THE DOCKET

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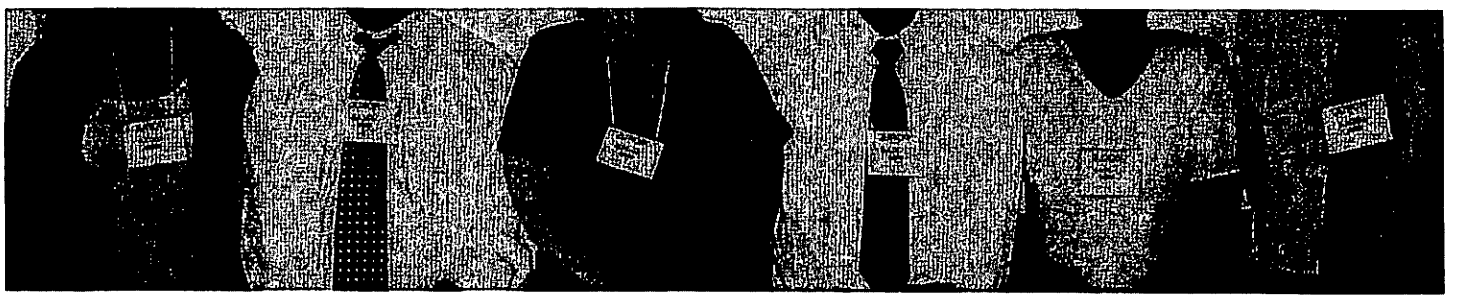
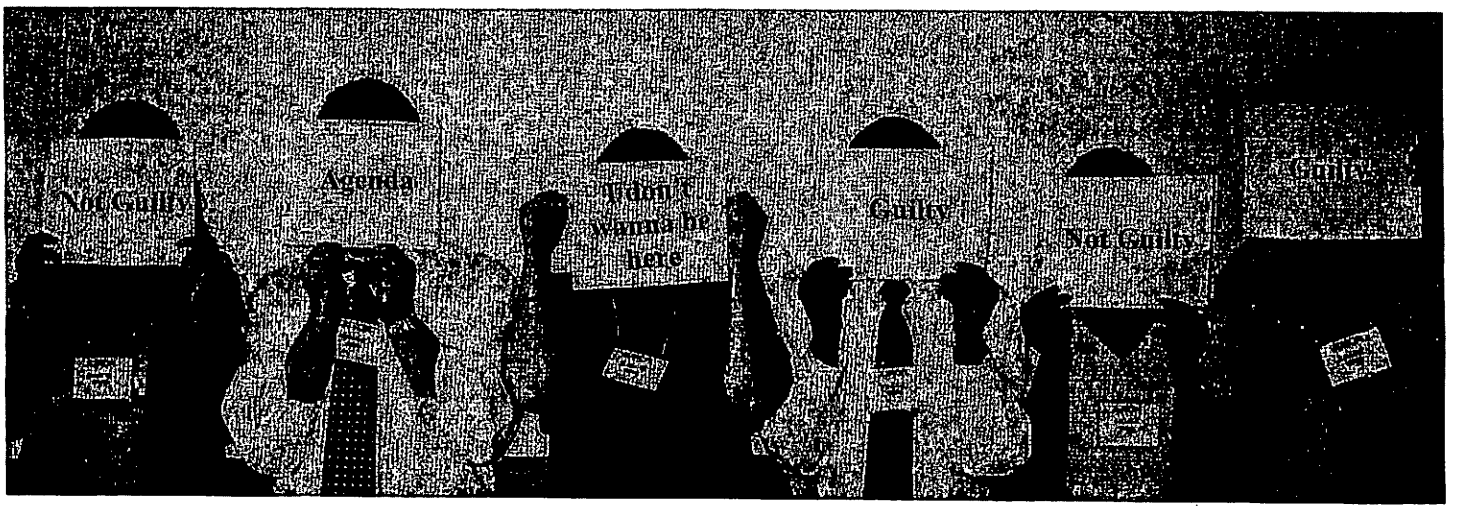


Whose Peers Are These?

Notes on Jury Interviews



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Whose Peers Are These?
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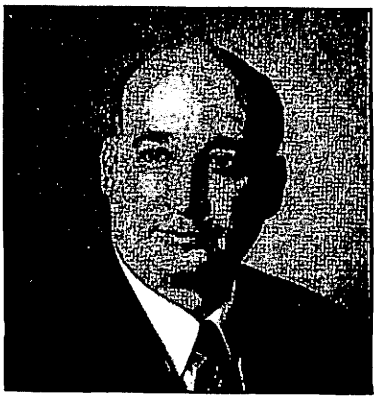

By H. Case Ellis

In the Beginning . . .

In November of 1998, while attending a motion call, a bailiff mentioned to me that a jury trial had begun the previous afternoon and that one of the attorneys was as bad a trial lawyer as he had ever seen. I decided to stick around to watch and was fascinated by what I saw. So fascinated, in fact, that I watched nearly two and one-half days of the trial. I had to miss the closing argument, because I actually had to do some work to earn a living, but was stunned to learn of the trial's eventual outcome. So stunned that I got the jury list (public record) and ended up interviewing four of the jurors to see what had really happened. After 22 years of trying cases and talking to jurors following my trials, I thought I knew what to expect—but I was in for a big surprise. I introduced myself as a "court neutral" who "studied juries" (I was becoming a full-time court mediator at the time) and it was immediately clear that the jurors spoke differently to me than they had when I had been a lawyer representing one side in the litigation. The jurors I spoke to were frank, and often enthusiastic in their discussions with me in large part, I believe, because I was not an interested party. Rather, I was interested in *them* and *their* jury experience. They were more than happy to talk about the parties, the lawyers, the judge, and most interestingly...the other jurors. In the ensuing years, I have spoken to dozens of jurors (always one at a time) and continue to be amazed at the insight they provide. I'll try, in a few pages, to impart some of that insight here. Be forewarned, as a trial lawyer I found much of this troubling, and it's gotten worse over the eight years I've been engaging in this exercise.

> *We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read.*
>
> *~ Mark Twain ~*

The Ground Rules . . .

I always spoke to jurors one at a time and assured them that their identities would be kept confidential. In speaking about my findings, I have always tried to be careful not to make the identities of particular lawyers known since my plan was to critique the jurors and the system—not any individual attorney or his or her conduct. As I relay my findings, some facts may be modified to protect this anonymity, but all anecdotes contained in this article are factual (not just "inspired by actual events" like many of today's works of fiction).

Some Background . . .

In 2006, I participated in the Allerton House Conference, which delved into ways to improve Illinois' jury system. A number of conclusions were reached, most of which revolved around making the job of sitting on a jury easier or more comfortable for the jurors. Some recommendations involved allowing attorneys "mini opening statements" before each witness, allowing jurors to

start discussing the case amongst themselves as soon as they are impaneled, and even allowing the jurors to participate in the questioning of all witnesses. I left the conference with the sad feeling that we must not have very many competent trial lawyers or trial judges if jurors were having such a tough time receiving evidence. After much reflection, I have come to one major conclusion: the problem with today's jury trials is not with the system, but rather with the jury pool. In recent years, and recent interviews, I find myself asking the same question over and over . . . "Whose peers are these people?"

What's the Case About? . . .

"Tell me about the case?" A simple open-ended question, designed to suggest absolutely no bias or particular interest on my part, is the way each interview began.

In fact, I usually knew quite a bit about the case because I had spoken to one or more of the attorneys involved in the trial. It was helpful to have the attorneys' impressions because sometimes my discussion with a juror would make it appear that the lawyer and the jury had been in two completely different proceedings. One particular case comes to mind where I asked about the theory the defense lawyer told me was the lynchpin of his case and the juror seemed surprised by my inquiry and told me "that wasn't really discussed by us—it was not really relevant to the case."

Anyway, the immediate response I got from almost every juror to my simple inquiry was similar. *They told me about the parties!* When was the last time you walked up to another lawyer, said "tell me about the case?" and they immediately responded "Man, do I have a good looking client" or "My defendant is really going to put-off a jury because he's such a jerk?" Probably never. Lawyers are analytical; we like to talk *issues*. "It's an arm-off case," or "It's a rear-ender" . . . It's a "fall-down" or a "legal malpractice" or a "commercial dispute," etc. That's how *we* think as lawyers. That's not how today's jurors are wired. To them, this is a contest between two or more *people*. What matters most to them is whom they like and whom they dislike! The really tough deliberations occurred when they liked everybody and then had to rationalize hurting one of them, or when they struggled to compromise enough that they upset neither.

The first lesson I took away from these interviews can best be summed up by the old adage "You can't make a silk purse out of a sow's ear." Evaluate your party. Clean them up when possible and minimize their impact if you can't clean them up. If they are completely hopeless, consider settling the case before they give a deposition because at the end of the day, they *are* the case. I think some trial lawyers become so impressed with their own abilities that they think they can sell any product, despite its shortcomings.

> *When you go into court, you are putting your fate into the hands of twelve people who weren't smart enough to get out of jury duty.*
>
> *~ Norm Crosby ~*

Here are some of the responses I've received to my initial inquiry:

- "We thought she (plaintiff) was just looking to make some money."
- "We couldn't believe that old man (defendant) was trying to blame the plaintiff."
- "The plaintiff never did answer a question—her attorney did all the talking."
- "We felt so sorry for . . . ."
- "He knew he was driving too fast, but he felt bad about the accident and we felt sorry for him" (a defendant who had killed a pedestrian and was found not guilty!).
- "We agreed that the doctor was negligent, but he/she was very conscientious and these things just happen" (two medical malpractice cases where the jury let off physicians despite clearly believing the doctors had deviated from the standard of care).

And my favorite:

- "We couldn't believe how

> dismissive the CEO of (defendant company) was. He acted like this lawsuit was nothing but a nuisance ... so we had to educate him."

Ironically, this CEO was not even with the company when the incident giving rise to the lawsuit occurred. Nonetheless his demeanor almost single-handedly resulted in a seven-figure verdict against a company with extremely thin liability.

The Lawyers

There are three words you want the jurors using to describe you after a trial. Well actually, you want them using two of them—but the third may bode just as well for your client.

The first is "Prepared." I can always tell which attorneys impressed the jury because the jurors will comment that Mr. or Ms. attorney was always so well prepared. Being organized, punctual (they know who's holding up proceedings by being late), respectful of the judge (more about this later) knowledgeable about the case, and courteous to the others in the courtroom all translate into being "well prepared."

"Honest" is the next word you'd like to hear, but when jurors used this word to describe one attorney, it was usually to imply they felt that the other lawyer was less than honest. I think they expect honesty from the attorneys. When the subject came up in my interviews, they never once used the word "dishonest" to describe an attorney; but when they spoke about one lawyer's honesty, it was clear they were suspicious of the other attorney.

"Incompetent" was the third word they use. No, this is not a typo . . . I have heard lawyers described as incompetent in three different trials, and each time their clients made out great. Read it and weep:

After six hours of deliberation a jury reached a six-figure award for a plaintiff and one of the jurors said, "You know what stinks? That idiot lawyer is going to take a third of the money." He then suggested that they divide the agreed-upon award by three and add that amount to the verdict. That's what they did, resulting in the largest (at the time) tort award in the county. I was shocked when the first interviewed juror told me this. I reacted by asking "Did it occur to you that you just gave that "idiot lawyer" nearly $40,000 more in fees?" The juror seemed upset with this prospect, as did the other three jurors I interviewed after this trial. They all said that if someone had pointed out that result, they never would have increased the award.

In another case, after deciding that they were going to "hit" a different defendant, the jury decided to let off (NG) a defendant whom they agreed was definitely negligent. They felt sorry for this clearly negligent defendant because he was remorseful and his attorney "had been so incompetent" that the defendant must have been worried throughout the trial by his lawyer's conduct. This was a good demonstration of how emotionally involved these jurors get with the parties. They were upset when the defendant wasn't present at 9:00 in the evening for the reading of the verdict because they were all

anxious to see the look on his face when he heard that they had given him a pass despite his clear negligence and incompetent attorney.

In the third case involving an "incompetent" plaintiff's attorney, the jury awarded nearly one-hundred thousand dollars to the plaintiff in a soft-tissue case that one would have expected (as the defense attorney did) to be worth less than twenty-five thousand dollars. The plaintiff was apparently a rather pathetic woman whose attorney the jury determined was "unqualified" to handle the trial. They took it upon themselves to protect this woman and awarded more than her lawyer had requested.

So, my advice to you is to be well prepared and sincere—but if that's too much to ask, convince the jury that you are incompetent and your client will have 12 advocates in the jury room.

The other lesson to be learned is that you have to be careful when your opponent is incompetent. Don't run roughshod over the "idiot" and his/her client to the point where the jury begins feeling sorry for the other party.

Oh, by the way, there's one word that you don't want to hear a juror use in describing you. It actually has been used by interviewed jurors in at least a half-dozen cases to describe the lawyer for the party who didn't make out so well. That word . . . "Slick." This seems to be the impression left by an attorney whose credibility or trial techniques seem less than straightforward. Jurors also seem leery of lawyers who "do all the talking" and don't let the client or other witness answer questions on their own.

The Judge

As lawyers, we often talk about which judge is good for a trial and which might not be as desirable. One clear thing I've learned from the jurors: they all have great respect for the judge. They really don't appreciate lawyers arguing with the judge or forcing the judge to constantly chastise them. These lawyers don't do well, unless, of course, this is merely part of their overall incompetence. I have never, in more than six dozen interviews, heard a juror criticize the judge's conduct. In a few cases where one of the lawyers confided in me that the judge gave him a hard time (and, of course, implied that the judge was the problem) the jurors clearly didn't see it that way. This respect for the judiciary was probably one of the more positive lessons I took away from these interviews. To jurors, the judge represents "the system" and the jurors seemed to feel that the system worked.

A word to the wise: Don't fight with the judge and don't keep irritating the judge just because you can. The jury doesn't like to see you attack the system.

The Jurors

We now come to the most troubling aspect of my interviews, the discussion about the jurors.

We all know that "agenda jurors" can wreak havoc on a jury trial. They have ulterior motives and usually a desire to steer juries into a specific result which will make a statement of some sort that transcends the specific case being presented. We always *voir dire* jurors about their prior jury experience because we want a fresh jury, unencumbered by any baggage they may have acquired during their past jury service. We go to great lengths in *voir dire* to learn about the prospective jurors and any bias/prejudice they may have. We claim to be looking for impartiality, when in fact we're looking for jurors who will relate more to our client than the other party. The best way I can characterize jurors' impressions of their fellow jury members is by relating anecdotes from the

Brilliancy should not be overly displayed.
Some lawyers are so imbued with an exaggerated opinion of their ability as trial lawyers that they cannot seem to resist the temptation to display their brilliancy before the court, the jury and the spectators.

~ Irving Goldstein, Trial Technique (1935) ~

interviews:

"We wondered why attorney Doe left the three motorcycle people on the jury."

Here, the plaintiff had been on a motorcycle and, according to the four jurors I interviewed, three motorcyclists were left on the first two panels. Most of the jurors said they didn't like motorcycles and the jurors could not understand why the defense lawyer left motorcyclists on the jury. I knew why—because the defense lawyer felt he had such a strong case that nobody could disagree. He further felt that experienced motorcyclists would want to disassociate themselves from the plaintiff, who the lawyer felt would be perceived as a "dirt-bag" (his words, not mine).

This proved to be a critical mistake. The day before closing arguments, one of the motorcyclists on the jury announced to the other jurors that he wanted to volunteer to be the jury foreperson. The others resisted and told him they would have to wait for deliberations to begin. When he again volunteered at the commencement of deliberations, the jurors proceeded to conduct a secret ballot and elected someone else foreperson. As soon as the foreperson was announced, the rejected juror said "Well I know we're only supposed to give the plaintiff x dollars (the amount asked for by plaintiff's attorney in closing argument) but I think we should give him one million dollars because the defendant was such an "$%#." The two other motorcyclists on the jury said "I agree" and the battle lines were drawn before deliberations even began.

The non-motorcyclists on the jury felt that the entire deliberation from that point forward was about motorcyclist rights. It was amazing to me how little had been discussed about *issues* relevant to the case.

Interestingly, this was not the only case where jurors had lobbied actively to become foreperson. In each case, it was clear that they had an agenda.

"Attorney Doe (defense lawyer) never said anything about the requested damages—so we assumed he had no problem with plaintiff's recommendation."

When I started with a defense firm 30 years ago, there was a decided split among trial lawyers on whether or not a damage recommendation should be made in a case where liability was being contested. I always came down on the side of making a suggestion despite arguing liability, and my interviews have strengthened my resolve on this issue. Two of the three largest tort verdicts in the history of one local circuit have come in cases where the defendants fought liability and the defense lawyers made no suggestion about the case's value.

In one, after spending forty minutes arguing liability (on what turned out to be a lost cause) the defense lawyer said "And regarding damages ... you all know what this case is worth." Well apparently the jury didn't know, so the entire deliberation was spent working off of the plaintiff's demand. Half of the jury assumed that the defense lawyer had no problem with the demand since he offered no other method of evaluation. The other half of the jury was upset with the defense lawyer for failing to give some guidance as to damages. They felt that the request by plaintiff's counsel was grossly excessive but could not respond to the other jurors' insistence that silence of counsel was acquiescence. In the other case, the jury merely debated about what percentage of the plaintiff's request they should award since the defense lawyer had offered no guidance. In *both* cases, the aggressive defense tremendously inflated the verdict because it only served to infuriate the jury.

"We couldn't believe the defendant was trying to blame the plaintiff."

Doing defense work, carriers would send me the defense of a left-turner and suggest that they expected a 15% or 20% reduction for comparative negligence since I could always argue speed or insufficient lookout on the part of the plaintiff. As I wised up (after trying to put on an untenable defense), I would tell them to let me admit liability so I could save them 25-50% on damages. The smart ones agreed.

Based upon all the interviews I've conducted, I'm certain that the best way to insure an excessive verdict is to overdefend liability to the point that the jury feels you aren't (as one juror put it) "man enough to admit it was your fault." The biggest verdicts (the ones the carriers would call run-away) almost always carry some component of dislike, or even contempt, for the conduct of the defendant. If you aren't comfortable with a defense, don't raise it. A failed defense invariably increases the jury's aggravation factor and usually the verdict.

By the same token, a plaintiff's attorney should not overstate his/her case. On a number of occasions a juror told me that the plaintiff's request for "ridiculously high" damages cast a doubt of suspicion over the whole case. In one case, the jurors told me that they "were with the plaintiff" until, in closing argument, the attorney requested damages in an amount they felt was laughable. At that point they "realized that the whole case was bull" and they found for the defendant.

"We knew why attorney Smith did such and such—they always do that on Law and Order."

In criminal law, they call it the "CSI Bounce" and most prosecutors and defense lawyers can tell you that it helps to have some type of "forensic" evidence just because the jury expects it these days. Don't underestimate the extent to which civil cases are being influenced by *Judge Judy, et al.* I never bring up the subject of television in my interviews, but more than half of the interviewees will reference either a law serial or a "judge" show as proof that they have some experience with "what's going on in the courtroom." In the T.V. world, the most complicated problems can be dealt with in a 42-minute television show and the "obvious answers" seem to magically appear in every case. Unfortunately, the real world works differently, but the jurors still hold a fascination with what they see on television. I'll leave it to you to decide how you feel comfortable handling that subject in *voir dire.*

"We were feeling sorry for the plaintiff until one of the jurors did some research on the internet and we realized that the whole case was a scam."

This was the red flag that caused my greatest concern: the internet. On three different cases, jurors' use of the internet had a substantial effect on the outcome of the deliberations. In one case, the jurors had all researched the background of all of the medical experts and physicians as well as the attorneys involved in the case. It was unclear as to what effect this actually had on the deliberations, but it was clear that the jurors were interested in learning things outside of the courtroom. If you have a website, you can

bet that someone is going to be "checking you out" on the internet. If you are a defense firm that lists your representative clients, you can forget about your motion *in limine* regarding the existence of insurance. If you do trial work and have a webpage, I suggest that you make sure that everything you post on your webpage is something that you don't mind being viewed by your jurors.

The second case in which the internet was discussed involved the use of aerial photographs taken off of the internet. There was a dispute as to sight lines at an intersection and someone on the jury actually viewed satellite photographs and reported to the other jurors on what he had learned. This became important in determining who was telling the truth about sight lines at the intersection where the accident occurred. As I am sure you all know, satellite photographs appearing in Google Earth (and probably other locations) could have been taken at any time and certainly are not representative of the area on the date of the incident.

The third and most disturbing reference to the internet occurred in the case with the juror quotation above. In a case in which both the plaintiff and defense attorney expressed to me surprise that the jury had reached a not guilty verdict, the jurors advised me that they were sympathetic to the plaintiff's case until one of the jurors thoroughly researched knee replacements on the internet and learned that "total knee replacements are never the result of trauma." When the jury learned this, they then "realized" that the whole claim was a "sham" and found against the plaintiff on liability. Interestingly, while the defense lawyer had argued medical causation in the case, he had never suggested that trauma could not result in damage requiring a total knee replacement. I have no idea what site this juror was looking at, but his flawed research had a tremendous impact on this poor plaintiff's verdict.

To me, the possibility of ju-

rors using the internet is one of the more frightening trends I have encountered. I think this is something judges must deal with in their cautionary instructions to the jury: they must impress upon the jurors that they are not to do any research whatsoever on the internet and stress the unfairness of relying on inherently unreliable material. Although this probably will not make the problem go away, it will at least put enough peer pressure on the jurors that they don't reference the internet when talking about their thoughts to the other jurors.

After my initial shock with these revelations, I was hardly surprised to read in the papers about the jury conduct in the trial of Governor Ryan last year. You will recall that one of the jurors actually printed out Illinois case decisions from the internet and threatened another juror by citing those cases.

If I were selecting a jury today, I'd ask each juror what they have posted on their "My Space" site, and then I'd check it on the internet to see how truthful they were being. It's amazing what people reveal about themselves on these sites!

"Luckily, there was another teacher on the jury, and we were able to explain to the other jurors how lawsuits completely messed up the school systems."

Yes, that's right, the above statement was made by a juror who made it clear to me that she and another juror had educated the jury about all of the frivolous lawsuits in this country. Despite the fact that the case they were deliberating on had nothing to do with schools or school districts, this woman could not wait to "straighten out" the other jurors and turn them on to all the problems being caused by "these frivolous lawsuits." At one point, she asked me if I was aware of the outcome of one of the cases that she and other jurors had read about. When I asked her where she had heard about that case, she indicated that "occasionally Yahoo replaces its joke of the day with a list of stupid lawsuits." This list had been discussed among the jurors and the resulting "lynch mob" mentality certainly did not work to the plaintiff's benefit.

When I first started doing these interviews in 1998, I was often asked by lawyers if the adverse publicity spewing forth from big business and the insurance companies had started to have an impact on juries. I can honestly say that until about three or four years ago, I did not find that to be the case. In the last three years, however, it is rare that I speak with a juror who does not at least mention that "I am aware of all of the frivolous lawsuits" at some time during our interview. I believe that the anti-litigation message of big business and the insurance industry is finally starting to get to the jury pool. This is a clear change which has been occurring over the past three or four years, but now has firmly taken root. This thorny problem can't be ignored, and yet I am not sure if even the best of *voir dire* examinations can overcome this prejudice or unring the bell. This may be today's greatest challenge for plaintiff's attorneys.

Some General Observations

Although this should be obvious, my interviews confirm that:

Juries don't like:

- Young drivers
- Old drivers
- Empty chairs (missing parties at counsel table)
- Motorcycles
- Gravel Trucks
- Semi rigs
- Arrogant professionals/

businesspeople
- Drinking and driving
- Exaggerated damages
- Flashy attire (jewelry)
- Technology that slows down the trial

Juries like:
- Well prepared attorneys
- Witnesses who address THEM
- Courteous attorneys
- Parties who look at them during trial
- Judges
- Modest attire (Lawyer & client)
- Remorseful defendants
- Technology that aids understanding
- Guidance from lawyers
- An explanation for everything

There are interesting anecdotes for each of these propositions which I'd be happy to discuss with you—just give me a call.

I also learned that juries generally feel obligated to uphold promises they made during *voir dire*. It is a good idea to exact promises (award large damages if proven, find for defendant if burden of proof not met, etc.) and remind them of the promise during closing argument. This came up a number of times during the interviews.

What I've Learned

When I began this undertaking eight years ago, I found it both interesting and useful. It was useful because I would frequently have lawyers from "out of town" coming to Lake and McHenry counties to mediate their cases and cite me various "Jury Verdict Report" results to support their position. It was particularly useful that I could ask them about the reported case and then inform them that I had some familiarity with the case. It certainly lent some credibility to my awareness of local jury activities.

I was also struck when I started this endeavor by how willing the jurors were to talk to me. The first five years I did this, I can only recall two people declining my invitation to talk. Most of the others were quite interested in discussing their experience and in asking me questions about the system in general. Just as jurors' attitudes about litigation have been changing, their willingness to speak to me has also abated. In the last three years, it is not unusual to have people hang up on me without even responding to my invitation, or to politely say that they are "not interested" or "don't have the time." I think that this is a direct reflection of the coverage that jurors have been getting in the news lately. Jurors are invited to talk to Oprah, are interviewed for newspaper and magazine articles, are even writing books about their jury experiences. The celebrity status that attaches to some jury cases, in my opinion, has further corrupted the system. Today, being a member of a jury is in and of itself an "event." I have particularly noticed that the younger

"under forty" jurors seem much more taken with themselves than the older jurors. The younger jurors feel that this is their time to take center stage and to play a leading role in this production known as "the trial." They seem much more assertive, much more anxious to impress and persuade other jurors and less interested in the real life participants in the underlying drama. They talk about "principles" and "how much I know about this type of situation" to the exclusion of the actual facts being presented in the courtroom.

Those of you who heard me speak on this topic recently know that I am beginning to attribute some of this problem to the culture of "narcissism" which seems to be pervasive in the "under forty" generations. Jury duty gives these people a chance to star in the drama. If they're lucky, they may get the leading role (foreperson). They can make a difference—unfortunately it becomes more about them than the actual parties to the litigation.

The reasons for my skepticism about motive and the celebrity of today's jurors was highlighted in the death penalty phase of the Brown's Chicken case this past year. You may recall that the jury voted 11-1 for the death penalty. Since one juror held out, the death penalty could not be recommended by the jury. According to the newspapers, the dissenting juror went "underground" and would not comment to the press. Not to be denied, the press was going to get that juror's story. The father of the juror was quoted the next day in a headline that read "Juror Felt Pressured by Lynch Mob Mentality." Apparently, not believing that this "spin" was going to take the heat off of the juror, another paper the following day quoted the juror's brother-in-law in a headline stating "Juror Thought Sentence Harsher than Death." Now, family members of jurors were spinning the press to promote various agendas. This media scrutiny is more than a juror should have to endure and more than a litigant should have to deal with during a trial.

In a fleeting moment of insanity last year, I considered making a bid for the trial notebook that one of the Ryan jurors was auctioning off on eBay. The moment passed, however, when I realized I could get more instant gratification by merely flipping on Court TV.

A Jury of Peers

Yeah, I know, the term "Jury of Peers" is nowhere in the Constitution. The term, however, has become a part of the American lexicon and is generally accepted in case law and treatises as the standard by which we identify our jurors. Thanks to the media, the internet, satellite TV, and today's narcissistic culture, I wonder whose peers are really sitting on today's juries. While I still marvel at the "greatest legal system in the world," I just don't know where we're going to find the parties' peers anymore.

H. Case Ellis has been a litigation attorney (primarily defense with a concentration in defense of professional liability) since 1977. He has tried jury cases in six Illinois counties and two federal courts. In 1998, he began shifting his practice to mediation and the implementation of court mediation programs. In conjunction with his activities in mediation, he began interviewing jurors in 1998. He is a frequent lecturer on ADR issues and jury studies.