Risk Management—Developing and Testing Your Case During Trial

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I. Introduction

Shadow juries and focus groups are useful litigation tools for trial, particularly in complex or high-stakes cases. Regardless of how skilled and well prepared a litigation team is, a shadow jury or focus group can help litigators see their arguments from the perspective of individuals who are unfamiliar with the case (*e.g.*, the actual jury), understand which arguments are being presented poorly or unpersuasively, and provide daily assessments about how the trial is proceeding.

This kind of information, gathered every day of the trial, can be vital in determining whether a settlement position should be reevaluated, whether a different tack should be taken during trial, or whether certain evidence or arguments should be presented, emphasized, or omitted.

There is little case law regarding shadow juries and focus groups. But it is clear that they are allowed in the courtroom and that a court should prohibit the plaintiff from mentioning or disclosing to the actual jury that a shadow jury is being used. A court should also prohibit the plaintiff from disclosing to the shadow jury that it was hired by a particular party. These disclosures would serve not only to improperly disarm the defendant from using a legitimate and powerful litigation tool, but they might also improperly influence the actual jury, which could lead to mistrial. Indeed, at least one court has determined that the judges, themselves, have no right to know that a shadow jury is being used in their courtrooms.

Shadow juries, while not commonly used, have been embraced by courts as proper litigation tools. Information gathered by jury consultants using shadow juries, focus groups, and similar litigation tools is generally protected from disclosure by the attorney work product doctrine. In addition, courts have approved attorneys' fees awards that have included reasonable fees for focus groups and similar litigation tools.

The use of shadow juries and focus groups should be considered by more litigators as they prepare for trials in complex and high-stakes cases. Such important litigation tools might make a significant difference in how litigators approach unpredictable and hard-to-read juries.

II. Analysis

A. What Is a Shadow Jury or Focus Group?

A shadow jury or focus group is a group of mock jurors paid to observe a trial and report their reactions to a jury consultant hired by one of the litigants. The size of the shadow jury may vary from one to several individuals. Some attorneys find it useful to have a shadow jury that matches, to the extent possible, the size and demographics of the actual jury.

The shadow jurors "provide counsel with information about the jury's likely reactions to the trial." *Mercado v. Warner-Lambert Co.*, 106 S.W.3d 393, 395 (Tex. Ct. App. 2003) [citation omitted]. Like a jury consultant, a shadow jury is a litigation tool available for attorneys to use in their trial preparation. One commentator has described the function of shadow juries as providing "real-time 'market research' regarding how your product is selling." Michael D. Freeborn, "Best Practices for a Do-It-Yourself Shadow Jury," *available at* http://www.freeborn.com/shadow_jury.htm (last visited Jan. 20, 2011).

There are several advantages to using a shadow jury. First, a shadow jury is unbiased and has not, as the trial attorneys have, been intimately involved in the case for several months or even years. Accordingly, a

shadow jury can help an attorney see the case the way an outside observer (*i.e.*, the actual jury) would see the case. As one commentator has explained:

> There are so many details and so many layers of information implicit in [attorneys'] 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.

Theodore O. Prosise, Ph.D., "Shadow Juries: A Unique Advantage in Civil Trials," American Bar Association, Litigation News, *available at* http://www.abanet.org/litigation/litigationnews/trial_skills/trial-practice-shadow-juries.html (last visited Jan. 20, 2011).

Second, an attorney may be unable to recognize that he is speaking in overly complicated terms or using jargon that the jury fails to understand. Shadow juries provide attorneys a unique opportunity to discover when the jury may have misunderstood what the attorneys were trying to communicate during trial. See *id.* As one commentator put it, "It is not that you are trying to predict the outcome. You are trying to do things to get them to listen and pay attention and understand." Laura Maggi, "'Shadow' jurors give lawyers idea of what verdict to expect," The Times-Picayune, *available at* http://www.nola.com/crime/index.ssf/2009/11/post_63.html (Nov. 8, 2009).

B. How Do Shadow Juries and Focus Groups Work?

The purpose of using a shadow jury is to gain its unbiased impressions related to the actual trial. This experience cannot be re-created; therefore, certain measures are taken to ensure that shadow juries can observe and report in an unbiased manner.

For example, a shadow jury is told only that it is being retained to report its impressions related to the trial. In order to maintain its impartiality (which is critically important to its purpose of rendering unbiased impressions as the trial progresses), a shadow jury is not even told that it has been hired by one of the parties. Moreover, neither the actual jury nor other members of the public should know that a shadow jury is present at the trial, so there is no chance that the actual jury would be influenced or distracted by the presence of the shadow jury.

As mentioned, perhaps because of the novelty of the concept, there is very little case law that discusses shadow juries. Or, perhaps this is because, even from the court's perspective, the shadow jury is nothing more than a few members of the general public observing a public trial. It is well established in courts across the country that trials are public proceedings, not limited to the parties directly involved. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610, 98 S. Ct. 1306 (1978) ("The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994) ("The First Amendment presumes that there is a right of access to proceedings and documents which have historically been open to the public and where the disclosure of which would serve a significant role in the functioning of the process in question.") [internal citations omitted]; *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1015 (11th Cir. 1992) ("[A]bsent some exceptional circumstances, trials are public proceedings."); *Westmoreland v. CBS, Inc.*, 752 F.2d 16, 21 (2d Cir. 1984) ("[T]he First and Fourteenth Amendments clearly give the press and public a right of access to trials themselves, civil as well as criminal.") [internal citations omitted].

Despite shadow juries being no more than members of the public who observe the trial and provide feedback to a jury consultant, plaintiffs have raised many challenges to the presence and use of shadow juries. They have urged courts to disclose the presence of shadow juries to the actual juries, asked courts to allow them to examine shadow jurors (thus revealing to the shadow juries which party hired them), sought protected information relating to the jury consultants' work with shadow juries, and challenged attorney's fees that have included costs of shadow juries and jury consultants. These issues have been addressed by courts across the country and are presented below.

C. What Have Courts Said About Shadow Juries and Focus Groups?

Shadow juries, while not commonly used, have been embraced by courts as proper litigation tools. The disclosure of shadow juries to the actual juries is prohibited. In addition, information gathered by jury consultants using shadow juries and similar litigation tools is generally protected from disclosure by the attorney work product doctrine. Finally, courts have approved attorneys' fees awards that have included fees for focus groups and similar litigation tools where the use of such tools was reasonable and not excessive.

1. Reference to the actual jury of the presence or use of a shadow jury is prohibited

A party cannot dispute the public nature of a civil trial or logically suggest that anyone who enters the courtroom should be denied access to the public proceedings. Accordingly, a party has no basis to argue that the opposing party should be prohibited from using a shadow jury during trial. Nevertheless, plaintiffs have attempted to prevent defendants from using shadow juries and have urged courts to disclose the use of shadow juries to the actual juries.

Courts have rejected such attempts to prevent or disclose the use of shadow juries on grounds that such interference with shadow juries is irrelevant and prejudicial to the trial proceedings and would prejudice defendants by disarming them of important and accepted litigation tools.

Except that it reports its impressions to the proctor after a day at trial, a shadow jury is no more than a group of public observers. Accordingly, there is no reason a court should treat a shadow jury differently from any other group of public observers. There is no evidence to suggest that a shadow jury would be any more likely to interfere with trial proceedings than any other public group. Indeed, members of the public who have a stake in the outcome of a trial (*e.g.*, taxpayers observing a tax dispute, public interest groups observing the interpretation of controversial legislation, or homeowners observing a trial regarding a zoning dispute) might be more likely to disrupt the trial proceedings. Of course, in those situations, the court would exercise its inherent control over its courtroom and deal appropriately with any issues caused by those public observers.

The only reason a plaintiff would have to encourage the disclosure of a shadow jury would be to deny a defendant the benefit of a useful litigation tool. Even assuming that the shadow jury is somehow relevant to an issue at trial (which it is not), any mention of the shadow jury should be barred. The probative value of any such "evidence" is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. *See* Fed. R. Evid. 403.

Keeping shadow jurors ignorant of who hired them and actual jurors ignorant of the existence of the shadow jury has helped prevent improper influence on the actual jury, which would result in a mistrial.

For example, in *Mercado v. Warner-Lambert Co.*, 106 S.W.3d 393 (Tex. Ct. App. 2003), the plaintiff moved for a new trial, alleging that jury misconduct occurred when a shadow juror approached an actual juror during break, asking for a cigarette and a quarter. *Id.* The actual juror testified that he did not know that the man who approached him was a shadow juror hired by one of the law firms. *Id.* In fact, the actual juror testified

that he thought the man was part of the plaintiff's family because he often sat behind the plaintiff at trial. *Id.* The actual juror further testified that he and the man never discussed the case. *Id.* In addition, lead counsel for the defendant stated that, although his law firm had hired a third party to hire shadow jurors, he did not know the names of the shadow jurors and the shadow jurors did not know which party had hired them. *Id.*

The Texas Court of Appeals affirmed the trail court's denial of a new trial, finding that "neither the shadow juror nor the [actual] juror knew with whom the shadow juror was affiliated. As such, there could be no conscious or subconscious influence. The trial court did not abuse its discretion when it denied Mercado's motion for new trial." *Id.* at 397.

Similarly, in *Lafferty v. Stevens Memorial Hospital*, Nos. 56313-1-I, 56382-3-I, 136 Wash. Ct. App. 1027, 2006 WL 3775848 (Wash. Ct. App. 2006) (unpublished), the defendant moved for mistrial, in part, because it learned of an interaction between a shadow juror and an actual juror. *Id.* at *8. The plaintiffs had retained a jury consultant who hired three shadow jurors to listen to the evidence during the trial. *Id.* The jury consultant did not tell the shadow jurors which party retained them. *Id.* About a week and a half into the trial, defense counsel observed the shadow jurors enter the jury lounge during the lunch hour and contact an actual juror. *Id.*

The court separately questioned the three shadow jurors and the jury consultant and learned that the interaction was limited to an inquiry about parking validation. *Id.* The court also found that the three shadow jurors were not told which party had retained them and had been instructed not to discuss the case with each other or with anyone else. *Id.*

The defendant requested that the court (1) question each member of the jury panel about any interaction with the shadow jurors, (2) identify the shadow jurors and jury consultant to the jury panel, and (3) tell the jury panel that the shadow jurors had no affiliation with the defense. *Id.* The court denied the defendant's motion for mistrial and its request to question the jury panel members and inform them about the shadow jurors, concluding that the brief interaction about parking validation caused no prejudice to any party. *Id.*

The Washington Court of Appeals affirmed, finding that the trial court conducted an appropriate inquiry and that the trial court's refusal to order mistrial was not an abuse of discretion. *Id.* *9. The appellate court reasoned that the evidence demonstrated only a limited interaction between the shadow juror and the actual juror and that the interaction was unrelated to the case. *Id.* The appellate court also found that "[t]here was also no evidence that the shadow jurors knew who retained them, making it extremely unlikely that the juror knew who the shadow juror was affiliated with and in any way compromise the impartiality of the jury." *Id.*

Nothing in either opinion suggests that the presence or use of shadow juries was improper. To the contrary, *Mercado* and *Lafferty* demonstrate that courts accept the use of shadow juries during trial. The courts, when faced with the challenge to the use and presence of the shadow juries merely made inquiries to determine whether the interactions between the shadow jurors and the actual jurors compromised the impartiality of the jury.

Moreover, these cases stand for the proposition that it would be improper to disclose the use of a shadow jury to a sitting jury during an ongoing trial. In both cases, the safeguards put in place to ensure that the shadow jury remained impartial (and, thus, effective in its observation and reporting about trial), prevented the shadow jury from inadvertently having improper interactions with the actual jury. In other words, the very mechanism established to maximize the benefits of shadow juries serves to make the shadow juries acceptable by courts. Indeed, both the *Mercado* and *Lafferty* courts found that the disclosure of the shadow jury, rather than the use of the shadow jury, would have been improper.

As the courts observed, mentioning the shadow jury and its affiliation, might have consciously or subconsciously influenced the actual jury, which would have had a negative and prejudicial impact on the judicial process. Specifically, the actual jury might have been more focused on the shadow juror reactions and not on

the evidence being presented at trial. *See* David Gidmark, "The Verdict on Surrogate Jury Research," 74 A.B.A.J. 82 (1988) (quoting Terry Lunsford, consultant with National Jury Project of Oakland, California) ("[t]here is some evidence from past trials … that jurors don't like [shadow juries] … they're very likely to spot shadow jurors and figure out who they are. There have been some cases where they have reacted negatively to this.")); Marie Price, "Despite Popularity of Paid Courtroom Observers, Some Experts Question Their Effectiveness," Journal Record, Oklahoma City, OK (Mar. 1, 2007) (shadow jury expert opining that when the real jury knows about the shadow jurors and who employed them "[y]ou just don't know what kind of message they're going to take").

Further, the shadow jury's knowledge of its affiliation might have negatively affected the parties' trial strategy because the shadow jurors--now aware of who hired them--might have been biased in observing and reporting on the trial, thus wasting the hiring party's time and resources.

2. Courts themselves have no right to the disclosure of a shadow jury at trial

At least one court has found that a court does not have the right to know that a shadow jury is present at the trial. In *BASF Corp. v. Lyondell Chemical Co.*, [No case number available], 2010 WL 5288645 (N.J. Super. A.D. Dec. 28, 2010) (unreported), the plaintiff suggested at trial that the defendant's use of a shadow jury indicated that the defendant did not trust the actual jury. *Id.* at *15. Because the appellate court decided the appeal on other grounds, it did not have to address whether this statement required a mistrial. *Id.* Nevertheless, the appellate court noted its disagreement with the trial judge's assertion that she needed to know who was in the courtroom at all times. *Id.* (Apparently, until the plaintiff made its comment about the shadow jury, the trial court did not know that a shadow jury was present in the courtroom.) The appellate court noted that "[t]rials are open to the public … . A general requirement that individuals attending a trial identify themselves appears to us to be inconsistent with the spirit of that rule." *Id.* [citation and quotation omitted]. The court explained:

> If witnesses have been sequestered, as they were in this trial, a trial judge certainly has the right, and indeed the obligation, to make sure that witnesses are appropriately sequestered by asking, directly or through a court aide, whether someone entering the courtroom is a witness or potential witness. The judge did not need to know that jury consultants or members of a shadow jury were in the courtroom because a judge should also generally instruct members of the jury not to discuss the case with anyone during breaks, including people attending the trial, the parties, counsel, and other members of the jury (except during deliberation). And, the judge can also instruct members of the public to refrain from contact with members of the jury. A judge does not need to know the identity of those sitting in the courtroom to give such instructions.

Id.

Lyondell demonstrates that, not only are shadow juries permitted in courtrooms, judges do not need to be made aware of their presence.

3. The work product of a jury consultant is not discoverable absent showing of substantial need or undue hardship

Related to the use of a shadow jury for trial is the retention of a jury consultant to conduct mock trials. Discovery of a jury consultant's discussions with counsel, including notes of such discussions, may reflect the mental impressions and legal theories of counsel and, therefore, are protected by the work product doctrine.

In *In re Jefferson County Appraisal District*, 315 S.W.3d 229 (Tex. Ct. App. 2010), the trial court granted the plaintiffs' motion to compel and directed the defendant to disclose the identity of the defendant's jury consulting expert (who conducted a mock trial) so that the plaintiffs could depose him. *Id.* at 231. The Texas Court

of Appeals vacated the trial court's order, finding that the discovery of the jury consultant's discussions with defendant's legal counsel, including notes of such discussions, may reflect the mental impressions and legal theories of the defendant's counsel. *Id.* at 234. The court concluded that "such information goes to the core of the work product doctrine and is not discoverable. *Id.* The court further held that "any material or impressions developed by the jury consultant in anticipation of trial that reflect the consultant's opinions or conclusions is ordinarily not discoverable, unless otherwise disclosed or reviewed by a testifying expert." *Id.*

In re Jefferson County suggests that the work product doctrine extends to protect the material or impressions developed by a jury consultant from his observations. The data he gathers from a shadow jury would similarly be protected from disclosure by the work product doctrine. *See* Grimm *et al.*, Discovery Problems and their Solutions 145 (ABA Section of Litigation, 2005) ("Discovery of the substance of communications of mock jurors or focus groups and their identities should also be protected, although no cases have directly addressed this issue.").

4. Fees for shadow juries and focus groups are recoverable by law, but when challenged, courts will scrutinize whether these litigation tools were necessary and the fees were reasonable

There are very few cases dealing with fees relating specifically to shadow jury services. But courts have considered challenges to focus group fees, mock juries, and similar litigation tools and have determined that the fees have been recoverable when the use and cost of the litigation tools were reasonable.

For example, in *Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.*, No. CV 00-1693-A, 2003 WL 23715982 (D. Or. Oct. 27, 2003), the defendant—who had lost at trial and was ordered to pay the plaintiffs' attorneys' fees—asserted that, as a matter of law, such services as mock juries are never compensable as either attorneys' fees or costs. The District Court of Oregon disagreed, finding that a number of decisions have concluded otherwise. *Id.* at *8. The court, awarding the mock jury's standard fee, explained:

> I do not suggest that mock trials and jury consultants are necessary expenditures in routine litigation. Far from it. However, this was a complex case with many millions of dollars at stake. Plaintiff's experienced counsel reasonably concluded that Defendant would likely employ these services itself, and that Plaintiff would be at a decided disadvantage at trial if it did not match that expenditure. I find that, under all the circumstances, this expenditure was reasonably necessary to the successful prosecution of this action, and is compensable as part of Plaintiff's attorney fees.

Id.

Confederated Tribes demonstrates that courts, when facing challenges to litigation tools similar to shadow juries, will consider factors, such as the complexity of the case and the amount at stake, to determine whether the expenditure was necessary. This reasoning is consistent with a long line of cases across the country that also demonstrates that courts will reduce fees for these litigation tools when they find that the fees were excessive. See, *e.g.*, *Sigley v. Kuhn*, Nos. 98-3977, 99-3531, 2000 WL 145187 (6th Cir. Jan 31, 2000) (unpublished) (affirming trial court's award of expenses associated with mock trial); *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990) (allowing reasonable costs incurred for "a moot court trial run, and on consultations regarding a jury project related to the case"); *Charles v. Daley*, 846 F.2d 1057, 1076-77 (7th Cir. 1988) (allowing fees for "mock oral arguments," although eliminating some excessive charges); *Majestic Box Co., Inc. v. Reliance Ins. Co. of Ill.*, No. 96-8118, 1998 WL 720463 (E.D. Pa. Sept. 2, 1998) (finding that the complicated nature of defense justified defendant's expenditures on "mock trial"); *Guzman v. Bevona*, No. 92 CIV. 1500, 1996 WL 374144 (S.D.N.Y. July 3, 1996) (finding that expenses for "focus group" were recoverable); *Dubin v. E.F. Hutton Group, Inc.*, 878 F. Supp. 616, 623 (S.D.N.Y. 1995) (allowing recovery for costs of "mock jury trial");

Finkelstein v. Bergna, 804 F. Supp. 1235, 1239, 1258-59 (N.D. Cal. 1992) (allowing fees and costs associated with one mock trial and focus group, including employment of high-caliber attorney to act as mock opposing counsel, but disallowing second mock trial because contested issues were close to resolution by then); *Aguinaga v. United Food & Commercial Workers Int'l Union*, 142 F.R.D. 328, 337 (D. Kan. 1992) (allowing recovery of expenses for mock trial), *reversed on other grounds*, 993 F.2d 1480 (10th Cir. 1993); *City of Shreveport v. Chanse Gas Corp.*, 794 So. 2d 962, 979 (La. Ct. App. 2001) (finding that the court has discretion to award expenses for mock trial and jury consultant). *Cf. Denesha v. Farmers Ins. Exch.*, 976 F. Supp. 1276, 1291 (W.D. Mo.1997) (disallowing mock trial expenses on ground that the particular case did not warrant such preparation), *reversed in part on other grounds*, 161 F.3d 491 (8th Cir.1998).

In short, so long as the use of the shadow jury is both reasonable (based on the complexity of the case and significance of the outcome) and not excessive, courts will allow them to be included in attorneys' fees awards.

III. Conclusion

In complex or high-stakes cases, shadow juries and focus groups are useful litigation tools for trial. They can help trial attorneys see their evidentiary presentations and arguments from the perspective of a group of individuals who have not lived, as the attorneys have, with the case for several months or years. They can also help attorneys understand which evidence and/or arguments are unclear or unpersuasive and provide daily assessments about how the trial is proceeding.

There is presently little case law regarding shadow juries and focus groups. Courts that have considered issues relating to the use or presence of shadow juries and focus groups have accepted the use of these litigation tools. Courts have found not only that shadow juries and focus groups are allowed in the courtroom but that parties are prohibited from mentioning or disclosing to the actual juries that shadow juries are being used. Further, courts have prohibited the disclosure to the shadow juries that they were hired by particular parties.

In addition, information gathered by jury consultants using shadow juries, focus groups, and similar litigation tools is generally protected from disclosure by the attorney work product doctrine. Courts have approved attorneys' fees awards that have included reasonable fees for focus groups and similar litigation tools.

The use of shadow juries and focus groups is being accepted by courts across the country, and litigators are encouraged to take advantage of these tools to assist them with the preparation of complex and high-stakes trials.