
The American Legal System: Justice or Just Us?

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Can justice be bought in the American system?

The answer in a word is “Yes” and “No.” The question, however, is not whether Hollywood-style plots to tamper with, threaten, or bribe judges or jurors succeed, or even whether “designer” lawyers supported by maverick trial consultants and paid experts “unnaturally” influence the otherwise noble process of the American legal system. The real question is whether the money spent on reinforcing one side of an issue or the other leads to a bad (that is to say, wrong) outcome.

Justice is in the eyes of the beholder. Though a lofty ideal, there is no universal agreement of what justice is. If such agreement existed, there would be no need for a process to determine the just result because it would already be known before any trial took place. Everyone does not agree on what justice is in a particular instance because different people are driven toward different outcomes, each seeing their desired outcome as serving justice. That is natural. For example, in the insurance industry, policyholders may believe justice is having their claims found legitimate and covered, while insurers may believe justice is having claims scrutinized for reasons not to pay or for retrieving payment by reserving their rights when they do pay. The system is driven by self-interest and the assumption that each side will do all it can to prevail.

While one often hears rhetoric about seeking justice and being fair and impartial, these mean different things depending on whom you ask. I recall asking a lawyer whether he sought justice. His response still rings true as he explained, “You only want justice when you are not involved. When you are involved, you don’t want justice; you want to win.”

In trying to win, advocates use the best tools and weapons available to obtain the desired goal. Everyone involved attempts to accomplish persuasion toward their way of seeing things, to the most favorable audience possible. The efforts expended are on using the strengths of the case as perceived by the trial team, presenting what is helpful, and doing damage control as well as possible.

Trying to win also includes trying to avoid unfavorable-seeming jurors and arguments, and resisting unfavorable decisions by the judge. This is natural. Wanting to win is natural. The desire to win (or not to lose) money or liberty is also natural. To reject this is to believe that there is a predetermined party in the right that should prevail no matter what. As if for each case there is a “telos,” or ultimate end, that could be discovered if only the seeker were perfect in his or her method. This, however, flies in the face of the fundamental premises of the American system: Everyone deserves their day in court, everyone is

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entitled to proper legal representation, and everyone is innocent until proven guilty. In short, everyone has the right to win.

Theory does not equal reality. What the law requires often differs from what actual people in the position of making decisions require, for their requirements are based on their desires and experiences, not the law. Several examples demonstrate this gap. The law typically claims that the party suing has the burden of proving its case, while the accused need not prove anything. Yet most decision-makers want to hear the truth from the horse's mouth (i.e., the accused). The law may offer the party being sued or prosecuted the option of a judge or jury of peers. However, no one has 6-12 true peers (especially when there is disagreement on what constitutes a "peer" and where individualism is at a premium).

A commonly heard suggestion is to help restore the so-called natural process by having advocates accept the luck of the draw in selecting a jury to assure its randomness. The suggestion is to take away advocates' ability to exercise "peremptory strikes" (i.e., the ability to reject a fixed number of potential jurors without stating any reason). Many believe that a jury should be "neutral" (i.e., comprised of people who are disinterested, impartial, nonpartisan, open-minded, and unbiased). However, neutral is not natural. These requirements defy the basic human condition. Prospective jurors are ordinary people, not empty vessels void of experiences, knowledge, prejudices, and attitudes. In other words, jurors have natural preconceptions which prevent them from being truly neutral.

Some see specialized trial consultants, or "jury pickers" as some commonly refer to them, as an unnatural intrusion into a legal system which would otherwise be natural (that is, random). However, there is a major flaw in the belief that absent the advocates and their advisors, juries would be random. Before advocates or consultants even become part of the mix, the randomness of a jury is limited by who is available in the pool of prospective jurors. To be random, there would need to be a blind call with an even chance to any of them. This is simply not the case. From the outset, it is not random because jury eligibility is limited "naturally" by a number of things. Some of the limitations include age, distance from the court, language fluency, citizenship, registration with the motor vehicle bureau or voter registration, and the lack of certain physical and psychological impairments. A truly random system would include anyone, but it does not.

An additional criticism is that advocates try to stack juries with people who are not neutral, but rather who favor

the advocates' side. Jury selection gives advocates some say in who is dismissed, but not over who stays; they are left on the jury by default, often through seating arrangements and substitutions which may be entirely unpredictable. Hence, there is a natural limitation to what anyone can do to influence the randomness of jury composition, even if they so desire.

The effect of trial consultants, for instance, is to help advocates do what they already do, only better. What do social scientists do to accomplish this and who benefits? In brief, they bridge the gap between the kinds of expertise required to satisfy the law vs. the audience (the jury). Lawyers' expertise is the result of a very specific education in the law, personal status in the world, and experience with specific case facts and players. As a rule, lawyers are better educated, more motivated, more interested, and have lived with the facts longer than jurors ever will. Lawyers do not get their training by interacting with common people, nor do common people usually come from their world. Lawyers are immersed in the minutiae of their cases because that is what the law requires. Jurors, on the other hand, are not subject to such requirements. This is why and how big plaintiff lawyers beat up on "egghead" defense lawyers. Social scientists, on the other hand, are trained observers and interpreters of what jurors as people want and need to know to resolve the conflicts in dispute as they, the jurors, see them, not necessarily as the lawyers or adversaries do.

Skilled trial consultants offer vital information to parties in litigation through sound methodological techniques of research design, data collection, analysis, and seasoned consulting, which take years of proper education and training. Empirical research is more reliable and far more objective than plain old intuition.

When done properly, jury research also identifies the kinds of arguments jurors accept or reject and what can be done about them. Further research may be required to test reshaped arguments and determine likely damages awards. Jury profiling to identify the most hazardous juror features for your case optimizes the use of peremptory strikes, when allowed. When the key themes of a case are identified through research, they can be reinforced in the minds of the jury. This is accomplished in various ways, including recommendations for the presentation approach of the lawyers, proper preparation of witnesses to carry the themes throughout the trial (as if in a relay race), and through strategic graphics and demonstrative exhibits. The tools that trial consultants add to the repertoire of a skilled trial lawyer can strengthen one side of the case to the detriment of the other. Is this bad or simply imple-

menting the system to its utmost?

There are many other examples of psychological components which determine decision-making and thus the relative strengths and weaknesses of a case presentation strategy. The concepts of impression formation, credibility, perception, comprehension, and memory are not in the curriculum of law, yet clearly affect the lawyer's audience and need to be understood, assessed, and applied where relevant to a trial strategy. Knowing that these psychological factors necessarily affect the outcome of a trial, especially a jury trial, does subvert or enhance the trial process by using trial consultants trained in psychology.

As Shakespeare might have said, "All the litigation world is a stage." However, most lawyers are too bogged down with the factual agenda of the case to satisfy jurors' needs for a well-told story with sufficient drama to sustain their attention enough to watch the stage. Trial consultants play a significant role by identifying what the best story is (given the facts and the players) and ways to deliver it with clarity and interest. It could be argued this improves the jury trial system by making it jury-friendly.

By not understanding what claims mean in the eyes of the jurors, clients set themselves up to be victims of the archetypal insurance defense attorney who may tell the client "You have a great case," only to phone back the day it goes to trial to announce, "We're settling" from the courtroom steps. A client has a right to know what his or her case is really about, how well the attorney has prepared the case, and the strengths and weaknesses related to it. These are some of the reasons why jury research is a useful tool for litigants, especially unpopular ones or those facing daunting case facts.

Since there are no reliable actuarial data of jury verdicts and awards, jury research is the best source of risk assessment. Such research is based on fair representation of the case and of the kinds of people who sit on real juries.

Several well-publicized cases exemplify how trial consulting made a significant difference by seeking to understand and satisfy jurors' needs, and to resolve their dilemmas in reaching a verdict. The Menendez brothers, for instance, alleged that they killed their parents because they feared being killed themselves after experiencing years of abuse as children. The first time the cases were tried, defense counsel were highly effective at showing the father as an unlikable, arrogant, difficult, powerful, and abusive man who the brothers feared. Each brother's trial resulted in a hung jury (i.e., no unanimous verdict was reached) because jurors would not abandon their opposing positions. Some held fast to their sympathy for the abused young men on one hand, while others vehe-

mently rejected the defense as an "abuse excuse" on the other.

The role of trial consultants was key in bringing the retrial (for which the defendants were tried together) to a different end. The strategy was to help jurors organize the evidence differently to show that the defendants' actions were not justified. The first prosecution goal was accomplished by putting the focus on the history of the mother's relationship with her sons, as she had a significantly less salient role in their alleged prior abuse than the father and was hardly a current threat to two grown young men. By focusing on that, it would be difficult to see her murder as justified. If jurors were persuaded that the brothers committed unjustified murder against her, it would be easier to carry this judgment over to the father's murder as well.

An example in which trial consultants played a key role where money was at stake rather than liberty is a patent dispute between a small, unknown company and a Japanese-owned industry giant. The case revolved around patented video game technology and whether the industry giant infringed it. Jury research revealed several key problems for the plaintiff: 1) individuals attracted to technology and video games were impressed with the defendant's audio and visual wizardry, but were disinterested in how it came about; 2) the technology represented in the plaintiff's patent was abstract and complex, while the defendants' allegedly infringing products were concrete and simple; and 3) jurors with anti-Japanese bias who might have been considered unfavorable to the defendant did not apply this bias against the defense when coming to a verdict, so it was of no help to the plaintiff.

To overcome these obstacles for the plaintiff, a trial strategy was forged based on research with mock jurors, which proved effective. A theme describing the plaintiff's breakthrough technology as the "seed to the tree" on which all other such games were produced and enhanced with bells and whistles was salient to most mock jurors. It was quite persuasive and overcame important weaknesses (e.g., that the company never produced anything based on its patented idea and that the company was bankrupt, while the defendant was a great success worldwide). The plaintiff's affirmative position of ownership was further enhanced by having the actual inventors dramatically "tell their story" of how the seed was developed and how the branches of the tree related back to the seed. They effectively portrayed the personal aspect of owning – and being robbed of – something which turned out to be very valuable (a story many people can appreciate).

Finally, the research identified traits of unfavorable ju-

rors, and during jury selection this information was used to eliminate those most unlikely to favor the plaintiff. In the end, the jury found the patent valid and infringed and awarded hundreds of millions of dollars to the plaintiff (although the appeal process ultimately rejected the amount awarded).

A third example involved the manufacturer of sophisticated telephone equipment used by a relatively new mail-order company. The mail-order company claimed it was losing business because the manufacturer's equipment was defective and could not process a large volume of calls. The plaintiffs' expert had prepared a damage model which supported an award in the tens of millions of dollars. The plaintiffs, a group of likable entrepreneurs, had filed the case in their hometown.

The manufacturer planned a case story which, first and foremost, defended the performance of its equipment and challenged the plaintiffs' damage model. Because the technology involved was quite sophisticated, a lot of emphasis was to be placed on explaining this technology to the jury. But the manufacturer's case story also attacked the credibility of the entrepreneurs, accusing them of mismanaging the business.

A trial consultant was retained to evaluate and refine the manufacturer's story. Research strongly indicated that real persuasion in this case would be achieved at a different level. A different tactic was chosen.

A story was recommended which took advantage of the plaintiffs' desire to paint themselves as an American success story. The new story celebrated the entrepreneurs' success and congratulated them for generating such a large volume of business. Completely different in tone and substance from the original story, the new story placed very little emphasis on the equipment and its function, and a great deal of emphasis on how the plaintiffs had become an overnight success.

Embedded in the story was a key theme: "They got too big, too fast." It was a simple, easy-to-understand concept, and ultimately became the filter jurors used to decide the case.

Testing showed this theme to be very effective, especially in the context of the positive story now being told. The entrepreneurs were portrayed as people who were not bad managers so much as they were simply unprepared for their sudden success. The story was no longer technical or negative; it allowed the jury to like and admire the plaintiffs, yet still find against them.

When the case went to trial, the jury found for the manufacturer. Summing up the jury's opinion of the en-

trepreneurs in his post-trial interview, the foreman said, "These were good guys who had good ideas; they simply got too big, too fast." The jurors had embraced the story and made it their own.

These examples demonstrate that trial consultants, using social science research methods and principles, are able to reverse jurors' orientation by strategically redirecting their attention and satisfying their need to find for one party or another.

These scenarios exemplify how skilled professionals impact the system, a circumstance which is seen as a strength or a weakness of the system, depending on whom you ask.

What are the weaknesses of this system? It is often driven by economics and politics. That is, it is more likely that the party more economically or politically attracted to the service providers will benefit most from their services. A modest individual is unlikely to be able to afford the services of a host of experts, including a premiere trial consulting firm, or to attract them with a promise of good marketing or politically correct pro bono recognition.

A balancing factor may be the natural advantages of an individual's case in David vs. Goliath lawsuits, since the David character is often more popular and engenders more sympathy from jurors than a big, rich corporation or insurance company.

How can these "defects" be remedied? If one defines the defects of the American legal system as the ability to hire superior representation and skill at attempts to sway decision-makers to agree with you, then the "defects" of the system are the backbone of the litigation industry. However, the ability to prepare well for litigation is the result of skill, not finances. A streamlined, hard-hitting presentation which is thematic and clear is far more compelling to a jury than an elaborate dog-and-pony show which is unfocused and lacking in proper substance. Without knowing the themes of a case and how each witness and exhibit can support them, an expensive presentation is reduced to bells and whistles and will not carry the day.

To the extent that finances determine who gets what in legal preparation, there are several solutions for those who cannot afford it. Attorneys can learn to improve their trial presentation skills. Knowledge learned for one case in which a trial consultant is retained can be transferred to other cases where one is not used. One may find they are dealing with several parties who can help defray costs by participating in a joint jury research effort. One may also find that he or she has related cases that can be handled together, with benefits to all.

When one does a cost/benefit analysis of what a litigant stands to win or lose in comparison to an investment in pretrial jury research, the benefits often outweigh the costs, because proper research and consulting turn a high-stakes gamble into an educated risk. Going to trial blindly without knowing and properly preparing for the risks would be as unwise as issuing insurance unconditionally, without performing due diligence to assess the potential risk, and without taking proper precautions before assuming it. Gaining an edge from empirically pre-testing your case may be state-of-the-art, but it is pushing the system in a natural direction. It takes into account the factors that affect the reality of the system.

These statements may sound brash and self-serving – representative of a “cowboy justice” system. However, they intend to show that justice is not blind, just myopic. It often requires proper enhancements to be seen in the eyes of the beholders: The jurors. It is not what we show them that rules, but what they see. Trial consultants assist in diagnosing jurors’ vision. By seeing the panorama of one side’s definition of justice, the jurors can see it, too.