



October 18, 2006

RUNAWAY JURIES?

The influence of today's media has made finding impartial jurors that much more difficult.

By Peter Lengsfelder

Recently, the Association of Trial Lawyers of America (ATLA), changed its name to the American Association for Justice - a response to the media campaign from tort reform organizations, which had been successful at giving the term "trial lawyers" a negative connotation, and putting some plaintiff attorneys at a disadvantage with juries.

ATLA's response was another sign that litigating attorneys — both defense and prosecutors, both criminal and civil — are dealing with the consequences of sophisticated media and the dramatically different juries it is fostering. Here are four areas in which strategic responses to media are making a difference:

Trial Publicity - Pitchforks at midnight

Whether it is a criminal or a civil action, public access to information is important. However it is easy for the facts in a case to become secondary to the perception and for the perception to drive selection of the facts.

Cognitive scientist George Lakoff, points out in his book, "Don't Think of An Elephant", "People think in terms of frames and metaphors ... When the facts don't fit the frames (our ideas), the frames are kept and the facts ignored."

Understanding the jury pool and the regional media strengths and weaknesses allows the attorney to assess the media information that is already filtering to prospective jurors.

In highly emotional cases this creates what defense attorney Michael Coviello, of Bradenton, FL says is, "Pitchforks at midnight for the general community," referring to old-fashioned vigilante groups. "Pitchforks at midnight is not an impartial process."

Emotional, preconceived jury perceptions can be managed if the trial attorney first understands *who* receives *what* media. For instance, "Millennials" —16-25 year olds — are less inclined to watch or to read traditional media to keep up with the news. Seniors, on the other hand, are more likely to be retirees, and have far more time available and spend more of it reading traditional media, such as newspapers and magazines.

Understanding the jury pool and the regional media strengths and weaknesses allows the attorney to assess the media information that is already filtering to prospective jurors.

"One of the strongest strategies (to neutralize tort reform plaintiff bias) is to bolster the credibility of the plaintiff," says Cornell University Law Professor, Valerie Hans, "both by talking about their activities and showing that the plaintiff is reasonable, sensible, generous — not a

money-hungry person. Very straight forward, but often overlooked."

A change of venue can be key to finding an impartial jury. In a case with a potentially damaging, sensitive regional or local issue, the strategy is to go *toward* the larger media market where multiple stories fight for attention. As reported recently in *The Villages (FL) Daily Sun*, Jack Maro, a criminal defense attorney in Ocala, FL said the key to finding an impartial jury in the trial of the alleged kidnaper/rapist/murderer of 9-year-old Jessica Lunsford is to take the case to a bigger and busier city, such as Fort Lauderdale or Miami. He said that the lifestyle of a big city leaves residents with little time to read or pay much attention to news reports from a smaller community, even if that event has been reported nationally.

Maro said the publicity the case has received so far may have been overlooked by residents in the "hubhub" of South Florida, where there are more local news events vying for public attention.

Even when venue change is not an option, cognitive research strongly suggests that you do not attack the jury's preconceived notion (although you may attack opposing counsel's witnesses). Rather, select a theme that fits your evidence. Reinforce that framework throughout trial with images to give jurors an alternative way to make sense of the facts, *themselves*.

Ironically, trial publicity has also caused apprehension in jurors. The use of anonymous juries has risen in recent years in the federal system, where mob bosses, the Unabomber Theodore Kaczynski, and terrorist Zacarias Moussaoui left jurists feeling vulnerable to retaliation.

Recently, federal prosecutors had asked a judge to seat an anonymous jury to hear the case of a Bridgeview, Ill., man accused of funding Hamas and Palestinian terrorists. U.S. District Judge Amy St. Eve eventually denied prosecutors' request stating that "(T)he mere invocation of the word 'terrorism,' without more, is insufficient to warrant such an anonymous jury."

Pro-active Jurors - Stealth & jury sabotage

Media has helped spawn a trend in "stealth jurors" who land seats on high-profile cases for bragging rights; to write a book; or - in less visible cases — to exercise control. The idea did not originate with the film, "Runaway Jury", but there is no question that the Gene Hackman blockbuster has generated ideas in several prospective jurors.

In an April 2006 ABA Journal eReport, Los Angeles jury consultant Phil Anthony was quoted as saying, "It's almost like a sense of entitlement." He added that for these individuals, the "trial is not really about civic duty, but an opportunity to make a statement or influence society."

Cognitive scientists believe false answers by jurors may have as much to do with an aversion to public embarrassment as they do to a pre-planned manipulation.

In New York City, two years after juror Ruth Jordan was accused of giving the "OK" sign to Tyco executives Dennis Kozlowski and Mark Swartz and forcing a mistrial in the \$12 million corporate looting case, Jordan is writing her memoirs.

In North Carolina, the *Lumberton Robesonian* reported that a holdout juror forced a mistrial in the Myron Britt murder trial getting exactly what he wanted — a chance to sit on the jury to sabotage its outcome. According to one juror, during the deliberations the holdout told them "he wanted to get into the mind of jurors to see what it would take to have them decide with him."

There are jurors who don't speak up at all during *voir dire*. According to the publication *Court Review*, Gregory E. Mize, a retired Washington, D.C., superior court judge and a judicial fellow with the National Center for State Courts recalled one juror who had previously not spoken up but later revealed, in a closed-door individual interview with him, that the defendant was her fiancé. The trial went on without her.

Weeding out manipulative jurors is possible, but financial penalties aren't necessarily a deterrent. In Massachusetts there is a \$2,000 penalty for lying on a jury questionnaire — not enough to keep three jurors honest in a 2004 Suffolk County case involving the murder of a 10-year-old girl. According to the ABA Journal, that case ended in mistrial after it was discovered the three lied about not having criminal records.

Having the court clerk conduct a thorough check of potential panelists helps, as well as sharing that information with prosecutors, defense lawyers and the jurors themselves to cross check for accuracy, but it can be costly and time consuming.

A more efficient and telling method is to call each juror into a private setting, as Judge Mize did, and ask them a direct question. Cognitive scientists believe false answers by jurors may have as much to do with an aversion to public embarrassment as they do to a pre-planned manipulation.

TV Shows & Movies - Unrealistic expectations

Popular movies and TV series such as "CSI", "Boston Legal", "Law & Order", "The Shield", and the new "Justice" (which Fox claims is "an unflinching, behind-the-scenes look at the way high-profile cases are tried in the media age") give jurors unrealistic ideas of what's permissible, how the system works and what science can deliver in a courtroom. They potentially alter standards of reasonable doubt.

These shows give a false perception that forensic science is near-infallible. American forensics expert Max Houck says that, according to the Department of Justice, there are roughly 50,000 backlogged DNA samples in US labs, a mere 10% of the total 500,000 backlogged requests for all kinds of evidence. And the backlog is rising. Houck is the Director of the Forensic Initiative, which conducts research and outreach for forensic laboratories, and he teaches forensic science at West Virginia University.

"You never see a case (on television) where the sample is degraded or the lab work is faulty or the test results don't solve the crime," says Dan Krane, president and DNA specialist at Forensic Bioinformatics in Fairborn, Ohio. In a *USA Today* article he says, "These things happen all the time in the real world."

The expectation that scientific or technological evidence exists effects juror decision-making in civil cases as well as criminal, even if such evidence is irrelevant or absent.

Richard Matthews, a Trial Consultant with Decision Analysis San Francisco, says "If there is any transaction that happened by technical means, jurors will have some grandiose ideas about the availability of evidence on that topic ... and then mistake an absence of proof as a proof of absence."

In a Texas focus group, a mock juror began expounding on the tensile strengths of glass with such authority — purportedly gleaned from television — that before long other jurors were quoting him and asking why defense had not brought such evidence to light - despite the complete inaccuracy of the information.

In a Texas focus group, a mock juror began expounding on the tensile strengths of glass with such authority — purportedly gleaned from television — that before long other jurors were quoting him and asking why defense had not brought such evidence to light — despite the complete inaccuracy of the information.

Thanks to these shows, new services are being offered to trial attorneys that claim to decipher cognitive and affective responses from a witness' deposition or testimony, as well as "neuro-linguistic programming" that profess to detect lies by the way a person's eyes shift. Most would likely be dismissed by a judge.

The bottom line problem with the forensic TV shows is that jurors have begun to doubt their own common sense. In a recent CBS Evening News report, Baltimore prosecutors blamed the "CSI Effect" when jurors acquitted a man of murder, even though there were two

eyewitnesses.

But unrealistic media expectations can haunt defense attorneys too, because on TV (and most movies) the prosecutor is the Good Guy. Valerie Hans suggests, "Remind jurors that they're not in a TV show: Just because TV solves everything in one hour doesn't mean that happens in real life ... We think we have pretty good evidence and here's why."

The positive effect of these shows is that jury duty has become more appealing to prospective jurors. They have an expectation that an interesting story will unfold in court, a mixture of fascinating visuals and modern science or technology. A 2005 report in *US News & World Report* stated, "prosecutors are waking up to the need to cater to a jury's heightened expectations. That means more visual cues."

Cognitive psychologists would say these jurors are looking forward to the process of analyzing or evaluating the conflicting information, *and* to being given the same control they have seen jurors administer on TV.

This means jurors with critical thinking skills are becoming more willing to participate in the jury system, less likely in *voir dire* to force peremptories or ask the judge to release them on hardship.

Television, *in general*, has already created the need for immediacy and visualization in court, but the forensic TV shows have also put a charge into the lay person's view of research and technology, making these subjects more appealing to jurors, and raising their attention span for patent and intellectual property litigators. Trial consultants have seen similar jury responses to technical information clearly presented in construction, securities; insurance; and environmental litigation.

New Brain - Lack of concentration

Most of all, media has changed the way juries learn. Educational researchers have discovered that the adult attention span has shortened dramatically, probably because most of us grew up watching TV.

According to an April 5, 2004 *USA Today* article, "Frequent TV viewers in early childhood were most likely to score in the highest 10% for concentration problems." In many instances we have difficulty staying attentive, remembering things, and learning new concepts — critical issues for trial attorneys.

Los Angeles media psychologist Stuart Fischhoff coined the phrase 'new brain' to describe people exposed to a prolonged barrage of media stimulus - people like you and me and today's juror. Understanding and reaching the new brain is paramount to litigating attorneys.

In his books "Frames of Mind" and "Intelligence Reframed", Harvard professor Howard Gardner, an authority on education and cognition, calls them "visual/spatial learners." And more of us learn that way than ever before.

The positive effect of these shows is that jury duty has become more appealing to prospective jurors. They have an expectation that an interesting story will unfold in court, a mixture of fascinating visuals and modern science or technology.

Despite avowing distrust for the media, Americans rely upon it for information. During *voir dire* for the highly publicized 2003 D.C. area "Sniper" trials, local Gazette.net reporter David Abrams offered the following account, "Print reporters grimaced ... as juror after juror said he or she didn't read newspapers. Most said they watched a little television news, but that's it ... 'I don't trust the media,' said Juror No. 328, who then went on to say he believed Muhammad was guilty because of what he saw on television."

Yet the potential advantage of the 'new brain' is that, more than ever, litigating attorneys have the ability to teach highly technical, arcane or otherwise boring information to less educated jurors. These jurors want to make sense of the information themselves. They expect, and are more responsive to, the use of all sorts of visuals: models, stills, video and animation.

Peter Lengsfelder is president of Clear Case Legal, the visual litigation strategy firm. With nearly 25 years of media and legal experience, Lengsfelder has provided successful visual strategy, legal graphics and video to a number of the country's most influential law firms, as well as the U.S. Department of Justice. On the net: www.clearcaselegal.com