Juries are not composed of professional jurors, and that’s a good thing. We once had “blue ribbon” grand juries composed of prominent, typically well-educated, citizens who would investigate, for example, civic corruption – that is, until the packages contained within those ribbons were determined to violate the right of a defendant to have a jury of one’s peers. Turns out, juries consisting only of educated, white males aren’t considered a “fair” and “representative” cross-section of the community.

All juries – grand and trial – are now selected randomly and in a manner intended to ensure a mixed composition of citizens off the street. The system takes pains to avoid improper exclusions or inclusions, so that we don’t end up with jurors being drawn from limited walks of life. We can debate whether we have truly solved that problem, or whether perhaps the pendulum has swung the other way, where prominent, well-educated citizens seem to find their way out of jury duty more often than some. We’re looking at you, lawyers.

How often do lawyers serve on juries, anyway? Should lawyers be included in the spectrum of possible jurors just like anyone else, or should they be properly called out (and sometimes culled out) for bringing “special” issues to the jury box? Ask a seasoned trial attorney and she would probably find a host of potential problems with lawyers as jurors: They may be less willing, or less able, to listen with an open mind, bringing their jealous mistress (the law) with them wherever they go. In turn, lawyers may be prone, if not directly encouraged by their fellow jurors, to take over deliberations, given their often dynamic personalities or their (sometimes, supposed) knowledge of the law and its protocols to which other jurors would defer. Others might less charitably say that attorneys can be a problem because of their arrogance and inclination to interpret for themselves the law and its protocols. They may not be able to help themselves from coming to court with an agenda -- maybe to get out of jury duty, or alternatively, maybe to get selected as a juror.
One might have hoped that when the laws were changed over the past couple of decades to repeal automatic exemptions from jury service for attorneys, that attorney-jurors would be more likely to be role models in the courtroom and demonstrate the punctilio of propriety as fair and impartial jurors. We’re not saying this doesn’t happen, but it is probably misguided hope to expect that attorneys will ever be considered model jurors. Maybe it is just too hard for lawyers to put aside the baggage of expertise, as it were, that they invariably bring to the jury process. Maybe some lawyers are too enslaved to the billable hour regime to selflessly devote an indeterminate amount of daytime hours to this form of public service. Maybe other lawyers are too egg-headed to recognize the learning experience that the view from the jury box could offer, particularly for litigators.

Whatever the reason, it is all too often that lawyers are the first ones in a venire to get dismissed. You can see them swaggering out of the courthouse and back to their law offices, to regale their colleagues with stories of how they read the judge like a book and gave such clever voir dire answers so as to practically compel their removal. And, the truth of the matter is, that the lawyers trying the case are probably happy to be rid of their legal compatriots. Lead counsel wants to be the “top dog” lawyer in the room, and any attorney seated on a jury could undermine that authority, because he or she might dominate the deliberations and defiantly lead the entire juror pack in one (and possibly the wrong) direction.

Let’s set aside the less than admirable tendency of lawyers to evade jury duty and hope that lawyers -- ourselves included -- will do better in the future and come to recognize the importance of jury duty as a true civic duty. All employers should be more supportive of time taken out for jury duty and should respect attorneys’ participation in these tasks that are in the public interest, like a form of pro bono work. All of this is well and good.

So let’s turn to what happens when lawyers actually want to get seated on juries. What then? Presumably lawyers, like any other constituency in the jury venire, at least occasionally get through voir dire to properly form part of the illustrious jury of one’s peers. Indeed, the voir dire process is designed, or at least intended, to separate the wheat from the chaff, meaning those who shouldn’t serve as jurors because their specific biases or prejudices are removed for “cause” or at least peremptorily. And yet, lawyers can muck up that process too, by using their understanding of the system to manipulate it, rather than candidly submitting to the process like any other juror. If a juror who got empanelled is later found out to have answered questions falsely during voir dire, this can result in a mistrial, at substantial cost to the taxpayer and the justice system itself. The hard hand of the law should be felt by any lawyers who engage in juror misconduct because they, of anyone, should know better.

In times like these, it is hard for lawyers not to either shake or bow their heads in frustration, shame or simple bewilderment. What are lawyers, as officers of the court, thinking when they come to a courtroom and abdicate even their most basic duties as jurors? Whatever the reason, as politico Rahm Emanuel said, we should never let a serious crisis go to waste. So let’s look at the lawyers-as-bad-jurors situation anecdotally, because it is anecdotal and perhaps even anomalous. Consider the following sampling of choice cases that have hit the newswires recently.

In a case currently being litigated in the U.S. District Court in the Southern District of New York, U.S. v. Daugerdas, 09-CR-581, it was discovered that a member of a jury that convicted defendants in a tax shelter fraud didn’t come forward with the objective truth, in the face of unambiguous questions posed during voir dire questioning in jury selection, that (1) she was a lawyer; (2) at the time she was under suspension from practice; (3) she had a minor criminal record; and (4) her husband had a significant
criminal record. Hard to believe, but her conduct now threatens to jeopardize convictions that have nothing at all to do with (and show no signs of having been impacted in any way by) her misconduct.

Also recently in People v. Pena, a New York County jury was unable to reach a verdict in a high-profile rape case where the rape offense was allegedly committed by a New York City police officer (although the defendant was convicted on lesser charges). In that case, a juror who is a prominent attorney -- and a former prosecutor, with social ties to the district attorney whose office was prosecuting the case, as well as being the former adviser to former New York Gov. Eliot Spitzer -- never came forward with that critical information during voir dire examination or any other part of jury selection. In fact, the jury questionnaire actually asked, “Do you have any friends or relatives in law enforcement, i.e., police, FBI, district attorney?” At one point he explained that he didn’t mention his current relationship with the district attorney and his office, lest he be viewed as “shirking” his responsibilities as a citizen. After the trial, he told the press that, despite his close ties with the district attorney, he had felt he could, subjectively, be fair to both sides.

Really? It makes you wonder about these attorney-jurors. Maybe the one in Daugerdas, who straight-out lied during voir dire, felt that she, too, could be fair to both sides. In both cases, though, the lawyers wrongly took it upon themselves to make that determination. But why? Was it attorney arrogance and/or a presumed “understanding” of the law and the jury selection process? (As an aside, in Pena, there were four others lawyers selected as jurors, remarkably. Just think how the trial lawyers in the case must have felt when that jury was sworn!) Or were these individuals’ actions unconnected to the fact that they were attorneys? Lest we dismiss too readily the problems in Daugerdas and Pena, consider the older, still famed, example of People v. Dennis Kozlowski, where an attorney who was seated as a juror caused a mistrial of a six-month-long trial because of her blatant and unwavering refusal to deliberate with her fellow jurors.

One might look at these three tales seriatim, and simply conclude that attorneys shouldn’t be seated as jurors. Let’s bring back the attorney exemption for jury duty! Though it might meet with applause at a late-night bar association function, the exemption was a baby-with-the-bathwater approach that was properly repealed. So, what is the lesson here, when there are legion cases involving juror misconduct by lay jurors?

Our message is that lawyers bring their biases to the jury box, no more but also no less than anyone else. People who are summoned to serve on juries are the same people who go to the polls: Jury summonses are derived from voter registration lists; it is part of the democratic process. If we believe that jurors should represent a cross-section of society, then we have to take them as they come — the irrational crazies and all. Of course, trial counsel have a right to remove some jurors, but making the determination of who is “suitable” is easier said than done. The voir dire system only purports to work if potential jurors are willing to participate honestly, to the extent the court and its officers can decipher through questions that a member of the venire is better left off the jury. The best thing lawyers can bring to the table is this level of understanding and respect for the jury selection process, like any other court proceeding. The system asks no more from lawyers-as-prospective-jurors than anyone else. Lawyers should be counted on not to fight the process and use their professional skills to practice to deceive -- to either get on or off a jury for “extrajudicial” reasons. And so we end where we began: There are no professional jurors, and that’s a good thing.
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