



THE JURY BOX

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Greetings to all my loyal readers of THE JURY BOX. I know it's been a while since the last issue. Hopefully, you'll find the articles here worth the wait.

I haven't been idle in the intervening months. I have been updating my blog fairly regularly and you are welcome to check it out if you have a hankering for more juicy tidbits of jury-related musings. <http://juryboxblog.blogspot.com>.

In June, I attended the annual conference of the [American Society of Trial Consultants](#) in Chicago. In addition to getting my fill of deep-dish pizza, I participated in a panel on blogging, social networking sites and internet research for use in trial consulting. I have uploaded the presentation (<http://www.eps-consulting.com/pages/presentations.php>) to my website. Anne Reed, an attorney and trial consultant from Wisconsin, gave a terrific introduction to the current landscape of the blogosphere and ever-expanding social networking universe. Tess Neal, a graduate student from the University of Alabama, presented some preliminary results of her important study on the use of social networking sites by college students, law students, attorneys and trial consultants.

For those of you who really groove on learning as much as you can about jury behavior, I have good news. After a bit of a rocky debut, *The Jury Expert*, a publication of the American Society of Trial Consultants, has been reinvented as an electronic publication, with a team of excellent new editors. I encourage you to take a look at the first two issues (<http://www.astcweb.org/public/publication>) and sign up for email delivery of future issues.

Finally, I was recently interviewed for a program on Oregon Public Radio (<http://www.opb.org/thinkoutloud>) about a new challenge to Oregon's non-unanimous decision rule for criminal jury trials, and for an upcoming Lawyers USA symposium on online focus group research (<http://www.lawyersusaonline.com>).

– Edward P. Schwartz

Pro Bono Trial Consulting – Who knew?

I recently returned from the annual meeting of the American Society of Trial Consultants (ASTC) in Chicago, (where tornadoes threatened to tear the roof off the hotel). While our organization has the sort of committees you might expect (professional visibility, membership, etc.) it also has a committee devoted to the provision of pro bono trial consulting services to indigent litigants.

While we have long kept track of those consultants willing to provide pro bono service, (so noted in members' online

profiles on the ASTC website), the committee has really started to cook over the past year. Since most attorneys don't even know that there are trial consultants willing to work for free (or reduced rates), I thought it might be helpful to outline what this committee has been up to and what are its plans moving forward.

Largely through the efforts of Cynthia Cohen in Los Angeles and Alison Bennett in Dallas, two regional teams have been formed to assist attorneys working pro bono in those two metropolitan areas. These teams include jury consultants, litigation graphics specialists and focus group facility managers, so help is available for virtually any kind of case.

The two regional team leaders have been hard at work building connections between ASTC and the agencies that coordinate pro bono legal services in their areas. Cynthia and Alison have met with dozens of lawyers, legal aid coordinators, law professors and clinic directors over the past year. The response has been a resounding, "Wow!" as attorneys are surprised and delighted to learn that help can be available for their cases.

In the coming year, the ASTC Pro Bono Committee (of which I am now a member) will be looking to advance our visibility to the legal community. We want to make sure that those lawyers who need us know that we're here. We plan to establish a clearinghouse for cases, located on the ASTC website, to match lawyers in need with consultants in a position to help.

Given the dramatic early success of the Dallas and Los Angeles teams, we also hope to establish pro bono teams in other regions of the country. We don't have nearly the number of consultants in New England as they have in L.A. or Dallas, but I hope to get a Boston-based pro bono team up and running as soon as possible. Fortunately, much of a trial consultant's work can be done at a distance, so it won't be essential to have all team members nearby.

We also plan to assemble a comprehensive set of materials that our members can use to make presentations to lawyers groups about our pro bono initiative. So, if you think that your group would like to learn more about what trial consultants can do for you, please let us know.

This push in pro bono activity is a work in progress, but you don't have to wait for us to get everything up and running to make use of our resources. Do you have a case that could really benefit from some trial consulting? Do you need advice about jury selection strategies? Are you struggling to put together materials to support your motions for a supplemental juror questionnaire or attorney conducted voir dire? Could you really use a professionally produced timeline to help you argue your case to the jury? Contact us now. We'll help if we can.

You can reach the webpage of the Pro Bono Committee of the ASTC [here](#). Or, feel free to contact me directly at Schwartz@eps-consulting.com.

In The News...

Take a Chance on Loss of Chance

The MA Supreme Judicial Court recently handed down a decision in *Matsuyama v. Birnbaum*, permitting plaintiffs to sue for "loss of chance" in medical malpractice cases. In the opinion, written by Chief Justice Marshall, the Court acknowledged that, in keeping with jurisprudence in most other jurisdictions,

"Where a physician's negligence reduces or eliminates the patient's prospects for achieving a more favorable medical outcome, the physician has harmed the patient and is liable for damages."

While the opinion limits its scope to med-mal cases, the logic is certainly broad enough to be applied to other kinds of torts in the future.

The loss of chance doctrine is hard enough for lawyers to understand. Imagine trying to explain it to a jury. Well, that is exactly what litigators and judges will now be faced with in the hundreds of medical malpractice cases tried annually in Massachusetts. One need look no further than the language of the SJC opinion to appreciate how daunting a task this will be:

"Applying the proportional damages method, the court must first measure the monetary value of the patient's full life expectancy and... the defendant must then be held liable only for the portion of that value that the defendant's negligence destroyed."

As bad as juries are at detecting witness deception or understanding their instructions, they *really* stink at applying probabilities and percentages. Add this processing deficiency to the inherent unpredictability of damage awards and we have quite the witch's brew for chaos in the med-mal litigation world. (See my presentation on this topic at <http://www.eps-consulting.com/pages/presentations.php>) On the one hand, greater uncertainty about jury verdicts can support the sort of divergence of opinion that scuttles settlement negotiations. On the other hand, defense attorneys and insurance companies tend to be risk-averse, so this doctrinal change could provide greater incentive to settle out of court.

One thing that is clear is that attorneys (on both sides) had better learn quick how to argue loss of chance to juries. That a particular explanation makes sense to you does not guarantee that it will make sense to a jury of laypersons. This is just the sort of complicated task that lends itself to *false experts* taking over deliberations. Before you give your first closing argument on loss of chance, I'd strongly recommend that you test it out on a focus group panel first.

Similarly, there will be disagreements about the wording of loss of chance jury instructions that will be need to be resolved by trial court judges. Before you file motions with recommended language, you should test out that language on real people to make sure it generates the understanding of the law that you are trying to achieve. I can also help you track down studies on such language from jurisdictions where loss of chance has been available for some time.

Media Circus leads to cruel farce in jury selection

In a case that generated large-scale media attention on both sides of the Pond, Englishman Neil Entwistle was recently convicted of killing his wife and daughter, as they lay sleeping in their Hopkinton home. It is rather standard by now for the defendant in a case of this magnitude to use a trial consultant to help identify potential biased jurors. The primary concern is the saturation of the jury pool with pretrial publicity, especially that which is prejudicial to the defendant.

Judge Diane Kottmyer flatly refused requests by Entwistle's attorneys for a very modest allowance to pay for a trial consultant in this case. Her rationale was that no MA judge had ever granted such a request, so she didn't have to either. The Judge assured counsel that she could handle the issue of pretrial publicity by issuing instructions to the jurors to disregard anything they might have learned about the case in advance. Alas, the judge's assertion here is simply ignorant. Every single study that has ever been published about the effects of pretrial publicity has concluded that such limiting instructions are completely useless.

Judge Kottmyer similarly refused motions for attorney conducted *voir dire*, sequestered *voir dire*, a change of venue and even an extensive supplemental juror questionnaire. After allowing the lawyers to submit some questions for a questionnaire, the judge decided that she would write her own, allowing no input from either counsel.

Judge Kottmyer's mindset is a relic of a time when we didn't actually know anything about jury behavior. She believes that the best way to learn if a potential juror might be biased is to ask her, "Will you be biased?" Many studies show that those would-be jurors who admit to having been exposed to pre-trial publicity, but assert that they can be fair nonetheless, are actually *more likely* to be biased against the defendant than those who admit that they might have trouble being completely objective. That is, the question sorts the potential jurors *in exactly the opposite manner than that which is intended*. By insisting on employing antiquated procedures for jury selection, Judge Kottmyer pretty much guaranteed that Mr. Entwistle did not receive a fair trial, in terms of having an impartial jury.

Many people will be unsympathetic to these objections, on the grounds that Mr. Entwistle is almost certainly guilty of killing his wife and daughter. Remember, however, that the jury had the discretion to decide (by logic, intuition or mercy) whether the correct verdict was first-degree murder, second-degree murder, voluntary manslaughter or involuntary manslaughter. Judge Kottmyer did a great disservice to the Commonwealth by placing this responsibility in the hands of jurors predisposed to view Mr. Entwistle most harshly.

I expect that the appeals court will have something to say about Judge Kottmyer's "fast-track" jury selection procedures. The verdict will probably stick, however, on the grounds that no obvious "miscarriage of justice" has occurred.

Want to know more?

Access all issues of THE JURY BOX At
www.eps-consulting.com/jurybox