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Reinventing an Outdated Wheel: Innovations in Complex Litigation[*]

by John C. Lowe[**]

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I. Introduction

1. Even in the nation's most innovative courts, traditional jury practice in complex litigation suffers from major problems as far as the jurors themselves are concerned. Many post-trial interviews with jurors over the years have revealed a number of common problems. The three areas of the most frequent jury complaints are jury selection, trial procedures, and jury instructions.
2. These problems intensify in long jury trials, such as patent infringement lawsuits. Factual matters in these cases often involve complex high-tech substantive issues. Legal matters include complex issues of esoteric patent law. Indeed, the complexity of patent infringement cases has led some observers to question whether juries should decide them. Other complex technology cases, such as

products liability and medical malpractice cases, have similar problem areas.

3. But as long as the Seventh Amendment and the tradition of jury trials remain firm fixtures in America's legal system, juries will continue to grapple with complex cases. The question then becomes: Shouldn't the court and the attorneys representing all parties strive to present the information to the jury in a clear and understandable way?
4. The answer to the question posed is a resounding Yes. Trial judges and trial lawyers can, with ingenuity, develop ways of increasing a jury's understanding of complex subject matter and legal principles, and helping to ensure fair and just verdicts. This article reports on some innovative devices employed over the past several years in some highly complex patent infringement lawsuits with hundreds of millions of dollars at stake. The same devices apply to other types of highly complex litigation.

II. The Innovative Trial Judge

5. Under the Federal Rules of Civil Procedure and in many state systems, trial judges have wide discretion over the areas of jury selection, trial procedures, and jury instructions. From the outset of a complex trial, the judge can make one thing clear: The attorneys should look for innovative ways to improve the trial process, from jury selection to final instructions and argument. The judge’s mandate can challenge the attorneys to conduct the trial in a way that places jury comprehension as a top priority.

III. Jury Selection: The Juror Questionnaire

6. To lay the groundwork for effective jury selection, counsel should ask the trial judge to send the potential jurors a questionnaire before voir dire takes place, in order to reduce the time required for jury selection and make the selection process more effective. Juror questionnaires in several complex trials over the years have met with great success. With the judge's approval, the parties prepare an agreed-upon questionnaire and, under the best of arrangements, the judge has a magistrate judge summon the jury pool to court a week before trial to fill out the questionnaire under the supervision of the magistrate judge. The questions can range far and wide, relating to diverse subjects from personal and family data to opinions on various subjects, from familiarity with the involved technology to levels of education. Counsel should have well-considered positions on the reasons for the questions proposed for the questionnaire, as the judge will need to be convinced that a questionnaire in general and the questions on *this* questionnaire in particular are a sound idea. A strongly persuasive reason to have a questionnaire is that it *saves time* while still facilitating the seating of a fair jury.
7. The parties should receive copies of the responses to the questionnaire under a protective order to ensure the confidentiality of the jurors’ responses. The questionnaire enables counsel to undertake a very effective jury-selection process and to identify and eliminate unsuitable potential jurors.

IV. Jury Selection: A Preselection Jury Charge

8. Most jurors look at jury selection as a test to see if they are good enough to serve, a perception dramatically reducing their willingness to answer voir dire questions candidly. Admitting to simple human feelings might result in their being struck, which they would perceive as being branded unfit for jury service or, even worse, not a good person. To be struck from a jury peremptorily would be a judgment causing them embarrassment if their co-workers or neighbors ever found out. To be struck for cause would be tantamount to indictment, trial, and conviction of not being a good citizen.
9. As a result of this misperception many jurors do not provide candid, reliable information about themselves. This complicates the task of obtaining a fair and impartial jury for a particular case. The solution: Change the jurors' perception. Instead of letting jurors believe that the jury-selection inquiry seeks to find out if a juror is a good person, recast the process--correctly--as an opportunity for a juror to help the court determine on what kind of jury you are best suited to sit as a juror.
10. Many years ago I proposed an innovative preselection instruction to be read to the jury by the judge. Its purpose was to assure the potential jurors of the nonjudgmental purpose of jury selection. It was an instruction I had created years ago, in a previous incarnation, for use in criminal jury trials. Several judges over the years adopted the proposed instruction and read it to the jury at the beginning of voir dire. The instruction appears as Appendix A.
11. Thus freed from anxiety about being branded unfit, prospective jurors respond with remarkable candor, which facilitates very effective jury selection. This instruction not only results in better jury selection but also allows unselected jurors to feel good about themselves and maintain pride about their jury service despite their dismissal.

V. Jury Selection: Lawyer-Conducted Voir Dire

12. In the majority of my most complex federal jury trials, the judge has authorized lawyer-conducted voir dire on a limited basis. Many modern judges--particularly those with extensive trial experience before taking the bench--recognize the need for lawyer-conducted voir dire and require very little persuading.
13. Trial lawyers can persuade their judges by carefully presenting a proposal for *limited* voir dire by the lawyers. In my experience, the *limits* that resulted in a favorable decision by the judges were elimination of jury conditioning questions, questions that tried to try the case during voir dire, and other questions that did not bear directly on a determination of what kind of jury the jurors were best suited to sit on.
14. Voir dire questioning of all potential jurors as a group should begin with general questions from the judge. Following that, the lawyers should be allocated a reasonable time for each side for lawyer-conducted voir dire within the established limits. Inquiries by the lawyers following up on answers to juror questionnaires should also be permitted.
15. Voir dire of the entire venire by the court and counsel is best initially conducted with all potential jurors sitting in the gallery seats in the courtroom for questioning. When a potential juror gives a response that calls for further inquiry, the judge can then ask the potential juror to come forward for a side bar at the witness box, out of the hearing of the other potential jurors. Follow-up lawyer

questioning of individual jurors can also be conducted at side bar, which protects juror confidentiality and facilitates candid responses that enable the court to identify potential jurors who would probably be better suited to sit on a different type of jury without embarrassing the potential juror in front of others. The voir dire should proceed with dispatch and jury selection can be concluded in a very reasonable time, usually no more than three hours in a complex case.

16. Many trial lawyers reading this article might think that voir dire in a complex case, to be effective, would take much longer than a couple of hours. The answer is simple: not if the questions are properly limited and voir dire is properly controlled by the judge. Certainly in a multimillion-dollar case the parties ought to have some input to voir dire. But the truth is that most lawyers want more than they need and end up asking the kinds of questions that judges just will not allow.
17. It is distressing that so many judges will not allow lawyer-conducted voir dire. The court can prescribe tight ground rules to prevent undesirable questioning techniques or subjects, yet allow the lawyers the chance to identify any bases for strikes for cause and to formulate informed bases for peremptory strikes.
18. Jury consultants and trial lawyers who try many jury trials know that judges simply cannot elicit from jurors the kind of candid information necessary for effective jury selection. Even where judges ask meaningful questions, the authoritative image of the black-robed judge, cloaked in the powerful authority of position, inadvertently intimidates many jurors and inhibits their open responses.
19. But with proper judicial guidelines and oversight, lawyer-conducted voir dire not only can succeed but can enable the parties and the court to seat a jury best suited to try a complex patent infringement case or other high-tech case. Everyone wins with properly guided, lawyer-conducted voir dire.
20. Also, under the Federal Rules, a judge can configure the size of the jury. In the best of circumstances, the judge should rule that there will be no alternate jurors as such--all jurors who hear the trial to deliberations should deliberate. To provide alternate jurors in case some are lost during trial, the judge should provide a jury of twelve, with the proviso that if jurors are lost to illness or other problems during the trial, the jury will not be reduced below six jurors. This procedure ensures that no juror will be less attentive because the juror is only an alternate, as there are *no* alternate jurors.
21. By using these procedures, innovative trial lawyers can obtain a jury of twelve jurors capable of deciding a case involving complex technology and legal principles.

VI. Trial Procedure: Preliminary Jury Instructions

22. In many jury trials the jury sits through the entire presentation of evidence without the slightest idea of the law affecting the trial of the issues in the case. Only when the parties finish presenting their evidence in those cases do the jurors receive the instructions on the law--too late to help them know what to look for as the evidence is presented. During the trial, jurors can hark back only to any explanations of the law the lawyers might have given them in opening statements. That process suffers from two limitations: (1) judges usually frown on lawyers telling the jury what the law is, except for the most basic concepts, and (2) during opening statements the lawyers have not yet had a chance to build a trust level with the jury, and the jury is skeptical about

anything the lawyers have to say. So the jury typically feels at sea about what is going on.

23. Particularly in a complex case, the judge should give *comprehensive* instructions in lay terms to the jury *before* opening statements. The instructions should deal with the concepts of law involved in the case, provide an outline of the issues in dispute and the related burdens of proof, and include other helpful guidance for the jurors.

VII. Trial Procedure: Juror Notebooks

24. One of the most important things a judge can do to help the jury in a complex case is to provide the jurors with legal pads and notebooks, and allow them to take notes and maintain the notebook during trial. Throughout trial with the court's approval, each party should be permitted to designate exhibits to be inserted into the jurors' notebooks by the courtroom deputy, thus enabling the jurors to look frequently at important exhibits as the trial unfolds. Additionally, the jurors should have in their notebooks copies of the court's preliminary jury instructions and a glossary of relevant technical terms to refer to if they want to. In patent infringement cases, for example, jurors frequently take notes and look at the exhibits in their notebooks during testimony about those particular exhibits--for example, copies of the patent-in-suit and pertinent parts of the prosecution history of the patent. The procedure is much more efficient and effective than passing exhibits around the jury during the trial. Under a typical court order, the jurors are not permitted to take the notebooks out of the jury room or courtroom.

VIII. Trial Procedure: Jury Questions

25. Counsel should ask the court to allow jurors to submit written questions to the court during the trial, seeking clarification of the testimony as it is heard by the jury. The lawyers can view these questions at side bar before the witness leaves the witness box, object to the testimony the questions would elicit, if appropriate, and, if the questions are approved by the court, can then ask the questions of the witness, if they desire. Often, interesting and helpful questions are asked by jurors during a trial, allowing counsel to focus the witnesses more on the subjects of concern to the jury. To limit the jurors' questions, however, the court should not allow them to inquire about their own alternate case theories or initiate new lines of questions they might conjure up.

IX. Trial Procedure: Deposition Reading

26. Jurors do not enjoy having to sit and listen to the seemingly interminable reading of depositions. The most creative, dynamic lawyers in the country cannot make the experience palatable, much less interesting. Radical surgery is called for and should be approved. There is no reason to treat a deposition any differently than any other type of evidence. The parties should have the option of submitting deposition transcripts as written exhibits, redacted by agreement of the parties or by ruling of the court to eliminate undesirable and inappropriate material.
27. This procedure entails one disadvantage: if the jury has to slog through lengthy deposition

transcripts, the key passages will probably be read by only the most conscientious jurors, if by anyone at all. Years ago I pondered this dilemma: How to create the time-saving, boredom-eliminating procedure of submitting depositions as exhibits and still call the jurors' attention to the most important parts of the testimony? I decided that the solution was to do the same thing we do with transcripts and documents in our law offices--namely, highlight them with colored highlighter pens. Each party picks a highlighting color and highlights what it believes to be particularly important deposition passages. [1] To complement that effort, the parties place plastic flags on what they consider to be the most important pages of the deposition so that the jurors can spot them quickly. This system works like a charm, and judges embrace it.

28. The parties should be similarly permitted to highlight and flag documentary exhibits to assist the jury by pointing out the most important passages. There frequently are many exhibits with large numbers of pages but few really important passages. Since both parties can highlight and flag whatever passages they think are important for the jury to read, the procedure protects everyone and helps the jury immeasurably. In final argument, counsel can tell the jury to look for its colored flags on particular pages of depositions and exhibits, confident that the jury can more readily focus on the best evidence for the case.

X. Jury Instructions

29. Even in the most progressive courts, innovation in the field of jury instructions faces significant hurdles. Judges are leery of changing established, traditional jury instructions for fear of being reversed. Lawyers, fearing criticism from clients, have similar anxiety about eliminating complex language and boilerplate provisions from traditional instructions.
30. Traditional jury instructions are loaded with the detritus of generations of appellate case law that has little or no functional role in today's jury trials. Fearful of risking reversal because their appellate court might rule that some tattered remnant of an ancient case should have been included at the request of a party, most trial judges have simply repeated many long, tedious, and unhelpful instructions. As a result, lawyers feel compelled to present an aggregate of instructions so voluminous that significant instructions for the jury get lost in a mass of legalese.
31. The problem often is compounded by a judge reading the voluminous instructions in a monotone to the panel of bored, impatient, and uninterested jurors. Then, adding insult to injury, some judges dispatch the jurors to the jury room without a copy of the instructions. Many judges who refuse to provide the jury with written jury instructions do so for the stated reason that if the jurors have them they may focus on a particular instruction and not consider the instructions as a whole. In my experience, jurors consider all instructions but need to have them in writing to facilitate deliberations.
32. Jury instructions in complex litigations, such as patent infringement cases, are usually organized so that the jury must match up juror interrogatories--usually written in a separate document--with applicable and pertinent instructions either from memory or from a single massive pile of instructions. When jurors try to work out a decision tree to assist them in deciding the issues in the case, they face the daunting task of having to cope with massive and poorly organized instructions, which do not seem to correlate to the juror interrogatories.

33. This problem can be solved in several ways. First, restructure the traditional format of jury instructions and intersperse juror interrogatories throughout the instructions, instead of at the end. This technique avoids juror confusion and allows the jurors to consider the interrogatories at places in the instructions where the subject matter of each interrogatory is being considered. A separate recap sheet restating the same interrogatories interspersed throughout the instructions requires the answers already marked by the jurors on the interrogatories throughout the instructions to be copied onto the sheet as a summarizing verdict form.
34. Second, each juror should receive a complete set of the final jury instructions to add to the preliminary instructions already in the juror's notebook. When each of the jurors has a copy of the final instructions, he or she can then follow along as the judge reads the instructions. It has long been recognized that people understand material better when they read it at the same time they hear it. [2] Each juror's having a set of jury instructions significantly raises comprehension of them.
35. Third, to produce plain-language jury instructions, trial lawyers should cut and slash much of the traditional verbiage, eliminating the boilerplate instructions pervading most sets of jury instructions. Eliminate instructions on subjects that are unnecessary articulations of matters of common sense or everyday experience of the jurors or matters that are properly relegated to argument. [3]
36. The jury's finding instructions should contain three sections stating (a) The Parties' Contentions, [4] (b) Questions You Must Answer (the interrogatories), [5] and (c) The Law to Be Applied in Answering the Above Questions.[6]

XI. General Lessons Learned

37. Several lessons become apparent when trying complex lawsuits. First and foremost, *aggressive* participation by the trial judge in the early pretrial drafting *and approval* of detailed preliminary and proposed final jury instructions--weeks or perhaps even months before trial--goes a long way toward allowing counsel to simplify and limit complex subject matter and trial issues and thereby reduce jury confusion. The notion that jury instructions cannot be drafted before the judge hears the evidence just does not comport with reality. Exhaustive pretrial discovery in most complex cases enables the parties to frame most of the reasonably anticipated jury instructions months before the trial. Further, by resolving disputes over the form and content of jury instructions early on, the court can enable each party to assess the value of the case more accurately and to plan efficiently what evidence to present. But court orders that the parties should confer and arrive at agreed-upon jury instructions just do not work very well without the active participation of the trial judge, including early and decisive rulings on disputed jury instructions.

XII. Conclusion

38. Just when practitioners might think that pretrial and trial procedures are carved in stone and beyond meaningful improvement, significant innovations can improve the conduct of the trial. This is particularly appropriate in high-tech cases where the parties have often built their

reputations on finding ways to do established things in better ways. With forward-looking judges and ingenuity from counsel, unique approaches beyond those suggested here will surely follow. The innovations discussed in this article not only help the lawyers trying the case but--more importantly--enable the jury to understand a complex case and render a better verdict.

APPENDIX A

PRELIMINARY JURY CHARGE PRIOR TO VOIR DIRE

39. Ladies and gentlemen of the jury, by your preliminary answers to the questions about your citizenship and residency, you have shown that you are qualified to serve as jurors in this court. The remainder of the process, which we call jury selection or voir dire, is aimed at determining which type of jury you are best suited to sit on as a juror.
40. Because of the different life experiences different jurors have had, some jurors are better suited to sit on criminal trial juries and others are better suited to sit on civil trial juries. Similarly, within civil trial juries generally, some jurors may be better suited to hear trials concerning automobile accident claims, for example, and other may be better suited to hear patent suits.
41. The questions that will be asked of you by counsel and the court are aimed at helping us determine the type of jury you are best suited for. The result may be that you will be excused from jury duty today, and will serve on a different jury on a different day in this court. You should not take any of the questions to be a judgment on whether you are a good citizen or not, as it has already been determined that you are qualified in citizenship to serve as a juror in this court.
42. Since it is important to determine which kind of case you are best suited for, it is important for you to be as open and candid with counsel and the court as possible in answering their questions. If we have the most accurate information about your life experiences and the opinions you may hold, then we will be able to determine which kind of jury you are best suited to sit on.
43. Some of your answers may be such that the law recognizes that you would be better suited for a different type of jury, and the judge will excuse you from this trial so that you may serve on a different type of jury. When that occurs, it is called excusing a juror for cause. But that only means that this is not the type of case for which you are best suited, because of a reason specified in the law.
44. Other questions may reveal facts that do not make a clear-cut determination about whether a juror is best suited for this particular case, and it will be up to the lawyers to excuse certain jurors they believe would be better suited for other types of jury duty. The lawyers will exercise what we call peremptory challenges.
45. All of these challenges, whether for cause or peremptory challenges, have the same purpose: to determine which type jury you would be best suited to sit on, and to seat a jury for this case comprised of jurors well suited to try this type of case.

Footnotes

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[**] Mr. Lowe, a graduate of Lehigh University and the University of Virginia School of Law, is a partner in the intellectual property law firm of Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P., in its Washington, D.C. offices. As first chair trial counsel he has tried over one hundred jury trials to verdict, including cases involving various types of complex technology. He now devotes his practice to the trial of patent infringement and related cases.

[1] In a case many years ago, I had obtained permission for highlighting a deposition, but the same color was used for all highlighting, regardless of which party highlighted the passage. When I highlighted a short, important passage, my opponent simply highlighted a full page before and after--in the same color, of course--thereby effectively eliminating the *highlighting.* With each party using a separate color, this problem disappears. In addition, where there are more then two parties, a different color can be assigned to each party.

[2] Based on extensive research of Courtroom Sciences, Inc., Dallas, TX.

[3] The parties can agree to eliminate certain instructions. Without agreement, naturally there would be an issue of whether it would be error not to give them. However, most lawyers would be happy to eliminate many of the boilerplate instructions by joint agreement with the endorsement of the court, so long as the procedure did not give some sort of procedural or appellate advantage to the opponent.

[4] Each party should be given free rein to state briefly its contentions in each instruction, with the court exercising oversight. For example, in a patent infringement suit, the patent holder might have a contention in an instruction on ownership, *ABC Company contends that it owns the *123 patent through an assignment from the named inventors, Dr. X and Dr. Y, to DEF Company and a valid transfer from DEF Company to ABC Company.*

[5] Example (In the case of ABC Company v. PQR Corporation):

*INTERROGATORY 9

Has ABC Company proven by a preponderance of the evidence that it owns the *123 patent? YES _____ (for ABC Company) or NO _____ (for PQR Corporation).*

By identifying the prevailing party in each possible answer, the court can try to ensure that there are no unintended answers arising out of juror confusion.

[6] The law should be stated in simple, direct, layman's language, free of boilerplate and verbosity, using the names of the parties and referring, where applicable, to specific witnesses or evidence. An example of this type provision is: *Concerning the ownership of the *123 patent, you must consider if the ABC

Company has proven by a preponderance of the evidence that it was the assignee of the *123 patent.*