



"The Shadow knows"

Shadow jurors can help lawyers adapt on the fly

By Edward P. Schwartz

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It is the sixth day of trial and the mechanical engineer is droning on about shopping cart construction. You can't keep your mind from wandering - and he's *your* witness. As you scan the courtroom, your patented "sincere, competent and friendly" smile expertly cemented on your face, you notice for the first time just how many people are *watching* this completely unremarkable premises liability case. Even more surprising, they actually seem to be paying attention. Who are they? They don't look like folks on a day pass from the state hospital next door. They're too old to be a ninth grade civics class on a field trip. Not even the local rag of a newspaper would be desperate enough to cover this case.

You don't need Rod Serling to explain this particular phenomenon. These members of the gallery are probably shadow jurors, hired by your opponent to watch the trial and provide feedback about how things are going. "Wow!" you think, "The defense is really pulling out the stops."

Not necessarily. In truth, using shadow jurors can be a very economical way to get valuable information on your next trial.

There are several ways to make effective use of shadow jurors. Some of them can be used in conjunction, while others require the litigator to make a strategic choice before the trial begins.

Handy-dandy focus group

Imagine having access to an up-to-date focus group at any point during the trial.

If you use shadow jurors, you can debrief them at any point in the proceedings. You don't need to prepare any presentation materials since

they have been watching the whole trial. As with conventional focus groups, it is best to zero in on one particular theme or piece of testimony - "Did you understand the explanation of how a CT scan works?" or "Do you think the plaintiff was being completely truthful in her testimony?"

While an attorney can conduct these sessions, it is preferable to get a professional moderator to do so. If the shadow jurors are talking to the person who is paying them, they may be tempted to report what they think the lawyer wants to hear. This problem is only exacerbated if the shadow jurors develop a rapport with the attorney over the course of the trial. Finally, if the shadow jurors start to feel like part of the trial team, they might cease to be objective evaluators of how a real jury would see the case. It is critical to get honest, objective, unbiased opinions from your shadow jurors.

Regular focus groups quickly turn your shadow jurors into a shadow *jury*. You might want to solicit their individual opinions throughout the trial, free from the influences of the other shadow jurors. There are several ways to pursue this strategy and still get good data.

One possibility is to give your shadow jurors dial testers. These are little hand-held controllers that look like pong paddles. As the shadow jurors watch the trial, they turn their dials from "cold" to "hot" depending on how they feel about what is happening in the courtroom. In addition, it is possible periodically to prompt the shadow jurors with particular questions that they answer using their dials. The results can be monitored by a member of the trial team in real time, and new questions can be introduced whenever they come to mind.

There are now several companies that provide dial testing hardware, data collection and analysis, including:

www.perceptionanalyzer.com

www.presentationtesting.com

www.audienceresponse.com

They are all experienced at working with attorneys and trial consultants to configure their systems to the needs of particular cases.

Limitations of dial testing

Dial testing does have its limitations, however. You will probably need to

find a way to broadcast the trial to a remote location where your shadow jurors will be free to twist away. The controllers *are* wireless, so they can be used in a courtroom, with the technician and responsible trial team member squirreled away nearby. But it may be difficult to convince a trial judge to let your shadow jurors sit in the courtroom with their controllers.

I recently asked Nancy Gertner, a U.S. District Court Judge in Massachusetts and a courtroom technology advocate, whether she would allow shadow jurors to use dial testers in her courtroom. To my surprise, she replied, "I wouldn't have a problem with them so long as they and the 'dial testers' are inconspicuous and the 'real' jury wouldn't know that they are being 'shadowed.'"

When requesting permission to use dial testers, I recommend that you demonstrate for the judge how inconspicuous they can be. Coach your shadow jurors on how to keep the dial testers in their laps while using them.

While it's possible to work with shadow jurors who are not in the courtroom you lose the realism of watching a trial live, where they can watch reactions and body language in addition to hearing the testimony itself.

Another concern is that this technology doesn't come cheap. Expect to pay at least \$3,000 per day plus expenses for the equipment rental, the staff to run it and the resulting data analysis.

You can accomplish many of the same goals with a distinctly low-tech approach. A trial consultant can hand out short questionnaires to your shadow jurors during breaks and debrief them individually at the end of each day. This approach requires a bit of extra manpower, since one person won't be able to interview every shadow juror in the same evening.

One good question to ask every day is "Are there any questions you wish someone had asked of a witness?" This information is particularly valuable in jurisdictions that do not allow jurors to submit questions to witnesses.

A few refinements

One advantage of keeping shadow jurors apart during trial is to track trends in attitudes and opinions. If a shadow juror starts to warm up to the defense case, it is nice to know whether the change is the result of evidence and testimony, as opposed to the influence of other shadow jurors.

Such isolation also allows you to ask the shadow jurors to deliberate as a jury at the end of the trial. While you can have a shadow deliberation in any event, if the shadow jurors have been regularly sharing their views throughout the trial, such deliberation is unlikely to mimic what the real jury is going through.

What should you make of your shadow jurors' responses?

Even though the shadow jurors are watching the actual trial (unlike mock jurors or focus group participants, who typically watch an abbreviated presentation), their responses should still be interpreted as suggestive, rather than predictive. Shadow jurors are very useful for learning about what themes have been important, which witnesses have been credible and which information has been internalized by the actual jurors.

That said, how such matters get transformed into a verdict choice is often the result of idiosyncratic features of individual mental processes and collective deliberation dynamics. Your shadow jurors can improve the accuracy of your evaluation of how the case is going, but they can't tell you for sure what the actual jury is going to decide.

Suppose your shadow jurors are reacting negatively to your case. That doesn't automatically require a dramatic change in your approach. You should be careful to interpret shadow juror responses in conjunction with the results of your pretrial research, your trial consultant's evaluation of the case and your own experience with similar trials. You should huddle with your entire trial team before resorting to Plan B.

Plan B and how to use it

It is often difficult to change tactics in the middle of a trial. It is a good idea to have contingency plans laid out in advance, anticipating that you will be receiving regular feedback from your shadow jurors. This will allow you to smooth out any necessary strategic transition.

Suppose you anticipate that you might need to become more aggressive in your cross-examination of a particular witness. You should script out both versions of your questions in advance and plan a transition from one to the other that won't be too jarring to the jury.

A final note about shadow jurors. You should discuss this option with your trial consultant well in advance of trial. It takes some time to recruit a representative group of shadow jurors who are free to spend several days in a row in court (not to mention the debriefing sessions). In addition, you will

want to put a lot of thought into the techniques that your trial consultant will employ and the types of questions she will ask. You will be busy enough during the trial - you don't need to be drafting multiple-choice survey questions and scheduling conference rooms. So, if you think you might want to use shadow jurors, get the ball rolling early - it's much easier to dismiss shadow jurors you don't need than to find decent ones at the last minute.

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