serve on a jury unless he or she:

- is under 18 years old;
- is not a citizen of the United States;
- has not resided in the judicial district for one year;
- is unable to read, write, and understand English with a degree of proficiency sufficient to fill out the juror qualification form satisfactorily;
- is unable to speak English;
- is incapable of rendering satisfactory jury service by reason of mental or physical infirmity;
- or
- has been accused or convicted in state or federal court of a crime punishable by imprisonment for more than one year and his or her civil rights have not been restored. 28 U.S.C. § 1865(b) (2004).

The court may, in its discretion and for cause, excuse a range of other individuals after making an individualized determination.

In federal court a verdict may be rendered by a minimum of six jurors and a maximum of 12 jurors. Fed. R. Civ. P. 48. All jurors seated and sworn serve on the civil jury. There are generally no alternates. However, under unusual circumstances, the court may seat alternate jurors in a complex, protracted case. In an unusual circumstance, the parties may stipulate to a verdict by fewer than six jurors. Fed. R. Civ. P. 48.

Parties going into federal court should review the local rules to determine the method of jury selection employed in the district. In addition, the parties should check the practice of the individual Attorney Voir Dire: An Endangered Art Form

BY HON. BERNICE BOUIE DONALD

I acknowledge that, nationally, the number of jury trials conducted in federal courts is shrinking. In December 2003, the Litigation Section conducted a symposium on the issue of vanishing trials. The symposium found that there were 5,802 federal civil trials in 1962 and only 4,569 in 2002. Much scholarly effort has been expended examining the causes and impact on the trial process. That said, civil jury trials have not completely vanished in federal court or in state courts across the country.

Done properly, the jury trial is an art form that begins with voir dire. I frankly like conducting jury trials. I realize that, for a litany of reasons, they may not be the most cost-effective dispute resolution mechanism, are often highly adversarial, are sometimes not well presented, and are not well suited to many disputes. It is my observation in civil and criminal trials that one of the most significant events is jury selection. Voir dire is critical to that process.

The general purpose of voir dire is to test a person’s qualifications to act as a fair and impartial juror. See McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 849 (1984). Specifically, voir dire seeks to discover which jurors have feelings that may make it impossible for them to sit as impartial fact finders—that is, to ferret out bias as to a party or issue.

In the federal system, everyone is qualified to serve on a jury unless he or she:

- is under 18 years old;
- is not a citizen of the United States;
- has not resided in the judicial district for one year;
- is unable to read, write, and understand English with a degree of proficiency sufficient to fill out the juror qualification form satisfactorily;
- is unable to speak English;
- is incapable of rendering satisfactory jury service by reason of mental or physical infirmity; or
- has been accused or convicted in state or federal court of a crime punishable by imprisonment for more than one year and his or her civil rights have not been restored. 28 U.S.C. § 1865(b) (2004).

The court may, in its discretion and for cause, excuse a range of other individuals after making an individualized determination.

In federal court a verdict may be rendered by a minimum of six jurors and a maximum of 12 jurors. Fed. R. Civ. P. 48. All jurors seated and sworn serve on the civil jury. There are generally no alternates. However, under unusual circumstances, the court may seat alternate jurors in a complex, protracted case. In an unusual circumstance, the parties may stipulate to a verdict by fewer than six jurors. Fed. R. Civ. P. 48.

Parties going into federal court should review the local rules to determine the method of jury selection employed in the district. In addition, the parties should check the practice of the individual

In Case You Don’t Have a Mentor: Trial Tips for Civil Business Litigators

BY JASON H. WILSON WITH PAUL J. LOH

Few people realize that, despite a fivefold increase in court filings since 1962, fewer civil trials actually take place today than in 1962. Unfortunately, this decline in the number of civil trials has come at precisely the same time that minority lawyers are beginning to arrive in large numbers at business litigation firms. Hence, finding an older, experienced trial lawyer as a mentor is a particularly difficult task. Because you as an aspiring business trial lawyer may be facing this gap at your firm, here are concrete tips that young lawyers might hope to get from seasoned mentors:

Think “Trial” from the Start

In this era of the vanishing trial, perhaps the most fundamental mistake made is not thinking from the outset of a case about the possibility of trial. From the very beginning, you should ask yourself trial-oriented questions. The trial of a case does not turn on just the facts and the law; people matter. Accordingly, you need to ask yourself questions such as: Will your client be a good witness? Will he or she come off as being deceptive?

At the last minute, lawyers often try cases that

Continued on page 8
**Chairs’ Column**

**Stand Up for Trial Lawyers**

**Brett J. Hart and Burnadette Norris-Weeks**

**CoChairs of the Minority Trial Lawyer Committee**

Trial lawyers are viewed in the same way as used car salesmen. We are blamed for everything from high insurance premiums to the shortage of doctors in certain medical specialities. If there is a societal problem, the lawyer did it. Too often, trial lawyers politely listen and laugh at demeaning lawyer jokes where in the punch line the greedy trial lawyer dies, steals money or bills too much.

When Democratic candidate John Kerry announced his running mate would be John Edwards, verbal attacks against trial lawyers appeared to spike in the news. For weeks after the announcement, there was discussion as to whether cases successfully handled by Edwards had merit. News anchors, politicians and the public alike debated whether the trial lawyer status of Edwards would help or hurt Kerry.

If stereotypes about trial lawyers in general were not bad enough, minority trial lawyers have an even greater challenge. Minority trial lawyers often have to overcome the stereotypes that, for example, portray them as lazy, unaccomplished products of affirmative action. There are many more. Minority trial lawyers should perhaps be more concerned about trial lawyer bashing because of the double hit we endure as a result of these ridiculous stereotypes.

Edwards has been called a “friend to personal injury trial lawyers.” What is wrong with being a friend to trial lawyers? Trial lawyers do a tremendous amount of good for society. If not for trial lawyers, who could take on the huge corporations and finance class action suits that take years before there is a financial reward, if at all.

It’s doubtful that Ford and Firestone would have voluntarily recalled all of their unsafe tires without trial lawyer persistence. It’s equally doubtful that doctors would voluntarily and adequately compensate claimants for negligently amputating the wrong body part. We are fortunate enough to live in a country that regulates health and safety and resolves disputes through a civil justice system. Private trial lawyers help make that system work.

The American Bar Association once reported that one person in five agrees that lawyers are “honest and ethical.” In politics, “lawyer” has come to displace “liberal” as the dreaded “L” word, especially in the South. In Louisiana in 1999, all but one of the 10 candidates for state legislature who were attacked in the press because they were trial lawyers lost. While there are instances where trial lawyers are overzealous in the pursuit of a defendant or juries act out of revenge, the legal system usually works to correct outrageous trial court verdicts. These cases are the exception and not the rule.

When John Kerry selected John Edwards as his running mate, he declared, “I have chosen a man who understands and defends the values of America.” As trial lawyers, on some level, this is what we all seek to do. The next time someone tells a demeaning lawyer joke, stop them dead in their tracks. Minority trial lawyers can least afford to take the “hit.” Lawyer bashing often results in the deterioration of rights that so many people need. Let us all stand up for trial lawyers.
Trying a Case Before a Hostile Court

BY SUE ELLEN RUSSELL

When litigating a jury trial, lawyers expect to encounter bench rulings with which they disagree. Especially before a jury, they learn to accept the ruling graciously and proceed with their case. Lawyers must always balance the need to preserve the record for appeal against the risk of alienating the jury. Most courts understand the role of the trial lawyer and allow appropriate objections and explanations. When a major dispute arises over an objection, many judges call counsel to the bench or dismiss the jury while the issue is hammered out on the record. Thus, while preserving the record remains a necessary evil, the bench normally understands the concept of preservation and will not deliberately interfere with counsel’s duty to make a record.

In my practice, however, I have witnessed judges who became outwardly impatient with a lawyer during the course of a trial. Usually, the offending attorney is disrespectful, ill prepared, offensive, or overtly dishonest. However, there are times when an apparently unprovoked court does not maintain impartiality and becomes deliberately hostile. If you have not been the target of a hostile court, I hope you never will be. For those of you not lucky enough to have tried a case before a hostile court, I will share a recent experience to which I am sure you can relate and present the lessons I learned from the experience.

A hostile court can result from any number of factors, some within the control of counsel and some not. In my case, I believe the court became my adversary because: (1) in this particular state circuit court, judges do not receive trial assignments until the morning of the trial; (2) the case presented difficult issues that I had to bring to the court’s attention in order to preserve the record; and (3) opposing counsel and the trial judge were on friendly terms.

During the three days that I endured a wrathful court, I learned a great deal. First and foremost, I gained a true appreciation of the importance of preserving the record; I became cognizant of the fact that, if we were going to win, it would not be at the trial level. How do you preserve a record before a court that appears intent on preventing you from doing so? By remaining calm and dignified and by pressing objections even when it is clear that the court has no interest in hearing them. While doing so, you constantly walk the line between being argumentative to make your point and holding your tongue.

The trial record is a dry and unforgiving document. It does not reflect facial expressions, tone, or body language. It contains only the written word. While it will not yell out, “this court was trying to sabotage me,” after a while it may become clear that the court committed error. If you keep your head and remember you are trying the case to a higher court, the words coming out of your mouth will appear logical and sensible and will convey the fact that your client did not receive a fair trial.

I have chosen from the trial transcript excerpts that I hope will demonstrate how important it is to remain calm. I have omitted the names of the judge, the court, and the opposing counsel. I am sure that I could have handled the situation better, but at least I got through it without being held in contempt and created the record from which to argue on appeal.

Refusal to Rule on Dispositive Motion

The first conflict presented a difficult issue to the court and was potentially embarrassing to opposing counsel. Here, our clients, the defendants, were sued for breach of contract when they terminated public insurance adjusters for not performing under the contract to obtain insurance proceeds from a large fire loss. At the time of trial, a year and a half after the loss, the insurance company had not paid a dime. The complaint included a count for declaratory relief. In the event that the public adjusters succeeded in their breach-of-contract claim, they sought a declaration that a portion of the insurance proceeds, when paid, would be paid to them.

We were prepared to defend against the breach-of-contract count. Unexpectedly, the public adjusters dismissed all counts except for the declaratory judgment action on the Friday before the Monday trial was set to begin. Because the major cause of action was a breach-of-contract action, we immediately filed a motion for summary judgment, contending that a declaratory judgment was not the appropriate vehicle to determine ultimate issues of fact.

It did not occur to us that the court would not take our motion seriously. We understood that it could be denied, but not in the way that the court denied it. The court refused to rule on our motion and instead took it under advisement to be decided after the declaratory judgment action was heard. Its reasoning was as follows:

THE COURT: Well, first of all, whether the motion for summary judgment is dispositive or not, I don’t know, and I still don’t know, and I have it under advisement. Second, dispositive motions are supposed to be filed two weeks ahead of time so everybody has a chance to think about them and make a ruling before the trial date.

This was the first time I was tempted to respond with indignity. After all, two weeks ago, this was not an issue. Instead, I responded:

MS. RUSSELL: Which makes sense, Your Honor, except they changed the case on Friday.

I again held my tongue when the court responded:

THE COURT: I understand that the posture of the courts changed, which then necessitated, in your view, your motion, Ms. Russell. But that still doesn’t bump the trial date or disturb the trial that’s already planned. I mean, we call the jurors in advance.

And this was one of the high points of the trial. At least the court was still referring to me as “Ms. Russell.”

While we made our argument that the declaratory judgment action be dismissed.
to preserve the record, the court continued to make observations similar to the one stated above. Our request for postponement to allow the court to take the time it needed to review the motion was denied. The judge ordered that the matter proceed as a declaratory judgment action before a jury with the dispositive motion under advisement.

Refusal to Rule on Evidentiary Matters

The judge provided us with another ground for appeal when the issue of excluding an expert witness was raised. Now that the trial was proceeding on the ultimate issue, it was critical that the jurors understand what a public adjuster is, and why the public adjuster plaintiffs had not performed under the contract. The admission of our expert’s testimony was first addressed before opening statements when opposing counsel objected to the expert. At that time, the court stated:

**THE COURT:** Let me say that I’m inclined to let the expert say whatever you have identified he is going to say, but I will think about it further.

Before we presented our evidence, we listed our expert as a witness. Again, opposing counsel objected. By this time, almost every objection we made was overruled and every one of our opponent’s sustained. It seemed that in addition to the odd procedural posture, the court was determined not to allow us to present our evidence. When the court, after having already seen our proffer regarding the relevance of our expert’s testimony, asked the reason why we needed an expert, we calmly set forth our position.

**MS. RUSSELL:** The reason we would want to call the expert is actually for the factual understanding of the prevailing standards in the industry of what a public adjuster firm is supposed to do, which is really the crux of this case and the crux of whether or not they’ve substantially performed. I think it would be enormously helpful to the jury because a lot of the things are technical and— you know—these guys all understand it because they do it every day, but the insureds and the jurors certainly don’t.

The court’s response was as follows:

**THE COURT:** Well, this is not a negligence case. The standard of care of a public adjuster is just not the issue in this case, and it’s certainly not the issue before the jury. So I—I think I’m probably going to rule the way I’ve indicated [which earlier was that the expert could testify], but I guess I’ll make that decision when I get there.

When we “got there,” the following exchange occurred before the jury:

**THE COURT:** All right. Ms. Russell, please call your first witness.

**MS. RUSSELL:** My first witness is Mr. Coleman, the expert.

**THE COURT:** I’ll take that up at another time. Call your next witness.

At the end of the defendants’ case, we again sought permission to call our expert. This time, the court did not even allow me to finish the sentence:

**THE COURT:** All right. Ms. Russell, any further evidence that you want to present today?

**MS. RUSSELL:** The only request I have is whether or not you’ll hear testimony of—

**THE COURT:** I’ll take that up at another time. All right. Members of the jury, I think that concludes the evidence in the case.

Again, we did our best to preserve the record, especially before the jury. While the judge prevented us from asking again about the expert, it should be obvious to everyone (including the appellate court) that our sentence would have concluded with “our expert.”

Time and again, the judge attempted to avoid a ruling by stating that our objection or argument would be “taken up at another time.” For example, when we asked that a letter written by the insurance company be accepted into evidence as a business record, the court responded:

**THE COURT:** Well, I’ll take that up at another time.

The witness who wrote the letter was available, and we called him to identify and authenticate the letter. The letter contained the insurance company’s position that the public adjusters had not acted appropriately in adjusting the claim. After the letter was identified and authenticated by the author, we again asked that it be moved into evidence. The court responded again:

**THE COURT:** I’ll take it up at another time.

Although the record is replete with non-rulings, it is difficult to tell from the transcript that we were impatient or frustrated. At another time, during a witness’s testimony, we asked that identified exhibits be moved into evidence. Again, the court responded that we would take up the exhibits “at another time.” The record will reveal, however, the preclusive effect of the court’s “non-rulings” and their impact on the trial.

Rulings Made Sua Sponte

The court also prevented us on redirect from asking our own witness to clarify a question asked on cross-examination. We did not object to the question because we wanted our witness to explain. The questioning was as follows:

To plaintiff:

**Q:** Then, after Ms. Russell couldn’t get that resolved in the next four and a half months, did you ask her to withdraw?

**A:** No.

**Q:** If she couldn’t get it resolved in the next nine months, did you ask her to withdraw?

**A:** No.

**Q:** She still represents you today even though it’s been more than a year since she took over the case.

**A:** That is true.

On redirect, we asked the plaintiff to explain why she had not fired us. Before she could answer, the court stopped the questioning stating, “It’s not relevant.” We responded:

**MS. RUSSELL:** It was brought up by—

**THE COURT:** It’s not relevant. (To the witness) You may step down now.

**MS. RUSSELL:** Can you instruct the jury then that they should disregard the question that—

**THE COURT:** That motion is denied. You may step down.
All right. Ms. Russell, please call your next witness.

Conclusion

The court constantly told us to “move on” and “not to argue” and even prevented testimony where no objection was raised. To no one’s surprise, the jury returned in less than half an hour, answering the interrogatory in the public adjuster’s favor.

The trial was not fun. However, I learned valuable lessons about our system and the importance of keeping one’s cool. You must remain calm and state your objections in full, including a proffer of excluded evidence. Also consider a request for a ruling, even if you know it will be unfavorable, to avoid the “pocket veto” approach to objections. This must be balanced, however, with the rapport you are trying to build with the jury or judge as finders of fact. I do not know whether the appellate court will take the appeal of our case, but I know that I did my best to create a compelling record.

Note: On January 7, 2004, the Virginia Supreme Court granted an appeal of the trial court’s decision. Thanks to a well-preserved record the Supreme Court, on June 10, 2004, determined that the trial court abused its discretion when it allowed the action to proceed in the guise of a declaratory judgment. It also specifically found that opposing counsel was engaged in procedural fencing. The lower court’s decision was reversed and dismissed. The case is Green v. Goodman-Gable-Gould Co., 597 S.E.2d 77 (Va. 2004)

Sue Ellen Russell is a member of Russell & Russell, PC, a business litigation and counseling firm located in Falls Church, Virginia. She represents businesses before state and federal courts, in administrative proceedings, and in government investigations.

Ministry Trial Lawyer Committee • Section of Litigation • American Bar Association

JIOP Program Grows Again
Section Supports Minority Interns’ Work with Judges

Every year, the Section of Litigation’s Judicial Intern Opportunity Program (JIOP) offers minority law students of merit a chance to receive a $1,500 stipend each and to serve as interns with state or federal judges. Now in its fifth year, JIOP placed 87 students—16 more than last year—from 43 law schools with 62 state and federal judges in 2003-2004. Of that class, 57 worked with 42 judges in the U.S. District Court for the Northern District of Illinois, the U.S. Bankruptcy Court for the Northern District of Illinois, and the Circuit Courts of Cook and Lake Counties; the other 30 interned with 20 judges in the U.S. District Courts for the Northern and Southern Districts of Texas, the Texas Civil District Court and Texas District Court.

The JIOP program was one of four finalists for the Section Officers Conference Meritorious Service Award given at the SOC Business Meeting during the ABA Annual Meeting on Friday, August 6. The annual SOC Meritorious Service Award is given to the Section, Division or Forum Committee that has sponsored a program, project or initiative in the past year that is of extraordinary benefit to the profession, the public and/or the Association.

The program’s 2003-2004 program year began September 1. For more information, or to view press coverage of the Loyola University event, please go to the website at www.abanet.org/litigation/jiop.

Thanks to JIOP Sponsors and Planners

In June, 2004, JIOP program director Gail Howard and Section committees and diversity initiatives manager Burt Blanchard put on orientations for JIOP interns. At Loyola University School of Law in Chicago, 25 students heard presentations from lawyers and law professors on careers, firm life, and life in the courts. Afterward, Jenner and Block sponsored a reception where Diversity Plan Implementation Committee cochair Rich Gray, a partner in the firm, served as host. In Houston, interns enjoyed an orientation at the law firm of Vinson and Elkins, with immediate past Section chair Scott Atlas as host. Twenty students and a number of judges attended, and Section leaders Teddy Adams and John Irvine mingled with participants as Section representatives.
The Court of Law vs. the Court of Public Opinion: Considerations for Winning in Both

BY MARY ANN SABO AND DOUGLAS E. WAGNER, ESQ.

Good trial lawyers develop a communications and media relations strategy before ever stepping foot into a courtroom. When determining their trial strategy, they take into account the credibility of witnesses, the nature of the local community, and the peculiar traits of their trial judge, often relying on mock trials and focus groups to test their approach. Such planning is particularly critical in high-stakes, high-profile cases that have the potential to damage their clients’ business or business reputation.

Lawyers are increasingly aware that it is not enough to prevail only in the court of law. They must also consider how their case will be received in the court of public opinion. The “verdict” of customers, vendors, and suppliers can be more helpful—or more damaging—than that of the harshest judge or the most skeptical jury. It does a company little good to win a major victory in court if it loses the battle of public perception.

In response to this reality, law firms have begun to hire public relations (PR) consultants to manage the court of public opinion. The litigation team taps the communications and media relations expertise of the PR consultant in developing trial strategy, in the same way that it might call on specialists in accounting or structured settlements. Working in concert, attorneys and PR consultants can shape a communications strategy that becomes an effective litigation tool.

A Brief History of Litigation Communications

As a subset of public relations and a component of trial strategy, litigation communications is still a relatively new discipline. In harmony with its ethical rules, the legal profession has long held sacred the ideal that justice is blind to the whims of public opinion and sensationalized headlines, that judges are the masters of the legal universe, and that, ultimately, all that matters is what 12 men and women believe. The legal profession’s view toward trial publicity has begun to change during the last decade, prompted by the advent of 24-hour broadcast news coverage and the rise of the Internet as a reliable news source.

The first case of national significance in which PR consultants were used was William Westmoreland v. CBS et al. In 1982, General Westmoreland sued the CBS television network for libel and demanded $120 million in compensation after Mike Wallace aired a 60 Minutes report claiming that the general had exaggerated casualty and troop figures to convince the public that the United States was winning the Vietnam War.

The lawsuit went to trial in 1984, prompting the declassification of hundreds of thousands of pages of official documents that painted a story of a military command obsessed with media reaction to the war. CBS hired one of the top PR consultants practicing at that time to manage the public face of the lawsuit—ultimately to its great benefit. CBS and Westmoreland settled the suit before it went to a jury, and CBS ended up neither apologizing nor compensating Westmoreland monetarily for a broadcast that its own internal investigation had concluded was “seriously flawed.”

During the ensuing years, class-action lawsuits over lead contamination, the sleeping medication Halcion, and exploding fuel tanks rose to grab headlines, as well as the services of litigation communications specialists who carefully “managed” the public face of the lawsuits. Still, the legal community hesitated to embrace trial publicity because of ethical restrictions mandated by its profession, combined with its own long-held prejudice against the entire concept. It took blow-by-blow coverage of the O.J. Simpson murder trial in 1994-95 to forever cement the role of the PR practitioner at the litigation strategy table.

Recent court rulings have bolstered the status of PR professionals in the litigation process. In a June 2003 ruling, Judge Lewis Kaplan of the Southern District of New York ruled that confidential conversations between attorneys representing the target of a grand jury investigation and the PR firm they retained to manage media relations were protected by the attorney-client privilege—but only insofar as those conversations dealt with the legal issues at hand:

...Lawyers may need skilled advice as to whether and how possible statements to the press—ranging from “no comment” to detailed factual presentations—likely would be reported in order to advise a client as to whether the making of particular statements would be in the client’s legal interest. And there is simply no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some nonpublic facts, as well as the lawyers’ defense strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions. 265 F. Supp. 2d at 330.

Some attorneys would not think to step foot into a high-profile case without a PR professional on the team. In In the Court of Public Opinion, attorney and PR consultant James Haggerty argues that public relations should be handled with the same seriousness and care as any other aspect of a case.

Still, many law firms take a hands-off approach to litigation publicity, preferring to let chance and their own legal team handle the communications surrounding a high-profile lawsuit. These lawyers do themselves and their clients a disservice by failing to retain a PR consultant to assist in developing a comprehensive communications strategy for the pretrial, trial, and verdict phases.
Formulating a Proactive Communications Plan

In order to formulate a proactive communications plan, the litigation team must initially focus on these related questions:

- **What are our goals?** As a first step, it is crucial to determine what the clients’ and the lawyers’ goals are with respect to communications efforts. For example, if a client is about to file a defamation lawsuit, it might be critically important for the client to protect its reputation before a remedy can be obtained in court. Conversely, if the client is being accused of environmental contamination, pretrial media exposure could be damaging, and efforts should be made to quell sensational or untrue statements about the client.

- **What are the business interests, and who is our audience?** The second step is to analyze the stakes involved, such as money, reputation, and/or market share. It is also important to identify the audiences most affected, such as shareholders, employees, insurance carriers, clients, or customers. It is essential to determine the “currency” the business stands to lose or gain in the proceedings and place a value on that currency. For example, if the unblemished reputation of the business is at stake, is it in the company’s best interest to risk exposing dirty laundry in the court of public opinion—or would a quiet settlement be a more prudent approach? A business must carefully examine its stakeholders and the potential impact that a high-profile lawsuit will have and determine if the expense is worth the potential gain.

- **What will media exposure do for us?** Finally, a litigation team must evaluate how media exposure through a targeted PR campaign will aid—or hinder—the team from reaching the desired outcome and preserving its client’s business interests. Even if a client’s aim is to settle a suit quickly and quietly, with as little media scrutiny as possible, the client may need some form of media strategy to account for the fact that opposing counsel might find it to his or her client’s benefit to use the spotlight.

With a firm understanding of the desired outcome, business interests, audiences, and effects of media on the trial, the PR practitioner can develop a comprehensive communications strategy that will support the legal strategy. Recommendations should include pretrial, trial, and verdict phases, with probable scenarios developed for each.

In preparing the communications strategy, consider the following:

**Professional and ethical requirements:**
American Bar Association Model Rule 3.6 prohibits lawyers from making public extrajudicial statements that have a “substantial likelihood of materially prejudicing” an adjudicative proceeding in which they are involved. For example, an attorney may not talk about the character or criminal record of a witness, expected testimony or physical evidence to be presented, or any information that would be inadmissible as evidence. An attorney may, however, talk about the general nature of the claim information contained in the public record and the result of any step in litigation. Attorneys must verify that their PR consultant has a clear understanding of the ethical rules governing comments that attorneys can—and cannot—make to the media.

**Media outlets:** It is important to determine key media outlets and then prioritize those outlets to be targeted. It is equally important to develop media distribution lists well in advance of trial. In most litigation, there are five primary types of media to consider:

- **Financial media,** such as *The Wall Street Journal,* *Forbes,* and *Fortune.* If one of the parties involved is publicly traded, news of the lawsuit could have a material impact on the company and, therefore, would be of interest to the financial media.

- **Wire services,** such as the Associated Press, Dow Jones, Reuters, and Bloomberg. Securing the interest of one of these key disclosure outlets will ensure broad dissemination of a story.

- **General interest media,** such as local and regional newspapers and broadcast outlets. These media, which have broad reach in their own right, will customize the story for their own markets.

- **Trade publications** that follow the industries of the client involved may also be interested in legal proceedings.

- **Legal trade media,** such as *The National Law, American Lawyer,* and other regional legal publications should be considered.

**Spokesperson selection:** The media will always want to talk with the actual plaintiffs or defendants in the suit—and this is almost never a good idea prior to trial. A member of the litigation team, preferably someone familiar with all aspects of the case, is the best choice. Attorneys will often make the best spokespeople because they are seldom, if ever, tempted to say too much. However, this can also work against the client’s best interests if the attorneys fail to appreciate the need for effective public communication—or if they insist on talking as if they are reciting a legal brief. After the trial, however, it is appropriate and advisable to have one of the plaintiffs or defendants prepared to do interviews in concert with the attorney.

**Key messages:** Any communication can and should be boiled down to three or four key messages. This is particularly important in complex litigation. The PR practitioner needs to be able to condense affidavits, documents, motions, hearings, and rulings into concise statements that form the core of the key messages. These messages need to be reviewed and “internalized” by the spokespeople prior to any media interviews.

**Support material:** It is helpful to prepare prior to the start of the trial a number of support items, such as talking points, media statements, press releases, internal talking points for other attorneys in the firm, and a litigation case chronology. The case chronology is particularly important because it can detail a timeline of previous rulings and motions, as well as other items to help the media cover the trial.
The PR practitioner should consider preparing a pretrial press release as well as multiple versions of a verdict release to ensure that the litigation team is prepared for all eventualities. If the verdict is against a client, a statement given on demand to media outlets, rather than a widely distributed press release, would be advisable.

**Media training:** Media training sessions prior to any interviews are essential. The sessions should include an overview of media motivations and operations, news criteria, news-gathering techniques, and interview techniques. They should include an impromptu question-and-answer session, or a more formal mock interview situation, depending upon the time available. Such mock interviews will allow the PR professional to gauge how well the spokespeople will perform during their interviews, providing an opportunity to suggest changes that will ensure that key messages are reinforced.

**Monitoring services:** The litigation team should also secure a professional media-monitoring service to ensure that all media mentions will be tracked and cataloged.

Managing the court of public opinion in a manner consistent with one’s ethical responsibilities is an important part of the attorney’s role in obtaining the best possible result for his or her client. The power and omnipresent nature of news coverage in the modern world have heightened the need for formulating a proactive and effective communications plan designed to manage the media coverage of high-profile cases.

Few trial attorneys are equipped to handle this responsibility without the aid of a knowledgeable and experienced PR professional. With a good PR professional on the team, attorneys can feel more confident in their ability to navigate these somewhat intim...

Mary Ann Sabo is a former journalist and the founder of Sabo Public Relations LLC, a full-service communications firm based in Grand Rapids, Michigan. Douglas E. Wagner is a partner in the Grand Rapids, Michigan office of Warner Norcross & Judd LLP.

**Endnotes**


---

**An Endangered Art Form**

*Continued from page 1*

judge, as the jury selection method often varies by judge within the district.

In federal district court, the judge will generally conduct voir dire and will allow limited participation by lawyers through questions submitted to the judge. In state court, judge-conducted voir dire is the exception rather than the rule. Where judges allow direct attorney voir dire of the panel, time limits will generally be imposed, so counsel must conduct focused voir dire. Preparation for voir dire should begin well in advance of trial. Counsel should carefully consider the desired juror profile for a particular case. Counsel should also consider the type of case, issues, witnesses, and length of the trial as factors in the context of voir dire.

While one should seek a fair and impartial jury, the fact is that, like all human beings, prospective jurors have predispositions and prejudices, have likes and dislikes, and will sometimes make appraisals or evaluations based on personalities or other irrelevant factors. My experience has been that prospective jurors commit to do a job and work hard to fulfill their oaths. Notwithstanding that, all are products of their environment.

In order to enhance the effectiveness of voir dire, consider the following points:

**Prepare voir dire questions.** After thoroughly thinking about and preparing for your case, prepare a set of voir dire questions. Those questions should be designed to explore juror attitudes about relevant areas. They also should be designed to help uncover bias and expose difficult jurors.

**Explore bias or prejudice.** Voir dire can be a critical, albeit difficult, stage of the trial. In many instances, there may be sensitive cases where the jurors are uncomfortable talking about issues. This can be especially true in employment cases. Bias or prejudice can be especially difficult areas to explore and can easily alienate a potential juror. No one wants to be thought of as a racist, sexist, or ageist. Yet, in certain cases, those matters must be dealt with in a way that elicits important information. Asking a direct question regarding race or gender bias will rarely elicit anything meaningful except exposing the individual who really wants to get out of jury service. It may be more useful to ask a question such as, “Do you believe that discrimination against (race) (gender) is a problem in this country? Why or why not?” For better or worse, many individuals use stereotypes as a shorthand mechanism for supplying information about people. Open-ended questions may permit individuals to discuss stereotypes that they may or may not embrace. Counsel should explain stereotypes and further explain that prejudice and discrimination are not synonymous.

Prospective jurors come out of the same social constructs and operate on the same stereotype that may, in some instances, impact outcomes in trials. That said, I realize that many courts are reluctant to allow attorneys to bring the issue of prejudice into the open at trial. Judges have often barred attorneys who represent socially marginalized clients from pointing out that their client comes from a group that may frequently be stereotyped, on the grounds that such references play to the prejudices of the jury. That is, the court adopts a measure of “color-blind formalism,” which may have the effect of enabling decision makers to mask bias, thereby causing a counterproductive result.

The movie *Philadelphia* portrayed Tom...
Hanks as Andrew Beckett, an attorney wrongfully discharged for his sexual orientation. Think about how you would approach voir dire generally around that issue—what is the goal? Sometimes asking questions about reading material, hobbies, plays, or bumper stickers can provide meaningful insights into a juror’s attitude about certain issues.

**Listen to juror responses.** Too many times I see attorneys so intensely focused on what they need to accomplish that they fail to listen closely to juror responses and miss meaningful opportunities for follow-up questions. Counsel must engage in active listening when conducting voir dire.

**Determine experience with the legal system.**

It is important to determine whether prospective jurors have previous experience with the legal system. Determine whether they have been sued, filed a suit, been a witness, had legal training, etc. It may also be helpful to learn if jurors are fans of pertinent law shows.

**Elicit attitudes about corporations.** Judges will always explain that individuals and corporations are equal under the law and are entitled to the same standard of justice. Additional questions eliciting attitudes about corporations generally are advisable.

**Avoid patent attempts to curry favor.** Counsel should conduct voir dire in a manner designed to make prospective jurors feel comfortable and safe in providing information. This requires a high degree of professionalism and skill. Jurors are generally offended by statements that may be perceived as patent appeals on impermissible grounds. Counsel must be careful to avoid making patronizing comments or appearing to be condescending. Such things may be held against clients.

**Show respect.** Finally, counsel must demonstrate respect for the court, opposing counsel, and the jury venire during jury selection and throughout the entire process. Jurors expect and appreciate courtesy, respect, and consideration of others during the trial. Counsel should project those qualities from the beginning to the end of the trial.

The subject of voir dire as a part of jury selection is a critical phase of the process. This topic has been the subject of many thought-provoking treatises and articles. Because the number of civil jury trials is decreasing, and because judges primarily conduct voir dire in federal court, many lawyers may have limited opportunity to engage in voir dire. If you are faced with conducting voir dire, consider the above points beforehand.

May it please the court . . . !

---

**Minority Trial Lawyer Committee • Section of Litigation • American Bar Association**

**Trial Tips for Civil Business Litigators**

Continued from page 1

The importance of a good, simple theme is well demonstrated in Philadelphia. In that movie, Denzel Washington’s character repeatedly asked Tom Hanks’s character to explain his case to him as if he were a two-year-old. How you would explain your case to a two-year-old is something you need to think about from day one.

**Preparing a Great Trial**

Before the development of modern discovery acts, old school trial lawyers had to figure out cases without the benefit of reams of written discovery and scores of depositions. One would think that the availability of modern discovery means that lawyers are better prepared for the business trial. In my opinion, this is simply not the case.

**Discovery is not a war.** Regrettably, discovery has far too often become a phony war for lawyers who have little trial experience. Recently, I was in Hawaii as part of a continuing legal education panel on how to deal with difficult lawyers. The panel, for the most part, became a session on how to vindicate yourself in a discovery battle (i.e., what is the best way to put down the other lawyer in a dispute at a deposition). Interestingly enough, the attorneys with the most trial experience have the least interest in winning these phony wars. Rather, the issue is getting the evidence you need to win at trial.

**Consider taking a trial deposition.** While there can be good reasons for taking a deposition in discovery mode (trying to figure out every fact), often a better approach is to take a “trial” deposition. In a trial deposition, you are trying to pin down the witness on issues that you anticipate will be discussed at trial. When examining the documents at issue in your case, remember it is highly unlikely that your judge or jury will be able to focus on more than four or five documents. So isolate a few critical documents. Documents that confirm your client’s story or disprove your opposition’s story are critical. Such a deposition is much better for impeachment purposes.

**Play discovery straight.** Do not fall into the trap of being the type of lawyer who takes glee in finding ways to avoid producing documents or giving straight answers to interrogatories. Think twice about those tactics. We once won a trial (that I took at the last minute) where prior counsel had failed to get the key documents and interrogatory answers from the...
defendant. We used the defendant’s shifty behavior as evidence that he had something to hide.

**Great preparation trumps all.** In the run-up to trial, remember that the secret for conducting a great trial is careful preparation. Organize, organize, organize. To this end, create a trial notebook with the complaint; the answer; all discovery requests and responses; witness scripts; motions in limine and opposition thereto; witness list; and exhibit list. Also, prepare witness scripts. For adverse witnesses, include cites to their deposition testimony (or any other source of impeachment) so that you can immediately impeach the witness.

**Know the code.** Make sure that you know the relevant evidence code backward and forward. Great facts do not matter if you cannot get them into evidence. During a five-week jury trial, the most damaging testimony we had was hearsay from a co-conspirator against the other members of the conspiracy. But this testimony fell with an exception to the hearsay rule that arises when the plaintiff establishes a prima facie case of conspiracy. Knowing this provision of the evidence code, we reordered the witnesses at trial so that we were sure that we could meet that requirement for the exception (a prima facie case of conspiracy). When we introduced the evidence late in our case, opposing counsel objected but was overruled when we simply cited the number of this little-known evidence provision. Our client won and collected a $1.9 million verdict.

**Check the courtroom.** Another key part of your pretrial preparation is learning the layout of the courtroom. Before trial, check out the courtroom and make sure you have a place to put blowups and large Post-it notes (a 2.5-foot-by-2-foot pad can be bought at Staples or Office Depot). If necessary, invest in a portable stand for blowups and large Post-its.

You can never underestimate the effect a single lie can have on a jury.

For example, if testing for racial bias, do not ask: You would not discriminate against my client because she is African-American? Instead, ask: Can you tell me about any experiences you have had with someone who is African-American?

**Establish trust.** Trials are also a matter of trust, and one of the best ways to lose trust is to promise too much. So, in your opening statement, do not overpromise. During closing, you can be sure that your opponent will remind the jury or judge what you failed to get into evidence.

**Write your closing first.** One great way to make sure you will deliver what you promised in your opening is to write your closing before your opening. Your closing will contain the facts and law that you believe you need to discuss to win. By writing your closing first, you make sure that not only will you discuss the right evidence in your opening, but also that you will see to it that you get the right evidence admitted.

**See that your witnesses tell the truth.** Make sure that your witnesses are never glib about the truth. You can never underestimate the effect a single lie can have on a jury. In my first jury trial, things were not going very well for my client and me until I caught the defendant in a single lie. Based upon that lie, the jury turned against her, and I won a substantial verdict.

**Keep it clear and simple.** The truth, however, cannot be buried in clutter. You have to pare down your case to the bare essentials. We have yet to see a trial that was too concise. For this reason, do not try to elicit every fact; instead just elicit facts that tell your story or disprove your opponent’s story. And use simple words: “before” rather than “prior to.” While juries love cross-examinations and will focus on your cross, do not lose their attention by wandering off into irrelevant topics.

Finally, and most importantly, have fun. Civil trials are a wonderful and rare experience these days.

**Minority Trial Lawyer Committee • Section of Litigation • American Bar Association**
Overview and Perspectives:
Turning Celebrated Principles into Reality

BY STEPHEN B. BRIGHT

No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel. While leaders of the judiciary, legal profession, and government give speeches every Law Day about the essential role of lawyers in protecting the individual rights of people accused of crimes, many states have yet to create and fund adequately independent programs for providing legal representation. As a result, some people—even people accused of felonies—enter guilty pleas and are sentenced to imprisonment without any representation. Others languish in jail for weeks or months—often for longer than any sentence they would receive—before being assigned a lawyer. Many receive only perfunctory representation—sometimes nothing more than hurried conversations with a court-appointed lawyer outside the courtroom or even in open court—before entering a guilty plea or going to trial. The poor person who is wrongfully convicted may face years in prison, or even execution, without any legal assistance to pursue avenues of postconviction review.

U.S. Supreme Court Justices give speeches decrying the poor quality of legal representation and acknowledging the likelihood that innocent people have been executed, but they continue to apply a standard of representation that makes a mockery of the right to counsel. In the 2002 Term, the Court upheld death sentences in one case in which the lawyer had represented the very victim of the murder that his client was convicted of committing and another in which the lawyer gave no closing argument at the penalty phase. The U.S. Court of Appeals for the Fifth Circuit, sitting en banc, was bitterly divided over whether the right to counsel is violated when the lawyer appointed to defend the accused in a capital case sleeps during the trial. After a panel held it did not, the en banc court reversed, but five of the 14 judges on the court dissented and would have allowed the defendant to be executed. And, 40 years after the Supreme Court's historic decision in *Gideon v. Wainwright*, the Attorney General of the United States has argued that anyone he labels an "enemy combatant" can be denied a lawyer and held incommunicado indefinitely.

For far too many people accused of crimes, the right to counsel is meaningless and unenforceable. The 40th anniversary of *Gideon* requires a candid recognition of the tremendous resistance to *Gideon* by some prosecutors, judges, legislators, governors, lawyers and laypeople, the indifference of many others, and the enormous difficulty of protecting the rights of people without a constituency in an era when public policy is driven by campaign contributions and courts are unwilling to protect individual rights. It also requires a candid recognition of how far short most governments have fallen in meeting their constitutional responsibilities under *Gideon*. It also requires a sober assessment of the new ways of seeking justice that are needed, men would be arrested for vagrancy and other minor crimes, convicted prisoners to plantations, railroads, turpentine camps, or other private interests that needed cheap labor. When a workforce was needed, men would be arrested for vagrancy and other minor crimes, convicted, and leased. African-Americans were sent to prison on almost any pretext. Many convicts were worked to death. One historian has observed that, "[t]he South's economic development can be traced by the blood of its prisoners." Although convict leasing was replaced by prisons in the late 19th and early 20th centuries, many states did not provide lawyers for poor people accused of crimes except in capital cases. And, in those cases, the accused often received only token representation. During the 1920s and 1930s, many communities replaced lynching, which were giving them a bad reputation, with quick trials at which the
accused were provided only perfunctory representation before being sentenced to death and executed. These proceedings “retained the essence of mob murder, shedding only its outward forms.”

A half century after President Taft’s speech, the U.S. Supreme Court, speaking through Justice Hugo Black, expressed the same sentiment in Griffin v. Illinois, declaring “[t]here can be no equal justice where the kind of trial a [person] gets depends on the amount of money he [or she] has” in holding that the government must provide a transcript to a convicted defendant for purposes of appeal. A few years later in response to Clarence Earl Gideon’s handwritten petition, the Court held that the government must also provide a lawyer for the accused in felony cases. The Court observed, “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,” before concluding, “lawyers in criminal cases are necessities, not luxuries.”

A decade later, the Court expressed its concern about “assembly line justice,” where pleas were accepted without adequate attention to the individual defendant, in Argersinger v. Hamlin. Emphasizing the importance of a lawyer in helping defendants decide whether to plead guilty or go to trial, the court held that no imprisonment may be imposed unless the accused was represented by counsel. The Court called upon the legal profession to expand the availability of counsel “so that no person accused of crime must stand alone of counsel.”

These principles are more easily stated by the Supreme Court, however, than implemented by legislatures and enforced by the courts. Many members of the legal profession have been far more responsive to the extraordinary income that can be generated through the practice of law than to the Supreme Court’s call to expand the availability of counsel to the poor.

Realization of Gideon and its progeny requires structure, resources, independence, and a standard of representation enforced by the courts. While the Supreme Court has set the standard of representation so low as to be virtually meaningless, some states have created independent programs and some have adequately funded them. For example, Florida promptly responded to Gideon with the creation of public defender offices in each judicial circuit. The outstanding work of two veteran attorneys in preventing a wrongful conviction for murder is featured in the Academy Award-winning documentary, Murder on a Sunday Morning by Jean-Xavier de Lestrade. Colorado, Connecticut, Kentucky, and North Carolina are among the states with state-wide public defender programs that are working hard to make Gideon a reality. However, 40 years after Gideon, many jurisdictions lack all four of the essential elements.

Resistance to Gideon

While some states have implemented the right to counsel recognized in Gideon, others have resisted. For example, Georgia’s legislature rejected a proposal for statewide funding for indigent defense in 1976 after being told by the state’s prosecutors that it was “the greatest threat to the proper enforcement of the criminal laws of this state ever presented.” The opposition of Georgia’s judges and prosecutors delayed any state funding for years and prevented the creation of a system for providing indigent defense in Georgia until 2003.

Thirty years after Gideon, a judge of the Texas Court of Criminal Appeals decried its “mischievous results” and lamented that the decision deprived Texas of “its sovereignty in right to counsel matters for indigent defendant,” arguing that a case-by-case assessment of whether the accused needed counsel was “better reasoned and more true to principles of federalism.” This statement is particularly remarkable because, at the time, Texas had done virtually nothing to implement Gideon, leaving the responsibility for the representation of indigents to its counties.

Many state and local governments have been concerned chiefly with cost, not the quality of the defense or the fairness of process for people accused of crimes. When they have examined factors other than costs, many evaluate indigent defense programs, not from the standpoint of ensuring fair trials, but with an eye to increasing administrative convenience in moving dockets. And legislators pass crime bills that include greater appropriations for law enforcement, crime laboratories, and prosecutors, producing more arrests and prosecutions, but they fail to provide adequate funding for indigent defense, causing the system to become even more out of balance.

The need for structure, organization, and training for prosecutors, judges, and clerks is universally acknowledged. Courts and prosecutor offices are usually organized by judicial districts and have full-time staffs and associations or other organizations for providing training and mutual support. But no such structure exists in many states for providing defense services.

For example, Texas, which has 254 counties, leaves primary responsibility to its counties to provide representation for those who cannot afford lawyers. Such a hopelessly fragmented system cannot and does not deliver a consistent quality of legal representation. In addition, for many years Texas left funding entirely to its counties, and it now provides the counties with only a small percentage of the total cost of indigent defense.

Resistance to providing counsel was renewed when the Supreme Court held in Alabama v. Shelton that lawyers must be provided in cases in which the defendant is placed on probation but faces imprisonment for a violation of probation. Judges on some municipal and other courts that handle petty offenses without providing lawyers announced their intention to carry on business as usual, by extracting waivers of counsel, finding a “loophole” in the decision, or even disregarding it.

Some jurisdictions are overcoming, however, the resistance to Gideon. Arkansas established a statewide, state-funded public defender system several years ago, and Virginia is now establishing public defender and capital defender offices.
Still, resistance continues in states such as Mississippi, where a bill to create a statewide defender system passed the State Senate in 1997 but was blocked in the House. Mississippi still leaves the representation of indigents up to each county.

**Justice on the Cheap**

In the absence of adequate funding to attract competent lawyers to defend the poor, some jurisdictions still conscript unwilling lawyers to defend the poor. When their turn comes, the tax lawyer and the real estate lawyer are assigned a criminal case. This is much like assigning a dentist a patient who needs brain surgery, but courts operate on the fiction that anyone licensed to practice law can handle any kind of case even though ethical considerations require lawyers to decline cases they cannot competently handle. A Georgia lawyer who practices real estate law from his home had to file suit recently to seek to prohibit the court in his county from appointing him to represent children accused of crimes because he was not competent to defend them.

Other jurisdictions contract with one or more attorneys to represent all the indigent defendants for a fixed price. The lawyer is allowed to maintain a private practice, thus creating a disincentive for the lawyer to devote much time to indigent clients. Some jurisdictions award contracts to the lawyer who submits the lowest bid. A family of lawyers who contracted with four counties in Georgia to provide representation for the past 20 years handled felony cases at an average cost of less than $50 per case. In another county, a contract lawyer came to court with responsibility for 94 people set for trial on the same day. Most cases were resolved with hastily arranged plea deals; none were tried.

While some jurisdictions provide competent representation through a public defender or an assigned counsel program, many fail to fund them adequately, leaving underpaid lawyers with staggering caseloads and insufficient resources for investigation and experts. Some states pay assigned counsel such low rates that attorneys make less than the minimum wage in some cases.

In many states, judges assign lawyers to defend the accused. Ensuring competent counsel is not always the highest priority for judges appointing lawyers. A study of homicide cases in Philadelphia revealed that judges there appointed attorneys to defend cases based on political connections, not on legal ability. In a survey of Texas judges, more than half said that judges they knew based their appointments in criminal cases in part on whether the attorneys were political supporters or had contributed to the judge’s political campaign. A quarter of the judges admitted that their own decisions in appointing counsel were influenced by these factors. Another survey of Texas judges found that almost half admitted that an attorney’s reputation for moving cases quickly, regardless of the quality of the defense, was a factor that entered into their appointment decisions.

And providing zealous representation is not always the highest priority for lawyers who depend upon judges for business. An experienced criminal defense lawyer in Houston said, “The mindset of a lot of court-appointed lawyers is to please the judge, to curry favor with the judge by getting a quick guilty plea from the client. Then everybody’s happy.”

**No Justice at All**

As a result of the failure of many states to meet their constitutional obligations under *Gideon*, it is generally acknowledged that the kind of justice one receives depends very much upon the amount of money one has, contrary to Justice Black’s statement in *Griffin v. Illinois* and the phrase “Equal Justice Under Law” engraved on the Supreme Court building.

The difference is evident from the start. A person who can afford to retain a lawyer usually does so within hours of arrest, and the lawyer may secure the client’s release shortly thereafter. People who cannot afford a lawyer may spend weeks or months in jail before being assigned a lawyer. Those who can afford a lawyer receive individual representation. Those who cannot afford a lawyer are often processed through the courts with only a few minutes of a lawyer’s time.

But a far greater consequence of inadequate representation is the ultimate outcome of the case. The exoneration of more than 100 people previously sentenced to death and the release of even more people as a result of DNA evidence have demonstrated the most drastic consequence of inadequate representation—conviction of the innocent. In many courts, it is far better to be rich and guilty than poor and innocent.

Gov. George Ryan commuted the sentences of all of those on Illinois death row in 2003 because of the high rate of error in capital cases in that state. He had declared a death sentencing moratorium in 2000 because between 1987 and 2000, the state had released from death row 13 people who had been exonerated, while executing 12. Four of those exonerated had been represented at trial by attorneys who were later disbarred or suspended.10 Dennis Williams was represented at his trial by an attorney who was later disbarred, and at his second trial by a different attorney who was later suspended. Williams was convicted twice of the 1978 murders of a couple from Chicago’s south suburbs before being exonerated by DNA evidence.

One-third of the lawyers who represented people sentenced to death in Illinois have been disbarred or suspended. One of the lawyers, a convicted felon and the only lawyer in Illinois history to be disbarred twice, represented four men who were sentenced to death. He handled those cases after being disbarred once and then reinstated despite concerns about his emotional stability and drinking.

The same poor quality of representation by lawyers has led to wrongful convictions throughout the country.

Gary Drinkard was sentenced to death in Alabama at a trial where he was represented by a lawyer who did collections and commercial work, another who handled foreclosures and bankruptcy cases, and a recent law graduate. Drinkard was
imprisoned for seven years, five of them on Alabama's death row, before receiving a new trial at which he was represented by criminal defense lawyers with experience in defending capital cases. After they proved that he was at home on the night the murder was committed with a back injury so severe that it would have been impossible for him to commit the crime, he was acquitted and released.

In some cases, the system gets what it pays for. Frederico Martinez-Macias was represented at his capital trial in Texas by a court-appointed attorney paid only $11.84 per hour.11 After a full investigation and development of facts regarding his innocence by pro bono lawyers from Skadden, Arps, Slate, Meagher & Flom, Martinez-Macias won federal habeas corpus relief. A grand jury refused to re-indict him, and he was released after nine years on death row.

Numerous other wrongful convictions exposed through DNA evidence are described by Barry Scheck, Peter Neufeld, and Jim Dwyer in their important book, Actual Innocence (2000). Unfortunately, for many people convicted in the criminal courts, there is no biological evidence for DNA testing and no volunteer lawyer who steps forward to take the case.

But, even if the accused is guilty of a crime, the knowledge and skills of counsel are essential to protect the integrity of the process and ensure that courts make well-informed decisions on issues ranging from bail to sentence. For example, lawyers appointed to defend Horace Dunkins in Alabama did not present evidence that he was mentally retarded, and lawyers appointed to defend Robert Sawyer in Louisiana did not present evidence of his mental illness. The juries did not have this critical information when they determined sentence. Nevertheless, both were executed.

The quality of legal representation tolerated by some courts shocks the conscience of a person of average sensibilities. But poor representation resulting from lack of funding and structure has become a part of the culture of the courts, and it has been accepted as the best that can be done with the limited resources available.

For example, judges in Houston, Texas, repeatedly appointed, during a 40-year period, a lawyer known for hurrying through trials like “greased lightning” to represent indigent defendants. Ten people represented by the lawyer were sentenced to death. In at least two of those cases, the lawyer slept during parts of the capital trial.

In Calvin Burdine’s case, the clerk of the court testified that “defense counsel was asleep on several occasions on several days over the course of the proceedings.” The lawyer’s file on the case contained only three pages of notes. Most people caught sleeping on the job in any line of work are fired. But Houston judges continued to appoint Burdine’s trial lawyer, the late Joe Frank Cannon, to capital and other criminal cases, and the Texas Court of Criminal Appeals found that a sleeping attorney was sufficient “counsel” under the Sixth Amendment.12

The U.S. District Court, making the unremarkable observation that “sleeping counsel is the equivalent of no counsel at all,” granted Burdine habeas corpus relief,13 but a panel of the Fifth Circuit reversed the grant of habeas corpus relief.14 The court, sitting en banc, held in a 9-5 decision that Burdine was entitled to a new trial.15 When Burdine returned to Houston for retrial, the trial judge refused to appoint the lawyer who had represented him for 15 years in postconviction proceedings and instead appointed a lawyer who had no familiarity with Burdine or his case.

The same lawyer who slept during Burdine’s trial slept during the trial of Carl Johnson, but both the Texas Court of Criminal Appeals and the Fifth Circuit upheld the conviction and sentence. Neither court published its opinion. Carl Johnson was executed in 1995.16

How can trial judges preside over cases in which the lawyer for a person facing the death penalty sleeps? A Houston judge who presided over the case of George McFarland answered, “The Constitution doesn’t say the lawyer has to be awake.”17 The Texas Court of Criminal Appeals upheld the death sentence imposed on McFarland, rejecting his claim that he was denied his right to counsel over the dissent of two judges who pointed out that “[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense.”18

Of course, most lawyers do not sleep during trial. But the bitter division of a federal court over whether sleeping during a capital trial violates the Sixth Amendment sadly demonstrates how little regard the courts have for the right to counsel. Harold Clarke, then-Chief Justice of the Georgia Supreme Court, aptly described the efforts of Georgia and many other states in providing counsel for the poor: “[W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question: Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one half injustice is no justice at all.”19

Stephen B. Bright is director of the Southern Center for Human Rights in Atlanta, Georgia. Phone: 404/688-1201; e-mail: sbright@schr.org. This two-part article is based on one originally published in The Champion, January/February 2003; the second part will be published in the next issue.

Endnotes

3. Id. at 60.
5. Gideon, 371 U.S. at 344.
7. Id. at 36.
19. Chief Justice Harold G. Clarke, Annual State of the Judiciary Address, REPRINTED IN FULTON COUNTY DAILY REP.
She could have easily been written off as a lost cause. She grew up in New York’s foster care system and wound up in special education classes. But Alycia M. Guichard persevered to secure a GED (in place of a high school diploma), attend New York University, and pursue her dream to become a lawyer. In May 2004, she received her J.D. from Fordham University School of Law and will spend this academic year as a prestigious public interest scholar in Georgetown University’s Teaching Fellowship program.

Through the ABA Legal Opportunity Scholarship Fund (LOS), the Section of Litigation played a small part in Guichard’s success. Since the ABA launched the scholarship in the 1999-2000 bar year, the Section of Litigation has contributed $250,000 to the fund—the single largest contribution from an ABA entity. “The ABA Legal Opportunity Scholarship allowed me to attend law school knowing that I had people who believed in me so much that they were willing to help finance my legal education,” Guichard says. “This scholarship helped give me confidence that I could become an attorney when that dream seemed so far away.”

When Cole D. Edwards graduated from college, he proudly wore the distinction summa cum laude. He had accomplished a total turnaround from his high school years, when he was labeled “at risk” and graduated at the bottom of his class. That transformation, fueled by his passion to serve his community and determination to make a difference, made Mr. Edwards a worthy recipient of the 2003-04 ABA Legal Opportunity Scholarship.

“In the years of my youth, I believed in a certain type of power—the magic of my Cherokee identity,” Mr. Edwards writes in his scholarship application. “Today I believe that power can indeed be derived from one’s identity, but that identity stems not solely from heritage, but from one’s passions. My strength comes from a longing to help others, my passion is to serve through law.”

Mr. Edwards acknowledges that his dismal high school performance has helped him reach out to other “at risk” juveniles. Describing his volunteer service as an AmeriCorps mentor, he says, “It was a joy to help and encourage people who were facing situations similar to my own high school experience.”

In fall 2004, Mr. Edwards will attend UCLA law school as a 1L. His long-term goal is to become a judge because he believes that “I can best serve society and my passion to affect improvement, by serving in State Court.”

Fifth Year of Section Support for LOS

The Section of Litigation, in addition to contributing more than any other ABA entity to the Legal Opportunity Scholarship Fund (LOS) since its founding five years ago, has provided the active involvement of several Section members. Judge Bernice Donald, a Section of Litigation Council member and contributor to Minority Trial Lawyer newsletter, and Richard Gray, cochair of the Section’s Diversity Plan Implementation Committee, both served on the 2004 LOS selection committee.

This bar year marks the fifth anniversary of the LOS program, which is designed to encourage racial and ethnic minority students to apply to law school and to provide financial assistance to these students. Each year, the LOS selection committee awards 20 scholarships to entering first-year law school students. The scholarship provides $5,000 annually to each scholarship recipient attending an ABA-accredited law school.

For more information about the scholarship, go to www.abanet.org/jfe/losfpage.html.
In This Issue

Attorney Voir Dire: An Endangered Art Form ................1
In Case You Don’t Have a Mentor: Trial Tips for Civil Business Litigators ...............................1
Stand Up for Trial Lawyers ..........2
Trying a Case Before a Hostile Court ..........................3
The Court of Law vs. the Court of Public Opinion: Winning in Both .......................6
Overviews and Perspectives: Turning Celebrated Principles Into Reality .........................11