the shadow knows

a discourse on costs and benefits of shadow juries in civil trials

by Ruth M. Corbin, Ph.D., LL.M.

Jury deliberation has sometimes been described as a black box.[1] Modern mastery of shadow juries makes this analogy outdated.

Shadow juries are paid groups of men and women who follow every step of a trial exactly as the actual jury.[2] They are engaged for strategic reasons by counsel for one side or another to improve counsel's chances of a successful outcome. Success in this case means a favourable outcome for counsel's client.

Lawyers representing parties in a medical malpractice suit may have the option of having their case decided by a six-person jury instead of by a single judge. The option bears consideration. But concerns spring to mind. How does the process work, for recruiting, engaging, and managing a shadow jury? How much does it cost? Is it worth it? Is it a science or an art? And if it's an art, can one really rely upon it?

The analysis for the present article begins after the decision has been made to put one's case in the hands of a jury. Scientific research methods and consulting services are widely available for strengthening the chances of choosing a sympathetic jury, and they are summarized below. Once the jurors take their seats, every day of trial brings questions of what the jury is thinking, which information and themes are figuring into their attitudes, and how their judgments will converge on a single group decision. If only a clone of the jury were available ….

Clone no, but a shadow jury may be the next best thing.

This article puts shadow juries in the context of other jury research options. It observes that the use of shadow juries is an art informed by sixty years of social science. The ultimate benefit of a shadow jury is the personal education of the counsel who has engaged it. The article concludes by assessing whether that benefit is sufficient to justify the substantial expense.

OPTIONS FOR JURY ANALYSIS, AND HOW THEY WORK

There are three stages at which some form of simulated jury may figure into a lawyer's case development. The value of a shadow jury is explained in the third of these stages.

First, citizens in the population eligible for jury duty may be consulted before jury selection to gauge community reactions to the litigants (if the case has been publicized in the media), to explore social norms for the offending behaviour of one litigant or the other, or to identify the characteristics of people most likely to be sympathetic to one's own side of the case. Citizen input may be obtained individually by way of survey, in small groups by way of personal interviews, or in larger focus groups. For example, pretrial interviews were used in the Paul Bernardo case in 1995 to examine whether potential jurors would be receptive to the possibility that Bernardo's blonde, blue-eyed wife, Karla Homolka, may have been jointly

culpable. Interviews revealed a range of potential biases in the jury pool. Both prosecution and defense used the results of that research to design challenges for cause to prospective jurors.

Second, a simulated jury may be used as a component of a full-fledged mock trial, including videotapes of jury deliberations and interviews with jurors. A mock trial is a dress rehearsal, with a difference. When the rehearsal is concluded, the "director" may choose to change several parts of the script, the order in which the characters are presented, and even the costumes. The input of the mock jury will shape those decisions. There are hundreds of published scientific studies of mock jury simulations, using videotapes of completed trials, demonstrating, albeit post hoc, the enormous insights available to litigation counsel. Some who have used mock jury simulations to prepare for trial swear by them. A senior partner of Chicago law firm Bartlit Beck is quoted in the legal media as saying, "If you can afford a mock trial, it is legal malpractice not to do one."[3]

Third, a simulated jury of closely matched people may be recruited to attend the actual trial every day, shadowing the schedule and tasks of the actual sitting jury. In one reported case example,[4] a psychologist attended the selection process for jurors, and as each juror was selected, the psychologist immediately called a local employment agency to hire a person of similar age, race, gender, and job skills.

Once assembled, a shadow jury is paid to sit through the trial and see what the jury sees. They take notes as the jury takes notes. They retire for lunch when the jury retires. They are consulted daily by an objective jury consultant to elicit reactions to evidence, the likeability of different counsel and witnesses, and the unexpected nuances that make an impact. The jury consultant runs the project. The shadow jurors should not know which side has retained them: this will significantly increase the chances of their frankness. Along with optimizing the use of the shadow jury, the jury consultant will monitor each actual juror for their attentiveness, reactions, and apparent disposition.

Limited research reported in the literature reveals good correspondence of decisions between shadow juries and actual juries.[5]

YOU CALL THIS SCIENCE? NO, SON OF SCIENCE.

Table 1 organizes and summarizes jury research options for different applications that a criminal or civil dispute lawyer might face. Apparently, every single option was used by O. J. Simpson's "dream team" counsel before and during his 1995 trial.[6] Some options, like pretrial surveys to detect community sentiment, can be conducted as reliable and valid scientific projects on their own. Others, like the hiring of a shadow jury for current litigation, are not scientific on a single-use basis. That

Table 1

APPLICATION	TECHNIQUE	SCIENTIFIC FOUNDATION
Examining potential for **theories of the case**; potential hot buttons	Focus groups (at least 2 should be used)	Focus groups are exploratory, not scientific, facilitating the discovery of the "aha"
Examination of potential jury bias (in criminal trials, for **challenge for cause, trial by judge alone, change of venue**); identifying **community standards** and demographic pockets of sympathy for **jury selection**	Statistically reliable survey	Properly designed surveys meet scientific standards of validity and reliability, sometimes with trade-offs; Supreme Court has recently added "relevance"
Identifying and fine-tuning controllable factors for trial presentation; testing alternative theories or approaches	Mock trial	Not statistically reliable, but can call on high standards of validity; produces strong learning benefits for counsel; literature available to assist with experimental and statistical controls
Daily **feedback**, fine-tuning and **disaster checks during trial**	Shadow juries	As close as possible to valid real-time research in the absence of statistical reliability if controlled for possible biases; can be accompanied by expert validity checks against actual jurors to the extent possible
Continuous learning and professional development with direct practical applications for presentation of evidence, closing argument, and requests for damages	Archival analysis of cases and expert literature	Under-utilized tool; best value for money, given the rich social science literature; see in particular the literature on simplifying "heuristics" that jurors (and all people) use

is, a real-time litigation use of a shadow jury is not science but is like "the son of science." The benefits available arise from sixty previous years of social scientific study. Put another way, use of a shadow jury is not a scientific experiment with a predicted result at the 95% confidence level, in contrast to, say, pre-election polls. However, the design and use of shadow juries is supported by well-honed methods and measurement tools, which have been developed over years of reputable academic study and which guide the extraction of value on each single-use occasion. Nothing is guaranteed, but use of a shadow jury can definitely up the odds for a more favourable outcome.

LEARNING AVAILABLE FROM SHADOW JURIES

What specifically can be learned from a shadow jury? The same things that can be learned from market research focus groups can be adapted to the special-purpose application of shadow juries.

1. Continuous feedback

If you have ever watched yourself on video do a media interview, give a speech, or teach a class, you don't need to be told about the continuing surprises of what you see and wish you hadn't done. More enlightening still is feedback about actions you thought went well but were interpreted differently by an outside evaluator. No matter how wise or experienced counsel may be, there is continuing opportunity to gauge the interaction between his or her own behaviour and a new and unique audience in the context of a unique fact situation.

There is plenty of anecdotal but compelling evidence of the importance of monitoring and mastering cosmetic cues. In a 1960 pre-election debate between John F. Kennedy and Richard Nixon, the reactions of television viewers were markedly different from those of radio listeners. "Television viewers thought Kennedy looked well rested and photogenic. Nixon, on the other hand, appeared tired on television, and many people thought his five o'clock shadow made him appear sinister. Polls showed that radio listeners believed that Nixon had 'won' the debate, while television viewers thought Kennedy had been superior."[7] In an experiment staged at a 2004 conference of media counsel,[8] two groups of mock jurors each listened to a separate style of defense argument concerning defamation and deliberated on a verdict. Deliberations were notably affected by whether the defense counsel had delivered a rational, logical defense emphasizing facts and legal principles or an emotional defense focusing on the questionable ethics and credibility of the plaintiff alleging defamation. Both juries found the defendant responsible for defamation, but the damages awarded in the latter case were ten times the damages awarded in the former: $2.5 million compared to $250,000.

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2. Disaster check on strategies

Litigation strategies that are set to go can be subjected to a final "disaster check." In 1996, Avco Financial Services was researching options for an advertising campaign. Avco proudly offered loans to the blue-collar sector, including individuals who might be turned down elsewhere. One of its advertising options showed gardening equipment and a garden glove on the ground, symbolizing the working man. Its research agency pretested the advertising campaign with a focus group.

Upon seeing the picture of the glove on the ground, one participant called out, "O.J." Then a jokester in the group said, "Ya, am I going to run into him in their branches? Uh oh." Needless to say, that ad concept was immediately withdrawn. The association between a glove in the garden and a violent murder had simply never occurred to the advertising designers as they worked away in their own context of thinking. It can take fresh eyes to see hidden risks.

3. Opportunity to learn about people and attitudes never before experienced

Good listeners know the value of listening non-judgmentally, and without preconceived structures, to people whose likes they have never before encountered. It takes all kinds to make a world, and many of those kinds end up on a jury.

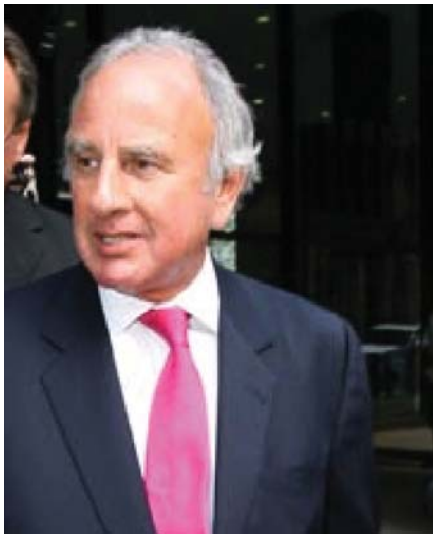
4. Adjustments of argument and language, particularly for damages awards

Lawyers and expert witnesses sometimes communicate, unintentionally, in incomprehensible technical or financial jargon. Writes one litigation advisor, "You cannot overestimate the dangers associated with talking over the jurors' heads." It is not just that they will fail to appreciate your case – rather, they will muddle through with their own simplifying logic. When cases are unavoidably complex, it is useful to anticipate the muddling-through logic that jurors may use, logic which is vulnerable to errors and bias.

Since 1975, there has been a parade of impressive research projects about the ingrained strategies or rules of thumb that people use to simplify complex information for decision-making. In the jargon of social science, they are called "heuristics." Such simplifying heuristics have been identified and catalogued. For the most part, simplifying heuristics produce results which are

consistent with intelligent rational choices. Occasionally, they may lead to irrational choices, particularly where arithmetic is involved. For example, according to the Nobel Prize-winning research of Daniel Kahneman and Amos Tversky,[9] people's judgments are affected by the heuristic of "anchoring and adjustment." People use benchmarks or starting points and adjust up or down to come up with their best estimates. Experiments show that people's final estimates will even be affected by randomly chosen starting points. Such research has direct implications for assessments of damage by lay jurors.

Another heuristic strategy people use in the face of complex tasks is reliance on cues that have guided them through other decisions, even if those cues are irrelevant in the present situation. Failing to comprehend or recall intricate legal arguments, they may rely, for example, on witnesses' demeanor, sympathy for a badly injured patient, or knowledge of the defendant's reputation as surrogates for credulity of the actual evidence.[10] One cartoon about juries shows a juror thinking, "That guy's tie is the wrong colour. I think I'll vote for the other guy." The cartoon is extreme to the point of absurdity, but not without a grain of truth. Indeed, while the cartoon was published before the Conrad Black trial in 2007, one may recall the disproportionate media focus on the colour of David Radler's pink tie on his first day of damning testimony. Debates took place in the media about whether it gave him the look of a gangster or the strong individual look of a man with style.[11] Perhaps lawyers reading the news coverage that day rolled their eyes; jury psychologists smiled and nodded.



The full extent of the expert literature about the innate biases in people's thinking is outside the scope of this article. Suffice it to say that counsel's observation of shadow jurors' reasoning processes, supported by the literature on what to look for, will have direct practical benefit to courtroom tactics.

A good way to summarize the benefits of shadow juries is as follows. If verdicts were affected only by the facts of the case and the behaviour of juries, then learning about juries would offer nothing but intellectual satisfaction. That is not so bad in itself. If one can't change the world, there is still some consolation in understanding it. But if you believe, as research certainly suggests, that verdicts are also affected by the actions of litigants and their counsel as the trial unfolds, then good lawyering absolutely requires staying tuned in to the dynamics between the jurors and the trial environment. Shadow juries are like the luxury options on a new car – they seem to cost a disproportionate amount, but you can't get what they offer in any other way.

IT COSTS A SMALL FORTUNE. IS IT WORTH IT?

The entry level expense for jury research is $25,000. The cost can go as high as $250,000, or more, depending on the options selected from Table 1. Budget authorization is obviously required from the client, the client's insurance company, or legal aid. And what is really bought for the money? The payer is certainly not buying a guaranteed scientific outcome with 95% confidence.

What payers are buying is a more educated lawyer, a lawyer with better instincts about their situation and their jurors. Continuous learning is a requirement of successful professionals. There are always new lessons about new people, new "aha" discoveries that make one wise. Sometimes, jury research serves only to bring to the fore certain information or insights which a lawyer has experienced in the past but are not top-of-mind. Is this an ethical use of clients' money?

For analogy, look to corporate market research and the investments made in focus groups. Focus groups cannot be treated as reliable sources predicting business successes. What focus group research does yield are insights, ideas, stimulants to bigger ideas, and reminders of forgotten truths for decision-makers. Ultimately, it is the corporate decision-makers' responsibility to combine all their inputs into wise choices. Shareholders are willing to invest heavily in providing the tools that facilitate wise decisions for their corporations. For corporate decisions entailing, say, $1 million of investment, it is within the range of normal practice for five per cent, or $50,000, to be invested in customer research. Sometimes more.

Similarly, when it comes to financial investment in shadow juries, it all boils down to a decision to fund the personal education of the lawyer for one-time benefit to the client. The concept is similar to purchasing a disposable camera for the lawyer to use, and the lawyer gets to keep the photographs. And why should clients or insurance companies invest? Because their chosen lawyer is the best chance they have. Because the smarter their lawyer, the better the prospects for themselves. Lawyers who downplay the importance of their own education and learning need to be reminded of the only viable conclusion: you're worth it.

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