THE JURY BOX
A Publication of
Edward P. Schwartz Consulting
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Vol. 3, No. 2. April, 2007

Welcome to the first JURY BOX tabloid extravaganza! There's a lot of jury related funny business going on in high-profile trials around the country. We're going to take a whirlwind tour of the sleazy, desperate, fraudulent and just plain negligent, as I use the tawdry details of some recent jury trials to highlight some useful lessons on trial procedure and strategy. Rather than relying on the speculation of our usual cast of talking heads, we're going to hear from the jurors themselves. What did they think of the process? Which evidence was most important? Why did they vote as they did?

Once again, I am co-hosting the New England Regional meeting of the American Society of Trial Consultants, to be held on the morning of April 20, at Bernett Research in Boston. Sam Sommers, a psychology professor at Tufts University, will give a presentation entitled "Jury Racial Composition: Surprising Lessons from Experimental Research." In addition, Sarah Holmes, of PenTec, will be speaking on "Handwriting: Reading Between the Lines in Jury Selection." A limited number of spaces are available for attorneys who wish to attend. Please contact me for details.

– Edward P. Schwartz

Most of the systematic information we have on jury decision-making comes from mock jury research. This methodology has much to recommend it, in that researchers can control and monitor the decision-making environment, allowing confident linkage between behavioral responses and variables of interest. That said, we are always mindful of issues related to external validity – how closely do real-world jurors mirror their experimental counterparts. As such, it's a good idea to monitor

how jurors make decisions in real cases

and compare what they say with the experimentally generated conventional wisdom.

Sticking it to the man

In the first Vioxx trial, held in Texas, the jury not only held Merck liable for the death of Robert Ernst, but they also delivered a $229 million punitive award against the drug manufacturer. Punitive damages are intended to be quasi-criminal, in that they are used to punish intentional wrongdoing. As such, the typical rationales for punitive awards are deterrence and retribution. Deterrence requires jurors to think about how likely the defendant's actions were to cause harm, the expected magnitude of that harm, and the likelihood that the wrongdoing would be detected and successfully prosecuted. These calculations allow a jury, in theory, to set the damages high enough to deter would-be tort-feasors from similar actions in the future.

Retribution is a more nebulous concept, but the calculation of "just desserts" presumably requires consideration of both the amount of harm done and the moral reprehensibility of the illegal act. So, do jurors set punitive awards in keeping with either of these objectives?

Consider a quote from juror Rhonda Wade:

> "Our award was based on the fact that once they figured out they had no choice but to make the [warning] label change, they chose to stall it in order to make as much as $229 million. And we don't want them to stall. We want them to tell us the truth, and be responsible."

Confirmed juror David Webb:

> "$229 million was the amount of money Merck would gain if they put off changing the label."

This fixation on Merck's sales figures highlights a couple of important points. First, the jury didn't seem to really think in terms of either deterrence or retribution. They instead chose to focus on taking back the illicit fruit of Merck's deception. Recent experimental research shows pretty definitively that jurors don't do deterrence calculations, even when their instructions are specifically designed to encourage it.

The second point involves the use of a particular number. As I have discussed in earlier issues of the Jury Box, jurors typically employ an "anchor and adjust" strategy for calculating damages. They find a plausible number, typically offered by one side or the other, and work from there. Here, the jurors locked onto a number that seemed to be in the right ballpark. Where did the jurors get this number? As juror Stacy Smith reported,

> "That was a number that they kept saying over and over. When you're sitting there for five weeks and that number kept being repeated, the number stuck in our minds."

The plaintiff team in this case did an excellent job of providing the jurors with an anchor. Keep in mind that jurors are always searching for a useful anchor; don't let the other side provide the only one.

The wrong time to play the race card.

In a recent Cape Cod, Massachusetts case, Christopher McCowen, a black man, was convicted of killing Christa Worthington, a white woman. After the verdict, three of the twelve jurors filed affidavits, alleging racism on the part of some of their fellow jurors.

According to Roshena Bohanna, one of the three concerned jurors, one white juror remarked, "Guys, the defendant looked at me. He scares me." When asked why, she replied, "I don't know – he's this big black guy, you know. He frightens me."

Juror racism is normally grounds for a mistrial, especially regarding a cross-racial crime, but the defendant is almost certain to fail in his efforts to secure a new trial in this case.

Why? Because the allegations of racism emerged after the verdict was already in. Federal Rule of Evidence 606 (b) (and its state counterparts) disallows post-verdict testimony by jurors

regarding deliberations or anything contributing to their states of mind during deliberations. What could the defense have done in this case? It is critical that the jury understand that any concerns about improper juror conduct must be reported promptly to the judge. An attorney who is worried about such matters should request that the judge instruct the jury accordingly.

This case also highlights one of the worst-kept dirty little secrets of our criminal justice system. Unanimous verdicts do not always reflect unanimous consensus on the jury. When good-faith, rational deliberation fails to resolve disagreement among jurors, choosing a verdict becomes a process of bargaining, haggling and sometimes intimidation. One has to wonder why the jurors who disagreed with the nature of the deliberations in this case went along with the verdict. In the end, all twelve of the jurors, including the three dissidents, *did* vote guilty. There is a very strong legal presumption (despite all the evidence to the contrary) that a juror who votes guilty *was actually convinced* beyond a reasonable doubt.

How strong is this presumption? Consider the case of Heidi Fleiss, the notorious Hollywood Madame. Her jury ultimately acquitted her of several drug distribution and prostitution charges and, instead, convicted her of the rather innocuous sounding charge of pandering. Little did the jurors know that pandering is a serious felony carrying a minimum 3-year prison term. Distraught by Fleiss's sentence, the jurors all signed a letter to the judge, indicating that they were mistaken in their verdict, in light of the corresponding punishment. The judge refused to reopen the case.

Taking Stock of the Enron Verdict

As I have mentioned in earlier issues, there are two main modes of jury deliberation: evidence driven and verdict driven. Most juries experience both at some point in their discussions. Evidence driven deliberations focus on establishing exactly what happened among the litigants – who did or said what to whom when. The jury tries to build a common understanding of events. This type of deliberation tends to be collegial, egalitarian and thorough; unfortunately, it can also be inefficient and meandering. By contrast, once a jury settles into verdict driven deliberations (usually after taking a straw vote), jurors tend to become more confrontational. Camps form, spokespersons emerge and civility lags. On the plus side, a verdict usually follows fairly quickly after the jury goes into this mode.

The jury in the Enron trial appears to have effectively worked in evidence driven mode for quite some time. According to juror Deborah Smith,

> "We answered all the questions, we tore the boxes [of evidence] apart and we looked at all the evidence. We won't have to worry about this later because we did it right the first time."

Added juror Wendy Vaughan, "It was like having a 25,000 piece puzzle dumped on the table." The jury apparently began deliberations by building their own timeline of events and statements. These are clearly the actions of jurors who saw their primary task as figuring out what happened, rather than picking the right verdict from a limited menu.

Libby, Libby, Libby labeled a Liar, Liar Liar

The jury in the Libby trial appears to have been similarly evidence driven. According to Denis Collins, a juror and former reporter,

> "We had about 34 PostIt pages, [and] I don't mean the little ones you stick on; they were like two-and-a-half feet by two feet, and they were filled with all the information that we distilled from the testimony. We took a long time to do that. We took about a week just to get all these little building blocks there."

Asked why deliberations took a full ten days, Collins replied,

> "We didn't start to do a straw vote right away and say, 'Well, what do you think?'. Well, it was too big, it was too much, it was too important. We just didn't do that. So, that's why it took so long."

Had the jury taken that early straw vote, the deliberations would have certainly taken a different route. Given the general advantages of evidence driven deliberation, it is a shame that jurors are not given any guidance on the timing of straw votes by trial judges.

Another interesting tidbit from the Libby case involves the definition of "reasonable doubt." On the eighth day of deliberations (after all the PostIt sheets had presumably been filled out), the jury sent the following question to the judge.

> "We would like clarification of the term 'reasonable doubt'. Specifically, is it necessary for the government to present evidence that it is not humanly possible for someone not to recall an event in order to find guilt beyond a reasonable doubt."

Jurors often have difficulty interpreting the reasonable doubt standard. How much doubt is reasonable? Horowitz and Kirkpatrick (1996) conducted a study on the impact of instruction wording on self-reported thresholds for reasonable doubt. Clearly, all reasonable doubt instructions are not created equal. Language about remaining "firmly convinced" (FC) of the verdict produced the most demanding reasonable doubt threshold, while language about doubt that would cause a juror to "waiver or vacillate" (WV) created a substantially lower threshold. Note that deliberation only managed to ratchet up the threshold when the "firmly convinced" language was used. Leaving the definition to the jurors' own imaginations (UD) also produces alarming low reasonable doubt thresholds.

		Reasonable	Doubt	Definitions	
Trial/Delibs	FC	MC	WV	RD	UD
Weak/Pre	68.87	57.37	58.25	68.25	52.87
Weak/Post	80.75	60.75	49.75	61.62	55.00
Strong/Pre	72.25	55.25	62.37	68.25	66.50
Strong/Post	81.87	57.50	61.87	69.75	62.62

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