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In the Shadows: Real-Time Juror Feedback From Trial

By Thomas M. O'Toole, Ph.D.

Over the past decade, shadow juries have emerged as a common tool to gauge potential juror reactions to the day-to-day happenings of high-stakes trials. A shadow jury is where four to six jury-eligible participants from the trial venue are paid to watch the actual trial and provide feedback each evening in the form of facilitator-led interviews. A shadow jury can be a useful tool for clients, but as a lifelong student of jury decision-making, I find them absolutely fascinating. It is incredibly rare to receive this kind of data, uninhibited by the limitations of mock presentations and post-trial juror interviews. Fortunately, I have had the opportunity to conduct several of these projects across the country in recent years. I recently completed a shadow jury project on a four-week and wanted to capture general findings that have been consistent with past projects while my memory was still fresh. While the cases vary, I've found there are several common threads in the shadow jurors' feedback. The purpose of this article is to highlight a few of those items. In order to provide some context, these findings are from trials generally lasting anywhere from two to six weeks. Some cases were more complex than others, but the element of information overload remained the same due to the length of the trials.

The first area of feedback from shadow jurors shows that opening statements are primarily about impression formation. The shadow jury data shows that jurors struggle with the level of detail and sophistication of the information that is often presented in opening statements. This is exacerbated by attorneys who attempt to do too much in opening by previewing too much evidence and testimony while jurors are still trying to adjust to the overwhelming world of the trial. At this point in trial, everything is new to them. There are a lot of things that simply do not make sense to them, including elementary issues that might not even cross the attorney's mind as being an issue of confusion. Rather than attempt to do too much in opening, attorneys should identify and focus on a few central facts that have symbolic value in the sense that those facts tell jurors everything they need to know about the case. Some facts evoke core principals better than others and, consequently, are better situated to be the centerpieces of the opening statement. These kinds of facts allow for early impression formation that does not require the jurors to understand the intricacies of the legal claims. For example, in a recent case involving fraud claims, rather than bury the jurors with all of the technical elements of a fraud claim and the supporting evidence for each of these elements, we started opening by highlighting facts that showed the plaintiffs were atypical "victims" of fraud. The facts that were presented were chosen because they violated general



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expectations about fraud victims. In other words, they resonated with common gut feelings and did not require jurors to understand the more sophisticated legal elements, of which we had plenty of strong facts on as well. The goal was to create a gut feeling amongst jurors that the plaintiffs were not victims of fraud with the understanding that this impression formation would likely influence the way they perceived and interpreted later evidence and testimony.

Impression formation in opening is critical since many studies show that between 70% and 90% of jurors make up their minds about case shortly after opening. Studies on “pre-decisional bias” may explain this phenomenon. Pre-decisional bias is when jurors’ perceptions of the evidence and testimony are influenced by their early leanings in the case. One study out of Cornell showed 85% of mock jurors exhibited pre-decisional bias in their decision-making¹. However, attempting to do too much in opening can undermine the opportunity to establish a pre-decisional bias that favors your client. Shadow jury feedback shows that three to five key points are ideal for an opening statement.

The second common finding from shadow juries relates to direct and cross-examinations of witnesses, although I would argue that they have particular importance for cross examinations by defense attorneys in lengthy trials due to the fact that it can be days or weeks in these instances before the defendant can put on their case. The problem centers around the jurors’ failure to understand the point of a line of questioning in cross examination. This problem stems from an attorney’s failure to effectively use language and phrasing in the questions and it manifests itself in two ways. First, it arises in situations where an attorney presumes the testimony clearly establishes or reinforces a theme during cross-examination rather than using the phrasing of the question to clearly establish the thematic context of the question. Unfortunately, attorneys often overestimate how apparent their theme is in their line of questioning. In reality, it often needs to be clearly spelled out through the question phrasing how a particular fact arising out of the testimony relates to the core themes of the case. This may be more of a missed opportunity by an attorney than a shortcoming, but the impact is considerable. Considering the pre-decisional bias research that has already been highlighted, it is important for an attorney to tie specific testimony and evidence to the themes he or she used to motivate the jurors in order to effectively arm those motivated jurors to be advocates in the deliberation room. In other words, once impressions are formed early in the case, a motivated advocate looks for evidence and testimony that reinforces what they want to believe about the case. An attorney’s ability to tie the evidence and testimony to the themes in cross-examination can feed this desire, which both arms the juror with the tools to exert influence during deliberations and also further entrenches that juror in their beliefs about the case. A failure to clearly

¹ Kurt Carlson and Edward Russo. *Biased interpretation of evidence by mock jurors*. Journal of Experimental Psychology: Applied. Vol 7(2), Jun 2001, 91-103



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tie the testimony to the theme or principle translates to a lost opportunity to activate, at various points, the motivating principles that drive jurors' decision-making. The more the attorney can activate those principles, the more effective his or her cross-examination will be.

This is somewhat similar to the second shortcoming, which is a failure to implicate a series of questions. Shadow jurors often highlight a line of questioning and indicate that they do not understand what it is supposed to mean in the bigger picture of the case. For example, I have seen numerous instances where an attorney achieved a major concession from a plaintiff in cross-examination, but the shadow jurors failed to appreciate why the concession was a big deal because they did not understand the implications of the concession. Similar to theme development in cross-examination, this problem can often be overcome with simple, but clear, sign-posting at the front or the back of a line of questions. For example, a defendant in a personal injury case might start a series of questions for the plaintiff with, "One of the issues the jury must decide in this case is whether or not you exercised ordinary care in the moments leading up to your injury, so I want to ask you a few questions about that." This simple act of sign-posting can play a critical role in helping jurors understand the point the attorney is making, which may be painfully apparent to the attorney, but it is not always so to the jurors.

In each of these problem areas, the question can become more important than the answer, which is an important strategic consideration for the examination of key witnesses.

The next common issue that arises with shadow juries relates to note-taking. I believe strongly that juror note-taking has not received the attention it deserves. These notes play critical roles in the deliberation process. It is not enough that the jurors take notes. Important consideration should be given to how they take notes and how those notes are used (effectively or ineffectively during deliberations). One issue that has become clear from shadow jury projects is that jurors may be taking too many notes, which undermines the effectiveness of their use in deliberations. In any one day of trial, a juror may take as much as 5-6 pages of notes. During the shadow juror interviews in the evenings, it has become clear that the shadow jurors sometimes get lost on their notes, struggling to find the information that supports their gut feeling or having general difficulty isolating critical evidence and testimony from everything else. This can have a detrimental effect on deliberations since the most important characteristic of a motivated advocate in deliberations is their ability shut down arguments from the other side as those issues are raised. The ability to do so in a manner that is effective and exerts influence over the group often exists in windows of opportunities. In other words, an advocate is less effective if he or she has to spend fifteen minutes or more sorting through his or her notes while an advocate for the other party takes control of the deliberations. There has been little to no attention given to how jurors take and use their notes during deliberation in this fashion. Attorneys need to consider how their presentation in



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opening, direct, cross, and closing can bring form and structure to these notes in a way that sets their advocates up for success during deliberations.

The final common thread of feedback relates to the use of jurors' time. Jurors do not like it when they feel as if an attorney is wasting valuable time in court. There are many situations that can lead to these perceptions. First, unclear lines of questions during direct or cross-examination are commonly highlighted by shadow jurors. When shadow jurors fail to understand the point of a series of questions, they tend to fault the attorney for wasting their time. Second, when attorneys stumble through their notes or outlines with long pauses between questions, jurors can get frustrated. This is perceived as disorganization, which they believe unnecessarily slows the trial down. Third, despite explanations from the judge, shadow jurors often try to place blame for an excessive number of sidebars on one of the parties. Finally, shadow jurors do not like when attorneys fumble with technology. If attorneys plan to use an Elmo or other technology at any point during the trial, they need to practice using it advance rather than assume they "get it" from short explanations of how to use the technology. The bottom line is that attorneys need to carefully consider how their organization, pacing, and use of technology impact the pace of the trial day.

These are just a few of the common problems that have been highlighted by shadow jury feedback. There is probably an entire book that could be devoted to this topic, but improvements on these few problem areas will go a long way in making attorneys more effective and persuasive advocates for their clients at trial.

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