

WHAT ARE THEY THINKING? A LOOK INSIDE THE MINDS OF JURORS REACTING TO YOUR CASE

BY JEFF M. DOUGHERTY, M.S.

It is just weeks before trial and you are wondering, as you are preparing your opening statement outline, “I wish I could know what the jury was thinking while I give my opening. Will they understand what I am trying to say here? Will the main case themes be persuasive?” There is a way to gauge what the jurors are thinking, not only during your opening but also during direct and cross-examination of witnesses; it is called a Shadow Jury or Feedback Jury.

A Feedback or Shadow Jury offers *immediate* mock juror reaction with regard to the persuasiveness and comprehension of case themes, presentation styles and critical evidence as expected *during* trial in real time. More specifically, a Shadow Jury involves a group of four to six jury eligibles who have been recruited from the trial venue according to the demographic and attitudinal characteristics anticipated within the actual jury panel. These mock jurors, via daily or twice-daily debriefing sessions with an experienced LI consultant, offer valuable insights as to the strengths and weaknesses of each side’s case. Further, these jurors reveal the evidence they expect to be presented based on what they perceive was “promised” by counsel during openings, and the questions they wish to have answered, as the trial unfolds. This information, which can be presented to the trial team via written and/or oral reports on a daily basis, assists in clarifying and refining elements of your case “on the spot.” In one instance, our defendant client had done so well cross-examining the plaintiff’s witnesses, the team considered resting without presenting a defense “case in chief.” This client wished to gauge how this strategy might be received by the trial jury. Consequently, we posed the question to the shadow jury, first asking who they believed was “ahead of the game” at that point in the trial (and most sided with the defense); then we asked how the shadow jurors would feel if the defense rested without calling any witnesses to the stand. The jurors’ responses were overwhelmingly conclusive, i.e., they all thought it would be unwise for the defense to rest. Jurors agreed it would have given them the impression that the defense either had something to hide, or did not care enough about the case to take the time to present its evidence. Either way, the message was clear: resting would likely be interpreted negatively by the trial jurors. We thus recommended to our client that they move forward with the presentation of evidence. By following our recommendations, the client reached a favorable outcome. Exit Interviews with the trial jurors reinforced the shadow jurors’ impressions and the defense team’s decision.

Moreover, a Shadow Jury assists in determining the extent to which jurors’ comprehension is consistent with your themes and strategic arguments. For example, in a personal injury case involving technical testing results for multiple types of brain scans, it was important that trial jurors understood the variations in the types of testing, the results of each and the implications therein. Any misinterpretation, misunderstanding or general confusion with regard to this testimony and evidence among trial jurors would have significantly handicapped defense-oriented advocates during deliberations on a major portion of the defendants’ case theory. During the course of the trial, even after repeated testimony on the subject, shadow jurors had great difficulty keeping the scan types as well as the results and the implications of the results of the brain scans straight. In fact, some of the shadow jurors’ understanding of this testimony was exactly the opposite of the facts. This was surprising to the trial attorneys (who had been living

this case for years leading up to trial). They knew the facts inside and out, which made it difficult for them to see this case from the perspective of “lay people.” The shadow jurors’ confusion highlighted the fact that it was probable the actual jurors were also struggling with these same concepts and it illustrated the extent to which this evidence needed to be clarified. As the trial progressed, the attorneys adopted more easily understood terms, explanations and graphics for the methodology, which ultimately assisted the shadow jurors, as well as the actual jurors, in their understanding of this complex but crucial evidence.

If pre-trial research has been conducted, a Shadow Jury may be the first time you receive juror feedback regarding your new or revised themes. Similarly, a Shadow Jury can provide the trial team with a read on a key witness (an important aspect of any case, particularly if surrogates were utilized during the mock trial or deliberation group). But even without the use of pre-trial jury research, a Shadow Jury can be a valuable asset and, in some cases, offer unique or unexpected insights that help counsel craft the direction of a certain witness or closing arguments. Working for a plaintiff in a contract dispute, it was important to learn how one of the defense’s key witnesses might be received by trial jurors. Prior to trial, mock trial results indicated almost universally that this witness would be disliked, not trusted and that his abrasive personality and behavior would be one of our client’s strong suits at trial. However, this was a reaction from mock jurors to videotaped deposition clips and not live testimony. Furthermore, this witness clearly had not been properly prepped for his deposition. Subsequently, at trial jurors saw a meek, submissive and gentle version of this individual, who had clearly been prepared by counsel. Based on LI’s background and our client’s history with the case, it was clear his trial testimony had glaring inconsistencies and blatant contradictions. To the trial team, this was obvious dissimulation and they hoped the jury was able to see through the façade. However, shadow jurors, having never been exposed to the other side of this witness’s personality, were unable to detect his feigned humility and they ended up feeling sorry for him and, in some cases, favoring his story. This result was a “wake-up call” for the trial team as they recognized that highlighting the inconsistencies of this witness’s testimony on cross-examination and during closings would still be important, but their original approach had to be retooled and softened so as not to bolster the potential sympathy trial jurors might have for this witness.

While Shadow Juries can run the course of the entire trial, there are sometimes budgetary constraints or concerns that shadow jurors will learn who is sponsoring the feedback or, more importantly, the other side will figure out the purpose of these extra “spectators” in the gallery. In these instances, we have limited our Shadow Juries to a discrete amount of time (e.g., both sides’ openings and perhaps the first witness or two, depending how many days this would span). But regardless of whether a Shadow Jury spans two days or the entire trial, learning about your case as the trial unfolds is an invaluable tool for counsel, as it allows you to clear up comprehension issues, retool themes and adjust case strategies that otherwise might have been overlooked.