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A Jury of One's Peers

At the outset, some confessions are in order. I want to be perfectly clear about a few things. I am not an expert in the historical development of English common law, the Magna Carta, or American constitutional history. I have picked juries in criminal and civil cases in municipal, state, and federal courts. I have rarely used jury consultants but, on the occasions that I have used them, these professionals have provided an expertise and insight that I do not claim to have.

The topic of this column was suggested by one of my partners who practices exclusively in the area of medical malpractice defense. As I was getting ready to prepare an outline of requested voir dire examination in an upcoming professional negligence matter, he asked me, "Whatever happened to the concept of being tried by a jury of your peers? A doctor or nurse would rarely, if ever, be allowed to sit on one of my juries." That comment made me question the vitality of the subject that I had chosen for this column and had, indeed, already begun to write: "Litigants' 'Elevated Expectations' as They Enter Into Mediation." As a mediator, even I thought that the topic was boring! So, here we are.

Rumor has it that the concept of a defendant's right to a trial by a jury of his or her peers was first established by King John in 1215, when he signed the Magna Carta at Runnymede, England. Rumor aside, the Great Charter of Liberties under the seal of King John, which has generally become known as the Magna Carta, specifically states: "No Free-man's body shall be taken, nor imprisoned, nor disseised, nor outlawed, nor banished, nor in any way be damaged, nor shall the King send him to prison by force, excepting by the judgment of his Peers and by the Law of the land." Blackstone has noted the following, however: "The Great Charter of King John was for the most part compiled from the ancient customs of the Realm, or the Laws of King Edward the Confessor; by which they usually mean the old Common Law, which was established under our Saxon Princes, before the rigors of foedal tenure and other hardships were imported from the continent by the Kings of the Norman line." Indeed, Sir Edward Coke has noted an example of the use of trial by jury as early as 1074, a mere eight years after the Norman Conquest. So, the rumor may, in fact, be just that. In any event, whether or not trial by a jury of one's peers has its genesis in the Magna Carta or prior English common law, the concept has been around for a long time and is embodied in our federal Constitution. Or is it?

A quick review of the U.S. Constitution readily reveals that trial by a jury of one's peers is not an explicitly stated constitutional right. Article II of the Constitution merely provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by jury." The Fifth Amendment provides for compensation when private property is taken for a public use, but nowhere does it provide that a trial in a condemnation case even requires a jury. The Seventh Amendment would seem to fill that gap, however, by providing that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. …" Nowhere in the U.S. Constitution is a trial by a jury of one's peers even mentioned. One is tempted to ask: What is a "peer?"

In interpreting the meaning and intent of the Magna Carta's reference to trial by a jury of one's peers, Sir Edward Coke referred to a "peer" as an "equal." The word was actually derived from the original Latin word "par" that was contained in the original text of the Magna Carta. The meaning of the word evolved and was later recognized to signify the right to be tried by a jury made up of "vassals or tenants of the same Lord, who were equals in rank and were obliged to attend [that Lord] in his Courts." Richard Thomson, *An Historical Essay on the Magna Charta of King John* (London 1822). "Peers" were also historically identified as "*Peers of Fees*, either because they held their fees or estates under [a Lord], or because they sat in his Courts to judge with him of disputes arising upon fees; and if there were too many in one Lordship, the Lord selected twelve of his tenants who received the title of Peers by way of distinction, whence it is said that Juries have been derived." (Emphasis in original.) That latter definition seems to beg the question: Did the original intent that the peers be the equals of the accused evolve into the notion that the peers were, in fact, individuals residing within the "Lordship" who had attained such a degree of prominence that they were considered the social superiors of the individual on trial? As preposterous as that may seem to us today, there is some support for the notion, because the Charter of King John establishes a peerage system of payments and

a hierarchical structure, below the King, made up of Earls, Dukes, Marquis, Viscounts, and Barons. In fact, there is actually a provision in the Magna Carta that appears to describe Peers, in the context of an unlawful taking of property by the King, as being Barons of the realm. Another provision involving the "judgement of the twenty-five Barons" relieves them of their service only in the event of a conflict of interest. What is apparently missing from the Magna Carta is the notion of equal protection of the laws.

How did the English common law system get exported to what is now the judicial system of the United States? More accurately phrased for purposes of this column is the question of what exactly is the composition of a jury of one's peers. In the vernacular, it certainly is understood to be a jury of one's equals. Yet, attorneys and courts engaged in the voir dire process go to great lengths to ensure that a jury is not made up of the litigants' peers. Over the years, that process has been formed by judicial opinions that have identified the parameters of who can and must be permitted to serve as a juror. Those opinions have, in effect, provided the foundation for the practice that has resulted in the concept of jury impartiality being transformed into the selection of juries that, quite literally, are expected to know nothing about the facts of the case or have any experience with the broad array of subjects that may be discussed during a trial.

Various courts have described jury service as a duty, a right, or a privilege. The nature of jury service is not at issue here; rather, the issue is who serves on a jury and why the judge or the attorneys choose certain people to serve. Contrary to what appears to be absent from the provisions of Magna Carta, rooted deeply in the modern jury selection process are the notions of equal protection and nondiscrimination.

At the outset, it should be noted that the Magna Carta's focus was on land disputes, monetary obligations to the Crown, and criminal matters. Based on the minimal research I conducted in preparing this column, it appears that the vast majority of cases addressing alleged irregularities in the jury selection process involve criminal prosecutions. Nevertheless, various courts have held that the standards governing jury selection are equally applicable to civil and criminal cases. The U.S. Congress has enacted the Jury Selection and Service Act, which deals with the selection of juries in federal court.

At the heart of all the discussions of jury selection and service is the concept that litigants have the right to be judged by a jury using nondiscriminatory criteria and processes. Those concepts may be further described as the selection of a jury in the absence of systematic and intentional exclusion of the various groups that may make up a community's population based on race, economic condition, social status, religious beliefs, political affiliations, gender, geographical location, or even age. The courts have even considered physical capacity and limitations, hearing impairments, language barriers, mental capacity, intelligence and general knowledge, literacy, citizenship, and ownership of property as sometimes valid, sometimes invalid, criteria upon which to allow or disallow a person from being seated on a jury. Courts will typically not take into consideration such factors as the level of a prospective juror's education, considerations of wealth, an eligible voter's failure to register to vote, perceived ethnic background based on the spelling of a surname, employment in a particular occupation or membership in any given profession (other than legal), and lack of a driver's license.

What the foregoing establishes is that the focus of the inquiry is—or at least should generally be—on the group, not on the individual. Thus, the American tradition of jury selection has come to require an impartial jury drawn from a cross-section of the community. Hence, the focus has shifted from convening a jury of one's peers to convening a jury that is representative of the community, many of whose members may not be a litigant's "peers." In that regard, however, the courts are virtually unanimous in holding that a litigant is not entitled to a jury that is composed, either in whole or in part, of his or her own group or that is tailored to fit the particular circumstances to be tried.

The next step in the elimination process and the reason the system has strayed so far from its original intent (regardless of which view of the Magna Carta you may adopt) lies squarely at the feet of the attorneys who do everything within their grasp to ensure that a jury of individuals who have no familiarity with the particular case or its subject matter is seated to try the issues. The list of potential disqualifying factors is almost limitless and includes, but is not limited to, the following:

- people have worked in the field or who may have relatives who do;
- a person with a strong personality who may become the foreperson if that person may be perceived to be philosophically opposed to your position;
- the individual whose arms are crossed when responding to voir dire about your side of the case;
- the person who has been a witness, juror, or litigant in the past; and
- anyone who knows a witness or an attorney, even if—maybe particularly if—only by reputation.

So, when all these prospective jurors are eliminated, what type of jury gets seated? The panel that is selected is made up of individuals who are potentially utterly uninformed about the society in which they live. Is that person your client's peer? I think not. But,

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Bioservices Corp. v. Lugo, 595 F. Supp. 2d 1189 (D. Kan. 2009); *Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962, 965–67 (D. Ariz. 2008).

Numerous other courts that have considered the issue, however, have rejected a strict interpretation of the term "exceeds authorization." *See EF Cultural Travel BV v. Explorica Inc.*, 274 F.3d 577, 583 (1st Cir. 2001); *Lasco Foods Inc. v. Hall & Shaw Sales, Mktg., & Consulting LLC*, 2009 U.S. Dist. LEXIS 99535, *13–*14 (E.D. Mo. 2009); *Calyon v. Mizuho Secs. USA Inc.*, 2007 U.S. Dist. LEXIS 66051 (S.D.N.Y. 2007); *Shurgard Storage Ctrs. v. Safeguard Self Storage Inc.*, 119 F. Supp. 2d 1121, 1125 (W.D. Wash. 2000). Those courts generally follow the approach employed by the Seventh Circuit Court of Appeals, which applied agency principles in a case in which the defendant accessed his employer's protected information after the employee had decided (unbeknownst to his employer) to terminate employment voluntarily and start a competing business. *See International Airport Ctrs., LLC v. Citrin*, 440 F.3d 418 (7th Cir. 2006). Although the employee contended that the access at issue did not exceed his authority, the Seventh Circuit held that the employee's breach of his duty of loyalty to his employer terminated his authorization to access the information at issue and rendered all subsequent access unauthorized. The Seventh Circuit reached this conclusion notwithstanding the fact that the employer was unaware of the employee's intentions and, therefore, had not actually prohibited the employee from accessing the files at issue.

Section 1030(a)(4)

A person violates § 1030(a)(4) of the CFAA if he or she "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value. …" In addition to the previously discussed issue of whether the access at issue was authorized, defendants faced with a § 1030(a)(4) claim frequently seek to have the claim dismissed by arguing that the employer's complaint fails to meet the particularity requirement imposed by Fed. R. Civ. P. 9(b). The majority position, however, is that the "intent to defraud" required under the provision of the act is not necessarily equivalent to fraud per se. Therefore, the heightened pleading requirement of Rule 9(b) does not apply to a § 1030(a)(4) claim. *See Motorola Inc. v. Lemko Corp.*, 2009 WL 383444 (N.D. Ill. 2009); *P.C. of Yonkers Inc. v. Celebrations! the Party & Seasonal Superstore LLC*, 2007 U.S. Dist. LEXIS 15216 (D.N.J. 2007).

Section 1030(a)(5)

A person violates § 1030(a)(5) of the CFAA if he or she "causes damage" to a protected computer by gaining unauthorized access or transmission of a program, information, code, or command. The act defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). As such, claims under this section frequently involve employees who download or install secure erasure programs or "file wiping" software to remove incriminating evidence of their illicit activities from employers' laptop computers and other devices before they are returned upon termination. Since most employers' computer use policies state that all e-mails or other files created using company hardware or software systems are the property of the employer, the deletion of such files constitutes a violation of this section. *See International Airport Ctrs.*, 421 F.3d at 420; *Arience Builders Inc. v. Baltes*, 563 F. Supp. 2d 883, 884–885 (N.D. Ill. 2008).

In addition to these three provisions, the Computer Fraud and Abuse Act prohibits a range of other computer-related offenses that may occur in the employment context. Moreover, the act has been—and is likely to continue to be—amended regularly in order to keep pace with evolving technologies. As such, it is important for practitioners to become familiar with the CFAA and to employ it whenever possible to combat misuse or abuse of the electronic tools that have become an integral part of business in the electronic age. **TFL**

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in that regard, I am as guilty as anyone of perpetuating the selection of that uninformed jury—all in the name of objectivity and fairness.

I am not sure that the process results in selecting a jury that represents a fair cross-section of the community. I am more certain that it does not result in the selection of a jury of one's peers. What I am certain of, however, is that, with regard to the entire jury selection process, I am properly accused of being somewhat of an anarchist (or maybe just disingenuous) because, as much as I may complain about the process, I offer no suggestions for improvement. **TFL**

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