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A View from the Bench: Practical Perspectives on Juries*

Prentice H. Marshall†

During my 38 years as a lawyer and a judge, I have participated in or presided over more than 225 civil and criminal jury trials and a greater number of bench trials. I have tried every kind of civil and criminal jury case.¹

While in practice, I visited with jurors following the return of their verdict whenever it was possible and desirable to do so. Since receiving my judicial appointment in 1973, I have visited with the entire jury in the jury room or in my chambers after the return of every criminal or civil verdict. I have never probed the jury's deliberations; their secrecy should be preserved. As a lawyer, I asked jurors what I could do to improve my presentation. As a judge, I ask jurors if they have any questions they would like to ask me (they always do) or suggestions for improving their working conditions (they almost always do). This approach did and does get them talking. Sometimes the jurors disclose the ingredients of their deliberations; other times the jurors are very circumspect.

On the basis of my experiences with juries and jury verdicts, my experiences in bench trials, both as a lawyer and a judge, and my discussions with judges and lawyers, I have concluded that in most civil and criminal cases a carefully selected jury which has received coherently submitted evidence and accurate and succinct instructions is superior to a judge in making decisions. The jury's collective comprehension of the facts is more complete than the judge's. The jury renders its decision more quickly than the judge can. The jury's independence and integrity are superior to the judge's. The jury's cross-sectional makeup brings community val-

* Adapted from a speech delivered at the Fifth Annual Symposium of the *University of Chicago Legal Forum*, "The Role of the Jury in Civil Dispute Resolution."

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¹ Examples of these trials include: automobile negligence, medical malpractice, product liability, contracts, securities fraud (civil and criminal), antitrust (civil and criminal), employment discrimination, civil rights (civil and criminal), RICO (civil and criminal), will contests, eminent domain, mail fraud, income tax (civil and criminal), theft, burglary, rape, robbery and murder (including two cases in which the jury was qualified to impose the death sentence).

ues to the decisionmaking process. Lawyers and judges create the problems many attribute to jury decision making. Consequently, the bench and the bar have the responsibility to remedy them.

I. JURY SELECTION

Jury selection is the key to successful jury decisionmaking. To start with, we must have random identification of prospective jurors from the community in which the court sits. We no longer use volunteer jurors (they were commonplace when I started practicing), patronage jurors or the venire hand-selected by township supervisors or others with access to registered voter lists. Today the "jury wheel" is the product of random computer selection from registered voter lists.

Next, we must assure, indeed, insist that those whose names are drawn participate. Certain jurisdictions in the country—both state and federal—routinely excuse and thereby condone non-response to the initial questionnaire. In addition, the official responsible for administering the jury program (usually a court clerk with a nudge from a political functionary) may excuse a prospective juror because of distance, job, social engagements or travel plans. The result is a skewed cross section. The demography of the venire is altered when distance of travel is a ready excuse. Similarly, the venire can be overpopulated with the unemployed or the elderly when employment is a ready excuse.

In the Northern District of Illinois, 97 percent of those who receive questionnaires from the clerk respond. We achieve this level of participation through three mailings: 75 percent respond to the first mailing; 10 percent to the second; and 12 percent to the third (which includes a warning that the recipient will be held in contempt if he or she does not respond). Thus, a truly representative group reports to the courthouse for jury service.

The jury clerk has the authority to excuse potential jurors on a limited number of grounds² and may grant one continuance for juror convenience. After that, only the Chief Judge can excuse a prospective juror. Our Chief Judges are devoted to the jury system—excuses are seldom granted. As a result, our juries include professionals, college graduates, business men and women, students, retirees, skilled tradespersons, law enforcement workers,

² Over 70 years old, permanent medical problems, responsibility for a child under 14 or prior jury service within two years.

and spouses of all types of people. The overwhelming majority are either employed or retired from careers.

Next, a group of prospective jurors is randomly selected to appear before a particular judge to hear a particular case. When they arrive at the courtroom, the prospective jurors know nothing about the case and frequently little about their duties. The judge is responsible for welcoming the jurors, describing the historic function of the jury and its responsibilities, describing the nature of the case (the plaintiff's claims and the defendant's denials and defenses), introducing the participants in the trial, disclosing the identity of prospective witnesses, advising the jury of the anticipated length of the trial, and committing to a working schedule for the trial. The judge should make an enthusiastic presentation and, if appropriate, emphasize the importance of the case to the parties and/or the community.

When the introduction is completed, the judge randomly calls prospective jurors to undergo voir dire examination. The examination should be deliberate but not burdensome. I cringe when I hear a judge boast that he or she selected a jury in 20 minutes. The parties have waited from one to ten years for the trial. Why rush jury selection? What harm comes from taking two, three, four or even five hours to select a jury that can try the case with an open mind, listen to both sides of the controversy, and render a decision based upon the law and the evidence?

Of course, there are horror stories of jury selections which have taken weeks, even months. Those lengthy jury selections are aberrations: the judge lost control of the process. Usually jury selection takes no more than a day. The exceptions for me are a half dozen criminal cases—including two in which the jury was being qualified to impose the death sentence—where it took two days to select a jury.

The judge should conduct the initial inquiry into the background of each juror. It is my practice to have each juror give a narrative autobiographical sketch, including place of birth, education, makeup of current family, residence (own or rent), occupation, occupation of persons with whom he or she lives, leisure activities, hobbies, reading, newspaper and television habits. I also ask about the individual's prior jury service (but without inquiring into deliberations). Other questions are related to the nature of the case. For example, in an alleged police misconduct case, I will ask jurors whether they have had encounters with the police. Further, I inquire into the juror's willingness to honor his or her obligation to the court and his or her ability to follow the law as provided in

my instructions. These interviews are intended to shed light on the prospective juror's ability to make decisions about a dispute between persons with whom they are not acquainted.³

Although the judge initiates this interviewing process, counsel should be permitted to participate in it. Many prospective jurors are more candid when counsel questions them than when the court questions them. The judge sits in an elevated position wrapped in a robe representing authority and integrity. The judge has introduced the prospective jurors to the case and has admonished them that they must be fair and open-minded. In these circumstances it is very difficult for a person to admit to the judge that he or she cannot be fair.

When counsel undertakes the questioning, the tone of the inquiry changes. I can recall a case in which nine prospective jurors who assured me that they could deal fairly admitted that they could not be fair with one of the parties when that party's attorney interrogated them in a quiet, fair, non-hostile manner. Although this is an extreme example, it is not at all uncommon for one or two prospective jurors, after assuring me that they can sit as fair jurors in the case, to admit a bias when counsel questions them.⁴

If we begin voir dire promptly in the morning, we select the jury, have opening statements, and most likely put one witness on the stand during the first day of the trial—but, I *never* put a stopwatch on the selection process.

II. PRETRIAL PREPARATION AND THE CONDUCT OF THE TRIAL

Although efficiency is important in all trials, it is imperative in jury trials. Most jurors are busy people. They are workers, students or retired people pursuing structured avocations. When they are first summoned, they view a jury trial as an intrusion into their lives. But this attitude changes: at least 90 percent leave my court with the feeling that they have learned about and contributed to the administration of justice. This feeling arises only if the jurors are used efficiently. They do not sit around twiddling their thumbs in their day-to-day lives and should not be forced to do so as jurors.

Therefore, the case should be ready for trial when the jury is summoned to the clerk's office and to the courtroom. Prospective

³ This is not always so in less populated counties (15,000 or under) in the United States.

⁴ Of course, counsel must not turn voir dire into a hypothetical trying of the case. Counsel is not permitted to obtain "commitments" from the prospective jurors.

jurors should not be summoned to the clerk's office only to be held in a detention or waiting room for hours or even days at a time. Further, when they are assigned to a courtroom they should not be obliged to wait there for hours while the judge and the lawyers iron out the last pre-trial wrinkles in chambers.

Prior to summoning the jury, the judge and the lawyers should review the anticipated testimony and exhibits. No surprises should be waiting for either the judge or the lawyers. The parties should mark each exhibit and make copies of documentary and photographic exhibits for themselves, the judge and each juror.

It is my experience that the evidence and testimony in a complex case anticipated to take six to eight weeks to try can be reviewed in a day or two prior to trial. The court should require the lawyers to prepare notebooks of the exhibits for each juror. Early in my career, I presided over trials where the lawyers would shovel in exhibits and never disclose their contents to the jury. It was not long before the jury was completely lost. When the jury is provided only a single copy of an exhibit which is passed from person to person, the trial is either delayed or jurors are called upon to look at an exhibit and listen to the testimony of a witness simultaneously. Both are undesirable. Careful pretrial preparation will aid juror comprehension of the evidence and expedite the trial.

Careful pretrial preparation will also eliminate the need to hold sidebar conferences or remove the jury from the courtroom during the course of trial. My discussions with jurors reveal that, next to idleness, they resent most the efforts of the judge and the lawyers to transact business either out of their hearing or out of their presence. They think they are being treated like children and that the judge and lawyers are not prepared. They are resentful because they have been called to participate in the trial of a case and yet are excluded from the trial process.

As lawyers and judges, we know that certain things must occur out of the jury's presence. It is not necessary, however, that those events occur during the course of the trial itself. Over the last ten years, I have not had any sidebar conferences; on only three occasions have I sent a jury out of the room. Those were criminal cases during which I recognized the need to admonish a witness who was toying with the truth and thereby exposing himself to a risk of criminal prosecution.

Before beginning the trial, the judge, after consultation with counsel, should establish a trial schedule and follow it religiously. In setting the schedule, the judge should leave time—one or one-half day per week—to attend to his or her other administrative

responsibilities. Meetings with counsel in the case being tried should be conducted in advance of trial in the morning or following the trial in the evening. Since jurors have other activities in their lives, must often travel a greater distance to court than to their normal place of employment, and may perform work they can tend to in the morning or in the evening, a schedule which meets their collective individual needs should be designed. The judge should also remember that the human attention span is limited: I would estimate that even the best of students can listen attentively only up to five and one-half to six hours a day. This is also true of jurors. Further, the trial should be limited to no more than five days a week.

The parties and the jury are best served if trial begins each day at 9:00 or 9:30 in the morning, recesses at 12:30 for lunch, resumes at 1:30 or 2:00 (during the one and one-half hour break the judge can dispose of some administrative responsibilities) and adjourns for the day at 4:30. Nights and weekends should be off-limits.

At the beginning of the trial, the jurors should be informed of the anticipated length of the trial and the working schedule. They should be informed as well of any day on which their services as jurors will not be required and of any court holidays which will occur during the trial. The judge should monitor the progress of the trial and advise the jury if its duration appears to be lengthening or shortening. The judge must see to it that the court adheres to the schedule.

The courtroom must have reasonably good acoustics or an amplification system since it is important for jurors to hear testimony. Further, since jurors, unlike judges, are reluctant to indicate their inability to hear, the lawyers and the judge are responsible for ensuring that the lawyers and the witnesses speak audibly. If it is necessary to position the lawyers in a particular place in the courtroom to assure that jurors can hear, it should be done.

Reasonable time limits should be imposed upon opening statements and closing arguments. Further, counsel should be confined to the proper purpose of an opening statement—outlining what counsel expects the evidence to show. I have read about, but thankfully have avoided, closing arguments that last for days. An examination of the subject matter of most trials reveals that the events in controversy are short (frequently lasting only a few moments) and uncomplicated. The presentation of the trial should mirror the event in question. Despite this, I have seen lawyers literally talk juries to sleep. Most lawyers would do well to remember

the old Protestant admonition that no souls are saved after 20 minutes.

III. JURY NOTE-TAKING AND QUESTIONS

I neither prohibit nor encourage jury questions or note-taking. I am concerned that a prohibition will distract the jury; yet questions and note taking are problematic for several reasons. Note-taking is an acquired skill either specially learned (stenography) or correlated to a person's level of education. We took no notes in grade school, few in high school, but many in college. Few persons have cause to take notes in their adult lives. As a result, a limited number of jurors have the skill; when the jury is allowed to take notes, only two or three jurors (in a 12 person jury) actually do. I am concerned that the note-takers will become the dominant jurors by corroborating their views with their notes.

Questions from the jury present other problems. First, questions interfere with the presentation of the case. My experience is that the lawyers in a properly prepared case know the information the jury needs for the purpose of deciding the case and the order in which it should be presented. Accordingly, I tell the jury in my introductory remarks: be patient, keep an open mind and the facts will be developed for you. In short—let the lawyers try their case.

Second, the jury's neutrality is affected when they are permitted to ask questions. Most people anticipate the answer they will receive when they ask a question. If they do not get that answer, they are disappointed or suspicious. These reactions affect the juror's neutrality and they interfere with the juror's ability to concentrate upon ensuing evidence.

IV. INSTRUCTING THE JURY

The movement to adopt pattern jury instructions—simple, concise, accurate statements of the jury's responsibility and the law applicable to the case—started at least 35 years ago in Illinois. Some states have followed the program. Some federal circuits have adopted it as well. The Federal Judicial Center and the Federal Judicial Conference have developed pattern instructions in criminal cases. I get the impression, however, that large numbers of cases are still submitted to juries with rambling, discursive and lengthy oral charges. I have heard of cases where charges to the jury have lasted a day. Even Justice Oliver Wendell Holmes could not have comprehended, retained and applied a day-long oral discourse by a judge.

Instructions should be simple, concise and accurate statements of the jury's responsibility and of the conditional imperatives or elements of the claims and defenses asserted. The instructions should be in writing but read orally to the jury. When I say they should be read, I do not mean they should be mumbled. If judges are not trained to read with emphasis, we should train them to be able to do so. This would not be a difficult undertaking.

Juries, like all people, comprehend better when they initially hear material orally and then have the opportunity to review the written version. Juries will follow the law if they are properly instructed and afforded the opportunity to review those instructions during their deliberations. On many occasions, jurors have told me that they had not expected the case to turn out the way it did but when they followed the instructions they arrived at the verdict they returned. They felt that the case was very difficult until they reviewed the instructions. The instructions made it simple.

The instructions I use are not mine. I use pattern jury instructions which committees composed of lawyers, judges, and in some instances psycholinguists and professional communicators have carefully drafted. In general, it takes 20 to 30 minutes to read the instructions. I cannot recall a case in which the instructions took more than an hour to read. Although I have the authority to comment on the evidence, I refrain from doing so, except in particularized cases of impeachment. Generally, I leave comments on evidence to the lawyers.

My thoughts on how to select a jury and try a jury case are not original. I learned them from lawyers and judges who were my mentors, judges before whom I tried cases, and lawyers with whom I have tried cases since becoming a judge. I recognize that a case may arise which demands treatment other than that I have suggested here. But in my 38 years of trying and presenting cases, I have yet to encounter that case.

V. THE JURY'S SUPERIOR COMPREHENSION, RECOLLECTION AND EVALUATION OF EVIDENCE.

In a bench trial, the parties have the attention of only one person, a judge, for whom trying cases is routine. That judge may find the subject matter of a particular case boring. For a jury, by contrast, trying a case is a unique experience. In every case, at least some of the jurors are interested in the situation, dispute and

problems presented. Together, they may be more attentive than a judge.

I am convinced that the jury's collective recollection of testimony is superior to that of the judge. The judge does, however, have one advantage. He or she is probably an accomplished note-taker (at least we hope so) and in those cases where the parties can afford to order it, he or she may also have a daily transcript of the testimony. Nevertheless, the jury's collective ability to recall the testimony is impressive. They have told me of their debates over what a witness testified to and they have recounted for me their resolution of those debates. Their recollection of disputed testimony has been highly accurate.

Today, jurors come from a variety of backgrounds.⁵ Jurors are often college graduates. Frequently, they are professional people. I have had lawyers, judges' spouses, corporate executives, accountants, scientists, students, police officers, steel workers, actresses, mystery writers, professional athletes, and retired people as jurors. People from all walks of life have worked on my juries.

As a result of their broad collective experience they are frequently better able to assess the credibility of a witness than a judge is. We tell them to assess credibility in the light of their own life experiences. They do just that. They bring six or eight or ten or 12 viewpoints to bear on the deliberations. The judge brings only one.

Finally, I am convinced that collectively juries are brighter than judges. Our benches are populated with very smart, successful people. The individual judge, however, cannot stand up to the collective intelligence, experience and wisdom of the jury.

VI. THE SPEED OF THE JURY'S DECISION

When the jury decides a case, the verdict—the truth—emerges quickly. On the average, if the case is submitted to the jury by lunchtime, a verdict is returned by dinnertime. Of course, deliberations in some cases take two to five days. In general, however, such lengthy deliberations occur only after trials which have lasted two to six weeks. We instruct the jury to consider each claim separately, each defense separately, each party separately. Since jurors

⁵ Historically, when juries were hand selected, many people were never called to serve because they were simply overlooked. Further, many were excused because they were "too busy." Finally, until the voting age was changed to 18 years old, students were unable to serve on panels.

take that instruction seriously, their deliberations may be time consuming.

Nevertheless, the jury reaches its decision much more quickly than does a judge in a typical bench trial. Though a judge in a bench trial may render an oral decision following closing arguments or an evening of reflection, my experience has been that after a bench trial of two to six weeks a decision is not forthcoming for months, or even a year. I include my own performance in those figures.

Why is this so? The primary reason is that the judge is diverted from the task at hand. He or she has other cases and administrative responsibilities. The jury, on the other hand, has a single purpose: to decide the case it has heard. Naturally, the parties want an accurate decision. But they also want a reasonably swift decision.

Some people decry the hung jury. Though a hung jury is a disappointment, it seldom occurs. In 38 years of trying cases, I have had five hung juries: four in criminal cases and one in a civil case. Juries want to decide the case submitted to them. When they are unable to do so, it is because they have been unable to agree on whether the plaintiff or prosecution has met its burden of persuasion. I have never had a jury hang because the jurors did not comprehend the case. Those who would dismantle the jury because it may hang are overstating their position: the risk of a hung jury is *de minimis*.

VII. THE JURY'S SUPERIOR INDEPENDENCE AND INTEGRITY

I have been around judges my entire professional life. I clerked for a judge for two years; I served on the Judicial Advisory Council of Illinois for eight years; I was a teacher for the Illinois Judicial Conference judges' seminars for many years; I have served on various committees with judges for the past 29 years; and for the past 16 years judges have been my colleagues. I regard judges highly. They are as much fun to work with, to play with, to fight with, and to drink with as any other variety of mankind. That is because they are human.

And because they are human, judges have biases. Certain judges have little tolerance for certain types of cases. Some judges firmly dislike certain types of cases. Other judges firmly dislike certain lawyers. I do not exclude myself from these categories.

In addition, in courts where a judge manages a case from beginning to end he or she may develop a bias prior to trial. The judge hears all of the pretrial motions, arguments, controversies,

bickering—whatever goes into the preparation of the case. It is the rare judge, in these courts, who does not have some notion of the outcome of the case before the trial begins—despite the fact that pretrial procedures are designed only to define the issues of fact which cannot be resolved without trial.

Jurors come to the case fresh. Some of them may have higher or lower levels of comprehension, some of them may have biases, some of them may be intolerant of the subject matter of the case at hand. But collectively, they balance each other out. Ideally, the jury has been selected with care, the biases or potential biases have been weeded out, and the group which hears and decides the case does so with open minds. The jury is ready to hear both sides and decide the case on the basis of all of the evidence and the law. It neither prejudges the merits of the case nor holds any biases against the lawyers or the parties in the case. With a jury, the litigants write on a clean slate.

Furthermore, judges are subject to influences to which juries are immune. Some judges aspire to continued tenure (all judges are not so fortunate to hold their office for as long as they exhibit good behavior). Other judges aspire to more prestigious political or judicial appointments. Some judges are influenced by the heat of controversial high-profile cases and others strive for approval in the circles in which they travel.

The jury suffers none of these handicaps. Of course, an individual member may be concerned about approval or the high profile of the case. In my years of visiting with jurors, however, I have observed this phenomenon only in highly publicized criminal cases. Even in those cases, I am convinced that the individual juror can overcome any apprehension simply by realizing that he or she takes part in a *collective* action. Together the jury decides only the one case and then each juror goes his or her separate way. Thus, the individual juror cannot be called upon to explain the verdict reached by an entire jury. When I visit with jurors, I urge them to refrain from trying to do so. They have reached a unanimous decision. Their unanimity reinforces them. They should not fracture that unanimity.

Though jurors are not called upon to give reasons in support of their verdicts, when a case has been properly tried those reasons are self-evident. The jury is instructed to decide the case on the basis of the law contained in the instructions and the evidence adduced in open court. They attempt to do so. Judges, on the other hand—at least those who are not in federal court and not subject to the requirement of findings and conclusions under Rule 52(a) of

the Federal Rules of Civil Procedure—frequently decide cases without stating any reason: they simply find for the plaintiff or the defendant.

Plain old down-and-out corruption cannot be ignored. In the past six years, numerous judges have been prosecuted and convicted of corruption in Chicago alone. Corruption is a national problem as well. In the past two years, three federal judges have been removed from office for official corruption.

How often do we hear of jury corruption? When it occurs it is national news. Reported incidents are very rare and invariably have been initiated by one of the parties. In my own experience, I know of only one case in which it arguably could be asserted that jurors were improperly influenced. In that case, the jury failed to reach a verdict because two jurors refused to agree with the other ten. After the jury was discharged, one of the other jurors wrote me alleging that one of the holdouts, whose brother was a former employee of one of the parties, had announced very early in the deliberations that he would not vote for that party. Evidently, the juror recruited a colleague. The voir dire examination of the jury had not included an inquiry into whether any member of the jury had ever had a family member employed by one of the parties.

VIII. COMMUNITY VALUES

I am persuaded that the jury brings community values to the decisionmaking process. Most cases are tried in the forum where the incident giving rise to the controversy occurred. Most cases involve members of the community from which the jury is drawn. And most jury cases are close cases: one-sided cases are disposed of before trial by motions or settlement negotiations. In these close cases, it is appropriate for the jury to assess the harm allegedly inflicted on the plaintiff in light of the values of the community in which it occurred. Jurors do just that. I do not mean to say that juries superimpose their own values on the law articulated in the instructions. Nor do they engage in jury nullification—an alleged phenomenon which, if it occurs, occurs more frequently in criminal than civil cases. Judges similarly strive to assess the harm in light of the community's values. But the judge is handicapped because he or she is only one person with one background and one viewpoint. I am convinced that collectively the jury is better able to decide the case in a manner consistent with community standards and values than is the judge.

IX. OTHER PERCEIVED PROBLEMS

Other problems with juries may arise. Sleeping jurors should be awakened or excused and replaced with alternates. Jurors who drink or allegedly take drugs should not be allowed to do so while acting as jurors. To avoid this, I tell the jurors not to drink during the trial day, that is, at lunch. When a bailiff is available, I ask the bailiff to keep an eye on the jury. When a bailiff is not available, I keep an eye on the jury. I stop in and chat with the jury once or twice a day. I discuss general topics, not the case. If the bailiff reports to me or I observe some behavior that is troublesome, I report it to the lawyers. On only a couple of occasions, however, have we had to excuse an aberrant juror by agreement.

CONCLUSION

Our use of the jury for the resolution of civil and criminal disputes is unique. Only in the United States is the jury used so frequently. Only in the United States is there a constitutional right to jury trial.

I believe we should strive to preserve the jury. We should not tolerate lengthy, burdensome, incoherent trials. We should not allow jurors to be summoned only to have them spend most of their time in the jury room rather than the courtroom. We should tell them what we expect of them, provide a reasonable working schedule for them and stick to it. In short, we should provide the jury with an environment in which they can discharge the high responsibility that we place upon them. When this is done the jury responds with dedication, honesty and enthusiasm.

