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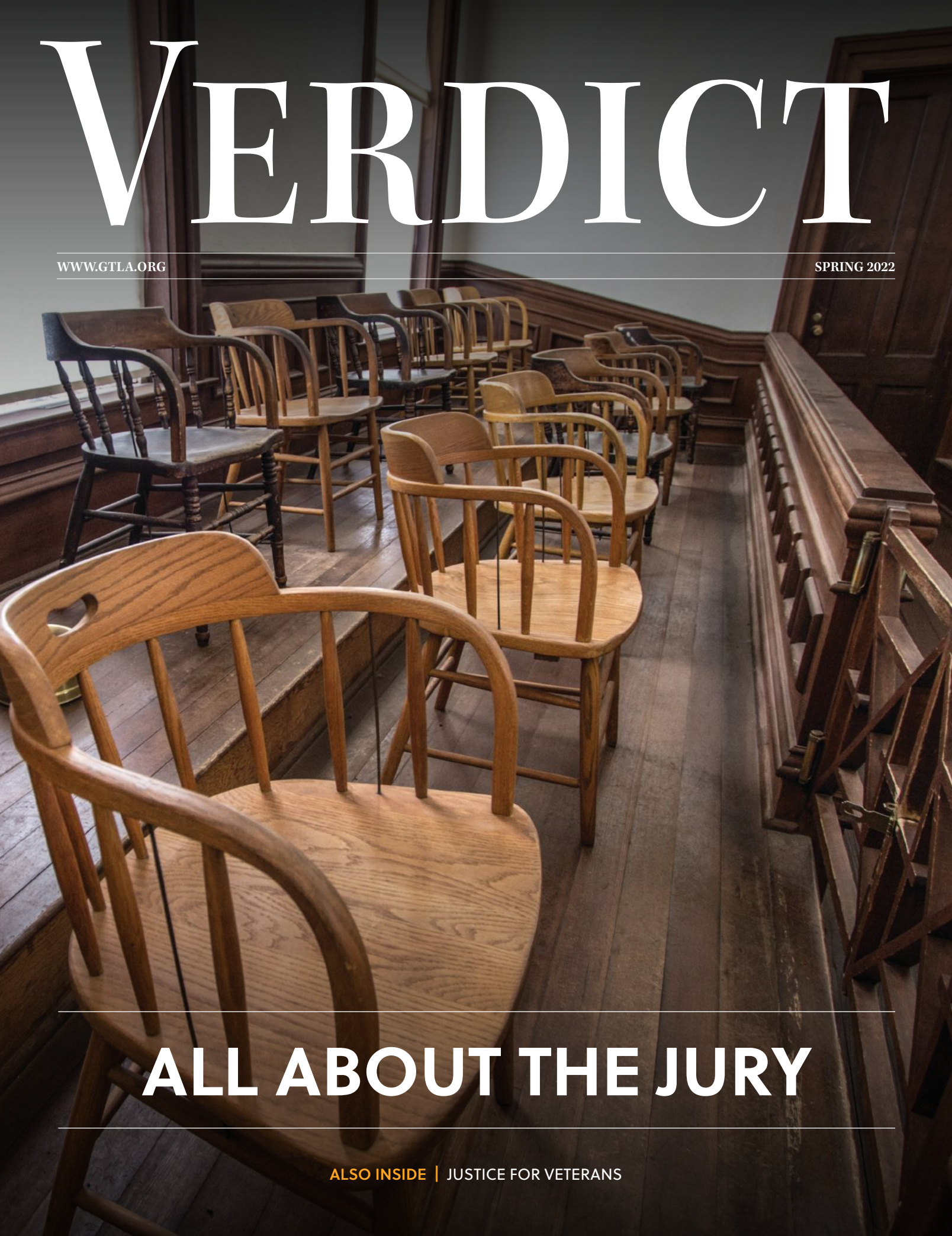

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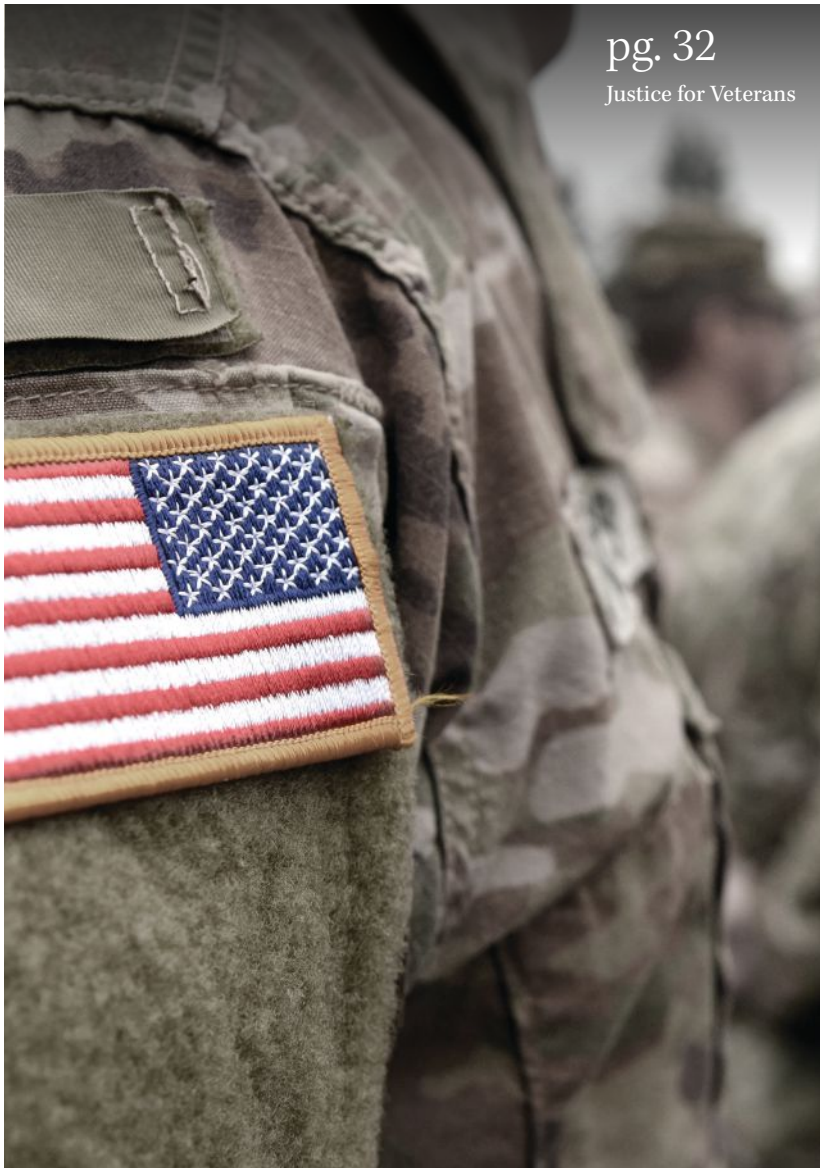

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It Has Been a Great Ride

JON POPE

It has been one of the greatest honors of my life to serve as president of GTLA. I have had the pleasure to work with numerous great leaders throughout my involvement with GTLA. The thoughtful, strategic, and consistent vision of past GTLA leadership has resulted in an organization with a strong and active membership, politically engaged and coupled with a top flight CEO and staff that continue to provide value to members through innovative programs and events.

It has been a busy year planning and overseeing meetings and CLEs, meeting with our local TLAs, working with committees, and working with our legislative team at the Capitol. I have tried to follow Sir Thomas Carlyle's advice from Sartor Resartus and "Do the duty which lies nearest thee." I enjoyed traveling to many parts of Georgia to talk local to TLAs and members about GTLA — Savannah, Valdosta, Macon, Columbus, Marietta, Rome, and Atlanta. In addition, I would be remiss if I didn't mention my wonderful visit to Booger Bottom. What I learned is GTLA has a vibrant, diverse, and engaged membership. This is the lifeblood of GTLA. We will continue to look at ways to increase GTLA's membership and provide value to our members.

I want to thank all of the members of the GTLA Executive Committee. All of you worked so hard to continue many of GTLA's best programs while improving GTLA in the areas of member communication, programs and continuing legal education, and community service.

GTLA's mission is to support and defend the right to trial by jury. We cannot fulfill our mission without our political team. This includes Dan Snipes, Jason Rooks, Jamie Lord, Howard Franklin, Brandeis Parkman, and the dynamic duo of Mo Thrash and John Haliburton. GTLA is so fortunate to have the very best legislative team in the State of Georgia and I want to thank them for all of their work. GTLA's team has been supported by our legislative committee chaired by Drew Ashby, Rob Snyder, and Ryals Stone. Their abilities to track and analyze legislation and support and defend GTLA's positions are critical.

I have been blessed to work with the most intelligent and dedicated officers during my tenure at GTLA. I served as chair of the Civil Justice PAC under Past President Pope Langdale and was later privileged to serve with Past Presidents Mike Prieto, Laurie Speed, Dan Snipes, and Lyle Warshauer. I look forward to continuing to serve and assist during the presidency of Adam Malone. No one cares more about GTLA than Adam Malone. I know Adam will continue to lead GTLA forward. I have also enjoyed working with Adam and the other GTLA officers — Madeline Simmons, Jason Branch, Josh Carroll, and Alan Hamilton. All of these officers give so much of their time for GTLA and I want to thank each one of them for their dedication.

I want to talk about who I believe is the most important person associated with GTLA, CEO Caroline McLean. I have never worked with a more intelligent, thoughtful, driven and competitive person. I first witnessed her talent when she was hired to serve as the executive director of the Civil Justice PAC. Caroline transformed the Civil Justice PAC into the powerful organization it is today. She has brought all of her talent and drive to her position as CEO of GTLA. Caroline has a progressive, forward-looking vision for GTLA that is critical to our continued success. Personally, I want to thank Caroline for her advice and counsel over these many years. If I did anything positive for GTLA during my tenure as president, rest assured Caroline had a hand in it.

In closing, I want to leave you with a few thoughts on what I believe are keys to the continued success of GTLA. Our members must remain engaged and committed to our goals. This means being engaged with our political efforts and showing a commitment by contributing financially. Finally, we must continue to invest in GTLA's LEAD program to continue producing future leaders.

I want to thank each of you for your help and support this past year and I look forward to my continued involvement in GTLA moving forward.

Jon Pope

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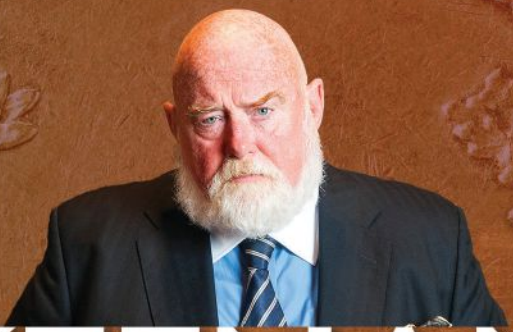

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Papa Don,
I wanted to thank the Keenan Trial Institute for leading this horse to water. I resolved two very difficult cases this week, and the KTI courses that I have taken over this past year are the primary reason. All of the lawyers on this EDGE journey have really helped reinforce my spine, and have me ready for battle. I can't wait for the next course. This beautiful system works, and our clients benefit. My clients are thrilled and feel like they have received their just due, that is why we all do this!

- J. Paul Vance, Jr., Esq., CT

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GTLA Mentorship Program

BY JAMES ROBSON

The Georgia Trial Lawyers Association has a great tradition of community, support, and leadership. More seasoned members regularly take the time to speak with our newer lawyers at our LEAD program events and share valuable skills and tips at our Winter Meeting and Annual Convention. The past two years have made in-person meetings and development challenging and has underscored to all of us how important mentorship and community are to our membership.

To help foster mentoring and fellowship between younger and more seasoned GTLA members, GTLA created the GTLA Mentorship Program, which pairs together two GTLA members for a one-year minimum commitment to help each other grow as litigators and leaders in the community. The goal is to pair mentees in their first four years of plaintiff's practice with mentors who have been trial lawyers for at least five years. The Mentorship Program Planning Committee is responsible for pairing individuals based on their abilities, needs, and goals.

The GTLA Mentorship Program began in 2021, and here is what a few of the 2021 participants have said about their experiences:

*"This is a great program! When I first joined the plaintiffs' bar, it was just after COVID shut everything down and I knew very few people on this side of the aisle. I soon thereafter signed up for the mentor program and was impressed at how thoughtful the matching process was…The GTLA Mentorship Program was a great introduction to GTLA, the many ways it can be helpful, and some of my contemporaries who have become friends, as well as generous and helpful resources." — **Meredith** (mentee)*

*"The mentor/mentee program turned out to be another great way for me to stay involved and give back. It is a worthwhile program, and I encourage everyone to get involved." — **Jay** (mentor)*

*"My mentor went above and beyond — meeting with me, answering questions, and discussing the law and life outside of it. As the practice of law continues to evolve, I appreciate GTLA's efforts to build support systems for newer lawyers." — **Brian** (mentee)*

*"My experience in the program was nothing short of spectacular. As a young trial lawyer learning the ropes, having a trusted, outside mentor proved to be more invaluable than I ever could have anticipated going in. My mentor provided me with seasoned, unbiased perspective on everything from negotiating salary to navigating personal matters such as office politics and managing work-life balance. Through this experience, I also gained a better understanding and greater appreciation of GTLA's salient mission, the immense value provided to GTLA members, as well as the many opportunities to become more involved moving forward." — **Kevin** (mentee)*

Mentors and mentees can come in all shapes and sizes and each relationship is unique.

- Mentors being accessible to their mentee as a sounding board when the occasion calls for it;
- Mentees committing to relationship building and self-growth;
- Checking in with each other at least monthly;
- Spending "face-time" (whether virtual or actually in-person) at least four times during the year; and
- "Attending" a GTLA event together (whether this is a happy hour, introducing mentees to friends at a break during a conference, or participating in a service opportunity is up to the mentor and mentee to decide based on their individual preferences and comfort levels).

The Mentorship Program Planning Committee is currently in the process of pairing mentors and mentees for 2022.

There is no doubt that the strength of GTLA is in our membership. The GTLA Mentorship Program will continue to give our membership a unique opportunity to strengthen, solidify, and increase their relationships within this organization.

ABOUT THE AUTHOR

Robson is a lawyer with Glass & Robson, LLC, an Atlanta-based law firm he co-founded in 2013. He handles serious personal injury and wrongful death cases throughout the country. Robson can be reached at (404) 751-4702 or jar@glassrobson.com.

Misguided Interpretation

BY BRIAN CUNHA AND DANIEL LEVITAS

Two recent state Board of Workers' Compensation orders have batted down a novel argument by insurers seeking to assert control over medical care in workers' compensation claims. The orders invalidated panels of physicians that lacked sufficient numbers and rejected insurer arguments that any physician "associated" with a listed physician could be substituted to revive an invalid panel.

Employers are required to maintain a valid panel of physicians that consists of "at least six physicians or professional associations or corporations of physicians who are reasonably accessible to the employees..." O.C.G.A. § 34-9-201(b)(1) and State Board of Workers' Compensation Rule 201(a)(1)(i). Failure to post a panel, or posting of a panel lacking the six required providers, allows for an employee to choose their own physician.

Prior to 2015, a valid panel could include only "non-associated" physicians. A 2015 amendment removed the "non-associated" requirement. This amendment was purportedly in response to the growing number of physicians merging their practices with established health systems, making it more difficult for employers to fill panels with physicians favorable to them, especially in rural areas.

After the 2015 change, employers could include multiple physicians on the same panel who were employed by the same medical practice, albeit practicing in separate locations. So, for example, an employer can now include both Dr. Death and Dr. Doom on its panel, even though both work for the same practice in different locations, provided both doctors are listed on the employer's panel as separate options.

Faced with the prospect that injured workers might assert some modicum of control over their own medical care, insurers began arguing that removing the ban on "associated" physicians somehow allows them to take one provider from a multi-physician practice already listed on the panel and use that provider to replace a defunct panel listing to reach the six-provider minimum required by law. Carried to its logical extreme, a panel could contain just one listing; however, as long as that single listing contained at least six physicians, each of them could be used to replace the vacant listing, thus restoring panel validity. Although the plain language of the statute allows for nothing of the kind, defense attorneys lately appear to be advancing this failed argument.

This misguided interpretation of the law seems to have taken root from an erroneous argument proffered in a footnote in Kissiah & Lay's Georgia Workers' Compensation Law (4th Ed. 2017), which states that "medical providers are no longer required to be 'non-associated,' which means that two doctors in the same practice could now count as two of the required six providers rather than counting as only one." *Id.*, § 18.05(2)(b), n. 18.

This argument is entirely devoid of legal authority and has been rejected now by at least two administrative law judges ("ALJs") at the State Board of Workers' Compensation.

Most recently, attorney Daniel Levitas of the law firm Clements and Sweet, LLP, successfully moved the Board to invalidate a panel that listed a physician who had died more than a year prior. The ALJ rejected the insurer's argument that the 2015 change to Rule 201(a)(1)(i) removing the ban on "associated physicians" permitted the replacement of a deceased doctor on the panel with any single physician associated with any of the five remaining medical practices. Levitas was awarded assessed fees for the employer's unreasonable defense.

Attorney Theodora Beck, also of Clements and Sweet, LLP, obtained a similar order in 2020 holding the employer's panel invalid. In that case, the panel listed just five physicians and one physical therapy facility, which does not count as a medical provider under the Georgia Workers' Compensation Act. The insurer argued the panel was still valid because the five medical practices listed employed a combined 60 physicians. The ALJ rejected the insurer's attempt to revive its invalid panel with this argument.

These two cases illustrate the attempts employers will make to deny injured workers their choice of doctor even when the posted panel of physicians is invalid. Neither of the rulings cited above were appealed, and there are no judicial opinions from higher courts on this issue, so we expect employers will continue their efforts to restore validity to plainly defunct panels in this manner. Lawyers representing injured workers should be prepared to vigorously challenge any such efforts. Don't allow insurers to push this argument. Move to invalidate the panel, seek assessed fees, and get your client to the best doctor possible.

ABOUT THE AUTHOR

Brian Cunha is an attorney at Slappey & Sadd, LLC, who represents injured workers seeking compensation and persons injured through the negligence of others.

Daniel Levitas is an attorney at Clements and Sweet, LLP, who represents injured workers. For copies of the Orders mentioned in this article, email brian@lawyersatlanta.com or dlevitas@clements-sweet.com.

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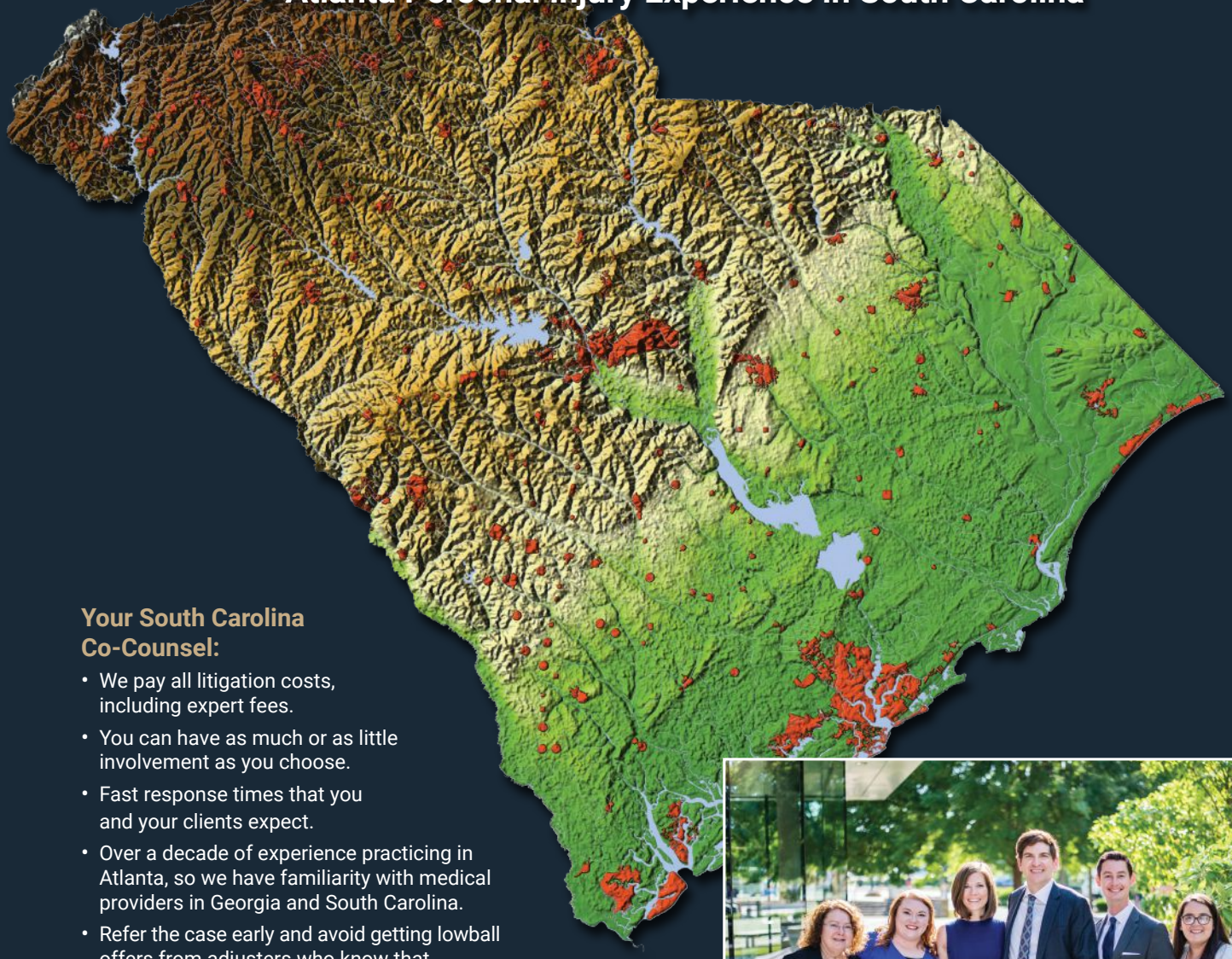

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MEMBERS IN THE COMMUNITY

In this recurring feature, *Verdict* magazine highlights GTLA members and their accomplishments, both in and out of the courtroom. This edition, we share the following:

AWARDS AND ACCOMPLISHMENTS

This September, Litner Deganian kicked off a partnership with LifeLine Animal Project. The firm has been paying the fees associated with adoption, sponsoring one animal for every case we have closed and will close through March of 2022 and possibly beyond. We like to think that every sponsorship makes it easier for someone to adopt a Lifeline dog or cat.

Tyrone Law Firm – Birth Injury Law is excited to announce that Nicole Ronco has been appointed as the new administrator of Tyrone's Tykes, the firm's 501(c)(3) nonprofit foundation.
https://www.tyronelaw.com/tyrones-tykes

Congratulations to Jim Myers who was promoted to partner at Pratt Clay, LLC in 2021.

Trial Lawyer Joseph R. Neal, Jr., Esq. and his firm Neal Law have moved their offices from midtown to No. 18 at Buckhead Village, 3017 Bolling Way, NE, Atlanta, Ga. 30305 effective January 1, 2022.

Glass & Robson, LLC is pleased to announce that Virginia C. Josey has joined the firm as an associate attorney. Ms. Josey previously practiced with another plaintiff's firm in Macon, Georgia, and will continue advocating on behalf of injured individuals and their families in cases involving serious personal injury and wrongful death.

Donovan Potter, a 2021 GTLA LEAD Alum, launched his own law firm, Potter Law, LLC, in August 2021. Potter Law is a full-service law firm focusing on personal injury cases, business/IP law and also serving as general counsel to small businesses, athletes and entertainers.

FIRM DEVELOPMENT

Attorney Zachary H. Thomas recently announced the launch of Zachary H. Thomas Law, P.C. with over 17 years of practice in the Savannah area. His practice areas include medical malpractice, personal injury, and wrongful death. For additional information, please visit www.zhtlawpc.com.

Congratulations to Brandon Smith on opening his own firm, Brandon Smith Law, as of October 1, 2021.

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Tips to Improve Technological Competence

BY KORINNE R. MORRIS, ACP

Paralegals witnessed the onset of the pandemic catapult the legal profession further into adopting technological solutions at record pace, forcing legal professionals to quickly adapt. Since then, we have all seen the hilarious "I am not a cat" video of the lawyer and his paralegal who lacked the know-how to remove a kitten filter from the attorney's face during a Zoom court hearing. While this faux pas gave us a good laugh, the reality is that clients and courts do not find it entertaining or cute for legal professionals to display technological incompetence.

The pandemic illustrated how important technological savvy in the workplace is for paralegals. Technology competence for legal professionals is not merely a suggestion but an ethical obligation. ABA Model Rule 1.1, Comment 8, states: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." This is an area where paralegals can add value to their firm and their cases: by assisting lawyers in ethics compliance by ensuring they themselves are fully versed in technologies relevant to their field and helping to educate their employers on the same.

There are additional professional benefits beyond a specific case. Career advancement opportunities for paralegals increase for those who put in the work to master technologies. At a minimum, doing so will greatly increase efficiency and organization, which translates to saving time and money.

For a motivated paralegal, there are numerous routes through which to pursue technological advancement. For example, a paralegal can complete programs through the Academy of Certified eDiscovery Specialists (ACEDS) if your area of practice involves eDiscovery. Likewise, you can learn more about digital forensics and assist the firm in preserving and obtaining electronic information from clients. If you are less involved in discovery you can become intimately familiar with each software program utilized by your employer and become the "go-to person" to teach others in your office about capabilities of that application. For example, many lawyers and staff members alike are unaware of the form, editing, and electronic signature options built into Adobe Acrobat programs.

Take the time to investigate other programs or applications that may be more user-friendly or increase efficiency within your office. These recent years have provided the perfect opportunity to learn about virtual document sharing and signature programs, like Docusign, and remote access to office voicemail and extensions, like that offered by Ring Central, among others. If you're feeling ambitious, you can even develop an understanding of how artificial intelligence (AI) algorithms are used in your area of law and the ways in which they may benefit or harm your cases (i.e. improve document review efficiency or cause data spoliation).

Beyond mastering software programs or other technologies utilized by your employer or within your field, take the time to learn all the places and ways in which technologies out in the world are capturing data or other evidence that could be applicable to the matters in which your employer is engaged. The "internet of things" continues to grow. Paralegals should be aware of all the potential locations of digital evidence that may exist relevant to the matters you are working on and have a plan in place to use technologies or engage digital forensics companies to collect and preserve that evidence in a timely manner. This includes researching and becoming acquainted with the various social media platforms and other digital outlets where your clients may be leaving a digital footprint.

Paralegals interested in learning more on this topic and the impact of technology and social media on litigation are encouraged to read the publicly available paper *Technologically Competent: Ethical Practice for 21st Century Lawyering* by Heidi Frostestad Kuehl.

ABOUT THE AUTHOR

Korinne Morris is an Advanced Certified Paralegal in Product Liability and eDiscovery with Harris Lowry Manton, LLP. Morris has worked in the legal field for nearly 25 years with over a decade in transactional real estate practice prior to entering the civil litigation arena. She serves on the Continuing Education Council for NALA | The Paralegal Association and is a recurring contributor to the APEX award-winning paralegal magazine *Facts & Findings*. Morris is also president of the Southeastern Association of Legal Assistants, and she recently joined the Advisory Committee for the Paralegal Studies Program at Savannah Technical College.

Jury Selection in State and Federal Court

BY KEVIN PATRICK AND MAGGY RANDELS

"View from the Bench" is a recurring feature in which *Verdict* magazine's readership will have the chance to become better acquainted with trial and appellate judges throughout Georgia.

STATE COURT

For the state court portion of this article, we had the distinct privilege of speaking with Chief Judge Richard M. Cowart of Georgia Southern Judicial Circuit. The Southern Circuit encompasses Brooks, Colquitt, Echols, Lowndes, and Thomas Counties. The Hon. Richard Cowart has served as a superior court judge in this circuit since 1995. He received his law degree from Mercer University's Walter F. George School of Law and undergraduate degree from Valdosta State University.

1. What do you handle during jury selection and what do you let the attorneys handle?

During jury selection in the Southern Judicial Circuit, the Court handles the general qualifying questions, such as residency in the county, as well as questions to ensure the fairness and impartiality of the jury panel, like knowledge of the parties and case. The Court also asks basic questions to the panel concerning their occupation, the name of their spouse, if applicable, and other demographic information. The attorneys then handle the individual questions to the jury panel, which involve the more case-centric matters.

2. Do you put any time limits on jury selection? Why or why not?

The Court does not impose any time limits on the jury selection process because the Court is mindful that the specific facts and circumstances of the case will often impact the time needed for this process. A more routine case may only take a half-day; whereas, a case with significant publicity may require several days. For example, the Court recently concluded a murder trial, which required additional time for the *voir dire* process. As a practical matter, the Court asks that the attorneys be mindful of the jurors' time and strive to be efficient and prepared throughout the jury selection process.

3. Have you changed your process during or as a result of the pandemic?
Prior to the pandemic in the Southern Judicial Circuit, the prospective jurors all used to report to the courtroom(s). Now, the Clerk of Court has the jurors check in for a screening process in the lobby of the courthouse. This process includes a health screening and temperature check to mitigate any risks of spreading an illness. Another benefit of this process, which will be maintained even after the conclusion of the pandemic, is the ability to screen out people that may not actually be able to serve on a jury due to age or a change in residency. This initial check-in process has helped make the jury selection process more efficient for the Court.

4. Do you have any observations about juror attitudes toward jury selection, both before and during the pandemic? Have there been any changes?
The Court has been pleasantly surprised and found that jurors have been and continue to remain steadfast to their civic obligations for jury service. There generally is a high rate of attendance for jury service in the Southern Circuit both before and during the pandemic. The jurors have been receptive to social distancing practices and the use of masks.

5. What practice tips would you give to attorneys conducting *voir dire* in federal/state court for the first time?
As a practical matter, the Court strives to avoid issues that may come up in juror selection by talking with the attorneys prior to the actual *voir dire* process. These discussions can range from the placement of jurors in the courtroom, sensitive topics that may arise in the case, as well as the manner of exercising strikes. In addition, attorneys should always be cognizant of their roles not just as advocates for their respective clients, but also attorneys are officers of the court. Attorneys that are well-prepared and professional tend to have better results, avoid unnecessary interruptions in the jury selection process, and help the overall functions of the Court.

FEDERAL COURT

For the federal court portion of this *View from the Bench*, we spoke with the Hon. Steve C. Jones of the United States District Court for the Northern District of Georgia. Judge Jones was a Superior Court judge in the Western Judicial Circuit from 1995-2011. Since 2011 he has served in his current position. Judge Jones is a proud graduate of the University of Georgia for both his undergraduate and law degrees.

1. What do you handle during jury selection and what do you let the attorneys handle?

The Court handles roughly 75 percent of jury selection and the lawyers handle the other 25 percent. Before the judge enters the courtroom, the jurors are all set. He greets them on behalf of the United States District Court and explains jury duty, responsibilities, and procedure. Judge Jones stresses honesty as well as the importance of providing as complete an answer as possible. For example, he will explain to the jurors that if someone has a plane ticket to Italy during the jury period, that should be disclosed. He lets the jurors know they can answer questions in private if needed.

After that introduction, the Court allows lead counsel to introduce themselves and their teams. Then the Court reads *voir dire* instructions, including a brief overview of the case. Following the instructions, Judge Jones asks the qualifying questions regarding attorneys, parties, witnesses, and insurance. In panels of 14, the jurors then individually answer eight preset questions: (1) What is your present occupation? Please tell us the name of the company where you work. (2) If you have had this job for less than three years, what was your previous job? (3) If married, what is your spouse's occupation? (4) In what city and county do you reside? How long have you lived there? (5) What is your educational background? (6) Do you belong to any social, civic, political, or religious organizations? (7) Have you ever been on a jury before? If so, when, where, what kind of case, and did you reach a verdict? (8) Have you (or any member of your family) received any legal training?

The Court permits follow-up questions from the attorneys. Then, each side is allowed to ask their own questions. The questions must be submitted to the Court in advance and then pre-approved. This streamlines the process and avoids objections during questioning. Following questioning, the jurors are excused and challenges are entertained.

2. Do you put any time limits on jury selection? Why or why not?

Yes. There is no limit on the number of questions, but each attorney gets 20 to 30 minutes per panel. The Court finds this helps to decrease repetitiveness. Because the lawyers know ahead of time how long they will have, it encourages prioritization of the most important questions. Additionally, the time limits make things more efficient and keeps jurors' attention so they are providing full, honest, and accurate answers.

3. Have you changed your process during or as a result of the pandemic?

Yes. Judge Jones currently selects jurors in the 23rd floor Ceremonial Courtroom to allow for more space. Instead of being questioned in the jury box, there are two microphones. Odd numbered jurors go to one microphone; even numbered jurors go to the other. Each juror is given a plastic bag to cover the microphone while speaking. Hand sanitizer is present as well. While this process is a little more involved for jurors, the general questions and procedure are the same.

4. Do you have any observations about juror attitudes toward jury selection, both before and during the pandemic? Have there been any changes?

In the Northern District, the Court has seen practically no problems with jurors coming in and complying with their obligations. The panels have represented a good cross section of the community. In Judge Jones' experience on the bench since 1995, he has found that jurors, with some limited exceptions, come in wanting to do their best, take notes, and follow instructions. During the pandemic, he has even more respect for them. Jurors have really risen to the occasion, including those coming from far away (Cherokee County into downtown Atlanta, for example).

Judge Jones finds that it helps to explain the whole process to the jurors, including why precautions are being taken. He also thanks the jurors and finds they appreciate that gesture.

5. What practice tips would you give to attorneys conducting *voir dire* in federal/state court for the first time?

1. Be prepared and ready. Know the procedures for your judge, and learn them before you arrive on the morning of trial. In federal court many judges have standing orders that explain the process, but if not, ask at your pretrial conference. Do not just know the procedures, also follow them. Judges do not like having to correct you in front of the jury, so don't make them.
2. Make a good first impression with the jury and be respectful of their time. Don't ask the same or similar questions that have already been asked. Listen and don't be repetitive — the jurors will notice. Instead, follow up or clarify answers already given.
3. Have someone else with you to track answers. Do not waste time writing out answers while you are asking questions.
4. Have local counsel if you are not from the area. That person will be the best resource because they have local knowledge about the area and about the jury pool.

5. Be courteous and professional with the jurors. It goes a long way to call them by name (Mr./Ms. Last name, do not use first names).
6. Be open and honest with the jurors. Take the opportunity to introduce yourself and let the jury know something about you, i.e., where you're from, how long you've been practicing, whether you served on a jury before. Remember the jurors are answering a lot of personal questions, so it helps to break the ice when you share something about yourself. It makes the jurors more comfortable.

On behalf of the members of the Georgia Trial Lawyers Association, we are grateful for all the federal and state judges and their staff and their commitment to ensuring access to justice during the COVID-19 pandemic. We also sincerely appreciate advice and insights from both Hon. Steve Jones and Hon. Richard Cowart for this article, as well as their commitment to public service and our judicial system.

ABOUT THE AUTHOR

Kevin Patrick is a trial attorney in Atlanta with his own practice, Kevin Patrick Law, LLC. Kevin primarily handles automobile accident and daycare injury cases. He is a graduate of the LEAD Program and recipient of the Fred Orr Memorial Scholarship. Kevin attended Mercer University for law school and the University of Georgia for his undergraduate degrees.

Maggy Randels is a trial attorney at Shiver Hamilton Campbell, LLC, in Atlanta. Maggy handles serious injury and wrongful death cases, primarily in the automobile, commercial vehicle, and premises liability fields. She is an alum of GTLA LEAD and a proud Georgia Bulldog. Maggy can be reached at maggy@shiverhamilton.com.

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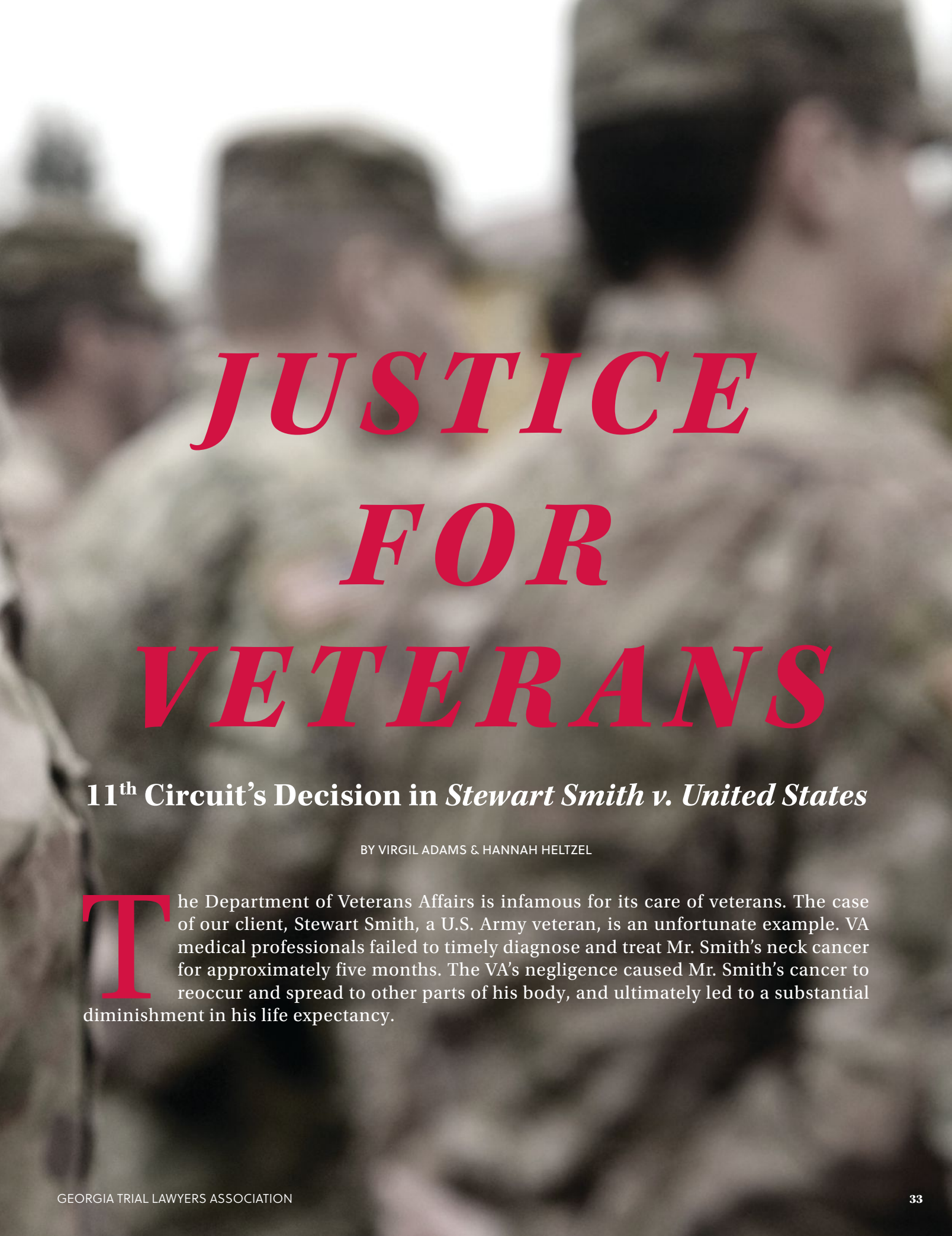

JUSTICE FOR VETERANS

11th Circuit's Decision in *Stewart Smith v. United States*

BY VIRGIL ADAMS & HANNAH HELTZEL

The Department of Veterans Affairs is infamous for its care of veterans. The case of our client, Stewart Smith, a U.S. Army veteran, is an unfortunate example. VA medical professionals failed to timely diagnose and treat Mr. Smith's neck cancer for approximately five months. The VA's negligence caused Mr. Smith's cancer to reoccur and spread to other parts of his body, and ultimately led to a substantial diminishment in his life expectancy.

In 2018, Mr. Smith brought a medical malpractice lawsuit against the United States in the Middle District of Georgia under the Federal Tort Claim Act ("FTCA"), 28 U.S.C. §1346(b). The government moved to dismiss Mr. Smith's claims, arguing that the VA's failure to timely diagnose and treat Mr. Smith's neck cancer was a mere "decision regarding benefits," and thus, judicial review was foreclosed by the Veterans' Judicial Review Act ("VJRA"), 38 U.S.C. §511(a). The district court granted the government's motion to dismiss for lack of subject matter jurisdiction. The 11th Circuit reversed in part, finding that Mr. Smith's medical malpractice claims were not subject to the VJRA, and thus, the district court had jurisdiction over such claims.

The 11th Circuit's decision in *Smith v. United States* is a significant justice for veterans in failure to diagnose and treat cases. The *Smith* case is the first 11th Circuit case to solidify that veterans' failure to diagnose and treat cases are not barred by the VJRA and that veterans may pursue such cases in federal court under the FTCA.

Avenues for Veteran Medical Malpractice Claims

To understand the 11th Circuit's holding in *Smith,* it's important to review the two avenues that Congress provides veterans for recovery against the VA: (1) a veteran may file a medical negligence lawsuit against the United States pursuant to the FTCA; and (2) a veteran may simultaneously pursue a disability or benefits claim with the VA.

Under the FTCA, a veteran may bring a medical malpractice action against the United States in federal court for the negligence of the VA's medical professionals and personnel. 28 U.S.C. §1346(b)(1); *United States v. Brown*, 348 US 110, 110-13 (1954). The FTCA states that district courts "shall have exclusive jurisdiction of civil actions on claims against the United States for money damages…for…personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government" under certain circumstances. 28 U.S.C. §1346(b)(1). Regarding tort claims related to negligence of the VA, 38 U.S.C. §7316(a)(1) states that the FTCA will provide the remedy for "damages for personal injury, including death, allegedly arising from malpractice or negligence of a health care employee of the VA in furnishing health care treatment" and that a remedy is "exclusive of any other civil action or proceeding by reason of the same subject matter."

Accordingly, the FTCA allows the United States to face liability for negligence of VA medical providers just as private medical providers may face liability for medical negligence. As such, the standards of care that govern medical professionals are set forth in state law and incorporated into the FTCA. *Anestis v. U.S.*, 749 F.3d 520, 527 (6th Cir. 2017). Georgia law recognizes medical negligence through delay that causes injury or death of a patient, including loss of chance for a cure or recovery or diminished life expectancy. *See, e.g., Central Ga. Women's Health Center, LLC v. Dean*, 342 Ga. App. 127, 134-36 (Ga. Ct. App. 2017) (failure to diagnose case). These are the very same grounds upon which Mr. Smith filed his lawsuit for medical malpractice against the VA.

Apart from medical malpractice actions under the FTCA, a veteran can pursue another independent track of recovery. A veteran may seek "benefits" under 38 U.S.C. §1151(a) for disability or death resulting from negligence on the part of VA medical personnel or occurring at a VA facility. The Veterans Judicial Review Act, 38 U.S.C. §511(a), created an administrative review process to review disputed veteran benefits issues, thereby limiting the authority of federal courts to preside over cases involving benefits owed to veterans. *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1020 (9th Cir. 2012). This comes into play, for example, if the VA denies benefits for certain medical care for a veteran. The VJRA further provides that the

> THE 11TH CIRCUIT'S DECISION IN *SMITH V. UNITED STATES* IS A **SIGNIFICANT JUSTICE FOR VETERANS** IN FAILURE TO DIAGNOSE AND TREAT CASES. THE SMITH CASE IS **THE FIRST 11TH CIRCUIT CASE** TO SOLIDIFY THAT VETERANS' FAILURE TO DIAGNOSE AND TREAT CASES ARE NOT BARRED BY THE VJRA AND THAT **VETERANS MAY PURSUE SUCH CASES IN FEDERAL COURT** UNDER THE FTCA."

Secretary of Veterans Affairs is charged with "deciding all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." 38 U.S.C. § 511(a). The VJRA's implementing regulations specifically excludes medical determinations from the Board's review process under the VJRA. 38 C.F.R. 20.104(b). The VJRA dictates that "the decision of the secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." *Id*. Therefore, a district court lacks jurisdiction over a veteran's action against the United States if adjudication of the claim would require review of a VA "decision regarding benefits." *Anestis v. United States*, 749 F.3d 520, 525 (6th Cir. 2014).

The VA's denial of benefits for certain medical care may be subject to the VJRA. For example, if VA medical professionals find that a veteran requires specialized care not available through the VA system, the VA's Care Coordination Team must approve such treatment, which entails a two-step process: (1) an administrative review to ascertain eligibility of VA benefits; and (2) a clinical review to determine whether the recommended services are available through the VA and whether the outside care is medically necessary. If the outside care is approved, there is no longer any question regarding benefits, and a VA employee will schedule an appointment with the appropriate outside provider. At all times, the VA's Care Coordination Team is responsible for tracking and monitoring the patient's medical care and treatments.

The VA's Failure to Diagnose and Timely Treat Mr. Smith's Throat Cancer

The VA's failure to diagnose and timely treat Mr. Smith's throat cancer was inexcusable. In October of 2013, Mr. Smith began experiencing severe pain in the right side of his head, tongue swelling, and slurred speech. On October 24, 2013, Mr. Smith called the VA Medical Center in Dublin, Georgia, where he had received medical treatment for years. A VA nurse relayed Mr. Smith's symptoms to his VA primary care physician and advised Mr. Smith to go the local emergency room. Mr. Smith went to the ER that day and the next day, attempted to make an appointment with his VA PCP, but was unable to get an appointment

until December 16, 2013. At this appointment, Mr. Smith's VA PCP confirmed swelling in his neck and ordered a CT. Mr. Smith's CT, which was finally done in January 2014 because of VA delays, showed a tumor in his throat at the base of his tongue. The VA radiologist noted that the CT scan was worrisome for underlying head and neck malignancy, yet only recommended an outside ENT consultation and possible PET/CT for biopsy.

Once Mr. Smith's VA PCP received his CT results, the PCP notified VA personnel that Mr. Smith needed a follow-up appointment with the VA as soon as possible. The PCP also recommended Mr. Smith receive a consultation with a non-VA ENT specialist and entered a "Non-VA Care Coordination Note" into Mr. Smith's record requesting such. Although Mr. Smith's CT scans showed cancer, Mr. Smith's medical team did not order or attempt to facilitate an immediate outside ENT consult. On January 22, 2014, Mr. Smith attended his appointment with his VA PCP and reported swelling and pain in his neck and right ear. Again, his VA PCP entered another Care Coordination Note requesting an outside ENT consultation. On January 24, 2014, Mr. Smith's VA Clinical Coordinator approved Mr. Smith's outside ENT consult. At this time, there was no longer any issue whether Mr. Smith was entitled to VA benefits for the outside ENT care.

Over the next months, the VA failed to timely diagnose, treat, and monitor Mr. Smith's cancer and treatment:

- From January 24 through March 6, there was no medical follow-up or care coordination by any VA medical professional.
- On March 7, the VA finally scheduled Mr. Smith's outside ENT consult for March 11.
- On March 11, Dr. Sanford Duke of the ENT Center of Central Georgia examined Mr. Smith and confirmed the mass on his right neck and tongue. A biopsy revealed malignant cancer.
- Two days later, Dr. Duke informed Mr. Smith that he needed immediate surgery and ordered a CT scan with contrast and PET scan in preparation for the surgery.
- The VA failed to perform the CT scan until March 28 and the PET scan until April 7.
- The VA took until May 12, 2014, to approve Mr. Smith's surgery and only after Congressman Barrow contacted the VA regarding Mr. Smith's care.
- On May 19, 2014, Dr. Duke performed surgery on Mr. Smith. Unfortunately, Dr. Duke found that Mr. Smith's cancer had grown during the VA's delay and now encased his carotid artery. Importantly, Mr. Smith's CT taken on March 28 clearly showed no encasement of the carotid artery. Dr. Duke was unable to remove the entire mass through surgery.
- Due to the growth of cancer, Mr. Smith was required to undergo a more intensive chemotherapy and radiation regimen, thereby reducing his chances of survival.

- On May 29, 2014, Dr. Duke and Mr. Smith's oncologists confirmed a plan of care, which was to begin on June 3.
- It was only after Mr. Smith and our firm held a press conference that the VA finally started his treatments on June 25, 2014.

Our experts, Dr. Robert Ferris and Registered Nurse Rose, opined that the VA's care of Mr. Smith was below the standard of care. Dr. Ferris specifically opined that Mr. Smith's cancer was completely resectable as of March 28, 2014, yet the VA's two-month delay in getting Mr. Smith to surgery resulted in the cancer progressing.

11th Circuit's Decision in *Smith v. United States*

The sole issue on appeal was a jurisdictional question: whether Mr. Smith's claims involved a decision of benefits and was thus subject to the VJRA? If such claims were subject to the VJRA, the district court lacked jurisdiction. If they were not, the court had jurisdiction.

On appeal, the government argued that Mr. Smith's claims concern only "delays in the approval and provision of veterans' benefits" and Mr. Smith's medical malpractice claims were based on the VA's delay "in approving and scheduling his medical care." The government argued that even a complete failure treat, or significant delay in treatment on behalf of the VA would still not be a FTCA claim, as the VJRA would apply and limit judicial review of such claims. The Court rejected this expansive interpretation of the VJRA, finding that "under this view, any issue a veteran had in not receiving necessary medical care could be addressed only through the administrative appeals process established by the VJRA — a process designed to address a veteran's entitlement to benefit, not tort claims." The Court stated "it defies both common sense and the plain language of the VJRA to frame Mr. Smith's case as one in which he seeks solely to have an Article III court review a benefits determination by the Secretary."

The Court held that Mr. Smith's medical malpractice claims were not subject to the VJRA and thus, the district court had jurisdiction to hear these claims. The Court reasoned that some of Mr. Smith's claims centered on the VA's medical personnel's failure to diagnose his cancer, recognize the severity of his medical condition, properly treat his cancer by immediate surgery, and generally to manage, coordinate, and monitor his medical care. The Court found that "Mr. Smith's claims, in effect, are that the VA's medical professionals and their supporting personnel owed him a legal duty of standard medical care and breached that duty." The Court noted that Mr. Smith had specifically asserted medical malpractice claims against the VA and attached an affidavit of expert Dr. Ferris in compliance with O.C.G.A. §9-11-9.1, which set forth the VA's medical negligence. The Court also noted that Dr. Ferris testified that "given Mr. Smith's initial symptoms, the standards of medical care required that the VA's medical team: (1) promptly obtain CT scans within days; (2) given the obvious findings of cancer from the CT scans, quickly diagnose cancer; and (3) perform surgery soon thereafter."

The Court further reasoned that "Mr. Smith's allegations of medical negligence (in both diagnosis and treatment) do not require the district court to decide whether Mr. Smith was 'entitled to benefits,' nor do they 'require the court to revisit any decision made by the Secretary in the course of making benefits determination." (*citing Shenseki*, 678F. 3d at 1025). In fact, the Court found that "as of January 24, 2014, the VA had completed its administrative and clinical review and determined that Mr. Smith was eligible for an outside ENT consult and that the consult was necessary." Accordingly, "there was no benefits issue as to the outside ENT consult then or at any time." Accordingly, "the delay in diagnosis and treatment was not due to an adverse benefits decision, and there is no adverse benefits decision, or a question to that decision, for a federal court to reexamine." (*citing Tunac*, 897 F.3d at 1202; *Broudy*, 460 F.3d at 115). For these reasons, the Court found that Mr. Smith's medical malpractice claims were brought properly before the district court pursuant to the FTCA and not barred by the VJRA. The Court reversed and remanded the case back to the district court. We anticipate going to trial this year to obtain further justice for Mr. Smith.

As a result of the VA's negligence, Mr. Smith has endured a tremendous amount of suffering and continues to require medical treatment for his cancer. In 2018 and 2019, Mr. Smith received radiation and chemotherapy treatments. He then underwent immunotherapy in 2019 and 2020. In 2021, Mr. Smith had another recurrence of cancer and was required to undergo additional therapy.

And to think, all of this was preventable had the VA taken proper care of a veteran.

ABOUT THE AUTHORS

Virgil Adams began his distinguished career as an assistant district attorney for the Macon Judicial Circuit, where he handled and tried many serious, high-profile cases. His extensive trial experience includes a long history of success on the civil side, including a $15 million verdict in a premises case. Adams has earned his reputation as the "go to" lawyer in Middle Georgia for his expertise in understanding and reading juries.

Hannah Heltzel is an associate at Adams, Jordan & Herrington, PC, in Macon, Georgia, where she litigates catastrophic injury cases resulting from medical malpractice, civil rights violations, automobile collisions, premises liability, and products liability. She is a 2019-2020 GTLA LEAD alumna and now serves on GTLA's Verdict Board.

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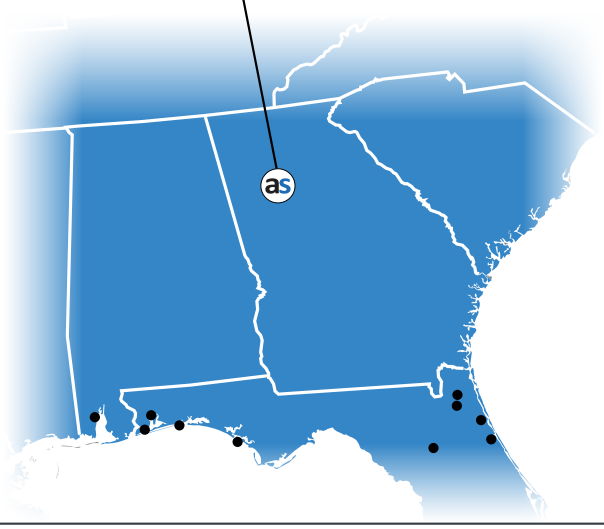

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Things to Avoid in Jury Selection

BY JAY SADD

I have been fortunate to pick a lot of juries for the plaintiff over the last 29 years in cases involving car wrecks, truck wrecks, premises liability, medical malpractice, insurance bad faith and beyond. Here are a few things I have learned to avoid.

Late Nights — Get your sleep. We are better rested than we are tired. We often use studies in trucking cases to show that sleep deprivation is a leading cause of dangerous driving. It is also a leading cause of bad lawyering.

Going In Cold — Every judge conducts jury selection differently; sometimes very differently. Ask other lawyers, clerks and the judge herself how she does it before day one of trial. Where will the venire be seated? How will they be numbered? General questions, then individual questions? Or do we follow up on general questions as they are answered? When do you normally break? How much time is allotted, if there is a limit, to jury selection? What questions will the judge be asking? With this information and more, you can plan your approach and be on the ready with charts, etc., to help your team keep track of the fast-moving process.

Going It Alone — Jury selection is less about the questions we ask than the answers we receive. Obviously, four eyes and ears are better than two. The same can be said for six of each. Eight might be too many cooks in the kitchen.

Believing It Is Jury Selection — Calling it jury "selection" is ironic. Of course, we do not select people we want to be on our jury; we deselect people we don't want to be on our jury. Finding those in the venire to strike requires the attitude of a cordial assassin, not one of a fraternity membership chairman.

Looking Away — Don't do it. Jury selection is about leading a discussion. Keep eye contact with the people with whom we are having a conversation.

Taking Notes — It forces you to lose eye contact. I admit I do it occasionally. I use a one letter code when I do and am quick about it. There is a lot for you to keep track of during jury selection. Let your co-counsel or paralegal take the notes.

Reading Notes — I also confess to using notes, but only to trigger the thought to ask the question. Nobody likes to watch somebody else read. Use notes sparingly, or not at all.

Talking More Than Listening – We get wrapped up in doing our job, part of which is to ask the right questions. But it is far more important to be good at listening. Really listen, not just to the words, but to the tone, the sincerity and the readiness or hesitancy of the spoken words.

Talking and Listening More Than Observing — As important as words might be, body language speaks volumes. Did they cringe? More subtly, did they change body position just a bit? Was an eyebrow raised? Did they look away for a split second? How a prospective juror really feels is often more accurately depicted by body language than actual words. At the risk of sounding mystical, let yourself feel what is going on. It is hard to trust your gut if you don't gulp it all in.

Asking Only Your Questions — Why wait for the defense lawyer to ask his questions? If you know she is going to ask, "Does anyone here think that just because my client has been sued that he must have done something wrong?" then go ahead and ask it yourself. This will give you the opportunity to rehabilitate that potential juror before the defense lawyer gets his claws in her.

Imitating Others — Enough said. Be your best self. Learning from others is invaluable, but imitating others is impossible and leads to inauthenticity. It is hard to be seen as telling the truth when you are inauthentic. The two just don't mix. Never have, and never will.

Arrogance — Don't think you know everything. We are only human, and as humans we don't always see things clearly. This is especially true when we are personally invested in representing a client. Everybody drinks their own Kool-Aid. Mock juries, focus groups and the advice of other attorneys help keep us humble and curious, and help us plan jury selection as much as they do other aspects of the trial.

Too Much Advocacy — Jury selection is not the time to overtly fight for our clients. Jury selection is a time to understand others who, frankly, are far more important to the process than we are (sorry, but it is true). Because we are there to listen, observe, and understand people we have never met before, this is not the time to argue a case or let the world know how skilled and prepared we are. Make jury selection about the venire, not about your case.

Leading Questions, Unless ... — The idea is to get the crowd of potential jurors talking. Yes or no questions tell us little about what people feel. Open-ended questions followed up with "Could you tell us more about that?" or "Would you mind telling us why you think that?" reveal more about the bias we are looking for. However, when you find someone who appears to be unqualified because of their beliefs, then it is time to artfully ask more leading questions to fully reveal the bias in a way that will result in that person being struck for cause.

Getting Fired Up! — Yes, it is game day; but no, it is not time to get fired up. Many in the venire fear the unfamiliarity of the surroundings and the weight of jury service. Help them relax by being relaxed yourself. Open-ended conversations occur in a relaxed setting. Think barber shop or hair salon talk, not "I need winners on my team, are you with me or against me?"

Non-Answers — Don't let potential jurors hide. Find ways to make them answer questions by being inclusive in your attitude and showing that you understand their reticence. If at the end of the process you have someone who has not answered anything, tell him you have noticed and ask him to say something about what you have been asking. Do it in a way that makes him feel included, not singled-out and embarrassed.

Being Discourteous — Always thank jurors, even those you feel are "poisonous." They are public servants, who have given up a good part of their lives to serve for essentially no pay. If you must raise your voice, for instance in response to a defense lawyer stepping out of bounds, show the venire that you can do it professionally. Save your emotions for later in the case when they might be more appropriate on cross-exam or in closing.

ABOUT THE AUTHOR

James (Jay) Sadd is partner of the firm Slappey & Sadd, LLC, which represents families, workers, and consumers who have been critically injured or lost a loved one because of the negligence or willful conduct of others.

VOIR DIRE

12 Great Lawyers Talk About How to Get 12 Great Jurors

COMPILED BY TEDRA CANNELLA

Voir dire is a subject that intimidates many lawyers. Some lawyers, however, have done it spectacularly, many times over. For this article, we collected wisdom from 12 of GTLA's most effective lawyers, across the spectrum of plaintiffs' practice. These lawyers, whose practices are very briefly summarized below, have all made headlines for their outstanding results in front of a jury. They generously agreed to share some of their most tried and true voir dire questions and ideas.* *Their responses have been edited for brevity and clarity.

Issues of Fairness

"Can you be fair and impartial?" is a question that nearly dictates the answer, because few people are willing to admit the truth when the answer is "no." Virgil Adams, however, asks the question in a way that does not carry negative connotations:

- "We all have personal experiences and beliefs that may get in the way of being fair to both sides. For example, would it be fair for a Saints fan to referee a Falcons game?"
- "Is there anyone who would not be satisfied to have your case decided by a juror who entertains the same frame of mind as you do right now?"

Adams explains how these questions accomplish two objectives: First, they put the question of bias in relatable and simple terms; and second, they tell the jury how important it is to identify any prejudice the potential juror may have against the client or the case.

Getting the Prospective Jurors Ready to Speak Candidly

Pete Law does not do drama in voir dire and instead prefers a more matter-of-fact approach. He tells the panel that "*both sides* want a fair jury." He emphasizes that the goal of voir dire is for the plaintiff *and* the defense to determine which potential jurors have backgrounds or experiences that are a good fit for the case. Law makes that his first statement to the jury.

Jordan Jewkes emphasizes the importance of speaking candidly by asking a question he borrowed from attorney Nick Rowley:

- "What is brutal honesty? What does it mean to be brutally honest?"
- "I find it helps get the jurors talking and emphasizes the importance of limited time, being direct with our responses, and of course, being honest in their responses even at the risk of offending me or my client," Jewkes says. "Also, I can always go back to the jurors' responses to this question later in voir dire and use their responses to be direct with them."

Follow-Up Questions

Adam Malone has found that "follow-up is where we attorneys stifle ourselves." Asking, for example, "Who has had a bad experience with medical care in a hospital?" is just the beginning. Follow-up questions generate the most valuable information.

In a case where a person had a delayed diagnosis, for example, the lawyer might ask:

- "What was that like?"
- "Please tell me more."
- "What I hear you saying is the doctors and nurses did not listen to you, did not document your concerns, and did not communicate your symptoms with each other. Did I get that right?"
- "How important is it for doctors to listen to their patients?"

The third question will mirror the person's experience, ideally in terms that incorporate what the case is about. The fourth question highlights the rule or principle that was violated, and it can also help the juror relate their experience to the plaintiff's.

The Burden of Proof

Drew Ashby asks potential jurors questions about the burden of proof. Ashby observes that "most people have an internal standard for the level of proof that it will take to make them act. Many of them use that standard regardless of what the jury charges say. Some may not even be able to help it because it's so innate." After explaining what the burden of proof is, he asks:

- "Could you decide a serious case based on 50.01 percent proof?"
- "Could you award tens of millions of dollars — or whatever the amount based on 50.01 percent proof?"

These questions tend to generate group discussions. Also, it gives venire members freedom to admit the truth. While panel members may be shy about admitting they cannot be "fair and impartial," they are not shy about stating openly that they cannot find for the plaintiff unless the plaintiff meets a higher standard than the law requires.

Identifying Potential Jurors Who Are Generally Against Lawsuits

Jeff Harris cited one general question he has found to be the most probative:

- "If you or one of your family members was injured by the negligence of some other person, would you be willing to bring a lawsuit?"

A person who would not bring a lawsuit even if a family member is hurt is going to be a bad juror for a variety of reasons. "I've always asked that question," Harris says, "and I found it to be very effective at identifying terrible jurors."

Other lawyers reported asking a version of this question:

- "If you were injured by someone else, who here knows you would never file a lawsuit against the person or company that hurt you?" (Adam Malone)
- "Who here believes the jury system is a good way to resolves disputes? Who here does not believe the jury system is a good way to resolve disputes?" (Adam Malone)
- "Which of you lean toward believing that lawsuits are a problem in our society and are not an appropriate way to

resolve disputes? Why do you feel that way?" (Kathy McArthur)

Voir Dire as a Part of Your Case

Virgil Adams designs voir dire that will not only help him strike a jury, but also highlight the themes of the case. In a clear liability medical malpractice case, where the defendant refused to admit liability, Adams asked:

- "Does everyone agree that frivolous lawsuits are bad for all of us?"
- "Does everyone agree that frivolous *defenses* to avoid responsibility are just as bad?"

Adams recalls a case in which he used this approach, and then he "called the defendant doctor for cross as the first witness and asked him, 'You don't take any responsibility for my client's paraplegia, do you? Even though this has been going on for five years, as you sit here today you still deny any responsibility for your role, don't you?' I think it's a great setup for the evidence and closing."

Pete Law represented a Black teenager who was wrongfully arrested and detained for 45 minutes at a movie theater. The plaintiff was never transported to jail or booked, however, so the defense claimed he was uninjured by the incident. Law's first question was "has anyone ever been publicly embarrassed or humiliated in front of 3,000 people, to include their friends?" Law explains, "Both sides needed to know if anyone shared a similar experience to the facts in our case." The question made an impression on the potential jurors. The foreperson on the jury, who happened to be a State Farm adjuster, later told him, "You had me at your first question." The jury rendered a $3 million verdict.

Identifying Panel Members Who Are Uncomfortable with Money Damages

Many of our participants ask venire members if they would have a problem awarding damages of a certain amount. That question came in a number of forms:

- "Mr. Defendant has admitted 100 percent fault and agrees Ms. Plaintiff did absolutely nothing wrong. So the only question is — based on the evidence and law — how much money to award Ms. Plaintiff. Does anyone have a problem with that?" (Jordan Jewkes)
- "If you feel that the testimony and evidence presented at trial supports it, would anyone have any problem with awarding my client a verdict of a significant amount of money, perhaps even a number that's a little higher than what we'll ask for our client at closing?" (Jordan Jewkes)
- "We believe the evidence in this case will warrant a verdict of millions of dollars. We understand that you have not heard the evidence yet. You don't know the full extent of the damages to this family. The judge has not told you the law. But, if the law authorizes it, and if the evidence supports it, does anyone feel as if they are going to have a hard time rendering a verdict of millions of dollars just because it's a large amount?" (Matt Stoddard)
- "Now if you find for Plaintiff Name in this case, then you will be asked to place a reasonable dollar amount beyond her medical expenses. Would any of you be either unwilling or unable to assign a dollar amount to this

category of damages, which the law calls pain and suffering? In other words, if the evidence supports it, you will be able to award both economic damages — dollars and cents for medical bills, lost wages etc. — and non-economic damages, for things like the actual pain endured, loss of enjoyment of life, interruption with daily activities. Is there anyone here that would be unable to assign a dollar amount to these non-economic damages?" (Simmons)
- "Under our system of justice, the only way to compensate someone who has been wrongly injured is through money damages. How many of you have a problem with this concept of justice (religious/moral/other?)" (Simmons)

Simmons elaborates in a way that explains why money damages are the best possible option for obtaining justice in civil cases. "I tell them, we aren't an eye for an eye society thankfully — if someone runs you off the road, you cannot go run them off the road in return — all we have as relief for injuries resulting from bad conduct is money damages. Does anyone here have a problem with this concept of money damages?"

Chris Stewart uses a version of the question to emphasize that selfishness is not allowed in the jury room:
- "Is there anyone who, at the end of trial, will refuse to go over a certain amount or decrease the verdict for the victim because of their own monetary situation at home?"

Jewkes uses a concrete number that is a little higher than what he will ask for at trial, which "breaks the ice" on the size of the verdict, avoids surprises at closing, and sets the first of several "anchors" during trial for the ultimate ask. By the time deliberations begin, he reasons, the jury should be comfortable with the number plaintiff asked for.

Getting to Know Your Potential Jurors

Malone has a strategy that helps him identify leaders and bullies.
- "If I asked the person closest to you to describe you, and they were given only three categories to choose from, who here would be placed in the category of: (a) leader, (b) loner, (c) collaborator?"

The reason this works so well, according to Malone, is that it helps "identify the leaders (or those who think they are). The answers give me a lot to follow up on individually when I start asking why they believe the person closest to them would place them in those categories. I ultimately want to identify leaders, but more importantly, I want to identify the bullies. Bullies are not leaders, but they think they are."

> I DON'T WANT THE OPPOSITION TO HAVE JURORS WHO CAN BE TRICKED INTO REACHING AN IMPROPER RESULT. THOSE PRONE TO BELIEVING CONSPIRACY THEORIES ARE LIKELY TO **IGNORE THE ACTUAL EVIDENCE** THAT IS PRESENTED.

Kathy McArthur has a method to get those people who have not talked much to open up, so that she can learn about them and observe their body language. One example of this strategy asks panel members to share what they care about. The lawyer's participation makes sharing less intimidating and gives the venire members a chance to get to know the lawyer as well:
- "Other than your family and your faith or religion (which people will often default to for their answers), what are you passionate about and tell me why you feel the way you do? I'll go first: I'm passionate about dogs. We have two Labrador retrievers, one that sleeps in bed with us. And I'm passionate about working with Girl Scouts. My mother was my Girl Scout leader, I was a Girl Scout leader, and my brothers and husband are all Eagle Boy Scouts."

McArthur says, "It gets them talking about themselves and allows me to personalize a little with them. There are a lot of funny answers too." If there is time, she asks another question that can generate conversation:
- "Do you view yourself as more positive and optimistic (glass half full) or more negative and pessimistic (glass half empty) and give me an example from your life that explains why you feel that way."

Ben Brodhead won the award for most original question in this survey. He asks the panel:
- "How many here believe the world is flat?"

The question, which has elicited affirmative responses in the past, encourages "those who have an unreasonable view of the world to identify themselves." Broadhead reasons, "I want to know who is crazy and who can be duped with incorrect and unscientific arguments so I can keep them off the jury. I don't want the opposition to have jurors who can be tricked into reaching an improper result. Those prone to believing conspiracy theories are likely to ignore the actual evidence that is presented."

Matt Stoddard has had success with asking catchall questions toward the end of jury selection:
- "Now that you have had a chance to sit here and listen to me talk for a while and you have observed the parties and the lawyers, is there anyone out there that is thinking, man he might not know it yet, but this guy does not want me on this jury?"
- "How about the opposite, is there anyone out there that thinks that because of their life experience, they would just make an exceptional juror for this case?"

Panel members who have sat silently throughout voir dire will sometimes speak up and give invaluable information in response to these open-ended questions, Stoddard says.

Issues of Race

Sometimes, sensitive topics are best addressed directly. This is how Chris Stewart handles potential racial prejudice, asking:
- "Does anyone have an issue with the fact that I'm a Black lawyer and lead counsel?"

Stewart tried a case in a rural county where a potential juror raised his hand in response to the question. In follow-up, the panel member claimed he did not understand why a white plaintiff hired a Black lawyer from the "city." More frightening than the people who do raise their hands, however, are the people who should raise their hands but do not. (Side note: Please attend GTLA's diversity and inclusion events and CLEs to understand how all lawyers can help address issues of racism in the justice system.)

Special Issues

In a case with causation problems, lawyers can use voir dire questions to remind potential jurors to use their common sense and their own experience to judge the evidence. For example, in one case, Stoddard asked:

- "Has anyone ever had a really bad or nagging injury without a broken bone like a torn meniscus, herniated disc, etc.? What event caused it?"

To follow up, he asked them how they knew that a specific event caused the injury. "Multiple jurors answered, and they all looked at me like I was crazy when I asked how they knew what caused the injury," he said. The answer was obvious to them: because it didn't hurt before and it hurt right after. The jurors' responses "gutted the defense of the case before the jury heard any evidence."

Madeleine Simmons similarly has posed voir dire questions that illustrate the absurdity of the defense's position in a premises case, for example:

- "When you visit a business, do you believe it's your job to inspect the premises for unsafe conditions that might injure you?"

The answer, of course, is no. However, asking the question allows panel members to come to their own common-sense conclusions about the merits of the defense.

Jeb Butler represented a victim who was sexually abused at the hands of a religious leader when she was a minor. He made the decision to gently ask the panel about their own experiences with abuse.

- "Now I need to ask about your own experiences. I know this is deeply personal, but it's what this case is about and if you're willing to share, I'd like to hear it. If you want to answer more privately, you can come up and answer by the bench with the judge, out of earshot of most folks here. But if you're willing, please raise your hand if you or someone you love has been a victim of sexual abuse or rape."

Many people raised their hands. "I couldn't believe how many were willing to share — either right in front of everyone, or at the bench, which wasn't actually very private with the judge, litigants, and court's staff all there, plus some of the other jurors within likely earshot." Butler said they were "moving, sad stories. Crying as they spoke." The members of the panel were able to see how common sexual assault is, and how long the effects stick with the victims. Butler noted he is still unsure why so many chose to share their experiences. "I *think* they felt like telling their stories could do some good. They could give meaning to tragedy. Maybe cathartic to some degree."

Law handled a case involving medical malpractice that caused such deep depression in an 86-year-old woman that she eventually committed suicide. Instead of waiting until he had developed a rapport with the panel, he jumped into the sensitive topic in his first two questions:

- I know this may be traumatic for some of you to discuss, and if so, speak up and we can talk with the judge in private after all of the questions are done. But, I need to ask some questions about an important issue in the case. Does anyone know someone who has suffered from depression, suicidal ideations or other mental health issues?
- One issue in this case is the issue of suicide, and again, if this is too personal or painful to discuss, let us know and we can talk with the court privately, but has anyone here had to deal with the issue of suicide of a friend or family member due to the pain created by the alleged negligence of another?

Law explains his strategy for addressing such a sensitive topic immediately during

jury selection. "I believe in primacy and recency. What you say first and last are the most important things, and they are what the jury is most likely to remember." Also, the question of whether a defendant should be responsible for a suicide caused by depression was hotly disputed. Voir dire allowed him to say in closing: "The very first question I asked you in voir dire was if you could process the idea of depression leading to suicide. That was the first thing we talked about." Addressing it first emphasized the importance of the issue.

Conclusion

If you talk to anyone who has suffered a hung jury or compromise verdict, they will likely tell you that choosing a jury is one of the most important parts of a case. As Law says, "I used to spend the least amount of time preparing for voir dire. Now it may be the thing I spend the most time preparing for."

Listening to the wisdom and lessons learned of other lawyers is an important part of developing a voir dire style and approach that works for you and your case. *The Verdict* thanks the lawyers who agreed to help with this project by sharing their experience and strategies. A rising tide lifts all ships.

OUR PARTICIPANTS

Adam Malone
Ben Brodhead
Chris Stewart
Drew Ashby
Jeb Butler
Jeff Harris
Jordan Jewkes
Kathy McArthur
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Batson Challenges

BY JOSH SILK

Watching the jury selection for the Ahmaud Arbery murder trial, many were struck by the fact that there was only a single Black juror, in a county where African Americans make up 27 percent of the population. Even more striking was Judge Walmsley's statement that there appeared to be "intentional race discrimination" in the jury selection process.[1] But, the prosecution's objections were overruled because the defense gave neutral reasons for the strikes.

We see race discrimination in jury selection all too often. Most of us know the three-step *Batson*[2] standard generally, but we also know that such motions are incredibly difficult to win, as the Arbery case illustrates. This article should provide some practice pointers so you can get your next *Batson* motion granted.

Use Silent Strikes!

Make sure your peremptory strikes are silent! The *Batson* remedies that are available generally cannot be applied if the juror knows which side struck them.[3] So to avoid a mistrial while preserving the possibility of a *Batson* remedy, make sure to use silent strikes.

When to Raise the Batson Challenge

Next, a *Batson* challenge is timely if it is raised after the jury is selected, but is untimely if it is made after the jury is sworn.[4] Once all the peremptory strikes have been completed, you must inform the Court that you have a motion, and in practice you must tell the court *quickly*. Interrupt if you have to, but do not let the jury be sworn in without raising your motion. In our opinion, the best practice is to simply tell the judge "we have a motion," as stating that it is a *Batson* motion or otherwise indicating what the motion is about could lead the Court to believe that the juror would be prejudiced against one side and that a mistrial is on the only remedy as a result.

The *Prima Facie* Case

Once you have raised your *Batson* challenge and are outside the hearing of the jury you must meet the first *Batson* step, which is to establish a *prima facie* case. This is a low threshold, and one you should be able to easily meet in a number of ways. Courts

have found a *prima facie* case established where: (1) there were no African Americans on a jury (despite comprising nearly a quarter of the panel)[5]; (2) counsel used all their peremptory strikes to challenge African Americans [6]; (3) counsel exercised a disproportionate number of strikes against a minority group[7]; or (4) the impaneled minority group on the jury was disproportionately lower than the members of the group in the venire.[8]

With that in mind, you should have several things prepared by the time you make your motion. First, you should know the demographics of your county. Second, you should track the demographics of the venire. Third, track the strikes used and who they were used on. Finally, note the resulting demographics of the jury. Make careful notes of everything asked of the venire, and their responses. With all that information, you should be well armed to make your *prima facie* case.

The "Race-Neutral Basis" for the Strikes

Once you've made your *prima facie* case, the burden shifts to the defense to explain away their strikes. This is where lawyers can truly get creative as they attempt to come up with a race neutral explanation for a racially motivated strike. Keep in mind that these race-neutral explanations must be "clear and reasonably specific."[9]

If the given reason is in fact a stereotype about the potential juror's race, gender, etc., that is not an acceptable explanation and the respondent has failed to meet their burden. Indeed, it is axiomatic that a racial stereotype is not a race-neutral reason. For example, reasons such as the potential juror having gold teeth,[10] that the prosecution could not understand the juror's "ethnic manner of speech,"[11] that whites would be selected because they could "identify" with the defendant, or that women would be struck because they would be "sympathetic" are all unacceptable stereotypes that cannot form a race-neutral reason.[12]Essentially, a proxy to stereotype a group, while not couched explicitly in race or gender, cannot be said to be neutral.

The Final Step – Has There Been Purposeful Discrimination?

With the "explanations" tendered, the ball is back in your court to show why those explanations should be rejected and why the Court should find purposeful discrimination. Your burden is to show by a preponderance of the evidence that the challenge was improperly motivated.[13] The trial court sits as the finder of fact in this stage, and should assess the plausibility and credibility of the proffered "race-neutral" reasons. There are several successful ways to overcome the given reasons:

IF THE GIVEN REASON IS IN FACT A **STEREOTYPE** ABOUT THE POTENTIAL JUROR'S RACE, GENDER, ETC., **THAT IS NOT AN ACCEPTABLE EXPLANATION** AND THE RESPONDENT HAS **FAILED TO MEET THEIR BURDEN**.

First, showing a disparate treatment may be the most prevalent rationale for overcoming a neutral explanation.[14] Compare the jurors who were struck to the jurors accepted by the defense and ask, were they treated the same way? For example, if the defense struck two African Americans purportedly because they were unmarried, but did not strike single Caucasians, you may have a good case that the proffered explanation was a pretextual for discrimination.

Second, we find that one tactic defense counsel sometimes takes is to ask little to no questions of minority group members in the venire. The result is that the neutral explanation must make some assumption or leap that was not actually provided on the record because the person was not asked.[15] Show the court that the defense could have asked the potential juror to confirm or deny whether these assumptions were true during voir dire, but chose not to. The failure to pursue an issue that is supposedly important to counsel during voir dire may show the bad faith in the explanation.

Third, go back to your notes. Oftentimes, the proffered explanation is simply not supported by the record, which may not substantiate or may flatly contradict the explanation. This also may be your best defense against the conclusory explanations that are often offered, where the defense says the potential juror had a bad "demeanor," or gave them a "bad feeling," or "looked at me funny." Look back at your notes and the record. Is any of that supported? Many judges take notes during voir dire, and if their notes and recollection agree with yours, that imagined "bad look" can be overcome.[16] Zoom voir dire should make these kinds of "demeanor" reasons even easier to rebut when the person speaking is highlighted for all to see.

Fourth, the defense will sometimes make a stereotype not of a race, but of a group as their explanation. Perhaps they say they struck women not because they are female but because they were teachers, and teachers tend to be sympathetic. Again, your first response should be to look for a disparate impact and see if they allowed any male teachers onto the jury. Assuming there is not a case for disparate impact, point out the stereotyping inherent in this explanation. Not all teachers are the same, just as not all lawyers are the same.

Finally, if all else fails, appeal to common sense. Is the reason plausible? Vague? Entirely irrelevant to your case? Is defense counsel reading from a list of previously approved neutral explanations? All of these things naturally give rise to an inference that the reason is a pretext.

What if the defense has one reason to strike the juror that is discriminatory, and one reason that is neutral? The tie goes to the *Batson* challenge being granted. A *Batson* violation results from a race-based reason even if it is accompanied by a race-neutral reason.[17] The trial court's finding of one "racially motivated explanation vitiates the legitimacy of the entire jury selection procedure."[18]

Be Prepared to Defend Your Own Strikes

Invariably, every time we make a *Batson* challenge the defense has brought one against us in response. None of these have ever been granted, but that is because we came prepared. Be prepared with your neutral explanations. Use your notes. If the defense struck all the African Americans leaving only whites in the panel, and then says your strikes of white people were racially discriminatory, point out that you had no other choice given their strikes. Be ready — defendants long ago learned that the best defense is a good offense.

You've Won! Now What?

You've scaled the rarely conquered *Batson* Mountain and the judge has found that a peremptory strike was used with discriminatory intent. The remedy is not always clear as it is within the court's discretion. There seem to be two primary options (other than mistrial). First, the trial court can seat the improperly struck juror on the jury, bumping the last juror selected out of the jury. This was the method used in *Holmes v. State*[19] and approved by the Georgia Supreme Court. In *Holmes*, the trial court found that the use of one peremptory strike was pretextual, reinstated the juror who had been struck, and made the juror who had been chosen twelfth an alternate. The Court held that "the trial court had the constitutional power to seat an individual juror determined to have been challenged in violation of *Batson*."[20]

The second option, and which I have had judges use in my cases before, is to put all the jurors back in the pool and re-strike the jury, with the improperly-struck juror declared off-limits.[21] Depending on who was the last juror chosen, this option may or may not be appealing as opposed to simply seating a struck juror.

In no event, however, should there be an option that allows the improperly struck juror to be kept off the jury. Make clear to the court that not only do the parties have a constitutional right to a jury selected free from discrimination, but the individual juror also has a constitutional right not to be excluded from jury service on account of their race or gender.[22]

Some Final Thoughts

Keep in mind the importance of preparation to all of this. Have a bench brief on *Batson* laying out the steps and remedies prepared for every trial. Have a designated person to take notes and track demographics during voir dire. Think about whether to make a *Batson* challenge while making your silent strikes — you may have to make a split-second decision on whether to raise the motion, so be ready. *Batson* is far from perfect, but armed with these cases and pointers, hopefully the next time you encounter "intentional race discrimination," you will be prepared to win.

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12 Hutchison v. State, 239 Ga. App. 664, 665 (1999).
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15 See Gamble, 257 Ga. at 328 (assumption that potential juror had been dishonorably discharged from military without asking).
16 Barnett v. State, 191 Ga. App. 552, 553 (1989) (granting motion where explanation was that juror was unemployed when record showed juror was employed).
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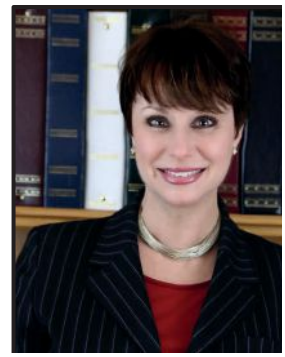

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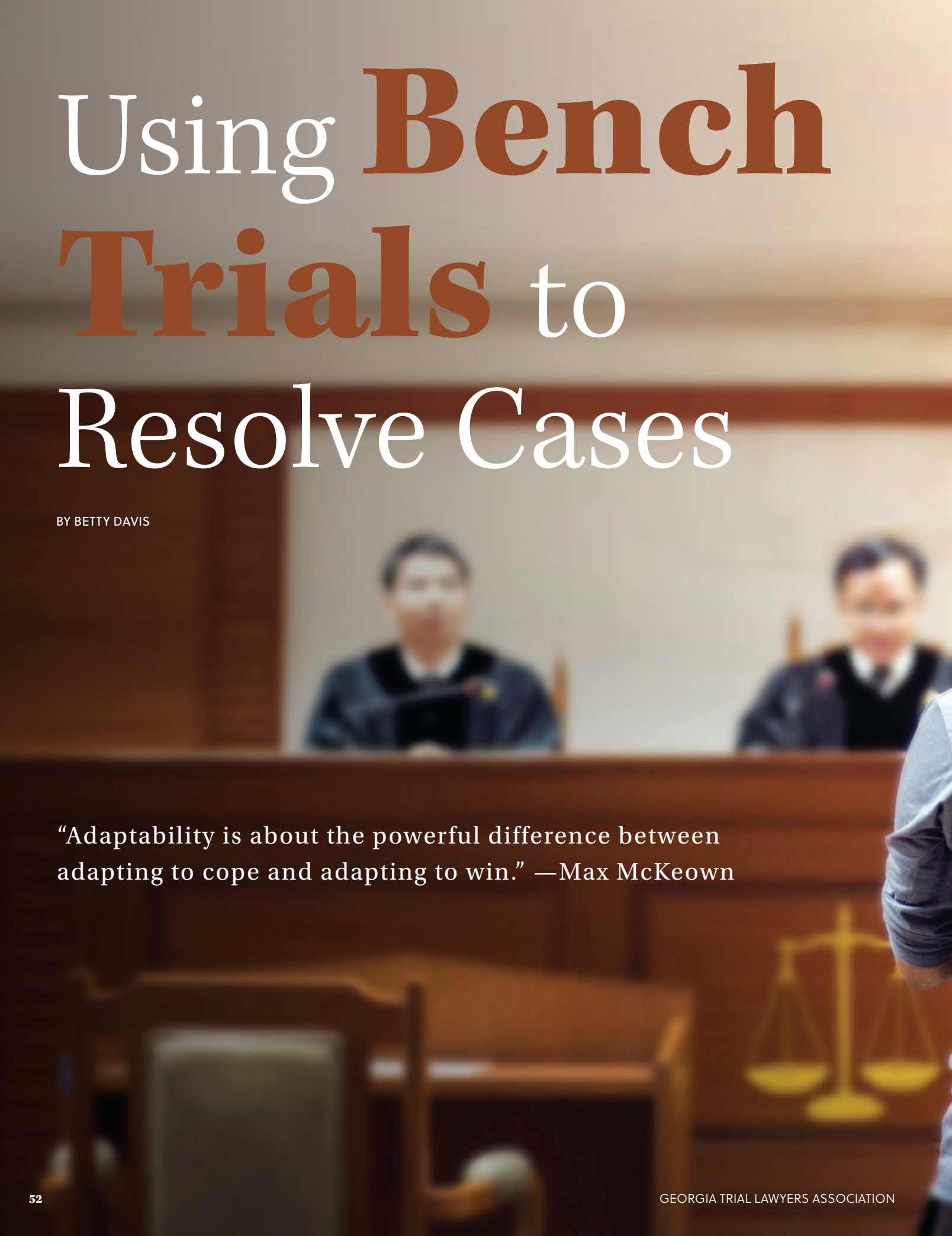
Using Bench Trials to Resolve Cases

BY BETTY DAVIS



"Adaptability is about the powerful difference between adapting to cope and adapting to win." —Max McKeown

In the third year of the COVID-19 pandemic, the courts, judges, and lawyers have shown an amazing ability to adapt to our sudden change of circumstances, and, in many ways, made the practice of law better and more efficient. Many of the changes, like Zoom depositions, came quickly and have allowed us to practice law more efficiently.

But, what about that penultimate jury trial? It is a widely held belief amongst trial lawyers that the jury trial is the end-all-be-all for a plaintiff in a civil case, but what if that is not necessarily true in all cases? What if we can "adapt to win" and use bench trials to resolve our cases?

The Data on Bench Trials vs. Jury Trials

In 2005, the U.S. Department of Justice Office of Justice Programs, Bureau of Statistics, conducted a survey of state courts across the country to determine the types of civil cases being adjudicated by trials.[1] I was unable to find a more recent survey of jury trials vs. bench trials, but the 2005 study provides significant insight into considerations for when a bench trial could be beneficial for the resolution of tort cases.

The data showed that, in 2005, the majority of civil cases in the survey that went to trial were decided by juries, with 18,404 jury trials and 8,543 bench trials. Interestingly, plaintiffs in tort cases had a better record in bench trials: They won 56.2 percent of bench trials, but only 51.3 percent of jury trials. Trials overall accounted for 3.5 percent of dispositions in tort cases. However, according to an American Bar Association study released in 2020, the percentage of federal lawsuits decided by jury trial dropped from 5.5 percent in 1962 to 0.8 percent in 2013.[2]

The majority of motor vehicle, medical malpractice, and premises liability cases were resolved with jury trials. Specifically,

92.1 percent of motor vehicle cases, 98.7 percent of medical malpractice cases, and 93.8 percent of premises liability cases went to juries instead of judges. In motor vehicle cases, plaintiffs won 64 percent of the time, whereas plaintiffs won premises liability cases 38.4 percent of the time and medical malpractice cases 23 percent of the time. Plaintiffs in the cases surveyed were most likely to win animal attack cases, with a 75 percent success rate. Other tough wins for plaintiffs included product liability wins 19.6 percent of the time and false imprisonment wins 15.5 percent of the time. Products liability cases were tried in front of a jury 93.5 percent of the time, and false arrest and imprisonment cases were tried in front of a jury 63.9 percent of the time.

The median award in tort cases was similar for jury and bench trials. Juries awarded an average of $24,000, while judges awarded an average of $21,000. The median award in motor vehicle cases was $15,000, compared to a median award of $700,000 in asbestos cases. In tort cases where plaintiffs were awarded $1 million in damages or more, 5.7 percent of the verdicts were from juries, whereas 3.7 percent of the verdicts were from judges. The idea that the system is plagued by "runaway juries" is grossly inaccurate. Looking only at cases in which plaintiffs prevailed, only 4 percent of those cases involved awards totaling $1 million or more. Finally, in cases where plaintiffs sought punitive damages, 33.6 percent of cases where punitive damages were awarded involved jury trials, and 19.5 percent involved bench trials. Overall, only 5 percent of plaintiffs were awarded punitive damages. Medical malpractice cases had the highest median punitive damages award of $2,800,000.

On average, jury trials lasted two days longer than bench trials, with jury trials going for an average of four days vs. two days for bench trials. From the filing to disposition of the cases, the mean time for resolution of cases for jury trials was 26.6 months and for bench trials was 20.8 months.

Recent Bench Trial Results

Recently, many of our members have had great success with bench trials. In November 2021, Tyler Bridgers and Joe Wilson obtained a $632,000 verdict in a rear-end tractor-trailer case in front of Judge Amy Totenberg in the Northern District of Georgia. The case had been pending for more than three years when Mr. Bridgers and Mr. Wilson and defense counsel agreed to opt for a bench trial. In Mr. Bridgers and Mr. Wilson's case, the defense denied causation, claiming that the plaintiff had pre-existing knee injuries and would have needed knee replacement surgery even absent the wreck. Mr. Bridgers and Mr. Wilson decided to forego a jury trial in favor of a bench trial because their client was ready to resolve the case speedily. Prior to agreeing to the bench trial, Mr. Bridgers and Mr. Wilson did their research on Judge Totenberg and concluded that she is a very fair judge. It was not difficult to come to an agreement with defense counsel to resolve the case using the bench trial because Mr. Bridgers and Mr. Wilson had a good relationship with defense counsel. The parties stipulated to all evidence in advance, gave brief openings and closings, and did not object as much as they normally would during a jury trial, and the case took a day and a half to try. They tried the case in June 2021, and Judge Totenberg issued the verdict five months later.

In January 2022, Tedra Cannella, Jim Butler, and Rory Weeks obtained a $127 million verdict in a products liability case in front of Judge Steve Jones in the Northern District of Georgia. The parties were able to try a case with 11 experts in just 5½ days. That's less time than jury selection can sometimes take in a complex trial.

My own experience was in November 2021, when I tried a case with co-counsel Bethany Schneider. Our bench trial involved a motor vehicle collision that resulted in a $336,630 verdict. Judge Stephen Bradley in Greene County, Georgia, presided. The auto wreck occurred when my client, a college dean and professor from Atlanta, was headed to the Ritz Carlton at Reynolds Plantation for a university retreat. My client suffered from neck injuries from the wreck and spent more than one year seeking conservative care such as chiropractic treatment, physical therapy, massages, and acupuncture. He ultimately had to have several rounds of radiofrequency ablations in order to find relief, and his doctor testified the injury was permanent.

The venue in our case was a significant factor in deciding on a bench trial. After reviewing the census information for Greene County, it was clear that the jury pool would be conservative. Thus, I hired Alex Hoffspiegel to focus the case before a conservative group. The focus group jurors questioned the conservative care and an alleged "gap" in treatment by a medical doctor. In addition, there was concern about how a conservative jury from rural Georgia would perceive my client, who is a highly educated dean and college professor from Atlanta.

Prior to the bench trial, I argued against the defense's motion for summary judgment on issues of bringing independent negligent hiring and retention claims against the at-fault driver's employer and punitive damages, and the judge ruled in our favor. This gave us another reason to seriously consider a bench trial.

The bench trial took about a day and a half from start to finish. We did full opening statements, called several witnesses, including the police officer live, treating doctor via video, our client's wife via Zoom, a witness on the scene via Zoom, a treating chiropractor via Zoom, and a damages witness live, and did first and second closing arguments. As we were in a smaller county, there was not any courtroom technology, so we brought our own. All of the Zoom witnesses appeared on my laptop, and it went smoothly. In the end, it took the judge about 20 minutes to deliver a verdict in our favor that was 10 times the pre-trial offer.

From the data gathered from the 2005 study and from the anecdotal information gathered from GTLA members, we know bench trials can be both efficient and fair, but how do we determine the right case to try in front of a judge instead of a jury?

Benefits of a Bench Trial

Some positive attributes of bench trials include:

- Quicker more efficient way to get to trial, especially during the pandemic;
- Less or no motions in limine;
- No jury charges to prepare;
- Less room for legal error and less likelihood for appeal;

> THE LEGAL ISSUES IN A RUN-OF-THE-MILL CAR WRECK ARE USUALLY **SIMPLE AND EASY FOR A JURY** TO UNDERSTAND WHEREAS **A COMPLEX PRODUCTS LIABILITY CASE** WITH MANY EXPERTS, DOCUMENTS, AND WITNESSES MAY BE **MORE SUITED FOR A JUDGE** TO DIGEST.

- Evidentiary rules are more relaxed;
- Judges know legal issues;
- In some venues, there is a better chance of obtaining a just verdict.

Considerations for Bench Trial vs. Jury Trial

In addition to the data above, when considering whether your client's case is a good candidate for a bench trial, many factors come into play, including the age of the case, type of case, the complexity of the case, special evidentiary or legal issues, appellate issues, who the judge is, the jurisdiction, opposing counsel's behavior, the history of litigation in the case, and your client's wishes and circumstances.

Perhaps the most obvious reason to choose a bench trial over a jury trial, especially during the pandemic, is speed and efficiency. That data clearly shows that using a bench trial to resolve a case decreased the disposition time of a civil case in 2005 by six months. If you and your client are ready for a resolution, then a bench trial eliminates delays caused by the COVID-19 pandemic, resolving objections, motions in limine, and waiting your turn in line on a long civil jury trial calendar. If the facts and circumstances of your case support the use of a bench trial, then not only will you spend less time waiting to get to trial, the trial itself will take fewer days than a jury trial, as the need for motions in limine, jury selection, and jury charges are obviated.

Is your case a simple car wreck, a complex products liability or medical malpractice case, or something in between? The legal issues in a run-of-the-mill car wreck are usually simple and easy for a jury to understand whereas a complex products liability case with many experts, documents, and witnesses may be more suited for a judge to digest. Given some of the 2005 data from the Department of Justice showing the low success rate of medical malpractice cases, which were largely tried before juries, perhaps bench trials should be considered for medical malpractice cases?

Of course, every case is different, and your simple car wreck could involve defenses designed to confuse a jury, such as apportionment, sudden emergency, pre-existing injuries, or contributory negligence. In cases involving such defenses, having a judge who understands their legal complexities and effects could be more beneficial than allowing the defense to muddy up the waters for a jury. In addition, in a bench trial, a judge can ask questions of witnesses, which could help clear up any confusing or complex issues. Of course, it is important to note that when the judge questions that witness, you cannot control the testimony in the same way you can during a jury trial.

The more complex a case is, the more room for appealable issues to arise in a jury trial. It is more difficult to appeal a bench verdict because the judge is presumed to have followed the law and only considered relevant and admissible evidence.

Before you commit to a bench trial, do your research on the judge in your case. What is the judge's reputation for fairness? What is their experience in private practice? Are there any past case results in front of this judge?

Equally important to your decision as the judge is the venue. In a conservative venue, a judge may be better than a jury. One way to determine how a jury may view your case is the use of focus groups. Do not let the idea of the cost of a focus group scare you. There are some affordable options out there, and you can always conduct your own focus group inexpensively by posting ads on Craigslist and conducting the focus group via Zoom.

The history of litigation in your case could also help determine whether a bench or jury trial is appropriate. For example, has there been bad behavior from the defendant that the judge has witnessed or sanctioned? Has the judge already decided issues in your favor on summary judgment? Or, have you lost motion after motion in the case?

Finally, when deciding on a bench trial versus a jury trial, consider your client. Does your client want a resolution quickly, or is your client willing to wait for a jury trial? Is your client in a situation that requires a quick resolution? Will your client present better to a judge or a jury? Factors of your client's race, gender, socioeconomic status, and religion in comparison to your potential jury pool could all come into play for this analysis.

Tips for Conducting a Bench Trial

Although there may be less pressure of performing for a jury, the preparation required for a bench trial is nonetheless considerable and important. Judges recognize and appreciate preparation and hard work.

You do not have to select a jury, file motions in limine, or prepare jury charges. But, prepare an opening statement and closing argument, use demonstratives, think about your order of proof, and choose and prepare your witnesses the same way you would do so for a jury trial.

You can also consider calling witnesses via Zoom rather than in person. Most courtrooms have the technology to accommodate Zoom witnesses, and many judges do not have a problem with Zoom witnesses, so long as the defense agrees.

Note that a bench trial will move a lot more quickly than a jury trial. With less evidentiary issues or the need to bring a jury in and out of the courtroom, you will have to be prepared for witness examinations to move fast.

Finally, if you have a trial that should be bifurcated if it is tried in front of a jury, such as a situation where you are seeking punitive damages, the trial can be unified if it is a bench trial.

A Bench Trial Is Not a Unilateral Decision

Even if you conclude a bench trial is desirable (or worth the risk) in your case, there is one factor you cannot control: whether the defendant will agree to a bench trial. A defendant may have a knee-jerk negative reaction to a plaintiff who raises the idea of a bench trial, even though there are clearly potential benefits for the defendant as well. The ideal situation is to seize the opportunity if a judge suggests a bench trial. It is therefore important to analyze the question of a bench trial in all your cases, so that if the judge raises the possibility, you are ready to agree if possible. This puts the maximum pressure on the defendant to agree as well.

Regardless of whether the issue of a bench trial is raised by the court sua sponte or by you as plaintiff's counsel, put your election for a bench trial on the record. You can do this orally at a transcribed hearing or by filing something, like a "Plaintiff's Notice of Consent to a Bench Trial." The defendant will likely respond and be forced to take a position. Regardless of whether it agrees or refuses, there will be benefits to the plaintiff.

Conclusion

As we continue to adapt to the changes that the pandemic has forced us to make, the data show that bench trials are another way in which we can obtain justice for our clients.

Betty Nguyen Davis is a plaintiff's personal injury attorney in Atlanta. Betty has been recognized as a Super Lawyer for the past six years and more recently in 2021 and 2022 as a top 50 Women Georgia Super Lawyer.

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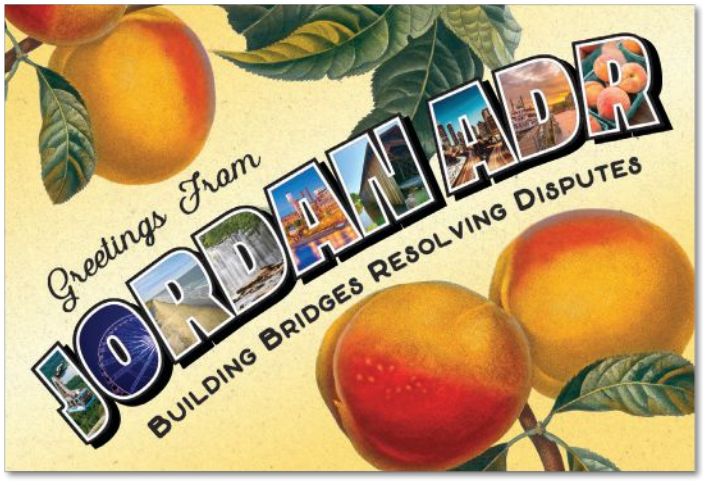

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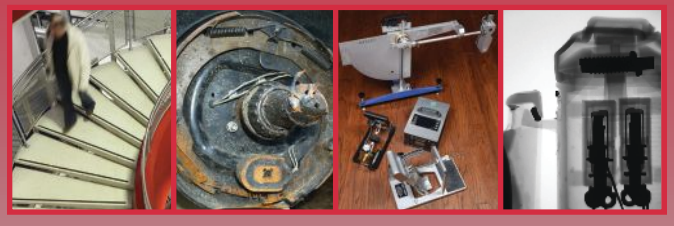

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Jury He

uristics

Applying Psychological Principles in Every Phase of Trial

BY ANDY CONN AND JEFF HARRIS

Beginning in the 1970s, the burgeoning field of Behavioral Economics focused on how people make real world decisions. A series of groundbreaking experiments revealed that people think much differently than previously believed. Instead of relying on rational thinking, the research of Nobel prize winner Daniel Kahneman and others concluded that people take mental "shortcuts" or "heuristics" when making important decisions. "Jury heuristics" helps trial lawyers understand how jurors think when arriving at a verdict. This article focuses on several frequently employed jury heuristics and explains why they are critical in your messaging at each phase of trial.

Frequently Employed Jury Heuristics

Similarity: The concept that people generally perceive objects/events through their experience with similar objects/events. For example, the probability that an athletic looking man is a teacher is far greater than that same man being a professional football player (because there are a lot more teachers than football players). Nevertheless, numerous studies have established that we give more weight to what we think something should look like than mathematical probabilities. Jurors often evaluate witnesses and evidence based on whether the witness or evidence is similar to what they expect.

Loss Aversion/Prospect Theory: The idea that people experience losses more severely than equivalent gains. The fear of loss can cause humans to act irrationally. Loss aversion applies to both tangible and intangible things and explains the tendency of jurors to cling to beliefs or positions in the face of contrary evidence. The pain of relinquishing a strongly held (albeit wrong) opinion may outweigh the gain of getting the "right" answer.

Priming: The tendency for exposure to previous stimuli to influence how people react to subsequent stimuli. In one famous experiment, study participants ran faster when shown a photograph of athletes than when shown a photograph of elderly people. The point here is that visceral reactions to stimuli are very effective at predicting future responses.

Framing: The cognitive response that causes people to choose from a set of options based on how the information is presented rather than the actual facts presented. For example, if a group is shown a picture of two condoms next to each other, one green and one blue, and are told that the green condom prevents 99 percent of pregnancies, but the blue condom causes 1 percent of couples to conceive a child, most of the group will decide to choose the green condom when given the choice. This choice is irrational because the options are the same, but the framing of the objects dictates the response from the group. Obviously, this heuristic is very prevalent in marketing.

Anchoring: Most trial attorneys are familiar with anchoring and have likely used it to some degree. When estimating a number, anchoring is the human bias of choosing a number based on an initial value provided. When negotiating the purchase of a house your offer tends to be near the "asking" price even if the price is excessive because the asking price anchors you to that price range.

Fundamental Attribution Error ("Blame the Plaintiff"): This heuristic is the tendency to attribute other's behavior to internal factors, like personality or character, while attributing our own behavior to external factors, such as our environment or circumstances. If someone tells you their car was just stolen, your immediate reaction is to ask whether they left their keys in it (i.e. place blame on internal factors).

Availability (Primacy and Recency): Basing judgments on the availability of other similar instances or occurrences that can easily be recalled. This often leads to an overemphasis on rare occurrences. For instance, if you woke up and read the newspaper to find that there was a shark attack the day before, you would be inclined to stay out of the ocean that day, but have no hesitancy to eat at a buffet, put on sunscreen, or drive in your car, despite each of these activities being empirically more dangerous than swimming in the ocean with sharks.

Confirmation Bias: The tendency to favor or recall information in a way that confirms internal biases that are either developed before or early during a process. For example, a person is more likely to watch a news channel that confirms their biases rather than a channel that challenges their core beliefs.

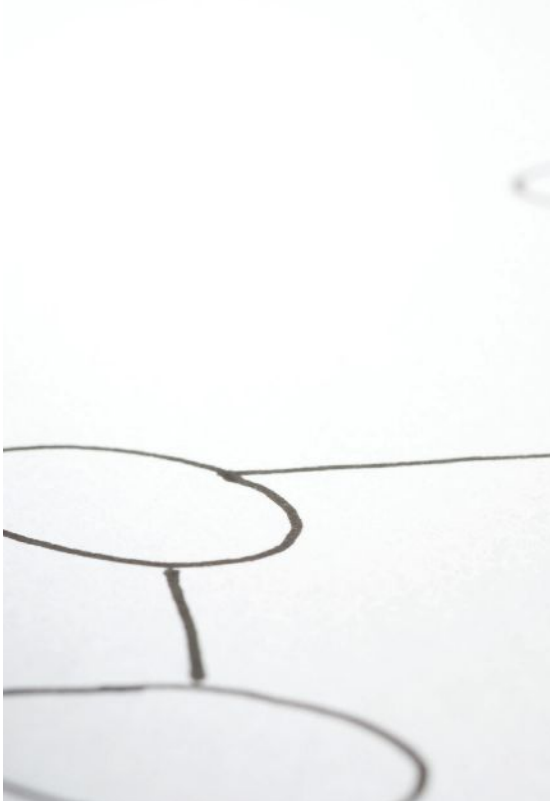
Authority: Tendency to accept information more readily when it comes from a person or place of authority and to reject information more readily when it comes from a person perceived to have a lack of authority. People are more inclined to believe a statement, regardless of its content, in a scientific setting when the statement is preceded by "scientists agree that…" The mere mention that these perceived authoritative figures believe something tends to cause people to trust the statement without the use of critical thinking.

Truth Bias: People default to believing others because it would be too mentally exhausting to determine if everything someone says is truthful.

Strategically Applying Heuristics to Each Phase of Trial

Top Heuristics for Voir Dire: (1) Loss Aversion; (2) Confirmation Bias; (3) Authority

Most veteran trial lawyers recognize that the primary purpose of voir dire is to identify jurors who have a cognitive bias that is so strong that the juror simply cannot receive contrary evidence. Therefore, the most important heuristics to understand during voir dire are confirmation bias and loss aversion. The two concepts are intertwined because a juror with a strong confirmation bias only hears what he/she wants to hear and ignores any contrary evidence. This concept is even stronger in the modern age of social media and targeted television channels because people frequently glean information from sources that only confirm and never challenge their belief systems.



Loss aversion creates a strong resistance to "giving up" previously held strong beliefs. It is pointless to try and convince a potential juror that they are wrong about a strongly held belief that might influence how they perceive your case, so it is better to just identify the juror and establish the requisite bias required for removal. The majority of questioning in voir dire should be focused on identifying jurors with a strong tendency to see the world through the skewed lens of confirmation bias.

Next, the authority heuristic is important because jurors tend to rely heavily on the mental shortcut of trusting people who are "authority figures" when making decisions. It is precisely why marketing experts employ spokespersons to sell products. Voir dire allows the attorney to become an authority figure to the potential jurors, which is why an attorney conducting voir dire should be concise, direct, tactful, and honest. A second important consideration is attorneys should be very careful in identifying any juror who might be viewed as an "authority" on a topic at issue during trial because, rightly or wrongly, jurors are likely to defer to that person's opinion even if contrary to the evidence.

Top Heuristics for Opening Statements: (1) Framing; (2) Priming; (3) Anchoring

How jurors ultimately determine what matters, why it matters, and what they should be

"JURY HEURISTICS" HELPS TRIAL LAWYERS UNDERSTAND HOW JURORS THINK WHEN ARRIVING AT A VERDICT.

looking for during the trial is hugely dependent on opening statements.

Your opening statement must be structured in a way that pits your stronger points against the defense's weaker ones to employ the appropriate "frame." For example, in medical malpractice cases, the defense often employs standard of care, causation, and comparative fault/apportionment (blame someone else) defenses even if one of the defenses is far stronger than the others. This "grab basket" strategy is a distinct advantage to plaintiff's counsel because, in opening statement, counsel can frame the strongest part of the plaintiff's case against the weakest defense and prime the jury from the very beginning about why this is *the* critical choice.

Next, priming during opening statements also consists of effective demonstratives and exhibits that cause visceral juror response. Don't just explain your points; use visual aids early and often. It is important to use aids that incorporate few effective words. Power points filled with word salads do nothing to invoke a response and should be avoided.

Finally, most trial lawyers have used some form of anchoring during trial to provide guidance to jurors in awarding appropriate damages. Numerous studies have shown that the single most difficult task jurors contend with in civil cases is awarding damages, because they simply have no frame of reference for that task in their day-to-day lives. Therefore, it is crucial that counsel begin anchoring the jury during opening statements to an appropriate damages range. If counsel has set the stage during voir dire, the authority heuristic also reinforces the jurors' willingness to listen to the guidance that trustworthy attorneys can provide on this difficult subject matter.

Top Heuristics for Directs/Crosses: (1) Truth Bias; (2) Fundamental Attribution; (3) Availability

Due to the truth bias heuristic, jurors are predisposed to believing witnesses when they testify. Research has convincingly supported this point. People are so hard-wired this way that it is difficult for jurors to believe a witness is lying even if a lawyer provides strong evidence of untruthfulness (with a few exceptions). While many believe that "demolishing" a witness is an effective means to win your case, the truth bias heuristic cautions that this is rarely the mental response from a juror. Thus, an effective trial attorney will elicit facts that are supportive of their case from your witnesses, fact-witnesses, and even the defense's witnesses. Unless there is a good basis for attacking a witness's credibility (i.e., a directly contradictory document), the better option is to usually win those points that they will agree on.

Fundamental attribution error in the trial context is what we call the "blame the plaintiff" heuristic. Often, something terrible has happened to your client that no one would wish on themselves or their families. Social science tells us that this leads to an urge for jurors to blame the plaintiff for what happened instead of recognizing that this is something that could happen to them under similar circumstances. Fundamental attribution error requires a methodical and honest approach by plaintiff's counsel to directly address the fact that certain jurors will be inclined to blame the plaintiff. Counsel should elicit evidence on direct and cross that plaintiff's conduct was normal, foreseeable, and predictable.

Similarly, the availability heuristic is important for overcoming foreseeability arguments and the "blame the plaintiff" urge. Defense attorneys frequently argue that something wasn't foreseeable because it is rare. The availability heuristic softens the power of this argument. Perhaps the defendant had a policy to address this rare outcome it failed to follow. The availability of this policy makes it easy for jurors to understand that a defendant foresaw and failed to act prudently. Further, the fact that the event happened makes it available to the jury.

Top Heuristics for Closing Arguments: (1) All Heuristics; (2) Availability (Primacy/Recency); (3) Authority

Put simply, all jury heuristics are important to closing arguments. If you have properly laid an authoritative foundation, then your words in closing hold more weight. If you have primed the jury to the important issues and framed the choices correctly, then the jury will pay close attention to those issues alone during closing arguments. If you have effectively normalized the "blame the plaintiff" bias, then you have a jury that will empathize and understand your client's tragedy. The availability heuristic reinforces the concept that what juries hear first and last is the most "available" information, so plaintiff's counsel should never waive the opening in a closing argument. By both opening and concluding, your remarks dovetail with what is naturally the most persuasive way of influencing the audience.

Conclusion

Understanding how jurors think and receive information is a powerful tool for an advocate to understand. Paying attention to the predictable "shortcuts" jurors employ allows attorneys to harness the power of "jury heuristics" and create more winning strategies at every phase of trial.

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Proximate Nonsense

BY ANDRE T. TENNILLE III

Georgia needs a better instruction on proximate cause.[i] Our appellate courts define it as "that which in the natural and continuous sequence, unbroken by other causes, produces an event, and without which the event would not have occurred."[ii] If that's too abstract, they add, proximate cause "is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent."[iii]

But what if precedent clashes with policy and neither is just? That's presumably where logic and common sense come in, although those two are also often at odds. And that is why proximate cause smacks of an after-the-fact rationale for a knee-jerk response.

Trying to make this comprehensible to a jury, the Council of Superior Court Judges suggested a pattern instruction. But it sows more confusion:

> Proximate cause means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event, but if an act or omission of any person not a party to the suit was the sole proximate cause of an occurrence, then no act or omission of any party could have been a proximate cause.
>
> When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury. (Use the bracketed part if there is evidence of a concurring or contributing cause to the injury or death.)[iv]

At least one commentator — a seasoned trial and appellate litigator — calls this instruction "mind-boggling." Jury charges, after all, should explain the law in "simple, straightforward, and understandable language."[v] The pattern charge does none of those things. It also seems to limit proximate cause to the "ordinary course of events." Does that mean that anything out of the ordinary cannot be a proximate cause? Of course not. But a jury would be forgiven for thinking so.

If anything, Georgia's proximate-cause instruction proximately causes confusion.[vi]

Transparency is a tempting cure. At bottom, proximate cause is simply a "limit on legal liability."[vii] It has little to do with causation in the usual sense and everything to do with some-

one's "policy decision" that a plaintiff shouldn't recover or that a defendant needn't pay.[viii] In fact, as the Georgia Court of Appeals explained, "the so-called proximate cause issue is not about causation at all but about the appropriate scope of legal responsibility."[ix] But that kind of transparency would hurt more than it'd help. Jurors may take it as license to decide cases based on policy preferences. So, for now, clarity may be the best we can hope for.

To that end, a federal court has used this definition of proximate cause:

> Proximate cause is that which, in the natural and continuous sequence, unbroken by other causes, produces an event and without which the event would not have occurred. Proximate cause is that which is nearest in order of responsible causes, as distinguished from remote; it is that which stands last in causation, not necessarily in time or place, but in causal relation. The mere fact that one event chronologically follows another is alone insufficient to establish a causal connection between the act or acts of negligence charged and the injury alleged before the Plaintiff can be permitted to recover damages.[x]

But most jurors — indeed, most lawyers and judges — would be at a loss as to how something can be the "nearest in order of responsible causes" though "not necessarily in time or place." That may make sense to quantum physicists. And implied extra-dimensional causality surely has its place, but it's not in jury instructions.

The key to making this comprehensible is focusing on foreseeability. After all, proximate cause "is largely grounded in the concept of foreseeability."[xi] Here is a foreseeability-focused instruction based on a recent Bench and Bar Committee proposal:

> For the plaintiff to recover, you must find that the defendant proximately caused the plaintiff's injuries. "Proximate cause" is a legal term. If the defendant does something (or fails to do something) that foreseeably brings about the plaintiff's injuries, then the defendant proximately caused those injuries.
>
> You may use reason and your experience to decide whether the defendant proximately caused the plaintiff's injuries.
>
> A "proximate cause" of an injury is more than trivial, but it need not be the only cause. The defendant may be liable if his or her conduct played a part in bringing about the plaintiff's injury—even though something else, including things beyond the defendant's control, contributed to the injury.

With careful instruction on the standard of care, this charge should help jurors understand proximate cause — if anyone can.

All of this prompts questions about proximate cause's place in Georgia jurisprudence. Do arguments about a lack of proximate cause make any sense, given that it is a "policy decision" about "the appropriate scope of legal responsibility"? And how can courts make those policy decisions on summary judgment without violating separation-of-powers principles?

ABOUT THE AUTHOR

Andre T. Tennille III is an attorney at Cheeley Law Group, LLC, specializing in critical-motion and appellate practice, particularly in cases with novel legal and scientific issues.

RESOURCES

[i] See Atlanta Obstetrics & Gynecology Grp., P.A. v. Coleman, 260 Ga. 569, 569 (1990) (explaining that there is "no satisfactory universal" definition of "proximate cause").

[ii] Zwiren v. Thompson, 276 Ga. 498, 500 (2003) (quoting T.J. Morris Co. v. Dykes, 197 Ga. App. 392, 395–96 (1989)) (internal quotation mark omitted).

[iii] Id. (quoting Atlanta Obstetrics & Gynecology Grp., P.A., 260 Ga. at 569).

[iv] 1 Ga. Suggested Pattern Jury Instr. Civ. 60.200 (5th ed. updated 2019).

[v] Beach v. Lipham, 276 Ga. 302, 305 (2003).

[vi] Thompson v. Thompson, 278 Ga. 752, 753–54 (2004).

[vii] Atlanta Obstetrics & Gynecology Grp., P.A., 260 Ga. at 569 (quoting McAuley v. Wills, 251 Ga. 3, 7 (1983)).

[viii] Id.

[ix] Blondell v. Courtney Station 300 LLC, 865 S.E.2d 589, 595 (Ga. Ct. App. 2021) (quoting Dan B. Dobbs et al., The Law of Torts § 198 (2d ed.)).

[x] Whiteside v. Geico Indem. Co., No. 4:16-cv-313 (CDL), 2018 WL 1535484, at *3 (M.D. Ga. Mar. 29, 2018).

[xi] Blondell, 865 S.E.2d at 595 (citation omitted).

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