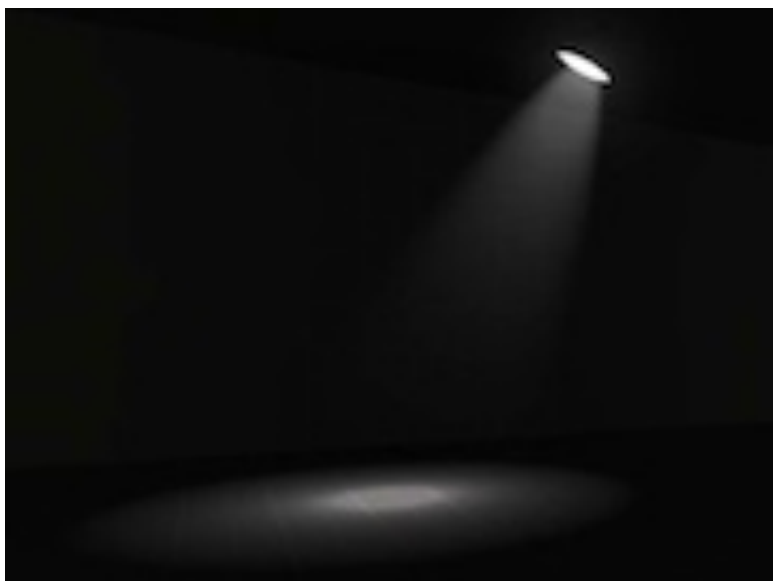


## Out of the Shadows, Into the Jury Box

by [Alexandra Rudolph](#) and [Tara Trask](#)

In today's world of high stakes litigation, we have one question: Why wouldn't you use a shadow jury? It's very likely that your opponent is using one. What once was limited to the pages of a John Grisham novel is becoming more common in the courtroom. A shadow jury reduces the guesswork by providing real-time feedback on elements that can make or break a case. Knowing what is working, what isn't working and why gives you an undeniable edge.



### **"So helpful it feels like cheatin'"**

Experienced trial lawyers are recognizing the tremendous value of using a shadow jury. In fact, we have both experienced dueling shadow juries on several occasions. One of our clients goes so far as to call the advantage he gets from a shadow jury, "so helpful it feels like cheatin'".

Even the most seasoned trial teams, consultants and experts cannot provide the same feedback that a small group of laypeople who are completely new to the case can provide. It is simply a different

perspective. At the end of the trial day, shadow jurors are debriefed by a professional facilitator. They provide their unvarnished views on the presentation style of the lawyers, the content of the testimony, what they heard (and often more importantly what they didn't hear), their thoughts and feelings about what they are hearing, the credibility of the witnesses, the influence of the judge on the case and a general perspective on what they think the case is even about.

It is important to understand what shadow juries can do and what they cannot do. Shadow juries are not a crystal ball that allows you to see into the minds of the actual jury. In fact, the name "shadow jury" is unfortunate and has likely caused confusion over time as to the role of the participants. Shadow juries are not meant to predict the outcome of the trial. There are simply too many variables to replicate for any predictive validity to be measured and any social scientist worth their salt will tell you that. Instead, shadow juries are used to provide

another vantage point, one that may indeed be more closely aligned with that of the actual jury, than anyone else on the trial team. In fact, it's best to think of shadow jurors as "lay translators" providing feedback to the team.

Historically in our practices, the shadow jury has usually been aligned with the views and decisions of the actual jury, the variation being mostly in degree. Every moment spent in front of the jury should be accomplishing some goal. Are you achieving the goals you are hoping to achieve each day? Did the points your witness was trying to make get through? Did they understand that concept that your expert explained that is central to your case? Are you beating a dead horse? These are the kinds of questions that the shadow jury can answer for you every day. With a shadow jury in place, these problems can be measured and adjustments can be made. Frequently, some of the best arguments, analogies and general trial strategies can come from suggestions of the shadow jury.

With thirty years of collective experience, we've heard all the criticisms about shadow juries. Of course, not every case warrants the use of one. However, with the exception of cost, and we agree shadow juries only make sense when big damages are on the line, the question isn't why should you invest in a shadow jury, but why *wouldn't* you?

### **"My instincts are good enough"**

As a trial lawyer your instincts are better than most, but if you are very experienced, you have probably lost a trial you thought you were going to win. It's a sobering experience.

#### *Perception is Reality*

Being technically right is nice but does not mean you will win the case. Verdicts are driven by the jury's understanding of the facts, not necessarily the facts themselves. Lawyers often look at a case from a legal perspective. Jurors don't. They see it completely differently, relying on their personal experiences and common sense, not case law.

On countless occasions, we've had counsel return from the trial day, high-fiving one another, the entire team convinced that the day's cross was a homerun. And then the shadow jury report comes in and the consensus of the shadow is that you didn't lay a glove on that expert, or worse yet; they loved him and thought you were nitpicking. These are the moments when a shadow jury can prove most valuable.

#### *Leave it to the Professionals*

When the shadow jury is reporting information that is different or at odds from most of the trial team, this can be disorienting, and it is understandable that counsel may find this distracting. This is why it is so important that you have confidence that the shadow jury is



being run correctly. When you retain a consultant, ensure that their recruiting and debriefing methods are sound. For example, shadow jurors should always be debriefed separately, rather than in a group. Does the facilitator have the experience and training to spot subtle biases and entrenchment of jurors over time? If you have satisfied yourself that the shadow is being run professionally, can you really disregard the views of six independent individuals who thought your cross was ineffective?

### **“Shadow juries can be disruptive”**

There was the Ernst & Young trial in 2009 that was nearly derailed when an impaneled juror spoke to a member of the shadow jury. Apparently, they were friends (Mishory, 2009). Things like this should never happen. Regardless of the fevered pitch of the morning of openings, it is imperative that the shadow jurors be screened for their knowledge of the actual jury. Again, retaining a consultant that has extensive experience with shadow juries is absolutely crucial. The research is being conducted real time at the trial and control of the shadow jury and an understanding of what processes need to be in place to ensure that the shadow jury does not impact the actual trial process in any way is imperative.

#### *Recruitment Is Critical*

Facilitating a shadow jury is both a science and an art. Take for example the angry shadow juror who protested his being fired by holding up flyers and telling his story of woe to anyone who would listen (Richardson, 2010). A renegade shadow juror is the nightmare of the consultant and counsel alike, but while there is no way to completely avoid a crazy episode such as this, there are ways to minimize the possibility. Spending time with the prospective shadow panel is important. Quirky or crazy tendencies can usually be identified and an

intuitive consultant will always err on the side of getting rid of any wild cards early.

Shadow juries should be composed of five or six jury-eligible people who have been carefully screened prior to the trial. Less than that is not recommended. Social scientists look for trends in data. There is no value in hiring one or two people to watch the trial. Not only does it compromise the validity of the data, but can actually be harmful. Without a significant group to compare, it is impossible to know if a single person’s feedback is consistent with general perceptions or is an outlier. Trials can last several weeks therefore it is important to allow for the possibility of losing a participant for any number of reasons during the course of the case.



Typically, a pool of prospective shadow jurors is recruited, much like the panel that is called down for jury duty. This group needs to understand in advance, that they may or may not be chosen for the project. Clear communication up front is key. Prospective shadow jurors must

be paid fairly for their time even if they are not chosen. Further, all shadow jurors must understand their role, the rules and the temporary nature of the engagement. Any problems or potential problems with this arrangement should be dealt with quickly.

It is imperative that the shadow coordinator have no contact with the trial team during the trial day. The shadow jury cannot know who has retained them and maintaining anonymity in the courtroom while being in constant communication with the trial team is challenging for the facilitator. Consultants are trained for this and used to it. Often, trial counsel is not. If you believe six people hired to watch the case didn't notice you giving the consultant a meaningful look at a critical moment or slightly nodding your head, you are underestimating them and, chances are, also underestimating what the real jury observes. They see everything. You are *always* on stage.

### *Don't Leave the Court In The Dark*

In this day and age, we do not conduct shadow juries in the shadows. Opposing counsel should be apprised that you are planning to conduct a shadow jury. You should file a motion in limine with the court not only about the mention of a shadow jury, but the mention of a trial consultant as well. It has been our experience that shadow juries run most smoothly when everyone is aware of what's going on, including the Court.

### **"Shadow juries can throw you off track"**

There is no substitute for the sound, strategic decision making of an experienced trial team. Blindly following anything a shadow jury suggests defies common sense. All information gleaned from a shadow jury must be considered, filtered and contemplated. It is simply another tool. More often than not, if the information is surprising, there is an "ah-ha" moment in the trial team or a realization that the goals of the day might not have been accomplished as planned.

How can you know if you can trust your shadow jury? Again, how it's run and who is facilitating it matters a great deal. It's easy to be lulled into thinking that shadow juries are simple to run. They are not. Ensuring that the shadow does not know which side retained them, ensuring that they are not talking to anyone about the case, investigating the case, or in any way gleaning outside information takes constant vigilance on the part of the facilitator. Also, it is important for the facilitator to be on the lookout for hints that the shadow jurors are becoming entrenched, or that they are not paying attention. All these factors must be taken into consideration when weighting their input.



## “Shadow juries are too expensive”

Shadow juries are expensive, and they are not for every case. It is also important if you choose to run a shadow jury not to skimp. In order to have participants who not only provide valuable feedback, but are a close match to the actual jury in demographics, background and value and belief systems, going down to the local employment agency will not work. Instead, you must retain a reputable consulting firm with broad experience in shadow juries to ensure a solid recruit, good attendance, extensive pre-screening and most importantly, professional facilitation and control of the shadow jury at all times.

Serial litigation can especially benefit from shadow jury research. Often, the same experts from both sides are called for multiple cases. Shadow juries provide a collection of data on experts or key witnesses including perception of credibility, their strengths and weaknesses. That information alone is a gold mine. How can your witness improve? What do they think about opposing counsel’s expert? If he or she is especially compelling, why? What can you do differently next time? What about your experts? How well are they received by jurors and how can they improve?

Whether or not to deliberate a shadow jury is a decision that should be made by the consultant and lead counsel. Sometimes, its best not to deliberate the shadow jury but rather to have each shadow juror fill out the verdict forms individually. If the team chooses to have the shadow jury deliberate, its important to remember that the result is in *no* way predictive, but rather that the thematic information gleaned can be of use. Knowing what evidence drives their decisions, the counterarguments, examples they use to explain unclear concepts and their final decision is invaluable for crafting closing arguments. Similar to a mock trial, watching the process and what drives their decisions allows the trial team to craft a compelling closing that clarifies any misinformation and utilizes the most powerful parts of the case instead of spending time on arguments they largely reject, is simply good strategy. Yes, shadow juries are expensive, but with tens or hundreds of millions on the line, the value of a shadow jury is comparatively huge.

Consider taking shadow juries out of the shadows. Shadow juries can be one of the most useful tools in the trial lawyer’s arsenal when the case warrants it. A partner at a high-stakes litigation boutique has a simple answer to the question of which cases are appropriate for shadow juries – “All the ones I want to win.”

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## Editor's Note

As you page through this issue, you'll see content on shadow juries, managing and mentoring Millennials, a review of the iJuror application for the iPad, recommendations on family law disputes, some research on damages presentation, thoughts on communication and gender of attorney, supplemental jury questionnaire items for Arab or Muslim parties in cases, and an interview with the trial consultants involved in the civil rights retrials featured in the new movie *Neshoba*. As always, our goal is to educate and inform and cause you to think. We do that through a combination of articles and a sprinkling of original research and technical pieces aimed at helping you keep up with the latest in trial advocacy and thought. We have two departures from trial advocacy in this issue--the interview elicited by the *Neshoba* movie release and the article on *Managing and Mentoring Millennials*.

We are proud of our history with civil rights and proud of our ASTC members who have worked to bring justice (albeit delayed). We're bringing you this interview with Andy Sheldon and Beth Bonora to show that pride and to highlight the contributions of these consultants. (And to encourage you to see the movie!) The Millennial piece is a follow-up to our piece in the July issue on what we really know about the Millennial generation. There has been a tremendous debate in the online community on the work ethic of the Millennial attorney. We are publishing this review of research on the Millennials at work and offering management/mentoring tactics to firms struggling with welcoming and retaining Millennial attorneys.

Read. Comment. Enjoy. Tell your friends and colleagues about The Jury Expert! And (ta-da!) watch for our very cool and way current web redesign coming at some point during the next month!

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