

TRENDS™

IN LITIGATION

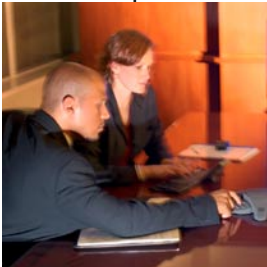


SCIENTIFIC EVIDENCE AND HIGH STAKES LITIGATION IN THE WAKE OF DAUBERT

An Interview with Jane F. Thorpe

SARBANES-OXLEY WHISTLEBLOWER CLAIMS: FAST START OR FIZZLE?

By Robert P. Riordan and Lisa Durham Taylor



THE SUBMARINE MAY BE SINKING – BAD NEWS FOR LEMELSON AND IMPLICATIONS FOR OTHERS

By Bruce J. Rose and S. Benjamin Pleune



JURY INNOVATION: A CONTINUING PROCESS OF TRIAL AND ERROR

Elizabeth A. Price and Colin K. Kelly

We are pleased to present this issue of Trends. Our goals with Trends are (1) to introduce some of our talented trial lawyers and (2) to highlight emerging issues of importance in our various practice specialties. We think this issue serves both goals well.

Our first article is an interview with Jane Thorpe, a nationally recognized leader in products liability litigation. Her passion for scientific issues in litigation and the scientific expertise she brings to her cases are unparalleled. We are confident you will enjoy reading about her practice.

The other articles in this issue should be of equal interest. Bob Riordan, the Chair of our Labor and Employment Group, has provided an insightful article on the litigation risks presented by the “whistleblower” provision of Sarbanes-Oxley. Protecting intellectual property is an increasingly difficult task, and Bruce Rose has written an excellent article on developments in that area. Finally, Liz Price, one of our leading trial lawyers, addresses a key issue in trials in all areas of the law—recent innovations in the use of juries.

We hope you enjoy Trends. As always, we solicit your feedback on this issue and any suggestions you have for future issues.

Peter Kontio

Todd David



*Peter Kontio
Co-Chair
Litigation Groups
pkontio@alston.com*



*Todd David
Co-Chair
Litigation Groups
tdavid@alston.com*





Jane F. Thorpe, Partner
Products Liability
jthorpe@alston.com

SCIENTIFIC EVIDENCE AND HIGH STAKES LITIGATION IN THE WAKE OF DAUBERT

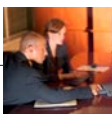
An Interview with Jane F. Thorpe

When it comes to the use of scientific evidence in mass tort litigation, Jane F. Thorpe is one of the nation's best. Jane has won awards at the state, national, and international levels as a top products liability lawyer and has been judicially praised by name for her advocacy on scientific evidence issues. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1393 n.13 (D. Or. 1996). In 24 years of practicing law, Jane has witnessed dramatic changes in how these cases are conducted—particularly with regard to the use of scientific evidence. Following the landmark 1993 Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Jane has been instrumental in developing new scientific evidentiary legal strategies. The breadth of her leadership for product manufacturers is impressive: national coordinating counsel in the cell phone health effects litigation, lead science counsel in the Texas uranium cases, national science counsel and a national trial team member in both breast implant and Fen-Phen litigation, as well as a national science and trial team member on asbestos litigation and on polio vaccines.

Recently, David Venderbush of the firm's Products Liability Group talked with Jane about the changes in how scientific evidence is applied since the *Daubert* decision.

Jane, why should consumer product and medical manufacturers be concerned with legal issues involving science?

Our economy is developing sophisticated and highly complex products that rely heavily on science and engineering—we don't manufacture just horseshoes anymore. While companies have great resources to develop science, they don't always understand the legal implications of that science. With an increasingly sophisticated plaintiff's bar, it is important that companies understand fully both the scientific and the legal implications of the science and medicine they develop. With this understanding, they can make the right decisions up front to avoid being a target of litigation.



So companies can use a science-based strategy to try to avoid litigation?

Right. One way would be to establish an “issue spotting” committee composed of people in the legal department, business planners and top scientists. This group monitors issues that receive general media scrutiny, and scientific and medical attention. They become familiar early with issues that could become potential litigation concerns. Issue spotting provides a window of opportunity to develop a global strategic plan to prevent becoming a target of mass tort litigation. That beats the standard 30 days after a complaint is served to formulate a strategy to avoid the litigation. We are fortunate; A&B has been in situations where I am convinced that our good advice has contained a potentially explosive situation—there’s nothing more satisfying than preventing a mass tort.

If litigation does arise, the company will have a ready strategy based on both legal and scientific principles. For example, on the legal front, we might try to move the cases out of the plaintiff’s success zone. On the scientific front, we will already be familiar with the potential scientific evidence—there may be opportunities to seek to exclude a plaintiff’s expert witnesses. A combination of the law and scientific knowledge can knock out these witnesses if their testimony isn’t based on good science.

You have had a lot of success using scientific evidence. Could you describe this approach?

Early in the case, it’s important for the court to think about scientific causation, apart from the other issues in the case. Often, mass tort litigation is kicked off when a news article, for example, suggests an association between exposure to a product and a disease. However, the article may be speculative and there may not be much well-developed science to support the association. So rather than starting a case spending lots of money and time to depose everyone in the company, it makes sense for courts to first focus on the issue of scientific causation. Most courts have a mechanism by which you can seek this.

So you can request that straight out?

Yes. Some of our work has resulted in published opinions that establish a string of cases that follow this method of examining



The 2003/2004 edition of “The International Who of Business Lawyers” published by Who’s Who Legal, named Ms. Thorpe as one of the best legal practitioners in the area of Products Liability.



scientific evidence in the product liability context. It just makes so much sense from a judicial economy standpoint.

What are the foundations of a successful scientific evidence strategy?

The first foundation is to learn your scientific facts. We pride ourselves on knowing the science. The second foundation is to understand the other side’s scientific theories and to assess the underlying data. Frequently, in high-stakes scientific evidence litigation, experts testify about their work; we are very aggressive in explaining to the courts that we need to see the underlying data upon which the experts rely. Obviously we are willing to provide our experts’ data as well.

So we get these data, study them, and make sure that we understand the data and their parameters, even when there are thousands of pages and it’s all in Swedish (true story!). This level of scrutiny enables us to determine whether data are legitimate. There’s no rational argument for not providing this information. It’s a basic concept of science that others can look at any work and verify that the conclusions reached from the data are plausible.

Do you hire experts to assist you in that analysis?

Absolutely! It is essential to have the very best people examining those data. And our experts help us with another foundation of a good scientific evidence strategy—cross-examining the other side’s experts. To do that, a lawyer must be educated in a way that permits her to ‘talk the talk’ of the expert sitting across the table to maintain control of the cross-examination. Before anyone on our team takes a deposition of an adverse expert in high-stakes litigation, he or she could *be* that expert. This type of scientific understanding is critical to getting admissions from the other side’s experts. And the transcript of the deposition is critical to the rest of the case—it drives our briefing on scientific evidence issues and our hearing strategy if we go before the judge on scientific evidence. With the way the law has developed, you must ask specific questions about the scientific underpinnings.



The first foundation is to learn your scientific facts.

We pride ourselves on knowing the science. The second foundation is to understand the other side’s scientific theories and to access the underlying data.



You make this approach sound like a new legal development.

Actually, it is. In 1993, the U.S. Supreme Court decided a case called *Daubert v. Merrell Dow Pharmaceuticals*, which adopted a new way of looking at scientific evidence. *Daubert* increased the responsibility of the trial judge, who essentially became the gatekeeper on whether there was a reliable scientific basis for the case; previously not a lot of scrutiny was given to the admissibility of scientific evidence. Importantly, this principle applies in any federal case involving an expert, from antitrust to labor disputes to criminal cases. It has been revolutionary. The courts are moving toward a standard of making sure the right thing is done, because these decisions are so important. Why? Because with mass tort litigation, it's hundreds of cases and they can drive our economy. Most people don't realize the extent of the interface between what the scientific community studies, what the regulatory community decides and what the court system is doing. It's really important to get it right.

Another interesting byproduct of *Daubert* has been that the courts—the Fifth Circuit for example—have developed a philosophy that they will not re-litigate a scientific evidence issue unless there's evidence that the science has changed. It's a form of scientific collateral estoppel where an issue has been ruled on from a science perspective. That's how it ought to be.

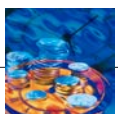
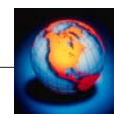
That sounds like a heavy scientific burden for trial judges. How do they ensure that they get it right?

In most cases in which a *Daubert* motion is appropriate, the science is pretty clear and judges don't have to become amateur scientists. We pride ourselves in being able to communicate to the judge lack of scientific validity in the challenged expert's testimony. The best example of that was our recent experience in the cell phone litigation where, through our written submissions, we distilled an extremely complicated topic for the judge involving subjects such as radiophysics and carcinogenesis. After five days of hearings, the judge wrote a wonderful opinion and got the science exactly right. It showed that the process really works.

Early on some judges appointed panels of scientists as independent technical advisors to the court. Two such panels were appointed by separate judges in the breast implant litigation and we were



Most people don't realize the extent of the interface between what the scientific community studies, what the regulatory community decides and what the court system is doing.



involved in both. We assisted in making the appointments and with establishing procedures. Since this had never been done before, it was an incredible life experience!

That's fascinating. Tell us about the cases.

A&B served as national science counsel for a major breast implant manufacturer. A scientific panel was appointed in the consolidated litigation phase of the multi-district litigation (MDL) and took several years to reach its conclusions. I helped draft the *voir dire* for the experts to ensure they were completely independent. During the hearings, I took part in cross-examining the plaintiff's expert scientists before the court's panel of scientists. It was unbelievably interesting. The court's panel heard testimony, reviewed thousands of pages of articles and then wrote a 400-page report. Prior to that panel, a federal judge overseeing the breast implant cases in the District of Oregon had appointed his own panel of advisors and we helped guide that process as well. Judge Hall in Oregon ended up appending the experts' reports to his exclusion order, which was the first in the breast implant litigation and helped pave the way for future victories.

Those two situations illustrate the complexity of the legal strategies in these types of cases. While the MDL panel process was going on, cases that were not part of the MDL were going to trial, so we were out arguing scientific evidence motions and trying related cases. We had to be sensitive to the interface between all of these cases. By the time the MDL science panel came out with its report, we had already basically won the war through our actions in the cases outside of the MDL.

We were able to apply the things we learned during the breast implant litigation when the cell phone litigation came up. In fact, the cell phone decisions cite to many of the breast implant cases.

When experts see you coming into the courtroom, what do they think?

By the time we are through with the deposition, those experts know that if they haven't stuck to the scientific facts, they have a problem, and they have to go before a judge and try to get out of the hole. So they aren't excited about being cross-examined in a hearing. I don't think they look forward to that process!



SARBANES-OXLEY WHISTLEBLOWER CLAIMS: FAST START OR FIZZLE?

Most public companies now face another substantial challenge in workforce management and exposure to litigation. The whistleblower protection provisions of the Sarbanes-Oxley Act¹ prohibit companies with publicly traded stock or debt from retaliating against employees who engage in certain protected activities, such as providing information in relation to alleged accounting improprieties, or participating in a proceeding related to alleged securities law violations. The scope of prohibited acts is broad, including not only discharge, demotion and suspension, but also “harassment” and “threat[s].”² An aggrieved employee can file an administrative complaint with the Occupational Safety and Health Administration (OSHA), and can proceed to federal court after a waiting period, regardless of OSHA’s determination.

The fact that *Time* magazine featured three prominent corporate whistleblowers as the collective “person of the year” shortly after Sarbanes-Oxley became effective symbolizes the visibility that whistleblower claims can have, and underscores the need for prudent human resources and risk management. Indeed, although Sarbanes-Oxley requires that an aggrieved employee first file their complaint with OSHA and permit OSHA at least 180 days to investigate before they may file a civil lawsuit, our experience has shown that an employee who believes they have been mistreated may not sit quietly and wait after visiting OSHA. Instead, they may file a complaint at the Securities and Exchange Commission and attempt to get the U.S. Attorney’s office involved to investigate the alleged wrongdoing with an eye toward criminal liability. Furthermore, whistleblower complaints may have significant implications for the audit process, leading independent auditors to define new audit criteria and require substantial additional audit work before issuing an opinion. These implications and others have led at least one commentator to suggest that smaller public companies may consider going private simply to avoid the additional burdens.³

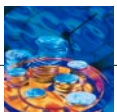
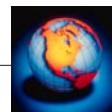
The outlook is not altogether bleak for public companies. Recent statistics show that employers prevail most of the time in these



*Robert P. Riordan, Partner
Labor & Employment
briordan@alston.com*



*Lisa Durham Taylor, Associate
Labor & Employment
ltaylor@alston.com*



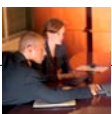
■
Companies may make a strategic decision not to contest the good-faith element, and thereby try to limit discovery to avoid expense and keep the dispute focused on alleged retaliation.

■

whistleblower cases at the administrative level.⁴ Between July 2002, when the Act passed, and December 2003, OSHA recorded 169 charges alleging Sarbanes-Oxley whistleblower retaliation. OSHA found for the employer in an overwhelming 77 of the 79 cases in which it completed an investigation. Of those, 45 were appealed to an Administrative Law Judge (the next step in the procedures defined by OSHA's regulations⁵), and OSHA's determinations have been reversed by an ALJ only three times. Only four ALJ determinations have gone to the next step, an appeal to the Administrative Review Board. In each case, the Board affirmed the ALJ. No Sarbanes-Oxley whistleblower complaint has yet reached the final stage of appeal provided by the OSHA regulations, a federal circuit court of appeals review.

Although an aggrieved employee must first bring their complaint to OSHA, the employee may file a civil lawsuit in federal district court if OSHA does not complete its investigation within 180 days. So far, seven of the first 169 cases have reached federal court. Once in court, there is a significant risk that the plaintiff will try to burden the company with high-cost discovery aimed at putting the company's accounting practices on trial. The employee will argue that they need to discover such information in order to satisfy their obligation to show a good-faith basis for their belief that wrongdoing occurred. The true issue, however, remains whether the employee spoke out and was retaliated against as a result, not whether accounting improprieties occurred. Thus, companies may make a strategic decision not to contest the good-faith element, and thereby try to limit discovery to avoid expense and keep the dispute focused on alleged retaliation.

An aggrieved or disgruntled employee may also attempt to gain leverage by naming individuals in their OSHA and federal court complaint. While Sarbanes-Oxley is explicit in its provision of *criminal* penalties for individual officers and agents who retaliate against whistleblowers,⁶ whether the Act permits individual *civil* liability remains an open question. The statute provides that "[n]o company . . . or any officer, employee, contractor, subcontractor, or agent of such company," may retaliate against a whistleblower.⁷ Courts have interpreted similar language in Title VII to mean that only companies may be liable for the acts of their agents and employees, not individuals. Because the remedies available under



Sarbanes-Oxley closely parallel the remedies available under Title VII, courts may interpret the Sarbanes-Oxley language the same way and reject individual liability. The question remains open, though, and it is likely that individuals will continue to be sued.

The remedies available to prevailing employees are limited (relief “necessary to make the employee whole”), and are similar to those available under other federal anti-discrimination statutes—reinstatement, back pay with interest, and attorney’s fees,⁸ but not punitive damages. While damages awards can still easily reach seven figures, the compounding effects of public relations issues, parallel government investigations, additional audit procedures, and heavy professional fees⁹ render these types of claims a very significant concern. Indeed, the fact that the Act’s mechanisms are readily available to any unhappy employee, coupled with current public skepticism about public company conduct, ensures that public companies will be confronted with an increasing number of whistleblower claims for quite some time to come.

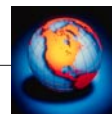
Endnotes

- ¹ Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. § 1514A.
- ² An Administrative Law Judge recently narrowed the scope of actionable adverse action, finding that a poor job performance was not enough. Rather, an employee needs to show “some tangible job consequences” in order to establish adverse action, like “lower salary, . . . jeopardized . . . job security, or . . . [other] tangible job detriment.” *Dolan v. EMC Corp.*, DOL ALJ, No. 2004-SOX-1, 3/24/04.
- ³ Tom Barry, *Sarbanes-Oxley Leads Firms to Mull Privatization*, ATLANTA BUS. CHRON., Jan. 16, 2004.
- ⁴ *Sarbanes-Oxley Claims Represent Largest Category of Non-Health, Safety Cases for DOL*, Daily Lab. Rep. (BNA) (Dec. 10, 2003).
- ⁵ Procedures for the Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. 31,860 (2003) (to be codified at 29 C.F.R. pt. 1980) (proposed May 28, 2003).
- ⁶ 18 U.S.C. § 1513(e).
- ⁷ 18 U.S.C. § 1514A(a).
- ⁸ 18 U.S.C. § 1514A(c).
- ⁹ Fees often include those directly related to litigation as well as the broad internal investigations that often accompany whistleblower complaints.

■

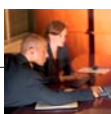
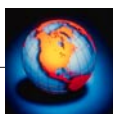
The fact that the Act’s mechanisms are readily available to any unhappy employee, coupled with current public skepticism about public company conduct, ensures that public companies will be confronted with an increasing number of whistleblower claims for quite some time to come.

■



OUR EXPERTISE ■

*A*ston & Bird's Labor & Employment Group has expertise in all areas of employment litigation, and regularly defends corporate clients against claims of discrimination, retaliation, wage and hour violations, family and medical leave violations, and various state tort and contract claims. Labor Group lawyers also regularly advise their corporate clients on employment policies and practices, represent management in negotiations and disputes with labor unions, and assist employers with safety and health investigations, affirmative action planning and audits. Our lawyers are currently involved in defending Sarbanes-Oxley whistleblower claims, both before OSHA and in federal court.



THE SUBMARINE MAY BE SINKING—BAD NEWS FOR LEMELSON AND IMPLICATIONS FOR OTHERS

Submarine patents are the byproduct of a former loophole in the patent statutes that allows inventors to file confidential patent applications with the U.S. Patent and Trademark Office (PTO) and, through a series of subsequent applications, keep the patent application alive in the PTO indefinitely. By doing so, inventors have been able to file a patent application and delay issuance while industries using the technology grew and became dependent on the technology. At that point, the patentee could allow the patent to issue and extract significant royalties from those who would rather pay a royalty than risk being precluded from using the technology.

Perhaps the most well known users of submarine patents have been the late Jerome Lemelson and the Lemelson Foundation he created, which continues to prosecute and litigate Lemelson's patents. Lemelson filed patent applications in the 1950s directed to methods and apparatus for using light or radiation reflection to scan and identify objects. By refining and resubmitting patent claims, he was able to delay the ultimate issuance of several of his patents until the 1990s. When Lemelson's submarine patents emerged from the PTO, he asserted that his patents covered such technology as bar code scanning and machine vision—technologies that by the 1990s had become staples in the manufacturing and service industries.

Lemelson then embarked on an aggressive licensing campaign. Rather than targeting the manufacturers of the scanning and machine vision equipment, Lemelson instead targeted their customers, the users of the equipment. Industry by industry, Lemelson brought numerous lawsuits against hundreds of defendants and then settled them by selling licenses in return for payment of a lump sum calculated as a percentage of the defendants' gross revenue over several years. Lemelson carefully set the percentage low enough so that it would be attractive to a defendant being threatened with an injunction, but also high enough to provide Lemelson with a small fortune.

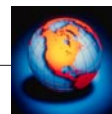
A list of Lemelson's licensees reads as a virtual "Who's Who" of leading companies in such industries as aircraft, appliance, automotive, computer, chemical, circuit board, electronics, furniture,



*Bruce J. Rose, Partner
Intellectual Property
brose@alston.com*



*S. Benjamin Pleune, Associate
Intellectual Property
sbpleune@alston.com*



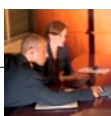
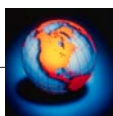
■
In addition to holding that the asserted patents were invalid and not infringed, the court found in resounding fashion that each of Lemelson's asserted patent claims is unenforceable due to prosecution laches.
■

and retail. It has been estimated that Lemelson and his foundation have collected more than one billion dollars. Lemelson's strategy was so successful that it prompted several other companies to engage in a similar practice of submarine patenting and attacking entire industries that had become dependent on a technology.

By the late 1990s, however, a group of manufacturers of bar code scanning and machine vision equipment led by Symbol Technologies, Inc. and Cognex Corp., having received indemnification demands from their purchasers of the accused equipment, brought a declaratory judgment action against Lemelson claiming that Lemelson's patents were invalid, unenforceable and not infringed. One of the bases for those claims is a rarely invoked doctrine known as prosecution laches. Under that doctrine, the plaintiffs claimed that because Lemelson delayed for so long in prosecuting the patent applications, while technology was developing and businesses were becoming more dependent on the technology, Lemelson should be precluded from asserting those patents.

There has been much debate as to whether prosecution laches exists as a valid defense to patent infringement. The trial court first held that this defense does not exist, but in 2002, the appellate court reversed the trial court, holding that the defense does exist, and remanded for determination by the trial court as to whether prosecution laches should be applied to the Lemelson case. Meanwhile, numerous litigations involving hundreds, if not thousands, of defendants were placed on hold pending the trial court's determination.

Recently, good news came to the defendants in those cases and others who were contemplating entering licenses with Lemelson. On January 23, 2004, one year after completing a bench trial, the trial court issued its opinion. *Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found.*, 301 F. Supp. 2d 1147 (D. Nev. 2004). In addition to holding that the asserted patents were invalid and not infringed, the court found in resounding fashion that each of Lemelson's asserted patent claims is unenforceable due to prosecution laches. The court concluded that Lemelson was aware of the ongoing developments in the machine vision and bar code fields, and yet systematically extended the pendency of his applications, while waiting for viable commercial systems to be designed and marketed, and then drafted hundreds of new patent claims in the 1980s and 1990s specifically worded to cover the new commercial systems.



According to the court, “at a minimum, Lemelson’s delay in securing the asserted claims amounts to culpable neglect as he ignored his duty to claim his invention promptly.” The court also found that the application of prosecution laches was warranted due to intervening public and private rights through development of new commercial inventions, which Lemelson tried to cover after they were in the marketplace for years. The court held, “this is precisely the type of prejudice to the public which the equitable doctrine of prosecution laches is designed to guard against.”

While the Lemelson Foundation will likely appeal, this decision should have a significant impact on threats by Lemelson or other owners of submarine patents. Those who are defendants in pending litigation by Lemelson, or are otherwise facing threats by Lemelson, now have the upper hand in those cases. A weakness in submarine patents has been exposed, and now there is a very valuable arrow in the defendants’ quivers—the defense of prosecution laches.

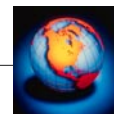
OUR EXPERTISE ■

*A*lston & Bird has one of the largest and most highly regarded intellectual property practices in the United States. More than 130 attorneys in our Atlanta, Charlotte, Research Triangle, Washington, D.C. and New York offices practice IP law 100 percent of the time, with 90 of those attorneys admitted to practice in the U.S. Patent and Trademark Office. We are intimately familiar with many patents and technologies contained within various portfolios, and we have worked with numerous clients in various industries in an effort to reduce or eliminate potential infringement liability, and as a result, to negotiate a reduction or elimination of license fees to be paid to the owners of these patents. Our lawyers are familiar with the technology that is often involved in these matters, such as scanning technology, encryption technology, and advanced telecommunications technology. In many instances, our lawyers have previously worked in the industries that are now being accused of infringing the patents in these portfolios.

■

The court held, “this is precisely the type of prejudice to the public which the equitable doctrine of prosecution laches is designed to guard against.”

■





*Elizabeth A. Price, Partner
Litigation and Trial
lprice@alston.com*



*Colin K. Kelly, Associate
Litigation and Trial
ckelly@alston.com*

JURY INNOVATION: A CONTINUING PROCESS OF TRIAL AND ERROR

Introduction

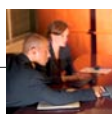
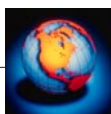
It is hard to dispute that the jury plays a vital role in the American legal system. Over the past decade, however, critics of the civil jury system have complained that it is an inefficient and cumbersome mechanism for resolving complex disputes.¹ While many European countries, including the United Kingdom, have eliminated or curtailed the use of the jury in civil cases, very few commentators have recommended such a drastic change in the United States. Instead, recent focus has been on methods of *improving*, rather than eliminating, the American jury system.²

To this end, many national and state commissions have undertaken extensive reviews of juries in their respective jurisdictions in an effort to make jurors more informed and tasks more manageable, and the decision-making process more efficient and rational from the perspective of trial counsel. Among the most widely discussed studies are those published by the American Bar Association and the National Center for State Courts.³ Although many practitioners may not be aware of it, there is an ongoing and comprehensive review of the jury system here in Georgia.

The Georgia Jury Initiative Pilot Project

The Court Futures Committee of the State Bar of Georgia launched its own jury innovation “Pilot Project” in the spring of 2000.⁴ The Pilot Project consisted of eight initiatives designed to make the Georgia civil jury system more accessible to lay persons and more efficient for all the parties involved. For more than a year, judges throughout the state were asked to experiment on a voluntary basis with these initiatives during civil jury trials, and to gather feedback from jurors and other trial participants accordingly. The eight proposed initiatives were as follows:⁵

1. Have counsel give a mini-opening statement prior to *voir dire*.



2. Allow use of juror notes during deliberations.
3. Provide the jury with written copies of preliminary instructions and the final charge.
4. Give the final charge to the jury prior to closing argument.
5. Strive to fully answer deliberating jurors' questions and meet their requests.
6. Encourage the parties in civil cases to consent to use six-person juries.
7. Allow alternate jurors to participate in jury deliberations, but not to vote.
8. Allow civil juries to proceed with less than a full panel when one member is disqualified.

Based on responses received, at least some of the jury initiatives proved to be successful in enhancing both juror job satisfaction and attorneys' views on efficient dispensation of justice.⁶ Two key initiatives (during the jury selection and jury deliberation trial phases) that received overwhelming support during the Pilot Project are discussed below.

Jury Selection

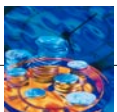
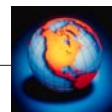
Have counsel give a mini-opening statement prior to *voir dire*.

- Research shows that jurors who are instructed on the law before the presentation of the evidence are better able to comprehend their role in the overall process. Additionally, evidence suggests that jurors have a general desire to receive as much information as possible early in the jury process.
- Jurors in the Pilot Project overwhelmingly supported allowing attorneys for each side to give a brief (five minutes or less), non-argumentative opening statement to the jury panel before conducting *voir dire*.
- No existing rule or statute prohibits such a procedure and the Court Futures Committee of the State of Bar of Georgia strongly recommended such a procedure for all civil jury matters going forward.

■

Research shows that jurors who are instructed on the law before the presentation of the evidence are better able to comprehend their role in the overall process.

■



Jury Deliberation

Provide the jury with written copies of preliminary instructions and the final charge.

- Research shows that juries are better able to understand what they have been charged to do if they have a written copy of the judge's instructions.
- Over 95% of those jurors who responded to the Pilot Project's use of written instructions overwhelmingly approved of the initiative. As might be expected, having copies of the judge's instructions greatly helped speed deliberations because the jury did not have to constantly interrupt the process with questions for the court.
- Some judges noted that they might be less inclined to draft creative or custom jury charges if they are required to give the jury written copies during deliberations.

■
Research shows that juries are better able to understand what they have been charged to do if they have a written copy of the judge's instructions.
■

Conclusion

Although the two above proposed jury initiatives were adopted and recommended by the State Bar of Georgia, there is certainly room for future innovations and attempts to improve the jury system. Notwithstanding the long and distinguished history and prominence of the American jury, it is still undergoing a continuing process of trial and error.

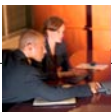
Endnotes

¹ See, e.g., Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 Psychol. Pub. Pol'y & L. 788, 792 (2000).

² Arizona, more than any other state, has championed the issue of jury reform. In the late 1990s, the Arizona Supreme Court commissioned one of the most comprehensive and sweeping attempts at reforming its state jury system in both criminal and civil trials. In less than two years, the Arizona state court system adopted 41 out of 55 suggested reforms in the summons, selection, trial, and post-verdict phases of the jury trial. See Tim Eigo, *O, Pioneer: Michael Dann Shapes Jury Reform for a New Century*, 37 Ariz. Attny. 18, 24-25 (2001).

³ *National Center for State Courts, Jury Trial Innovations I-4* (G. Thomas Munsterman, et al. eds., 1997).

⁴ See October 21, 2001 Draft Memorandum from Robert E. McCormack, Deputy General Counsel, State Bar of Georgia to Court Futures Committee, entitled *Third Preliminary Results of Civil Jury Reform Project* (on file with author).

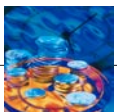
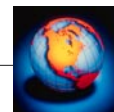


⁵ See April 10, 2001 Memorandum from State Bar of Georgia to Members of Court Futures Committee, entitled *Jury Reform Project* (on file with author).

⁶ The Court Futures Committee proposed that the State Bar of Georgia recommend initiatives 1,2,3,5,8 to judges throughout the state.

OUR EXPERTISE ■

Alston & Bird has some of the most experienced and finest trial and appellate lawyers in the country. Alston & Bird's Litigation and Trial Group provides premium services to clients through its size and breadth of litigation experience. The group consists of over 80 trial attorneys who are experienced in handling large and small cases from pre-litigation through appeal. Our litigation experience is national in scope, and we're routinely engaged as lead trial counsel in substantial litigation throughout the country, with particular emphasis in the Southeast.



OUR CREDENTIALS ■

- Our 700 attorneys are in five major markets, representing world-class companies, including UPS, Verizon Wireless, Bertelsmann AG, Wachovia Corporation, BellSouth Corporation, Delta Airlines, Inc., AFLAC, and The Prudential Insurance Company of America.
- *The Best Lawyers in America*® 2003-2004 features 55 of our attorneys.
- Our 280+ litigators include an Alston & Bird attorney named among *The National Law Journal's* "Ten of the Top Litigators in America" and another listed in their 2002 "Forty Under 40" showcasing rising litigators.
- Partner Neal Batson served as the court-appointed Examiner in the Enron Corp. Chapter 11 bankruptcy.
- *Chambers USA: America's Leading Lawyers for Business 2004* recognized Alston & Bird and our attorneys as among the best in Georgia, ranking us #1 in eight of its twelve designated practice areas.
- In 2003, *Corporate Counsel* ranked Alston & Bird as one of the top 10 law firms ("All-Around Champs") in its survey of the Fortune 250 concerning the firms they retain to handle litigation, corporate transactions, and intellectual property matters.
- In a 2003 *American Lawyer* survey, Alston & Bird tied for 1st among all law firms in the number of designations as primary outside counsel by the largest privately held companies as ranked by *Forbes* magazine.
- In 2003, *IP Law and Business* ranked Alston & Bird 6th among the top firms protecting the intellectual property rights of the Fortune 250, and in 2002, *The American Lawyer* named our firm to "IP America's Dream Team."
- In *Euromoney's 2002 Guide to the World's Leading Tax Advisers*, Alston & Bird tied for 5th among all U.S. law firms in the number of tax attorneys included.
- In 2003, *AmLaw Tech* ranked Alston & Bird 1st in the quality, use, and deployment of technology on behalf of clients.



OUR CULTURE ■

- In The BTI Consulting Group's 2003 survey of Fortune 1000 companies, Alston & Bird ranked 11th among the 30 firms that comprise the "Client Service A-Team."
- Alston & Bird is 2nd on *Fortune*® magazine's 2004 "100 Best Companies to Work For™" ranking, making it the only law firm ever to make the top 10 for three consecutive years.
- We are ranked 3rd overall and 1st among law firms our size or larger in *The American Lawyer's* 2003 Midlevel Associates Survey.



**Atlanta**

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404-881-7000

Charlotte

Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
704-444-1000

New York

90 Park Avenue
New York, NY 10016-1387
212-210-9400

Research Triangle

3201 Beechleaf Court, Suite 600
Raleigh, NC 27604-1062
919-862-2200

Washington, D.C.

601 Pennsylvania Avenue, N.W.
North Building, 10th Floor
Washington, D.C. 20004-2601
202-756-3300

www.alston.com

