



THE JURY BOX

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Happy Thanksgiving everyone! Welcome to the official beginning of the season of gluttony. This is our last newsletter of the year. Look for **THE JURY BOX** again in January, after I dig out from under the pile of wrapping paper, party hats and empty antacid bottles.

It has been a great year for Edward P. Schwartz Consulting. The introduction of our exclusive JURY MEMO® has been a huge success. This innovation came out of discussions with clients about how best to meet their needs at early stages of litigation. Let's keep the dialogue going. If you find yourself wondering whether I can help you with a particular strategic quandary, just give me a call.

Pull out your calendars and Palm Pilots and reserve Monday, November 21. From 5 pm to 7 pm, I will be participating in a panel sponsored by the Business Litigation Committee of the Boston Bar Association, entitled "How to Effectively Try a Business Case to a Jury." The roundtable discussion, to be held at the BBA headquarters at 16 Beacon St., will include, among others, US District Court Judge Nancy Gertner.

In this issue, I discuss how to interpret some strange (and some not-so-strange) things that can be seen during a trial. While jurors don't miss much, they often trust their eyes too much. Sometimes, seeing shouldn't be believing.

— Edward P. Schwartz

While Halloween may have come and gone, we can still talk about people wearing **spooky outfits**. Recently, there was an interesting and amusing thread on the American Society of Trial Consultants (ASTC) listserve about strange juror attire. It started off innocently enough with the following inquiry: "I am working on a trial in which the jury has done something very odd. At the close of plaintiff's case, all the jurors showed up wearing the same color. Has anyone experienced something like this?"

Don't let it color your judgment

This produced a series of anecdotes: "I had a trial when all the jurors wore dark blue one day... what a mystery!... Found out later that they liked the judge so much that they decided to wear the color of her robes one day."

"Funny you should mention this. We were just discussing one instance in which the jury had bonded socially and began wearing theme clothing every day. (e.g. Hawaiian shirts one day, sports shirts the next, etc.) Not surprisingly, there was a unanimous verdict."

"I had a jury show up with paper bags over their faces with the eyes cut out! – it was Halloween. They also decided to walk into court backwards one day. They did other things, as well.

Despite their cohesiveness, it was a 10-2 verdict after a very long deliberation."

"I too have had a jury do this. They all wore red shirts and black pants one day. Interviewing them afterwards, they said that since they couldn't talk about the case, they'd talk about where to go to lunch or what they'd wear tomorrow... 'Hey, let's all wear black and red! Ha, ha. It'll make the lawyers wonder what's up!' All our attempts to analyze their behavior were moot. Despite their cohesiveness, it was a 9 – 3 verdict."

The person who posted the initial inquiry wrote back a few days later: "Apparently, the bailiff says that the jury just thinks the lawyers all look like they are wearing uniforms. The jury decided to follow suit. Yesterday was 'green' day!"

So, is there any lesson to be learned from these anecdotes? The first thing I would point out is that none of these incidents appear to be an attempt by a jury to "send a message" to the lawyers or the court. Second, there seems to be little correlation between such incidents and the verdicts that juries reach. So, don't overanalyze!

Trick or Truth!

It is only human nature to try to make sense of things we see with our own eyes. It turns out, however, that our eyes are very often deceiving.

Several scholars have studied people's ability to detect truthfulness and deceit. In a 1981 study by Zuckerman et al., subjects either read a transcript of, listened to an audiotape of, or watched a videotape of a witness's testimony. Of those who watched a video, some saw the witness's face, some saw the body language, and some could see both. In addition, some of those who watched the testimony on videotape received no audio. So, who performed best at detecting the truth?

	<u>Visual Cues:</u> <u>Auditory Cues</u>	Face/ No Body	Face/ No Body	No Face/ Body	No Face/ No Body	Means
Speech		1.00	0.99	1.49	1.09	1.14
No Speech		0.35	0.05	0.43	0.00	0.21
Means		0.68	0.52	0.96	0.54	0.68

Transcript Only: 0.70

The results are presented in the table above. Please note that the results are in units of standard deviation. Higher numbers represent greater success at differentiating between truth and deception. The most important thing to take from this study is

that seeing the witness's face uniformly decreased the ability of jurors to tell when they were being lied to. On the other hand, jurors performed better when focusing on body language. So, next time you think of asking someone to "Look me in the eye and say that," consider asking to watch their hands instead.

Alas, even body language can be deceiving. As Jeremy Rosenthal summarizes in his review article in the *Nebraska Law Review* (1993):

"Observers commonly assume that people who are being deceptive are uncomfortable, shifty, restless in their seats, and move their heads in all directions so as to avoid an observer's scrutiny. During actual deception, however, there is in fact a decrease in each of these behaviors. This is probably a direct result of the fact that people who are being deceptive know which behaviors result in judgments of deception. If a speaker expects those observing him to interpret postural shifts as signs of deception, he will try to reduce such movement."

What should lawyers make of the inability of jurors to detect witness deception? Well, I would never advocate that anyone tell a witness to lie. I would, however, caution any litigator not to count on a jury's ability to see through the lie of a witness for the other side. Just because you know that the witness is lying does not mean that the jury does. So, make sure that your cross-examination is thorough and prepare rebuttal witnesses in case they are needed.

You can't hide your lying eyes

The unreliability of eyewitness testimony has received a good deal of recent attention in the press. Most of the prison inmates who have been exonerated by DNA testing were originally convicted on the strength of a lone eyewitness identification. The problem is exacerbated by the fact that eyewitnesses tend to be more confident of their identifications than they should be. This overconfidence is compounded by the fact that jurors typically believe that an eyewitness account is one of the most reliable forms of evidence. (See generally Well and Loftus (eds.) *Eyewitness Testimony: Psychological Perspectives*, 1984)

This problem is not limited to criminal trials, however. While some civil cases revolve around whether conduct satisfied legal requirements, many involve disputes about what actions the parties took (or failed to take). As such, an eyewitness account can play an important part in how such a dispute is resolved by a jury.

So, what can an attorney do if she is concerned that an eyewitness's testimony, while honest, is nonetheless erroneous? As the phenomenon of eyewitness unreliability has become better understood, judges are becoming more willing to allow expert testimony on the topic. So, an attorney can attempt to impeach an eyewitness's testimony by having an expert point out to the jury the ways in which such observations have gone astray in the past. This is still a risky strategy, however, as jurors enter the courtroom with strong confidence in their own abilities to judge the reliability of testimony. As such, they will be suspicious of attempts to convince them otherwise. In

addition, in a civil case, the move may smell of desperation. As this strategy has not been used often in civil litigation, I would strongly encourage that an attorney explore how it will sit with a jury by running a focus group in advance of trial. Such a study will also allow the attorney and expert to hone their testimonial strategy in light of the focus group's response.

In the News

New Chief Justice to weigh in on *Batson v. KY*.

On December 5, the United States Supreme Court is scheduled to hear the case of *Collins v. Rice*, the first jury-related case of the Roberts Court. The case involves an application of the seminal case, *Batson v. Kentucky*. The question is how best to decide whether a litigator's (here a prosecutor) proffered race-neutral rationale for exercising her peremptory challenges is pre-textual.

Chief Justice Rehnquist, the man Roberts replaced (and clerked for 25 years ago) dissented vehemently to the original *Batson* decision, pointing out, among other things, the difficulty of asking judges to read the minds of attorneys to determine whether rationales professed for peremptories were pre-textual. It seems quite likely that Rehnquist would have found in favor of the trial judge who upheld the strikes. It will be interesting to see how Justice Roberts handles this case.

The case is particularly important for those who try cases in Massachusetts, and other jurisdictions with very limited voir dire. When the judge asks all the voir dire questions and severely limits the scope of those questions, it makes it difficult for an attorney to provide a race-neutral explanation for her peremptory strikes when facing a *Batson* challenge. In jurisdictions with extensive, lawyer-conducted voir dire, a lawyer can point to specific answers to questions she asked. Such is not the case in Massachusetts. As such, the Supreme Court's interpretation what qualifies as "pre-textual" could have profound implications for jury selection in Massachusetts.

Aussies ready to throw unanimity on the barbie

After a hung jury in a high profile murder trial, the Parliament of New South Wales is considering legislation to introduce majority verdicts in criminal trials. I have always found it curious that most Americans assume that there is no legitimate alternative to unanimity for criminal trials, while so many common law jurisdictions have long since abandoned the practice.

England went to 10-2 verdicts in 1967. Oregon and Louisiana have always allowed non-unanimous criminal verdicts. Several of the other states of Australia use 10-2 or 11-1 verdicts. Most of these jurisdictions also have minimum deliberation times. The Civil Law countries that use mixed panels of judges and lay persons typically use simple majority rule or a one-way rule requiring a two-thirds majority for convictions.

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