



THE JURY BOX

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Welcome to the Judicial Vacancy Issue of The Jury Box. In earlier days of my academic career, I studied Supreme Court decision-making. The Court can operate with fewer than its full complement of justices and has, in the past, for extended periods. With Rehnquist's passing, Stevens, the most senior associate justice, becomes acting Chief Justice, creating 4-3 liberal majority on the court, capable of setting new precedents and reversing old ones (at least temporarily). Such a scenario would certainly tempt the Democrats to drag their feet with respect to confirming Roberts. I believe that this is the primary reason that Justice O'Connor has agreed to return on an interim basis.

During his long tenure on the Court, Justice Rehnquist was no great fan of the jury. He consistently voted to curb juridical authority, most recently in his opinion in *State Farm*, limiting the ability of juries to punish tortfeasors through large punitive damage awards. In addition, Justice Rehnquist consistently rejected the fair cross-section component of the impartial jury, insisting that an impartial jury was simply one comprised of impartial jurors – nothing more, nothing less.

In this issue, I review the empirical literature on curative and limiting instructions – what works, what doesn't, and what only makes things worse.

– Edward P. Schwartz

“The jury is instructed to disregard the witness's last statement.” How often have we all heard that refrain? And yet, can jurors follow such an instruction? Will they? We all understand that one cannot “un-ring the bell.” Are we all doomed, then, to operate under a legal fiction that struck testimony is really struck? The answer, as we understand it so far, seems to be “mostly yes, but sometimes no.” That is, there are some occasions in which the right curative instruction can actually work.

There are three broad categories of improper information to which a jury can be exposed, triggering limiting instructions. The first is pre-trial publicity, or other descriptions of the case, that jurors might see either before or during the trial. The second category involves improper testimony (or sometimes evidence) to which the jury is exposed during the trial. The third category involves “external influences” exerted on the jurors during deliberations. This includes both discussions with non-jurors about the case and the consultation of unauthorized sources of information, such as dictionaries or the internet.

Media Bias

Exposure to pretrial publicity typically gets addressed during the initial jury-selection *voir dire*. Sometimes, however, jurors will be exposed to some news story after the trial has begun. The judge may then hold an additional *voir dire* to question the jurors about what they have read or seen and how it has

affected them. The first thing to understand is that jurors misrepresent how such exposure has affected them, either intentionally or unknowingly. That is, while *voir dire* might be fairly successful at discovering who has been exposed to what, it is essentially useless for determining the extent to which such exposure has biased the jury.

Several studies have shown that jurors who are exposed to prejudicial information, but assure the judge that they can remain impartial, are much more likely to vote in the direction supported by the information than jurors who have not been exposed at all (Dexter et al. 1992, Kerr et al. 1991). In addition, such jurors typically vote very similarly to those who admit that they have been biased by the prejudicial information (Thompson et al. 1981). This is very troubling in light of the strong deference that is given to jurors' claims that they can remain impartial (*Thompson v. US 546 A.2d 414 (DC 1988)*). At least one study concludes that such *voir dire* actually increases the jury's reliance on the inadmissible information, by drawing attention to it (Freedman et al. 1998).

Given that *voir dire* seems not to be very helpful in avoiding such bias, what can a litigator do to protect her client? One strategy is to ask for a continuance. If the tainted information is factual in nature, a continuance of a couple of weeks has been shown to reduce the influence of such information on the jurors' decision-making. If the information is emotional, inflammatory or judgmental, however, such a continuance seems to be of little help (Kramer et al. 1990). This is probably because of the different ways in which humans store factual and evaluative information in their brains. Emotions are much easier to access and their connections to factual triggers are hard to sever.

Another strategy is to ask for a change of venue. This strategy involves its own risks. Thanks to the internet, CourtTV and other sources of news about court cases, citizens in surrounding communities are just as likely to have been exposed to accounts of the case as are those in the original jurisdiction. For a criminal case, by asking for a change of venue, the defendant essentially waives his Sixth Amendment right to a jury drawn from a fair cross-section of the community in which the crime was committed. As such, the defense risks having the trial moved to a community with disadvantageous demographics. According to current jurisprudence, a defendant has no right to have the case moved to a county similar to his own. The fair cross-section requirement only applies to the selection of jurors from the district in which the trial takes place, *not the selection of that district itself* (See *Mallet v. Missouri 769 S.W.2d 77 (1989), 494 US 1009 cert. denied*).

Watch where you point that thing!

Admonitions to disregard are typically ineffective. They are prone to the *backfire* effect, whereby the admonition only increases the jury's perception of the importance of the forbidden information. This effect is found with respect to inadmissible evidence and juror misconduct, as well (Cox and

Tanford 1989, Pickel 1995). The backfire effect is the result of a combination of two factors. First, the attention paid to the issue by the judge makes it seem important. Second, the jury may experience *reactance*, a term that also came up in my discussion of expert testimony in the January issue of *The Jury Box*. When a juror is told what to do by the judge, without a compelling supporting reason, the juror will sometimes rebel by concocting reasons to disobey. So, if the judge's admonition is supported only by a flimsy explanation (or none at all), it can backfire.

Consider a study conducted by Broeder in 1959, in which he tested the effectiveness of a judge's admonition to disregard testimony that a tort defendant was insured. As the table below illustrates, the instruction backfired, leading to higher damage awards than those associated with no corrective instruction, at all.

Did Jury learn of defendant's insurance?	No	Yes	Yes
Was Jury Admonished to Disregard?	N/A	No	Yes
Average Damage Award:	\$33,000	\$37,000	\$46,000

The encouraging news is that a well-crafted admonition, supported by a logical explanation, can be effective. For instance, such instructions have been shown experimentally to reduce jury reliance on hearsay evidence (Landsman and Rakos 1991, Paglia and Schuller 1998). Since pretrial publicity suffers from many of the same evidentiary shortcomings as hearsay testimony (credibility of source, inability to cross-examine, etc.) it should be possible to craft an effective admonition in certain cases of prejudicial publicity. This is speculative at this point since the existing publicity studies employ standard admonitions, which have proven to be ineffective.

Unfortunately, not all admonition rationales can be easily articulated. It is possible to explain to a jury that polygraph tests are scientifically unreliable and the jurors will usually be able to disregard that a witness made reference to one (See *Peyton v. US 709 A.2d 65 DC Court of Appeals, 1998*, for a well-crafted admonition with respect to mention of a polygraph test). The Fourth Amendment exclusionary rule, however, is hard to defend to a jury because the evidence itself seems both probative and reliable. Similarly, jurors seem completely unable to disregard evidence of prior convictions or to use such evidence for a limited purpose, such as impeaching the credibility of the defendant as a witness (Pickel 1995).

I want a Do-over!

Given the profound effect that extra-legal factors can have on jury deliberations, and the near-impossibility of keeping those factors out of the deliberations once they have been revealed, you might think it would be straightforward to secure a mistrial when the jury has been exposed to prejudicial information. You might be very wrong. In *Peyton v. US*, the DC Circuit reviewed

the six factors that a judge should consider before granting a mistrial (citing *Guesfeird v. State 300 Md. 653 (1984)*). In the end, the judge has the authority to balance the factors as she so chooses, with a strong presumption against a mistrial. Given the strong possibility of the backfire effect and the difficulty in securing a mistrial, a litigator would be well-advised to think twice before raising an objection to the introduction of inadmissible information. In many circumstances, the best strategy is just to sit tight.

Just don't look it up.

Ironically, it is somewhat easier to secure a mistrial when jurors themselves engage in seemingly innocuous misconduct. For instance, mistrials have been declared because a juror looked up a single word in the dictionary (See *Marino v. Vasquez 812 F.2d 499 (1987)*, where the Court reiterated that "unauthorized reference to dictionary definitions constitutes reversible error which the State must prove harmless beyond a reasonable doubt."). So, if a plaintiff witness were to mention during testimony the net worth of the defendant, the defendant would have a hard time getting a mistrial; however, if one of the jurors looked the information up on the internet, a mistrial would almost certainly be granted.

In the News

Are Massachusetts Jury Pools Fair?

Judge Nancy Gertner is in the news again. This time, she is objecting to the racial composition of jury panels drawn from the federal district for Eastern Massachusetts. In supervising the murder case of two African-American defendants, she notes that a larger percentage of jury summonses sent to urban, largely minority, neighborhoods are undeliverable or unanswered than those sent to suburban neighborhoods. In order to assure that the diversity of the jury pool is reflected in the jury panels, she wants undelivered (or unanswered) summonses to be replaced by new ones *to the same zip codes*.

United States Attorney Michael Sullivan objected to this move and the Court of Appeals has suspended Gertner's order pending its own review of the case. In the meanwhile, Judge William Young, Chief Judge of the District Court, has appointed a committee to investigate the situation.

Because federal juries are typically drawn from a larger geographic area than state ones, they have the potential to be more diverse. The downside for minority criminal defendants is that they cannot count on juries populated by people who can identify with their situations. Many experts identify this phenomenon as largely responsible for the increasing federalization of criminal law.

I think we all know how Justice Rehnquist would have resolved this issue. An impartial jury is one made up of impartial jurors - nothing more, nothing less.

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