

Shadow Juries: A Unique Advantage in Civil Trials

By Theodore O. Prosis, Ph.D.

In one trial, the defense decided to cut three of its four damages witnesses because the focus on damages was degrading the strength of the liability case. In another trial, the defense altered cross-examination tactics to remind jurors of key defense themes that had been lost during plaintiff's lengthy case. In yet another trial, the planned closing argument was changed dramatically to target a few key points rather than an extensive summary of the case. Opposing counsel's poor closing reflected an inability to adapt to the unexpected brevity and focus of his opponent. In still another case, the key witness's credibility was salvaged after he initially came off as defensive and angry. His revised examination for the next day revealed that his behavior was frustration due to his integrity as a doctor being questioned and not because he had anything to hide.

Each of these strategic changes was made in the course of trial and made a significant impact at trial. Each of these changes was informed through the use of a unique research tool being employed during trial: the shadow jury. Although the trial team did not know exactly what the real jury was thinking, they were able to make meaningful inferences from the shadow jurors' reactions to the trial.

The use of a shadow jury is not a new concept by any means, but the use of tools like these is once again becoming increasingly common. In their early forms, these research projects were typically too complex and virtually unmanageable. The contemporary versions could be characterized as "Shadow Jury Lite." Also referred to by some as trial monitoring, these projects often involve a consultant and four to six jury-eligible individuals who attend trial and evaluate the daily events. Their quick feedback to the trial team can be used to make modifications and refinements to the day-to-day strategy, change the demeanor and

approach to witnesses, and target closing arguments.

The unique perspective offered to attorneys by a shadow jury comes with risk. If an attorney decides to use this tool, there are some important and practical steps to be followed to ensure it is conducted in a useful and secure manner.

Benefits

A trained incapacity results from expertise. Training and experience allow people to perceive things in a specialized way. They shorten the way to understanding, but they simultaneously constrain the ability to see things in the way of people who lack such training. For lawyers, this can be a significant and understandable impediment. It is challenging to "think like a juror," i.e., to think about the case from the perspective of an outsider, a layperson, a person without the benefit of years of legal training.

In addition to the technical training in the law and legal argument, attorneys, who have been immersed in a matter (or area of litigation) for a substantial time, can know the case too well. There are so many details and so many layers of information implicit in their thinking about the case. They seek to emphasize details because of the rich context they know too well. They emphasize details because of their enhanced understanding of the law. Jurors do not have the benefit of these contexts. In addition, the attorneys are necessarily advocates and can easily fall into the trap of viewing a case exclusively from their client's point of view. Jurors, on the other hand, are approaching the case with a theoretically open mind rather than from a position of advocacy favoring one side or another.

Communication involves the sending and receiving of information. Senders of information dramatically overestimate the degree to which their audiences understand what they are trying

to communicate. Far too often, those who are on the sending side of the communication model assume their intended message is being received, understood, and classified as important in the minds of the audience. Far too often, those senders come to learn that their audience understood an issue quite differently.

Objections

There are many possible objections to using a shadow jury in a trial.

- You can never predict what a jury is going to do.
- You may think "I know what my strategy has to be."
- You may think you know what the jury thinks about what you're doing.
- Shadow juries may seem overwhelming and unmanageable.
- Using a shadow jury may be too much of a risk.
- Shadow juries are too expensive.

Addressing these concerns helps to see the best ways to maximize the benefits and minimize the risks and limitations of these projects.

The first objection is that a shadow jury does not offer meaningful data, because jury verdicts are ultimately a crapshoot. It is true that data from the shadow juries is not a reliable predictor of what the actual jury will do. It is small-group research and cannot offer scientific predictions of behavior. Likewise, you are polling different people—not the actual jurors—each night. At most, these objections point to a limitation and not a valid reason to dismiss the utility of such a research project. Saying that one cannot know what a jury is thinking is not a good reason to avoid feedback that may give the best possible insight into how the case strategy, particular witnesses, approaches to direct- and cross-examination, and other aspects of the trial are being perceived by those not trained in the law, not intimately familiar with the case, and not committed to a particular point of

advocacy. These panels may well be the best means to peer into the “black box” of a real jury.

The next two objections are vastly different from the first. The second basically says that there is only one way to try this case and the jury will have to take it the way it comes out. The third says that you already know how the jury will respond and have framed the case in the best possible way. The introduction to this article is intended to make the trial team pause when they begin down these paths. Overestimating the effectiveness of our communication is part of the human condition. As suggested above, the more expertise you have, the more predisposed you are to believing the audience already sees it like you do. Moreover, even if there is truth that an attorney can read jurors’ reactions effectively or infer how they are evaluating a message, the feedback from the shadow jurors should be a valuable supplement to such knowledge.

There is an old military maxim that says “It is a bad plan, the one that cannot be altered.” Flexibility is essential to implementing an effective battle plan. The ability to respond quickly, efficiently, and effectively to information or to opposing counsel’s strategy is critical to a successful trial strategy.

The remaining objections are process-oriented and not conceptual. Good methodology will maximize the utility of the research and minimize the risks and limitations of a shadow jury.

Methodology

Consider the diversity of views, not just the demographics. Do not overestimate the significance of demographics. Characteristics, such as race, gender, or class can be useful, but they are extremely error-prone and can be highly misleading. The attractiveness of data that is easy to collect and stereotype is hard to overcome. It is crucial to have a shadow jury that is composed of responsible, reasonable people with diverse viewpoints, experiences, and attitudes. Although you should not have a person with experiences and attitudes that would be grounds for a cause challenge or obvious peremptory challenge, you do not want to stack the shadow jury with like-minded people who have experiences and attitudes favorable to your case.

Shadow jurors should be “blind.”

The shadow jurors should not know who they are working for. The goal of a shadow jury is to provide objective feedback. The trial team should avoid the phenomenon of the “good subject,” where participants are guided implicitly by an impulse to provide information that they think their employer wants to hear. Furthermore, if they know which side they are working for, they may advocate more for that position.

Good management is key. The shadow jurors and their feedback should be managed. These projects can offer unique insights into a trial team, but they also come with risks. There is an unlikely risk that a juror could provide feedback to the opposing side. There is also a small risk that one of the shadow jurors could become too involved in the case and talk to an actual juror or party in the matter. For this reason, an experienced handler must be present in the courtroom and able to manage the shadow juror’s behavior.

In addition, the feedback that the shadow jurors provide could become overwhelming. A trial team has enough on its plate without a deluge of random information after each day of trial. This is another reason why an experienced consultant should work directly with the shadow jury and through their understanding of the case, the goals of the trial team, and their experience with trial advocacy, highlighting only the most meaningful and manageable elements of the jurors’ feedback. This is the best way to provide appropriate and practical recommendations to the trial team.

Focus on the front, not the back.

The trial team needs to keep their attention focused on the front of the courtroom. Worrying about the shadow jurors should not become a distraction. That is the responsibility of the handler and not the trial team. Counsel must focus on using the jurors’ feedback to make necessary corrections and refinements.

The audience is always right. Jurors are the people who decide what is and is not important. Do not dismiss the feedback from shadow jurors because “they just don’t get it.” There are several reasons why this is a dangerous mistake. It

is quite possible that the real jury is not “getting it” either. The responsibility then rests on the advocate to adapt and correct the message to be more understandable and compelling. How the audience perceives the communication is the most important element of the communication.

Let jurors deliberate. If possible, the shadow jurors can be brought together to deliberate at the close of the parties’ cases but before closing arguments. In this way, the trial team can gain even more insight on what issues are most important to the jurors. This can be particularly useful in the development of a damages or alternative damages theory.

You get what you pay for. Adding the cost of a well-run shadow jury can be challenging on top of an ordinary trial budget. However, the expense can be put in an initial budget as an option should the case proceed to trial. Once the decision to go to trial has been made, the shadow jury can be a tool not only to increase the chance of a favorable verdict but also as a means to minimize the risk of a large judgment. The project can be the basis for a targeted alternative damage theory or drive the decision to pursue settlement discussions mid-trial. In some instances, shadow jurors may only be used to assess and provide feedback on the opening statements and then dismissed.

Conclusion

Although other forms of research, such as mock trials and focus groups, offer very useful information for trial tactics and settlement considerations, a shadow jury offers something unique in addition to these trial preparation tools. These research participants hear the “real thing”—the trial itself. They can evaluate the actual performance of witnesses. They also are exposed to the case in great detail through the length of the trial and thus have a perspective very similar to the real jury. While the projects come with risks and limitations, if executed well, the rewards can be rich and the advantage over opposing counsel unique. ■

Theodore O. Prosis, Ph.D. is the vice president and senior consultant at Tsongas Litigation Consulting, Inc.