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## JURY TRIAL TECHNIQUES IN COMPLEX CIVIL LITIGATION

Ronald S. Longhofer\*

*Ronald Longhofer, an experienced litigator, discusses the challenges inherent in trying a complex civil case to a jury. He explores aspects of complex litigation that often impede jurors from effectively hearing such cases. In conclusion, he suggests litigation techniques which have proved successful in overcoming such obstacles and effectively translating complex evidence to jurors.*

### INTRODUCTION

The complex civil case presents a severe challenge to the jury system, taxing the capacities of the lay jury to the utmost, and consequently taxing the abilities of the litigators and judges who must deal with the jury's limitations. This challenge, however, does not mean that juries are incompetent to reach fair and reasonable decisions in complex cases. The job of the lawyer and the judge in complex litigation is akin to that of a translator, converting complex factual and legal concepts into a language that lay juries can understand and can themselves translate into a just verdict.

Part I of this Article defines complex civil litigation. Part II explores the challenges of complex litigation that may impede jurors from performing effectively. Finally, Part III outlines some techniques that have proven successful in translating complex issues to lay juries: applying the rules of evidence with rigor, giving frequent jury instructions, allowing and encouraging judges to comment on the evidence, using new technologies to present evidence, allowing jurors to take notes, posing jurors' questions to witnesses, giving the jury a record of their instructions, and asking the jury to render a special verdict.

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## I. DEFINITION OF COMPLEX CIVIL LITIGATION

“Complex litigation” is usually thought of as referring to cases with huge financial stakes, voluminous documentary evidence, multiple parties, and the like. Indeed, such cases are usually quite complex. From the jury’s perspective, however, complex does not necessarily equate with massive. For example, a product liability case, involving a claim that a certain drug caused birth defects, can require the jury to resolve conflicting expert opinions involving theories of causation based on such things as extrapolations from animal studies and epidemiological analyses.<sup>1</sup> Such decisions can be just as complex for the jury as a document-intensive antitrust, patent, or securities case.

For purposes of this Article, complex litigation is defined to include any case involving transactions or occurrences, or requiring resort to forms of evidence, beyond the experience of the typical lay jury. Included are cases involving corporate transactions, mergers and acquisitions, securities, sophisticated product liability issues, antitrust, intellectual property, and the like. The majority of civil cases, including every day auto negligence, workplace injuries, wrongful termination, premises liability, discrimination, harassment, defamation, and the like, are excluded from the definition.

## II. CHALLENGES TO THE JURY’S ROLE

In simplest terms, the jury’s role in any civil trial is to find the facts and apply the law to those facts in accordance with the instructions of the court. Juries apply their common sense and

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1. This was the situation in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in which the United States Supreme Court changed the course of the law applicable to expert witnesses. *See id.* at 596–97. In the course of its ruling, the Court expressed confidence in the jury’s ability to deal with complex scientific subject matter and identified the traditional legal means of making it comprehensible to a jury:

Respondent expresses apprehension that abandonment of “general acceptance” as the exclusive requirement for admission will result in a “free-for-all” in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

*Id.* at 595–96.

everyday experience in assessing the credibility of witnesses and in deciding among the competing versions of the facts of the case urged upon them by the advocates. The jury's role in complex litigation, however, is unlike anything the jurors have ever been asked to do in any other part of their lives. Nothing in their experience prepares them for this job. Indeed, given the typical jury selection process, the jury is the only decision making body in the world selected specifically for its *lack* of expertise in the subject matter.

Once selected in a complex case, the jury's task is daunting:

They are asked to listen to weeks of testimony, often without being allowed to take notes.

They must peruse mountains of documentary evidence, frequently getting only a few seconds to read documents when they are "published," i.e., passed around the jury box, or, even worse, hearing snippets read aloud from the witness stand.

They are given "facts" to evaluate, filtered through adversaries who, far from presenting them objectively, are doing their duty-bound best to stretch them to the maximum allowable limits to support their respective positions.

They must decide between diametrically opposed positions taken by expert witnesses, who purport to apply the same methodology to the same facts, yet reach widely divergent conclusions.

They are asked to evaluate the credibility of a multitude of witnesses, keeping in mind the demeanor, motive, interest, bias, and prior statements of each.

They are instructed to disregard evidence improperly offered, after they have already heard it, essentially as if one simply pushed the delete button on a computer when the judge orders it stricken.

They are asked to consider evidence for a limited purpose, such as credibility, but not to use it to decide substantive issues in the case.

They are given complex instructions on the law, usually delivered orally, in arcane legal terms often quoted from appellate decisions.

They are told to apply those instructions to the facts and reach a verdict without being influenced by normal human sympathy or emotion.

### III. MAKING JURIES WORK IN COMPLEX LITIGATION

The need for techniques to aid the jury is manifest. As Justice Sandra Day O'Connor has written:

Too often, jurors are allowed to do nothing but listen passively to the testimony, without any idea what the legal issues are in the case, without permission to take notes or participate in any way, finally to be read a virtually incomprehensible set of instructions and sent into the jury room to reach a verdict in a case they may not understand much better than they did before the trial began.<sup>2</sup>

A number of techniques, discussed below, are available to assist juries in making rational decisions in complex cases.

### *A. Rigorous Application of the Rules of Evidence*

The evidence rules are time-tested filters designed to ensure, to the extent possible, that the jury is protected from unreliable matter. If properly and rigorously applied, the rules of evidence can be an important means of improving jury decision making in complex litigation.

Given the enormous handicaps the court system places on juries in performing their task, it is little wonder that the court insists that they work in secret. Because of the secrecy of jury deliberations, the jury's behavior is the one part of a trial about which we know the least. Like the making of sausage, we have decided it is better if the world does not observe this process. What we know about the behavior of juries is therefore limited to what we can discern from the verdicts they reach and from what they later report about their deliberations.

As a result of jury secrecy, the only control we have over the quality of the decisions reached is to control what goes to the jury in the first place. To continue the analogy, even if we do not know, and do not want to know, how the sausage is made, at least we can attempt to control the purity of the ingredients.<sup>3</sup>

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2. Sandra Day O'Connor, *Juries: They May Be Broke, But We Can Fix Them*, FED. LAW., June 1997, at 20, 22.

3. See, e.g., MIRSAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (1997). Damaška states:

[T]he verdict's opacity makes it extremely difficult for interested parties to assess and challenge its propriety. There is a palliative for this predicament, however: what remains open to challenge is the suitability of the database supplied to the inscrutable decision makers. If the rational support for the output of their decision making process eludes supervision, the rational support for the input can be subject to attack.

*Id.* at 44.

The rules of evidence are designed primarily for jury trials. In foreign legal systems without juries, and to a great extent in our system in bench trials, evidence rules play a greatly reduced role.<sup>4</sup> We protect the jury from tainted ingredients by making sure, among other things, that the evidence they consider is authentic,<sup>5</sup> relevant to the issues in the case,<sup>6</sup> not substantially more unfairly prejudicial than probative,<sup>7</sup> based on personal knowledge of the witnesses,<sup>8</sup> not hearsay,<sup>9</sup> unless of a type deemed especially reliable,<sup>10</sup> not based on a person's character or general propensity to act in a certain way,<sup>11</sup> not related to insurance coverage,<sup>12</sup> and, if from an expert, qualified and reliable.<sup>13</sup>

For the rules of evidence to serve their purpose of legitimizing jury verdicts, they must be rigorously applied. The common notion that the trial judge has virtually unreviewable discretion when it comes to admitting or excluding evidence should be abandoned. Appellate review of evidence rulings should be real and meaningful. While the trial judge's preliminary factual determinations relating to the introduction of evidence should be reviewed for abuse of discretion, legal error in applying the evidence rules should be reviewed *de novo* just like other legal questions.<sup>14</sup>

### *B. Frequent Jury Instructions*

The importance of frequent jury instructions, at the beginning, middle, and end of a trial, cannot be over-emphasized. The jury needs a compass and a road map to know where it is, and where it is headed, at all times. While *Federal Rule of Civil Procedure* 51 does not expressly authorize this practice, in the exercise of the trial judge's normal control over the course of the proceedings, sufficient discretion presumably exists to give appropriate instructions at times other than at the end of the case.<sup>15</sup> Rule 51 was amended

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4. See *id.* at 39–40.

5. See FED. R. EVID. 901.

6. See FED. R. EVID. 402.

7. See FED. R. EVID. 403.

8. See FED. R. EVID. 602.

9. See FED. R. EVID. 802.

10. See FED. R. EVID. 803–804.

11. See FED. R. EVID. 404.

12. See FED. R. EVID. 411.

13. See FED. R. EVID. 702.

14. See generally JAMES K. ROBINSON ET AL., MICHIGAN COURT RULES PRACTICE—EVIDENCE § 103.8 (1998).

15. See generally FED. R. CIV. P. 51.

specifically in 1987 to allow instructions to be given prior to closing arguments, following the practice in Missouri and other states.<sup>16</sup>

If necessary, the Rule should be amended to provide the trial court with this flexibility. The *Michigan Court Rules*, for example, require preliminary jury instructions and permit instructions to be given during trial, before as well as after closing arguments, and even during deliberations.<sup>17</sup> This practice keeps the jury informed at all stages of the case and permits jurors to follow the proceedings with far greater awareness of exactly what they are being asked to do.

### C. Judicial Comment on the Evidence

The trial judge's right to comment on the evidence and the witnesses, while rarely exercised in practice, can be effective in complex cases to assist the jury in understanding the issues. In the federal system, proposed *Federal Rule of Evidence* 105, which would have expressly authorized this practice,<sup>18</sup> was rejected by Congress.<sup>19</sup> However, federal judges have the common law power to explain, summarize, and comment on the evidence.<sup>20</sup>

The Michigan Rules expressly provide for comment on the evidence. *Michigan Court Rule* 2.516(B)(3) provides: "The court, at its discretion, may also comment on the evidence, the testimony, and

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16. See *id.* advisory committee's note.

17. See MICH. CT. R. 2.516.

18. Proposed *Federal Rule of Evidence* 105 would have provided:

After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

JOHN KAPLAN ET AL., *CASES AND MATERIALS ON EVIDENCE*, app. C-2 (7th ed. 1992).

19. See FED. R. EVID. 503 (Proposed Official Draft 1974).

20. See *United States v. Paiva*, 892 F.2d 148, 159 (1st Cir. 1989) ("A federal district court judge retains the common law power to explain, summarize and comment on the facts and evidence."); see also MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 107.1 (4th ed. 1996) (discussing Senate report on proposed but eliminated Rule 105, which notes that "the federal practice taken from the common law of affording the trial judge discretionary authority to comment on and summarize the evidence is left undisturbed").

the character of the witnesses, as the interests of justice require.”<sup>21</sup> To avoid an invasion of the province of the jury, however, it is important that this power be exercised judiciously and objectively.<sup>22</sup>

#### *D. The Paperless Trial*

In document-intensive cases, the paperless trial is a valuable tool. Currently available technology allows thousands of documents to be stored on a CD-ROM. All trial exhibits can be so stored, called up instantly at the push of a button, and displayed on a large screen or on individual monitors. This process enables all jurors to see the same document when it is being discussed by the witness. The documents can be highlighted on the screen and key language can be enlarged for emphasis.

This technology is far superior to its predecessor techniques, such as having witnesses read documents aloud, publishing multiple copies in the jury box, or using transparencies on an overhead projector. Other available technologies include computerized whiteboards and real-time transcription of witness testimony.

Use of available presentation technology not only helps to keep the jury's attention focused on the content of the exhibits being discussed by the witnesses, but also serves to expedite the proceedings, to increase juror comprehension, and to avoid juror boredom.

#### *E. Juror Note-Taking*

Note-taking is such a natural process for anyone who wants to remember complex facts presented over time that it is somewhat surprising for many jurors to learn that they may not take notes. The main arguments against note-taking are that it distracts attention from the testimony, that it is difficult to evaluate witness

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21. MICH. CT. R. 2.516(B)(3); *see also* M.C.L.A. § 768.29 (West 1998) (stating that the trial judge has the power to “make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require”).

22. *See, e.g.,* *People v. King*, 181 N.W.2d 916, 918 (Mich. 1970) (stating that the trial judge “must take great pains to make sure his comment is at least an accurate representation of the subject”); *see also* *People v. Brown*, 204 N.W.2d 72, 74–75 (Mich. Ct. App. 1972) (discussing that a trial judge, when instructing the jury, must remain fair and impartial); *People v. Wichman*, 166 N.W.2d 298, 301–02 (Mich. Ct. App. 1968) (stating that a trial judge must preserve the appearance of complete impartiality and objectivity).



demeanor while writing notes, and that, much like having a partial transcript, having incomplete notes may cause jurors to give too much emphasis to what they have written down.

On the other hand, one cannot expect that jurors who do not take notes will remember the facts of a complex trial in sufficient detail to reach a rational decision. Without notes, jurors are forced to rely on the attorneys, each with his or her own adversarial perspective, to provide them with a summary of the facts at the conclusion of the case. On balance, jurors in complex cases are probably better served by taking notes, just as any judge would do in a bench trial.

Under the Michigan Rules, trial judges have discretion either to allow jurors to take notes or to forbid the practice. *Michigan Standard Jury Instruction 2.13* provides two alternatives:

- a. You may take notes during the trial if you wish, but of course you don't have to. If you do take notes, you should be careful that it does not distract you from paying attention to all the evidence. When you go to the jury room to decide your verdict, you may use your notes to help you remember what happened in the courtroom. If you take notes, do not let anyone see them. After you have begun your deliberations, it is then permissible to allow other jurors to see your notes. You must turn your notes over to the bailiff during recesses.
- b. I do not believe that it is helpful for you to take notes because you might not be able to give your full attention to the evidence. So please do not take any notes while you are in the courtroom.<sup>23</sup>

Similar instructions have been suggested by the American Bar Association Section of Litigation, in its *Civil Trial Practice Standards*:

Prior to permitting jurors to take notes, the court should give an appropriate cautionary instruction to the jury, including that:

- i. Jurors are not required to take notes, and those who take notes are not required to take notes extensively;

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23. MICH. STANDARD JURY INSTRUCTIONS—CIVIL § 2.13 (2d ed. 1998).

- ii. Note-taking should not divert jurors from paying full attention to the evidence and evaluating witness credibility;
- iii. Notes are merely memory aids and are not evidence or the official record;
- iv. Jurors who take few or no notes should not permit their independent recollection of the evidence to be influenced solely by the fact that other jurors have taken notes;
- v. Notes are confidential and will not be reviewed by the court or anyone else. They may not be disclosed to other jurors until deliberations begin; and
- vi. After the trial is over, all juror notes will be collected and destroyed.<sup>24</sup>

On balance, the arguments in favor of juror note-taking are more persuasive than those against the practice. More informed jurors cannot help but make more rational, fact-based decisions than those who must rely on their memories as to complex facts presented over the course of a lengthy trial.

#### *F. Juror Questions*

To give the jury a greater degree of participation in the trial process, two kinds of juror questions should be permitted: questions to witnesses and questions to attorneys.

As to witness questions, the Federal Rules do not expressly allow questions to be posed by jurors. However, under *Federal Rule of Evidence* 611(a), which gives the trial court control over the mode and order of interrogating witnesses, the court presumably has the authority to allow juror questions.<sup>25</sup>

Many criticisms of juror questions exist. First, one may argue that questions are inconsistent with the basic premise of the adversary process, i.e., that the parties should be free to present their

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24. AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, CIVIL TRIAL PRACTICE STANDARDS 6-7 (1998) (citing AMERICAN JUDICATURE SOC'Y, TOWARD MORE ACTIVE JURIES: TAKING NOTES AND ASKING QUESTIONS 13-14 (1991)) [hereinafter CIVIL TRIAL PRACTICE STANDARDS]. See also FEDERAL JUD. CENTER, MANUAL FOR LITIGATION MANAGEMENT AND COST AND DELAY REDUCTION 86-87 (1993).

25. See, e.g., *United States v. Bush*, 47 F.3d 511, 514-15 (2d Cir. 1995) ("[D]irect questioning by jurors is a 'matter within the judge's discretion'"); *United States v. Cassiere*, 4 F.3d 1006, 1017-18 (1st Cir. 1993) (discussing cases that allow juror questions).

cases as they see fit. As a strategic matter, litigants often intentionally do not ask questions. The advocate who has succeeded in avoiding questions to a witness on a particular topic may feel like saying to a questioning juror: "If you are going to try my case for me, just be sure you win it!" A second argument against juror questions is that jurors who ask questions may inappropriately take on a position of advocacy, emulating the lawyers by formulating questions that reflect a view of the appropriate outcome of the case before all the evidence is in. Third, jurors who seek to ask questions may become resentful if their questions are not allowed. Finally, as with questions from the bench, attorneys are placed in the awkward position of risking juror alienation if they object to juror questions.

On the other hand, if handled properly, juror questions can benefit both the jury and the parties. Such questions increase the jury's access to information and their participation in the process. They also assist the parties by giving them a rare glimpse into the jury's thought processes. As noted in *United States v. Sutton*:<sup>26</sup> "Juror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror."<sup>27</sup>

The Michigan Supreme Court has held that it is error to preclude juror questions altogether, stating that the trial judge has discretion to determine whether and how juror questions should be asked.<sup>28</sup> Under *Michigan Standard Jury Instruction 2.11*, Michigan juries may be instructed as follows:

During the testimony of a witness, you might think of an important question that you believe will help you better understand the facts in this case. Please wait to ask the question until after the witness has finished testifying. If, after the witness has completed testimony, and only then, your question is still unanswered, you may write the question down, raise your hand, and pass the question to the bailiff. The bailiff will give it to me. Do not under any circumstances ask the witness the question yourself.

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26. 970 F.2d 1001 (1st Cir. 1992).

27. *Id.* at 1005 n.3.

28. *See* *People v. Heard*, 200 N.W.2d 73, 76 (Mich. 1972).

There are rules that a trial must follow. If your question is allowed under those rules, I will ask the witness your question.<sup>29</sup>

Similar cautionary instructions are suggested in the *Civil Trial Practice Standards*:

Prior to permitting the submission of questions, the court should instruct the jury that:

- i. Questions should be reserved for important points only;
- ii. The sole purpose of juror questions is to clarify the testimony, not to comment on it or express any opinion about it;
- iii. Jurors are not to argue with the witness;
- iv. Jurors are to remember that they are not advocates and must remain neutral fact finders;
- v. Jurors are not to reach any definite conclusions until the end of the case, after they have heard all of the evidence and arguments of counsel;
- vi. There are some questions that the court will not ask, or will not ask in the form that a juror has written, because of the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case;
- vii. Jurors are to draw no inference if a question is not asked—it is no reflection on either the juror or the question;
- viii. Jurors are not to weigh the answers to their questions more heavily than other evidence in the case;
- ix. Questions will be accepted only in writing, at the court's invitation, and are not to be disclosed to other jurors; and
- x. Any question must be submitted in writing to the court, with the juror's signature or designated number affixed.<sup>30</sup>

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29. MICH. STANDARD JURY INSTRUCTION—CIVIL § 2.11 (2d ed. 1998).

30. CIVIL TRIAL PRACTICE STANDARDS, *supra* note 24, at 9–10 (citing *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1508–09 (1997)); see also Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1185 (1995) (arguing that jurors should be allowed to ask non-substantively inappropriate questions of the judge); J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47

The second type of juror questioning involves questions directed to the attorneys. Under this procedure, the jurors are asked to write down, after the close of the evidence, any questions they would like counsel to address in their closing arguments. This procedure is beneficial both to the jurors and to the parties, since it not only allows the jurors' lingering questions to be answered, but it gives the parties a strong signal as to what juror concerns should be addressed in closing.

### *G. Instructions in the Jury Room*

In complex litigation, it is unreasonable to expect the jury to remember and apply instructions delivered orally from the bench, without being able to refer to them during deliberations. Full sets of the instructions should be made available to the jury, in either written or recorded form, or both.<sup>31</sup> Given the opportunity to have a copy of the instructions, jurors will almost universally rely on them to structure their deliberations. This greatly increases the chance of a verdict that follows the law.<sup>32</sup>

### *H. Special Verdicts*

The special verdict is a valuable tool in complex jury trials. Under *Federal Rule of Civil Procedure* 49(a)<sup>33</sup> and parallel state special verdict rules<sup>34</sup> the jury is asked to make specific findings of fact, and the judge then enters the judgment based on the jury's findings.

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HASTINGS L.J. 1433, 1507 (1996) (stating that a 1998 study of Wisconsin state courts found that permitting juror questions alleviated juror doubts about trial testimony).

31. See MICH. CT. R. 2.516(B)(5). The Rule provides:

Either on the request of a party or on the court's own motion, the court may provide the jury with:

- (a) a full set of written instructions,
- (b) a full set of electronically recorded instructions, or a partial set of written or recorded instructions if the parties agree that a partial set may be provided and agree on the portions to be provided.

*Id.*

32. See CIVIL TRIAL PRACTICE STANDARDS, *supra* note 24, at 19 (citing William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 585 (1990)).

33. See FED. R. CIV. P. 49(a).

34. See, e.g., MICH. CT. R. 2.514.

There are a number of advantages to the special verdict. First, by limiting the function of the jury to that of fact-finder, special verdicts minimize the opportunity for the jury to decide a case on the basis of sympathy. This, in turn, increases the likelihood that cases will be decided on the facts as they occurred.

In addition, a special verdict asks the jury to perform the function it does best—finding facts. Lay jurors have no particular abilities in applying law to facts. Jury instructions also may be simplified and limited to explaining the questions and the procedure for answering them. There is no necessity of explaining to the jury the legal consequences of their fact findings. Finally, special verdicts make clear exactly what facts have been found on the dispositive issues in the case, facilitating review of the verdict, either on post-trial motions or on appeal.

In comparison to these advantages, the arguments against special verdicts are inconsequential. First, special verdicts limit the jury's opportunity to nullify the law and render verdicts based on their view of the just result in a particular case. This argument runs contrary to the basic premise of the rule of law. Second, the drafting of, and reaching agreement on, appropriate questions may be difficult. While this may be true, the drafting of instructions on the law presents its own difficulties. Third, special verdicts may lengthen jury deliberations, since it is easier to reach a compromise on the basic issue of which party should prevail. Aside from the lack of empirical evidence to support this argument, compromise verdicts are not necessarily the most desired outcome under the adversary system.

On balance, the special verdict is an available option that can be of great benefit in complex jury trials.

## CONCLUSION

In complex litigation, the challenge to the trial attorney, and to the judge, is to translate complex facts and legal concepts into a language that can be understood by the jury. All available methods of increasing the level of juror perception, comprehension and rational decision making should be employed. There is no reason to believe that, given appropriate assistance by the professional participants in the process, lay jurors are not up to the task. When the techniques described in this Article are used to their best advantage, juries are fully capable of reaching reasonable decisions in complex civil litigation.

