined the process further so that empanelment of a jury is commonly accomplished with a couple of hours at most with little input from lawyers.

Those who express alarm about runaway jury verdicts are sometimes accused of being "against the jury system." Yet it is the derelictions of the legal system's professionals, more than any original sin on the part of jurors, that lies at the root of many a runaway verdict.[16] Jurisdictions where trial abuses have never had a chance to take root should count themselves lucky, and keep up their vigilance for the future. ◆

FOOTNOTES

1. This essay is adapted in part from Walter Olson, *The Rule of Lawyers* (St. Martin's, 2003), Chapters 7 and 8.

2. Walter Olson, "A Small Canadian Firm Meets the American Tort Monster," *Wall Street Journal*, February 14, 1996; Michael Krauss, "NAFTA Meets the American Torts Crisis: The Loewen Case," *George Mason Law Review* 9 (2000), p. 69; D. Geoffrey Cowper, Q.C., "The American Experience: A Canadian Litigator Looks at the American System," in *Law & Markets: Is Canada*

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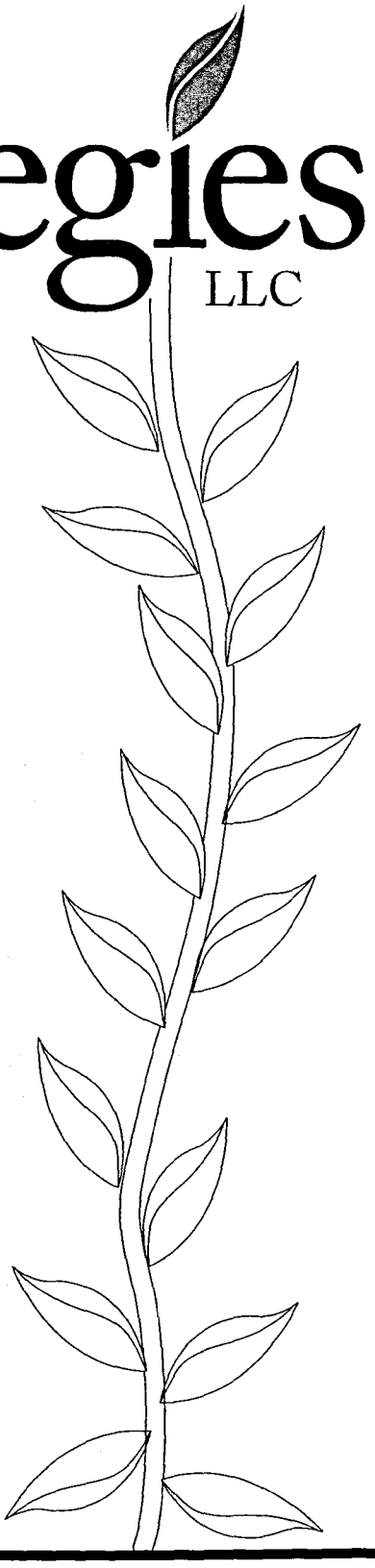

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3. *AP/New Orleans Times-Picayune*, August 29, 2003; noted at *Overlawyered.com*, August 29, 2003.

4. Sandra Barbier, "Family Awarded $1 Billion in Lawsuit," *New Orleans Times-Picayune*, May 23, 2001; Brett Martel, "Exxon Mobil to Appeal $1 Billion Fine" *Reuters/New York Times*, May 23, 2001.

5. "Whirlpool settles $581 million verdict out of court." *AP/Fox News*, March 1, 2000; "$581 Million for a Satellite Dish Scam," *Lawyers Weekly USA*, roundup of year's top verdicts, http://www.lawyersweekly.com/ootop-ten4.cfm, visited July 17, 2002.

6. The litigation began in the Delaware Court of Chancery, which denied Pennzoil's motion to preliminarily enjoin Texaco's acquisition of Getty Oil Company. Pennzoil then voluntarily dismissed its action as to Texaco and refiled in Texas state court on the same day. *See Pennzoil Co. v. Getty Oil Co.*, 1984 WL 21900 (Del. Ch., April 12, 1984) at **1.

7. *See* roundups at *Overlawyered.com* (July 19-20 and 24-25, 2000).

8. "Casino Justice," *Washington Post* (editorial) July 13, 1999.

9. Tim Burt and Robert Rice, "Weighted Against Outsiders," *Financial Times*, February 14, 1997 ("Some investment bankers claim these legal hazards have become a powerful deterrent to smaller companies contemplating U.S. expansion.") See also "The people v. America Inc.," *The Economist* (March 22, 2001).

10. David Bernstein, "The Abuse of Opening Statements and Closing Arguments in Civil Litigation," *Manhattan Institute Civil Justice Memo* 38 (August 1999).

11. "Brits Discover North Carolina," *Wall Street Journal*, August 25, 1997.

12. Stephen J. Adler, *The Jury: Trial and Error in the American Courtroom* (New York: Times Books, 1994).

13. *Daytona Beach News Journal* trial coverage and Jim Oliphant, "Many Called, Few Chosen," *Miami Daily Business Review*, October 5, 1998.

14. Catherine Wilson, "Jury Selection Thorny in Fla. Tobacco Lawsuit," *USA Today* (July 7, 1998).

15. Charles Maechling, Jr., "The Crisis of American Criminal Justice," *Cosmos Journal* 1996, quoting Judge Marvin Frankel.

16. It remains to be seen how effective recent statewide reform efforts in jurisdictions like Alabama, Texas and Mississippi will be. Many abuses in the voir dire process and incitement of prejudice are a product of local rather than statewide practice.

FEATURE

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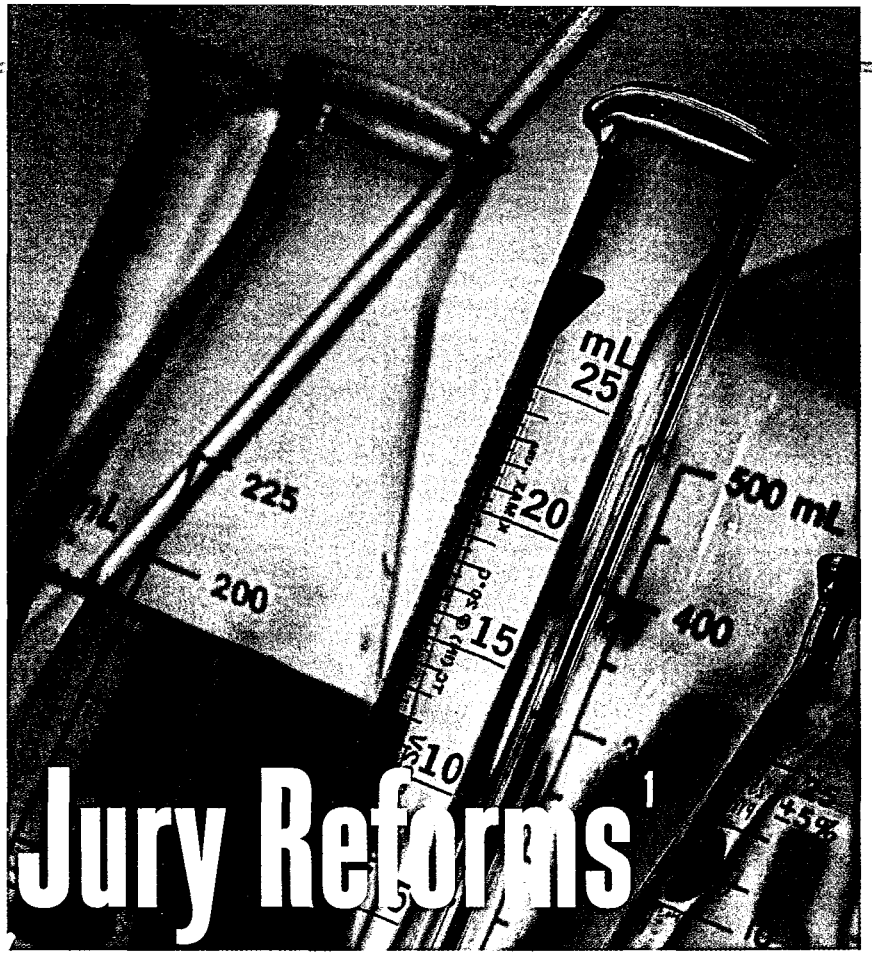


Testing Jury Reforms[1]

The basic conclusion is positive: Jury verdicts are strongly correlated with the weight of evidence in the case.

DNA evidence has become a key law enforcement tool and is increasingly presented in criminal trials in Delaware and elsewhere. The integrity of the criminal trial process turns upon the jury's ability to understand DNA evidence and to evaluate properly the testimony of experts. How well do they do? Can we assist them in the process?

Whether lay jurors can comprehend complex scientific and technical evidence has long been a focus of research by jury scholars. We now have decades of research examining jurors' abilities in decision-making. The basic conclusion is positive: Jury verdicts are strongly correlated with the weight of evidence in the case. Furthermore, judges agree with the vast majority of jury verdicts.[2] If we ask jurors themselves, though, they say that scientific and technical evidence presented through adversary expert witnesses can be quite challenging.[3] Some studies suggest that statistics about matching DNA types can be difficult for laypeople to interpret.[4]

How can we help jurors? As both criminal and civil cases over the last decades have increasingly included complex evidence, jury reformers have proposed a variety of innovative trial procedures to assist jurors in complex trials.[5] These include basic reforms such as permitting note taking, through more controversial changes such as allowing jurors to ask questions of witnesses or to discuss the case together during the trial. Although reformers have endorsed many of these innovations, to be most successful in implementing them, we need to know more about how they operate in practice and which approaches are the most effective for a wide range of individuals.

Study Procedure

To study the effects of certain trial innovations, the authors conducted a research project in the fall of 2003 with the New Castle County jury pool. The study, funded by the National Institute of Justice, examined the use of several jury-reform techniques using a controlled mock-jury approach. New Castle County citizens who came to the courthouse to serve on jury duty,

and who were not needed for jury duty that day, were given the opportunity to volunteer for the research project, and many did so.

Mock juries composed of these jury-pool volunteers watched an hour-long videotape of an armed robbery trial, which featured conflicting expert testimony about a relatively new type of DNA evidence, mitochondrial DNA (mtDNA) evidence. Unlike nuclear DNA, mtDNA is found outside the nucleus and is maternally inherited. As a result, in some cases where nuclear DNA cannot be extracted from a sample, mtDNA testing is still possible. However, since mtDNA is maternally inherited, it cannot uniquely identify an individual.

The mock trial was based largely on an actual case from Connecticut. The crime was the armed robbery of a bank, in which a masked man wearing a blue hooded sweatshirt robbed a teller at gunpoint. Bank employees could not positively identify the robber. However, a police search of the area turned up a blue sweatshirt and stolen currency. Two human hairs were found in the sweatshirt hood, and they were subjected to mtDNA analysis.

An FBI analyst testifying for the prosecution concluded that the mtDNA profiles of the sweatshirt hairs and the hairs from the defendant matched, and that 99.98 percent of all Caucasian males would be excluded as potential contributors of the two mtDNA samples. That would mean, he said, that in the local Caucasian population, just six males could have provided the sweatshirt hairs.

The defense expert agreed that the mtDNA samples matched, but disagreed about the FBI agent's statistics. The defense expert asserted that the FBI's estimate of the percentage of the population excluded by the mtDNA evidence was too large because the FBI failed to account properly for the possibility of heteroplasmy (slight variations in the sequences of base pairs) in different hairs from the same individual. Accounting for this possibility, the defense expert reduced the FBI's percentage to 99.80 percent and said that fully 57 males in the locality could have supplied the mtDNA found in the sweatshirt hairs.

The defendant denied committing the robbery. The circumstantial evidence was purposefully ambiguous so the jurors would find it necessary to address the mtDNA identification evidence and resolve the issues raised by the experts.

Some mock juries simply watched the videotape and deliberated to a verdict. Others were permitted to take notes, ask questions about the scientific evidence of experts who were standing by, use a checklist that provided a list of questions about the mtDNA evidence, or refer to jury notebooks containing background materials about mtDNA and the case.[6] These reforms were selected by us and our National Institute of Justice Advisory Group, which included judges, attorneys, and DNA experts. The reforms were chosen from a range of promising jury trial innovations that have been considered or implemented in different jurisdictions.[7]

Results

Like actual jurors nationwide, the mock jurors who participated in our study expressed enthusiasm for the innovations, and frequently employed them when given the opportunity to do so. Figure 1 (see below) shows that when jurors were permitted to take notes, 88 percent of the mock jurors did so; 86 percent used DNA checklists when they were provided; and 92 percent referred to the notebooks when given the chance.

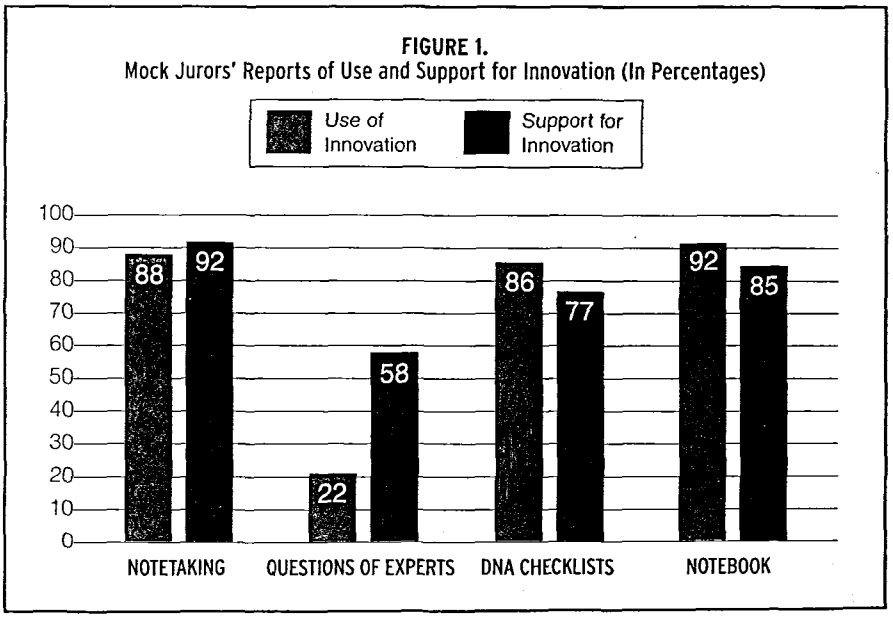
However, a relatively low number, 22 percent, asked a question of a DNA expert when given the opportunity to do so. Most jurors who could ask questions but did not do so felt that there was no need for any questions. Of course, our mock jury study may not be a good reflection of how frequently jurors would ask questions in real-world jury trials of this complexity, but when jurors are able to ask questions in actual trials, the typical number of questions is fairly low.[8]

The strong support for jury innovations among our Delaware participants is similar to that found in other studies and other jurisdictions.[9]

Jury Performance

Jurors' comprehension of the mtDNA evidence was good, on the whole. We gave our participants true-false questions about mitochondrial DNA. Responses to specific mtDNA knowledge questions showed that as a group the mock jurors had good comprehension of certain aspects of mitochondrial DNA. Virtually all of our mock jurors, for example, were able to respond correctly to a basic question about whether nuclear DNA or mtDNA was the more definitive method of proving identity. Both of the expert witnesses, the prosecutor, and the defense attorney in the trial stated during the trial that nuclear DNA was superior, and that fact was obviously communicated

FIGURE 1.
Mock Jurors' Reports of Use and Support for Innovation (In Percentages)



well to the mock jurors. A majority of our mock jurors also responded correctly to other basic knowledge items, such as the fact that mitochondria are found outside the nucleus of the cell, that the sequence of base pairs is important, and that mtDNA is maternally inherited. On the other hand, as has been found in other studies, some mock jurors made mistakes in inferences to be drawn from the statistical presentations of the competing experts.

Not surprisingly, comprehension was higher for mock jurors who had more formal years of education and more math and science courses. Interestingly, it was also better after jurors had a chance to deliberate together.

Use of some of the jury innovations appeared to improve comprehension of the mtDNA evidence, but the effects were modest and did not occur in all analyses. We compared the mock juries that had decided the case with or without being able to use the different innovations. In some analyses, the use of jury notebooks and a checklist improved juror comprehension after jury deliberation. In other analyses no effects on juror comprehension were detected. Jurors who took notes tended to do better, but once we controlled for the fact that more highly educated jurors were also more likely to take notes, the independent effect of note-taking disappeared. Jurors credited note-taking with helping them remember the evidence; it's possible that in a longer trial note-taking would assist jurors.

Conclusion

This study of jury trial innovations leads us to several conclusions. First, it is reassuring that most of the members of the jury pool showed good comprehension of basic information about complex scientific evidence presented during the mock trial.

It is interesting that the two innovations that appeared to have the most effect — the checklist and jury notebooks — were ones that gave jurors some reinforcement, background, or guidance on the scientific issues. Recall, too, that jurors who had more science and math courses were better able to comprehend the scientific evidence in this trial. All of this suggests that in complex cases it may be valuable to provide more extensive background information about disputed complex issues. For instance, the material could be presented in individual juror notebooks and checklists could be devised that suggest a logical decisional pathway through the disputed issues. In addition, complex cases might begin with a jury tutorial or presentation by experts acceptable to both sides in a dispute.[10] We look forward to continuing to explore the most effective ways to present complex evidence to juries. ◆

The two innovations that appeared to have the most effect — the checklist and jury notebooks — were ones that gave jurors some reinforcement, background or guidance on the scientific issues.

FOOTNOTES

1. This article summarizes results reported in B. MICHAEL DANN, VALERIE P. HANS, & DAVID H. KAYE, TESTING THE EFFECTS OF SELECTED JURY TRIAL INNOVATIONS ON JUROR COMPREHENSION OF CONTESTED MTDNA EVIDENCE, FINAL TECHNICAL REPORT (2004). The research project was supported by Grant No. 2002-IJ-CX-0026 from the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Points of view expressed in this article are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice. The authors wish to express our appreciation to the judges and staff of the Superior Court of Delaware in New Castle County, and 480 jury-eligible citizens of New Castle County who volunteered to serve on the half-day-long mock trials and deliberations.

2. Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 101 (2003); Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott, & G. Thomas Munsterman, *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 Crim. L. BULL. 33 (2003); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1999).

3. Sanja Kutnjak Ivkovich & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441 (2003).

4. Dale A. Nance & Scott B. Morris, *An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Large and Quantifiable Random Match Probability*, 42 JURIMETRICS J. 403 (2002).

5. Michael B. Dann, *"Learning Lessons" and "Speaking Rights": Created Educated and Democratic Juries*, 68 IND. L. J. 1229, 1249-53 (1993); JURY TRIAL INNOVATIONS (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead, eds., National Center for State Courts 1997) (hereinafter JURY TRIAL INNOVATIONS); ENHANCING THE JURY SYSTEM: A GUIDEBOOK FOR JURY REFORM (American Judicature Society 1999).

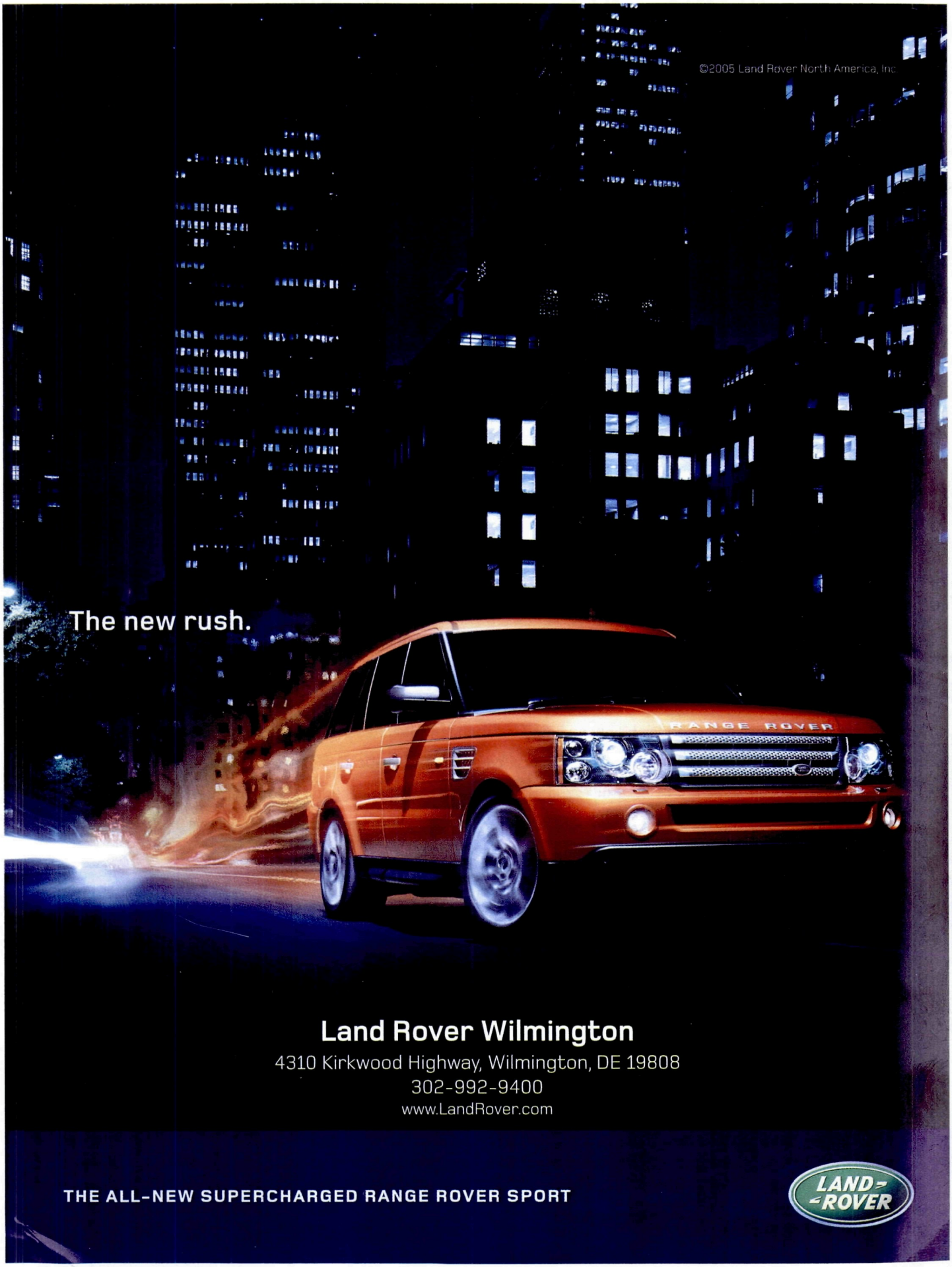
6. Each notebook contained blank paper for note-taking, a glossary of mtDNA terms used in the case, copies of the experts' slides, and a witness list. In a condition that included all innovations, it also contained the mtDNA checklist.

7. JURY TRIAL INNOVATIONS, *supra note* 6.

8. Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That is the Question,"* 78 CHI.-KENT L. REV. 1099 (2003).

9. For a review, see B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 COURT REV. 12 (2004). *See also* DEL. SUPER. CT., REPORT OF THE TASK FORCE ON THE MORE EFFECTIVE USE OF JURIES (1998), *available at:* http://www.dsba.org/AssocPubs/tfrep.htm (last visited on July 28, 2005).

10. Use of jury tutorials in trials of complex cases has produced positive results and has attracted supporters. *See, e.g.*, Verita Black, *An Interview With Judge Pamela Rymer*, 14 N.J.C. ALUMNI MAG. 10 (2000); JURY TRIAL INNOVATIONS, *supra note* 6.



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