THE JURY BOX
A PUBLICATION OF
EDWARD P. SCHWARTZ CONSULTING

VOL. 1, NO. 1. JANUARY, 2005

Welcome to the inaugural issue of THE JURY BOX. This newsletter is designed to provide attorneys with useful information and commentary on jury-related issues. In this issue, we discuss how to select, prepare and examine an expert witness with the jury's reaction in mind. In addition, we will use THE JURY BOX to update you on jury issues in the news, including those that emerge from recent high profile trials. We will archive the newsletter at our website, so you can always access this information at your convenience. Is there a topic that you would like us to cover in THE JURY BOX? Just give us a call, drop us an e-mail, or submit a request on our website with your ideas. We are committed to being maximally responsive to the needs of our clients. As Jerry McGuire would say, "Help me to help you!"

-Edward P. Schwartz

Expert Witnesses

are used in almost every civil trial and in many criminal ones, too. Should you use an expert in your next case? Who should you hire? What should she say? Should she use exhibits? The answers to these questions depend on how you expect the jury to react to your witness's testimony. In this issue, we review some of what we know about how jurors think about expert testimony.

Choosing an expert

Should you choose the chairman of the Harvard Economics department as your expert witness? Well, that depends on the contours of your case, how well the chairman communicates, and how much she charges for her services.

Do credentials matter?

Studies have shown that there are direct and peripheral routes to persuasion. If your expert will be testifying about something that the jury sees as fairly unimportant or that the jury feels ill-equipped to judge, the jurors may content themselves to believe the expert they believe to be best qualified. On the other hand, if the expert's testimony is seen by the jury as central to it's verdict, the content at and clarity of the expert's answers will trump a wall full of fancy diplomas.

A couple of examples

Example 1: A man mentions during his annual physical that he has seen some blood in his stool. He gets a routine colonoscopy about one year later, after turning 40, which uncovers colon cancer. Despite aggressive treatment, the man dies and his widow sues the physician for not ordering a colonoscopy sooner. The doctor claims that he told the man to get a colonoscopy right away after hearing about the blood in his stool. The widow, however, contends that the man, upon returning home from his physical, told her that the doctor had said, "Well, you're almost forty. That's when we suggest routine colonoscopies. You should get one pretty soon."

While there are certainly issues in this case about the likelihood that an earlier colonoscopy would have detected the cancer and how much difference earlier treatment would have made, the jury's primary focus will be on whether the doctor really told the patient to get an immediate colonoscopy. This is a factual dispute, not a medical one. The testimony of medical experts is secondary and the jury is likely to deliberate for hours before even thinking about what the experts have said. This case is ripe for hiring a high-powered expert and keeping her testimony short and to-the-point.

Example 2: A 9 year-old child develops an infection from an in-grown toenail. As an infant, she had shown a reaction to a dosage of penicillin that suggested a possible allergic reaction. A couple of years later, according to the child's father, she had completed a treatment with a related anti-biotic without incident. Since the infection failed to respond to non-penicillin antibiotics, the doctor chose to prescribe amoxicillin, closely related to penicillin, and provide the family with an epi-pen (and instructions on its use). The child subsequently went into anaphylactic shock, which the epi-pen did not entirely counter, and required emergency hospitalization. The parents claim that the child developed post-traumatic stress syndrome from the experience and sued the prescribing doctor.

This case revolves around the appropriateness of the treatment, in light of the circumstances and the possibility of the psychological consequences from the experience. Everything depends on whose experts are believed by the jury. As such, in a case like this, it behooves an attorney to hire medical experts who speak clearly, don't get defensive under cross-examination, and are good teachers. In addition, the experts should be available to spend a lot of time preparing for the case. Credentials should be a secondary concern.

Teach – Don't Preach!

Jurors, like the rest of us, do not like being told what to do. Even worse is being told what to think. An expert who offers a firm opinion without a clear explanation of her reasoning runs the risk of alienating the jury and doing harm to the case.

There is a well-studied psychological response to authority known as *reactance*. This occurs when a person responds to being given orders without explanation by constructing internal reasons why the prescribed action is a bad idea. The juror resents being told what to do and thinks "If she can't give me a good reason to do what she says, then there must not be one." An expert who talks down to the jury runs a real risk of inciting reactance among the jurors.

"The expert took so long to go over every single job and title, every single award and paper, we were all rolling our eyes. It became a running joke in the jury room" – "Michael", a juror in a medical malpractice case

The reactance phenomenon is best understood in the context of judicial admonitions to disregard inadmissible evidence. If a judge explains (preferably in advance) why certain information is not permitted at trial, the jury can usually follow instructions not to use that information or even speculate about it. It helps, of course, if there exists a good explanation to offer. For instance, a judge who explains that polygraph tests are scientifically unreliable can often successfully admonish a jury to disregard inadvertent mention of a polygraph at trial. On the other hand, it is virtually impossible to get a jury to disregard testimony of a large settlement offer in a civil suit, because jurors don't want to believe that they are unable to consider such evidence in a non-prejudicial manner.

The lesson for experts is pretty straightforward. "I'm right because I'm an expert and have been doing this for years" testimony is likely to provoke reactance. To the extent possible, an expert should walk the jury through the decision-making process that led to her expert conclusion. I often advise doctors to treat their testimony as if they are explaining the problem to a room full of pre-med college students. That is, they care, they want to get the right answer, they know virtually nothing, and most of that they think they know is wrong.

The Value of Visual Aids

None of us in academia would think of trying to teach our students about a technical subject without using the blackboard, an overhead projector, slides or a physical demonstration. Somewhere along the way, our students require a visual re-enforcement of what we are trying to explain. The same is true of an explanation to a jury. An expert should teach the jury like she would teach her students.

The best strategy is to ask the expert to prepare her own visual aids. This exercise will require that she think seriously in advance about how she can successfully explain her conclusions to the jury. Once the expert has submitted sketches of what she plans to show in court, a demonstrative evidence team can be brought in to make sure that the materials are clear and effectively presented.

In the News

Separate Juries for Capital Sentencing?

U.S District Court Judge Nancy Gertner recently held that the defendants in a capital case were entitled to a separate jury for sentencing (should they be found guilty of capital murder). The defendants, Daryl Green and Branden Morris, are accused of a gang-related slaying. While the death penalty is not available in Massachusetts, the defendants are being tried in federal court so that the death penalty will be available.

In 1985, the United States Supreme Court, in Lockhart v. McCree, held that a defendant in a capital case was not unfairly prejudiced by being tried by a "death qualified" jury, despite a host of empirical evidence that such juries are "conviction prone." That is, a jury from which persons whose death penalty views would "prevent or substantially impair" their ability to perform their duties as jurors (See Wainwright v. Witt) have been removed is more likely to convict the defendant than one from which such persons have not been removed because people who oppose the death penalty tend to be more receptive to arguments of criminal defendants than people who support capital punishment.

Nonetheless, Judge Gertner ordered two juries. This is unlikely to solve the problem, however, because jurors with disqualifying views on capital punishment are unlikely to be willing to convict a defendant of murder knowing that a subsequent jury could sentence him to death. Once this comes out at voir dire, Judge Gertner will have no choice but to "death qualify" the first jury, too. There will be two juries, but neither of them will be "fair."

Plain English Jury Instructions in California

The state of California has recently completed a major overhaul of its civil jury instructions. The six-year process resulted in instructions designed to "Ease …understanding by jurors, without sacrificing accuracy." (from Guidebook to using new instructions)

The website set up for the new instructions is at http://www.courtinfo.ca.gov/jury/civiljuryinstructions/. There is background information on the adoption process and directions for use of the new instructions. There are also some very illustrative examples. To wit:

Old language: "Failure of recollection is common. Innocent misrecollection is not uncommon."

New language: "People often forget things or make mistakes in what they remember."

In my experience, failure to understand instructions is the most common form of jury miscomprehension. Such errors can cost you your case. Attorneys need to think harder about jury instruction wording and be pro-active in assuring that jurors understand their responsibilities. This goal can be furthered by carefully crafted closing arguments, but the most effective tool is a set of clear instructions in the first place. As these new instructions have been tested for accuracy and juror comprehension, it might be possible to argue for their use in other state courts. Certainly, a system-wide plain English reform to any civil jury instructions would be a good idea.

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