

SMART PILLS

DON'T LET AMATEURS DECIDE

Expert juries should be hearing complex patent infringement cases. —By Stephen F. Sherry

Fourteen years ago, Judge Joseph Farnan, Jr., presided over the first patent infringement jury trial in the United States to involve recombinant DNA technology. Back then, litigation involving complex biotechnology patents was uncharted territory for Judge Farnan, the trial lawyers, and the jury called to the Wilmington courthouse.

When the jurors had been debriefed and discharged, Judge Farnan asked the trial lawyers, "Did you consider having a special jury in this case?" The lawyers looked at one another and then toward Judge Farnan with what could have been described as a "deer in the headlights" expression on their faces. Then one lawyer worked up the courage to say, "How would that work exactly, Judge?"

Judge Farnan explained that based on his reading of Federal Rule of Civil Procedure 53, he had the authority (with the consent of the litigants) to appoint a number of special masters to sit as the fact-finding jury in a civil case dealing with highly complex scientific evidence and issues. None of the lawyers had ever heard of such a procedure, and research for this article did not uncover a single reported instance in the past 14 years where such a special jury has been used in a patent infringement trial.

Leaving the fact-finding in patent cases to a randomly selected generalist jury may no longer be workable. Infringement suits that proceed to trial are usually difficult or close cases. Juries are increasingly confronted with cutting-edge technology and must wrestle with difficult scientific evidence.

The crux of the problem is overcoming the average juror's inability to comprehend the law or the scientific evidence. In most cases, the jury is confronted with conflicting, and sometimes controversial, scientific expert testimony. The conventional jury, however, does not even have the rudiments of scientific or technical training needed to review the questions presented by these experts in a complex patent case.

Due process, guaranteed by the Fifth Amendment, demands that patent infringement trials produce fair, consistent, and reasoned outcomes. The decision maker must have a minimal understanding of the patent system, the patent laws, and the

technology involved in the case. If a jury is unable to reasonably understand patent law or the facts of the case, its verdict would come from the jury's own determination of what is right. That would not be due process, but would constitute arbitrary and unprincipled decision making. The system of justice would be reduced to something like a lottery.

Those who defend the use of conventional juries argue that the parties, their lawyers, and witnesses should educate the jurors. Proponents contend that no area of knowledge is beyond a jury's capability, provided the issues and the evidence are well explained. This "educational approach" obviously requires substantial time and money in the effort to train average jurors.

The educational approach has its limitations. For example, the inventions at stake in patent lawsuits tend to be at the cutting edge of new technologies. The assumption that during the course of a trial an average juror would be willing and able to learn even some of these advanced scientific and engineering concepts seems unrealistic. It's more likely that the jurors will remember a few general impressions, rather than a logical and coherent pattern of facts.

Many trial lawyers recognize that training or educating a

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generalist jury is a daunting task. Although some attempt is made to teach the jury, many trial lawyers place greater emphasis upon exploiting the traditional jury's tendency to focus on tangential factors—for example, playing up the number of experts and their impressive credentials, or emphasizing the hometown connection with one of the parties or the witnesses.

The conventional wisdom among patent trial lawyers is that juries essentially vote for parties rather than decide issues. Therefore, much of the effort at trial tends to center on presenting the plaintiff, or infringement defendant in the most favorable

and sympathetic way. Timeworn themes appear frequently in patent trials—such as the underdog inventor versus the deep-pocketed corporation, the “greedy” patent owner trying to grab more than the patent covers, or the “thieving” infringement defendant.

Perhaps the time has come to abandon the conventional, generalist jury in favor of special juries with appropriate scientific expertise and training. So-called blue-ribbon jury panels, consisting of scientifically sophisticated members who comprehend technologically complex concepts, may provide more fair and consistent results.

Judge Farnan interpreted rule 53 as giving district courts the authority to appoint a special jury with the consent of the parties to decide complex patent issues. Rule 53(b) expressly permits the use of special masters in jury trials when the issues are complicated. The rule does not explicitly say that special masters can serve as jury members, but it does say that the special masters duties can include whatever the parties consent to.

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Those opposing a special jury might also argue that a panel drawn from the ranks of scientists and engineers would be more likely to have conflicts of interest or other kinds of biases. This objection unfairly attributes a peculiar dogmatism, closed-mindedness, and provincialism to engineers and scientists. The standard methods of voir dire and juror questionnaires would likely identify possible conflicts and/or bias in a juror.

Another concern may be whether enough qualified jurors can be attracted to serve. Jurors could be recruited from professional societies and scientific organizations. Additionally, academic institutions, as well as commercial dispute resolution or expert consulting services, could maintain a roster of technically trained, highly educated individuals who would be available for appointment.

The special jury would have a substantially greater ability to comprehend the evidence ordinarily presented in complex patent trials. These jurors would have the training and education necessary to understand scientific reports, laboratory notebooks, and the patent itself. The jurors will likely be familiar with terminology and theories used by expert witnesses. Further, the special jury would be more capable of rationally weighing the validity of conflicting expert testimony and judging credibility while making a sober assessment of the merits in the case. As a consequence, expert witnesses may be less tempted to overreach in their trial testimony.

Using a special jury would make the trial more focused and efficient. The time usually devoted to orienting and teaching fundamental concepts could be eliminated. And oversimplification, which so often distorts the true picture of the facts, could be avoided so that greater attention is paid to the case’s nuances.

Blue-ribbon jurors could use special verdict forms, which would further explain the reasoning behind their decision. Using these forms, the district court and the Federal Circuit would have a much better opportunity to evaluate the logic, reasoning, and specific evidence relied on by the jury in reaching its verdict.

A potential drawback of relying upon rule 53 to constitute a special jury is that the entire process can be derailed if any party objects. Amending the federal laws could address that problem. And a special jury statute could also require that the party requesting the special jury pay any additional costs (if that party wins, those costs could be recoverable against the loser). If the special jury was mandated upon the court’s motion, then the cost could be shared equally. If a party was unable to bear the cost of a special jury, the statute could provide funding through a surcharge added to all patent issuance fees and/or maintenance fees paid by patent owners.

Concerns also might be raised about constitutional rules that could arguably impose limits on the use of expert juries when ordered by the trial judge over the objection or without the consent of the parties. Specifically, the Jury Selection and Service Act of 1968 might be construed to prevent the use of education or other special qualifications in jury selection. The act specifies that federal juries are to be “selected at random from a cross section of the community.” Even though exclusion based on educational achievement is not expressly prohibited, Congress can amend the statute to be consistent with any new enactment granting federal courts discretion to employ special juries.

A more significant obstacle arises from the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court has held that these provisions provide a litigant with the right to a jury composed of individuals selected from a “fair-cross-section” of the community.

Challenges involving this requirement have dealt with issues of race, age, and gender almost exclusively. The Supreme Court has yet to directly address the issue of excluding less-educated persons from a jury. However, the Court has held that the states may limit jury selection to persons meeting specified levels of academic achievement. Moreover, a majority of lower courts have held that less-educated individuals are not sufficiently “distinctive.” Such an exclusion in complex cases is really no different than the permissible disqualification of illiterates or those who do not understand English.

It seems likely that a law permitting judges to appoint a special jury in complex patent cases would not be unconstitutional.

The special jury offers a promising means of ensuring predictable and rational outcomes in high-stakes, complex patent litigation. Hopefully, a forward-thinking judge and some courageous litigants will take a chance on the process.

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