



How Modern Juries Decide

Panel Presentation: *How Modern Juries Decide*¹¹

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The ultimate good news in what I am about to tell you is that notwithstanding modern advances in the use of technology in the courtroom or in the application of the latest techniques in trial strategy consulting, the best predictors of trial outcomes remain the quality of the evidence. This is particularly reassuring to know given the topic of our panel because modernization is often perceived as a mixed blessing. Its unfamiliarity leads many of us either to distrust what is new or to trust it too broadly.

Today I want to explore with you the complicated relationship between trust and technology as it is reflected in the various ways in which technology appears in modern courtrooms. This topic is especially intriguing for me as a psychologist because it resides at the interface of psychology and the law, with regard to the effects of technology on courtroom life and decision-making. And, trust it or not, we should make no mistake about it. Technology has transformed the courtroom.

In my work as a trial strategy consultant, and in particular when I assist with jury selection, I see the dividing line between those who trust modern technology too little and those who trust it too much as being at around age 45. Those under 45 know and trust technology more than those of us beyond that age. The simplest measure I've come up with to assess familiarity with technology for those who attended college is this: Did you take a typewriter or a computer with you to college?

Technology in the courtroom is attended by people's expectations. Lawyers expect technology to help them teach complicated ideas more easily. The old adage "a picture is worth a thousand words" is truer than ever before as our ability to summon up and manipulate images is greater than ever before. And, jurors expect technology to provide them with better evidence. Clear, instructive demonstratives enable complex concepts to be effectively taught – again, a reassuring thing in our country where we continue to rely on ordinary jurors to reach verdicts in all manner of complex cases.

In my practice as a trial consultant, I work often on patent cases and on securities fraud cases. Both are marked by serious complexity – modern inventions and current corporate finance practices are often Byzantine in their complexity. Yet, jurors rise to meet the challenges inherent in these cases provided that attorneys undertake the work necessary to make complex concepts clear. Pre-trial research and technology can help.

With regard to patent cases in particular, it is both a modern and an old suggestion that judges ought to try these cases. Analyses conducted by Kimberly Moore, then a law professor at George Mason University and now a judge on the U.S. Court of Appeals for the Federal Circuit, looked at all patent cases (over 1600) that went to trial in the U.S. from 1983 – 1999.^[2] In 2001, she published an article that compared the decisions of judges and jurors in complex patent matters. Her analyses revealed that while juries favored patent owners more than judges did, the rate at which these decisions were affirmed on appeal was the same whether the decision was made by a judge or a jury. Patentees, by the way, prevailed 63 percent of the time when juries decided the case, but only 49 percent of the time when judges rendered the verdict. (And both get reversed about half the time.)

In 2005, just about a year before she was named to the Federal Circuit, Moore testified before Congress and advocated that specialized trial judges should be appointed to preside over patent cases.^[3] She has come to believe that the complexity is more than jurors can handle and has written that “the less a jury understands about the technology, the more likely unrelated issues will influence decision-making.”^[4] Of course, this is not a new idea, but it is one that has never prevailed over our great and continuing commitment to the importance of having ordinary jurors make decisions even in complex cases.

It is certainly important, though, for attorneys to reckon with the greater complexity that attends modern inventions in areas such as biotechnology or microprocessors, and to rely on the store of resources that are available in these modern times. Because of trial strategy consulting and our empirically based pre-trial research techniques and because of courtroom technology, lawyers can be better positioned than ever before to bridge the gap between what jurors know and what they need to know in order to adjudicate cases fairly.

I want to talk with you briefly about both of these things: the contributions of trial strategy consultants through the pre-trial research studies we conduct and the role of new technologies in the courtroom.

When very complex information must be presented at trial, one of the best ways to figure out how to do this is to conduct focus groups and mock trials. These are relatively new tools for attorneys – the first formal use of such research techniques for trials began in the early 1970s. In focus groups, in particular, complicated ideas can be presented and discussed interactively with ordinary citizens – something that, of course, can not happen in the courtroom – not even courtrooms that employ modern procedures and permit jurors to take notes and to ask questions. The focus group moderator can explore with the participants in an ongoing exchange what aspects of the technology they found particularly difficult and what alternate ideas or analogies might help them to understand more.

Mock trials can also be useful in this regard. In one case I worked on, tried here in Chicago in fact, the invention at issue involved a chemical composition used in medical settings. An issue in contention was whether certain molecules were in solution or not. During the deliberations, one mock juror explained to the others that molecules in solution were not like the sticks and balls their chemistry teacher might have used to explain the structure of molecules. She said that molecules in solution were more like Kool Aid in water, where the particles actually dissolved, where their shape was changed by being in solution. That day, through those deliberations, we learned alternate ways to

teach the chemistry that jurors needed to understand in order to make reasoned decisions about the patent at issue and whether or not it was infringed, or invalid.

The increasing popularity of pre-trial research enables attorneys to pre-test various strategies for teaching complex material and for doing so in persuasive ways. One of my fundamental beliefs about this work is that people like to learn new things. Lessons clearly taught are gifts to jurors. I often tell my clients that the better teacher wins, and I believe this is so. Technology is one of the important tools that an attorney can use to be a better teacher.

Modern courtroom technology includes laptops that enable exhibits to be quickly located and broadcast to screens or monitors for the jury's benefit. Animations may be used to illuminate particular aspects of complex cases, such as the way complicated, multi-party, financial transactions occur over time and are reflected in a company's books and records, or what happens when new genetic material is introduced into a cell. Some animations are themselves scientific events, such as the animations produced to replicate airplane crashes in efforts to determine precisely what happened.

Other, powerful courtroom technology is text-based and includes the ability to show portions of deposition testimony with the witness on the screen. As the witness' testimony plays, portions of the transcript appear sync'd with what he is saying. Jurors can see the witness, hear and read his testimony. Especially when deposition testimony is being used for impeachment purposes, such use of technology can add real impact to aggressive cross examination.

Before I conclude, I want to shift gears a little bit and talk about two more aspects of modern courtrooms: First, modern expectations about email as evidence and second about the technology that jurors bring with them into the courtroom.

Emails are a relatively new form of evidence and are increasingly a feature of the modern courtroom. Jurors expect to see email evidence. Emails are especially interesting to jurors because they may be taken to illuminate the un-reflective thinking of their authors. Emails shot from the hip may be seen as more truthful than the testimony carefully planned later at trial to explain it.

Emails are often quickly and cryptically written – they tend to be brief, especially in business exchanges, and are highly affected by context – inside jokes or understandings, attempts at humor or sarcasm. Five years ago, incriminating emails were the touchstone in many securities fraud cases. The defense had little chance of having jurors understand the context in which such emails were written or the likely lack of reflection or criminal intent that preceded hitting the send button.

More recently, more jurors know more about email. Many jurors know that all emails are saved forever, and they believe that the authors of potentially incriminating emails knew this as well. The fact that emails are now known to be discoverable has changed the way bad emails are perceived. After all, the author knew that this email would last forever and could be unearthed. With this thought in mind, modern jurors may be more likely to see a poor choice of words as nothing more than that and not as a sign of criminal intent.

And, finally, I want to talk about the possibility that jurors, despite the court's instructions may get information about their cases on the Internet. It has become so

easy to do this – intentionally or not. Log onto AOL or any other internet browser and headlines of interesting cases will appear before your eyes.

At a recent murder trial where I assisted with jury selection, when we broke for lunch the judge failed to admonish the jurors not to read about the case. After all, it was only lunch. By the time we returned to continue jury selection in the afternoon, three of the prospective jurors in the box, those in the midst of being voir dired, had googled the case on their blackberries over lunch. The judge was horrified, and all of us in the courtroom that day learned a new lesson about the jurors' heightened access to information through technology.

Judge Moore's view notwithstanding, I am regularly impressed by modern juries. They learn more from more sophisticated techniques and technologies than ever before, I believe. It behooves those of us who work in courtrooms to learn how to use the tools that are available to us, to become better teachers. There is nothing quite as persuasive as good teaching. Soon you will hear more about the research on juries from Mary Rose, and I think you will find it reassuring. On this point, I also refer you to the work of Shari Seidman Diamond, and her 2006 article, "Beyond Fantasy and Nightmare: A Portrait of the Jury."^[5]

In this review of the research literature, Diamond paints a picture of jurors that reveals that they are sensible and sophisticated. Attorneys should not assume that those who end up on juries are the least educated or the most influenced by experts. Research shows this not to be the case. Diamond also shows that every bit of the trial matters. The evidence, now as always, matters most.

Modern juries can be informed, competent finders of fact even in complex cases. By paying attention to the role of technology in the courtroom, you can advance your trial preparation in many different ways, and, in these new ways, enhance your chances of success at trial.

Addendum

Shari Seidman Diamond Article Summary

In *Beyond Fantasy and Nightmare: A Portrait of the Jury* (Buffalo Law Review, Vol. 54, No. 3, December 2006), Seidman Diamond provides an overview of the current state of jury research. She lists ten common images of juries and then examines the validity of them based on the latest empirical jury research. Here are the ten images, and what the current research says about their accuracy:

1. Juries in civil cases tend to be pro-plaintiff

Conclusion From Research: Inaccurate about liability, but accurate about damages.

Statistical evidence does not show that civil jurors are more pro-plaintiff than pro-defendant. In studies in which jury verdicts were compared to the judge's leaning, juries were no more pro-plaintiff than judges on liability, but juries tend to award higher damages.

2. Juries are generally made up of uneducated citizens who can't figure out a way to get out of jury duty

Conclusion: Inaccurate.

If juries are less representative of their venires, which remains open to argument, the juries are more slanted toward older, non-minority, higher SES jurors. Methods that courts use to initially obtain jurors using voting lists and DMV records tend to miss younger and minority jurors. In addition, newer initiatives in many states have led to fewer occupational exceptions of such high-level jobs as lawyers and doctors.

3. The case begins and ends with jury selection

Conclusion: Inaccurate.

Jury selection is an important factor, but jury research has shown that juror characteristics are less predictive of verdict than the quality of the evidence. Deliberations routinely lead to individual jurors changing their decisions as well.

4. Citizens set aside their prejudices and biases when they take on their roles as jurors

Conclusion: Inaccurate.

“There is little doubt that expectations, beliefs and values affect the way that jurors react to evidence.” The impact is most clearly seen in death penalty cases.

5. The opening statements determine the verdict because jurors make up their minds by the time that opening statements are concluded

Conclusion: Inaccurate.

Research shows that jurors routinely change their views based on evidence and testimony during the trial, and change in deliberations as well.

6. Jurors will uncritically accept the claim of a highly credentialed expert who presents complex testimony that the jurors are unable to understand

Conclusion: Inaccurate.

Jurors critically analyze expert testimony. Jurors weigh expert testimony with the knowledge that one side hired the expert, and they are duly skeptical. They also dismiss unclear testimony.

7. Jurors generally ignore the judge's instructions on the law and rely on their own standards to reach a verdict

Conclusion: Inaccurate.

Mock trials consistently show that jurors work hard at applying the law provided in the judge's instructions. They are often hampered, however, by poorly written instructions. Jurors have also been found to be unable to disregard information (such as not to consider the defendants' criminal record in the verdict) in making their decisions.

8. The foreperson is a high status juror who controls the jury's deliberations and determines the jury's verdict

Conclusion: Inaccurate.

The foreperson is usually a somewhat high status person, but is not significantly more influential than the other jurors. Juries tend to pick a foreperson who will help them deliberate by facilitating conversation and decision-making, but not who they wish to obey.

9. The most talkative juror dominates the jury's deliberations and has the strongest influence on the jury's verdict

Conclusion: Inaccurate.

Talkativeness is not an especially influential juror characteristic, and can be seen positively or negatively by other jurors.

10. Deliberations are mere window-dressing: The verdict of the jury will be the position of the majority of jurors before deliberations begin

Conclusion: Inaccurate.

Not only do jurors change their decisions during deliberations, they also change their decisions before the first verdict vote in the deliberations.

^[1] Presentation at the 57th Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference, Chicago, May 19, 2008.

^[2] Moore, K.A., "Judges Juries and Patent Cases – An Empirical Peek Inside the Black Box," 11 Fed. Cir. Bar J. 209 (2001).

^[3] Schoenhard, P.M. "Judging Trial Judges: Despite what Professor Kimberly Moore told Congress in October, there is no need for specialized patent judges," IP Law & Business, March 2006.

^[4] Moore, Kimberly A., "Jury Demands: Who's Asking?" (February 2002). George Mason Law & Economics Research Paper No. 02-06. Available at SSRN: <http://ssrn.com/abstract=305263> or DOI: [10.2139/ssrn.305263](https://doi.org/10.2139/ssrn.305263), p. 5, FN 15.

^[5] Diamond, S.S., *Beyond Fantasy and Nightmare: A Portrait of the Jury* (Buffalo Law Review, Vol. 54, No. 3, December 2006).