



# THE JURY BOX

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Welcome to Summer School! Maybe you failed one of your finals, maybe you ended up in detention just a little too often, or maybe you just didn't apply yourself. Whatever the reason, instead of riding your boogie board through the surf, you're stuck here reading the July edition of **THE JURY BOX**. Not to fear - we'll do our best to make it educational and fun.

I just got back from the annual conference of the American Society of Trial Consultants, where there was much discussion about helping clients prepare for mediation and arbitration, not just trial. If you are interested in how a trial consultant can help you with ADR, check out my recent column on the subject for Lawyers Weekly. ([http://www.eps-consulting.com/pages/lw\\_506.php](http://www.eps-consulting.com/pages/lw_506.php)).

Summer School seems like a good place to review some of our recent lessons. I discuss here some recent studies of jury decision-making, with an emphasis on how you can apply their results to your own cases. Speaking of remedial education, I apologize for erroneously referring to Warren Harding as "William" in May's issue. As always seems to be true with such things, I caught my mistake moments after I mailed off the issue.

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- Edward P. Schwartz

When **interpreting mock jury studies**, it is important to keep in mind issues of *internal* and *external* validity. Internal validity deals with how well the researchers have followed proscribed scientific methods with respect to comparisons across treatments. A study should be designed so as to control the decision-making environment very carefully, so that treatments differ only with respect to the variable of interest. Such care increases the confidence with which one can attribute behavioral differences to the mechanism under study. External validity refers to the applicability of a study's results to real world cases of interest. Experimental study always requires streamlining, simplification and compromise. A good study accomplishes these while retaining the essence of what is being studied.

## Truth in Diversity

One interesting recent study nicely illustrates both kinds of experimental validity. Samuel Sommers, of Tufts University, (2006) ran a study investigating the behavior of racially mixed juries. He showed 29 6-person mock juries a videotape of a criminal trial. Sommers had artificially constructed the juries so that about half were all white and the other half had four whites and two African Americans. This study had great

internal validity, in that the jury composition was the only thing that varied among mock juries.

Sommers discovered that the main difference between the two groups was the behavior of the *white jurors*. Whites on diverse juries paid more attention to case facts, made fewer factual errors and were more careful to point out errors by others than whites on all-white juries.

Sommers asked individual jurors for a verdict choice immediately after they had been sorted onto juries. Perhaps the most interesting finding is that whites on diverse juries were one-third less likely to believe that the defendant was guilty *before any deliberations at all*. This result suggests that the mere presence of minority jurors caused some white jurors to be more open-minded about the case.

This study scores somewhat less well in the external validity department. A criminal case with a white victim and a black defendant maximizes the likelihood that racial issues will affect jurors' attitudes, arguments and verdict choices. As such, it is difficult to infer from this study whether racial diversity improves jury deliberation as a general matter. Should a lawyer handling a complex patent case seek a diverse jury to improve evidence recall and comprehension? I couldn't make such a recommendation based on this one study.

## Testimonial Assassins

In the very first issue of **THE JURY BOX**, I discussed the optimal choice of an expert witness. The main lesson of the research on direct versus peripheral routes to persuasion was that a litigator should hire a very good explainer, regardless of credentials, when the testimony was central to the case. When the testimony is likely to be seen as tangential to the case, the jury will focus more on the perceived expertise of the witness, as evidenced through experience, credentials and position. In addition, if the jurors feel completely ill-equipped to evaluate the testimony, they will base their credibility decisions on these peripheral cues.

A recent study on the "hired gun" effect throws a new wrinkle into expert witness selection. Cooper and Neuhaus found that highly credentialed experts, who were highly paid and very experienced at testifying, elicited suspicion among jurors. These "hired guns" were viewed as less credible than more modestly compensated experts and jurors did not like them very much.

The authors conducted a follow-up experiment, from which they learned that this effect is most pronounced when the testimony is complex and cannot be easily processed.

These results leave attorneys in somewhat of a bind. When jurors want to economize on information-processing, or are just unable to completely understand testimony, they focus more on peripheral cues, such as a witness's credentials. On the other hand, this is precisely where the hired gun effect is strongest. The best strategy seems to be to hire an impressive witness without a lot of experience testifying. This must be balanced

against the fact that experts who get hired regularly are probably good at what they do.

### Thor loses hammer; Odin held for questioning

One way to minimize the impact of the hired gun effect is to cover your expert's experience and compensation on direct examination, rather than letting the other side spring it on cross. This "thunder-stealing" tactic has been shown to be effective in a number of contexts. It mitigates the impact of potentially damaging testimony by allowing your witness to appear as honest, forthcoming, and unashamed. Such a tactic also allows your witness to provide a positive spin for her situation. This strategy runs the risk of increasing the salience of the damaging information in the minds of the jurors and should only be employed if you are certain that the other side will raise the issue on cross-examination if you don't do so first.

It turns out, however, that thunder can be stolen back again. In a 2003 study, Dolnik et al. discovered that if one side alerts the jury to the fact that the other side has "stolen its thunder," the jury responds almost identically to the negative information as if it had been only brought up on cross-examination. That is, the two strategies effectively cancel each other out. So, if opposing counsel steals your thunder, steal it right back!

### Maybe there's a market for Metrosexuals...

As long as we are discussing expert witnesses, I want to alert you to an interesting study of how subconscious biases can affect juror evaluation of expert testimony. McKimmie, et al. conducted an experiment involving the written transcript of an expert's testimony in a price-fixing case. The authors manipulated two variables, the gender of the expert and the nature of the businesses involved. Female experts were more effective when testifying about cosmetics retailing than when offering identical testimony about auto parts stores. By contrast, male experts were more effective than their female counterparts when testifying about the auto parts industry.

Somewhat surprisingly, the gender effect was exacerbated by group discussion. When subjects were asked first to evaluate the *qualifications* of the witness, however, some of the gender stereotyping was mitigated. It's almost as if subjects needed reminding that an expert knew what he/she was talking about.

This study was nicely designed from an internal validity perspective, in that the transcripts varied only with respect to the expert's name and the names of the businesses involved. There is some concern that there were only 62 participants in the study.

External validity is also compromised somewhat by the fact that subjects only read a transcript. It remains an open question whether demeanor on the witness stand can counteract initial gender biases among jurors. In addition, jurors did not review any other testimony from the hypothetical case.

### The Barney Miller Effect

A good deal of ink has been spilled recently about the "CSI Effect." Prosecutors have been complaining that jurors are

developing unrealistic expectations about forensic evidence as a result of watching CSI and other crime dramas on television. Early studies of the phenomenon were little more than surveys of attorneys, whose responses were predictably self-serving.

Kimberlianne Podlas, of UNC Greensborough, presented a theoretical rape case to almost 300 subjects and asked them to rule on the defendant's guilt. She found that fans of television crime dramas relied on issues of forensic evidence no more than other subjects. One nice thing about this study is that the author had anticipated the opposite result. Counter-intuitive results are often the most powerful.

### News Flash! People don't like losing!

As many of you know, one of my primary research interests is jury voting rules. As part of the ongoing jury reform project in Arizona, Shari Diamond and her co-authors recently compared the deliberations from 50 actual jury trials (Deliberations were videotaped in Arizona from 1999 to 2001 in order to evaluate a number of jury innovations). Arizona has what the authors refer to as a "quorum" rule in civil cases, meaning that only 6 votes of an 8-person jury are needed to render a verdict. The authors compared the deliberations of unanimous juries to those that rendered a non-unanimous verdict.

They discovered that unanimous juries tended to deliberate slightly longer. Jurors were typically happier with unanimous verdicts and they had more positive evaluations of the deliberations when they reached a unanimous verdict. Consider the following table from the article:

<i>Responses are on a 7-point scale</i>	Holdout Jurors	Majority Jurors	Unanimous Jurors
How influential were you during deliberations?	3.4	4.5	4.5
How open-minded were the other jurors?	4.4	5.1	6.0
How thoroughly were all jurors' views considered?	4.9	5.8	6.2

This is an example of a study that has internal validity issues. The authors want to use their results to argue in favor of a unanimous voting rule. The problem is that *all of the juries they studied were operating under a quorum rule*. Some of them happened to reach a unanimous consensus anyway. As such, it is likely that their study is actually comparing "hard" cases (where consensus is difficult) with "easy" ones (where the right verdict is fairly straightforward or non-controversial). We should not be surprised to see that the hard cases elicit less confidence in verdicts and greater concern about whether justice has been done. Other studies are much more equivocal about the advantages of unanimity.

Brrrrnnngggg!!!! Class dismissed!



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