

# **Forget what you Fear about Shadow Juries. Go Virtual!**

*Virtual Shadow Juries are not your mother's shadow jury.*

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**SHADOW JURY.** Shadow juries are akin to a focus group continuing throughout trial. Sitting in the courtroom is a low-tech observation method that has its advantages and limitations for trial feedback. Today's panel discussion gives a view of what to expect when technology evolves in the courtroom and how to effectively use modern technology. In particular, this paper addresses how "Virtual Shadow Juries" compare to the low tech or traditional version of "Shadow Juries" and demonstrates the use of Courtroom View Network (CVN) and Virtual Shadow Juries.

*History.* Shadow jury describes a group of mock jurors observing the trial and debriefed by a trial consultant at the end of each day. The trial consultant gives strategic feedback to the trial team. There is an art to getting and giving feedback and there are pros and cons to using Shadow Juries. While Litigation Sciences commercialized the business of trial consulting and coined the term "Shadow Jury" in the mid 1970s, the concept of modern jury research began with Hans Zeisel's work in the 1950s. The National Jury Project made a difference in political trials in the early 1970s for the Native Americans at Wounded Knee, the uprising in Attica prison, and the Harrisburg Seven trials.

Shadow juries are a jury research method classified under the art of communication, rather than scientific research. Trial consultants come from different fields such as psychology, sociology, communication, and theater. Some trial consultants are social scientists employing scientific methods and conducting hypothesis testing for case themes, jury selection, and potential damages in pretrial research. Some trial consultants

organize focus groups, mock trials, and shadow juries. As there are many benefits to feedback from mock jurors throughout the trial, as well as pretrial, many trial teams use shadow juries.

Benefits. Trial lawyers entrenched in case facts, law, and strategy, need objective eyes and ears to tell how the trial is perceived in the jury box. Lawyers who use office staff or family members for courtroom observation can get feedback, but inherent bias exists. Lay people with no dog in the hunt are better suited to be objective. Given the shadow jury is objective, the known benefits include:

- 1) Identifying jury comprehension of opening statements and witnesses' salient points. Clarifying concepts can be incorporated into subsequent trial testimony or closing arguments.
- 2) Strategy shifts can evolve from jurors' feedback. Once hearing presentations from opening statements and testimony, mock jurors' feedback can inspire a corrective shift in strategy. Either plaintiffs or defendants can apply this method in short or long trials.
- 3) Settlement decisions and better approach to damage issues. Mock jurors' feedback helps determine whether liability is perceived and strategy approach to damages or settlement.
- 4) Witness assessment and preparation. The number one area where trial teams benefit is view of witnesses at trial.
- 5) Closing arguments are refined by incorporating feedback.

Headlines from Trials Using Shadow Juries. Every trial has unique dynamics and every shadow jury has a unique story. Often trial lawyers tell their story to reporters. Here are a dozen headlines describing lessons from shadow juries. The proof is in the pudding; some trial lawyers love the method and others are skeptical.

- 1) "In the courts: Firm dismayed as jury rejects phone patent lawsuit."<sup>1</sup> Brits and Motorola surprised by jury verdict say, "Even the shadow jury favored the British company." It is unclear whether the Brits employed the shadow jury or were told of its views after the verdict. They were aghast that they lost and surprised that the real jury had a different view than the shadow jury. The Brits say that even Motorola thought they would lose so possibly Motorola conveyed the shadow jury's inclinations after the trial.
- 2) "Me and My Shadows."<sup>2</sup> When the shadow jurors didn't understand the plaintiff's opening statement in a securities case, the defense lawyer withdrew the multi-million dollar settlement offer on the table. The trial concluded with a defense verdict by the real jury and the trial lawyer attributes his confidence to rescind the settlement offer to the shadow jury's feedback. The article identifies the pros and cons in using a shadow jury.

- 3) “A Lawyer’s Late Arrival Gives Him an Edge”<sup>3</sup> A trial lawyer hired three weeks before the trial found that the shadow jury was able to give him the edge he needed and not over try the case. The plaintiff lawyer won a \$454 million verdict from a Dallas jury on a franchise agreement.
- 4) “Billion-Dollar Blockbuster Against Oil Industry”<sup>4</sup> What makes jurors angry? Missteps by the defense and the plaintiffs’ shadow jury’s feedback shifted the strategy to make this case into a punitive case against the oil industry.
- 5) “Durst lawyers relied on ‘shadow jury’ for guidance.”<sup>5</sup> In the famous murder case often noted as the epicenter of the *CSI* Effect, defense lawyers claim that they used pre-trial focus groups and a shadow jury to guide them throughout the trial.
- 6) “Small Firms Win Big. The firms behind some of the largest verdicts in early 2005.”<sup>6</sup> A plaintiff lawyer with a wealthy widow in Texas credits his demographically similar shadow jury for refining his strategy during trial, especially with questions that they thought they had answered.
- 7) August 8, 2005, *WSJ* on Vioxx.<sup>7</sup> In the first Texas Vioxx trial, Mark Lanier used a shadow jury to give feedback on effectiveness of his arguments. Lanier also used other resources, an expert observer and gives credit to his PowerPoint expert as well so it is hard to credit the shadow jury as the critical determinant. Relating to the jurors’ interests learned from juror questionnaires, Lanier connected on the emotional level. “He sprinkled the speech with biblical references, at one point using the tale of Esther to urge the jurors to do the right thing even if they were fearful. And he hammered home the point that they would be sending a message that would be heard widely. ‘I can’t promise Oprah,’ he said, but ‘there are going to be a lot of people who’ll want to know how you had the courage to do it.’”
- 8) “Shadow of a doubt: Despite popularity of paid courtroom observers, some experts question their effectiveness.”<sup>8</sup> Oklahoma City attorneys give their views of shadow juries. Basically they favor focus groups, but one says don’t bother wasting time with mock juries, do shadow jury instead. One contrasting lawyer states the other side had the shadow jury and they did not get it right – we won the trial.
- 9) “Ernst & Young Sued for Allegedly Covering Up Bad Audits.”<sup>9</sup> In this case, the trial consultant did a great job matching demographics of the shadow jury to the real jury. The judge wondered how the rest of the trial would proceed when he discovered that a real juror and a shadow juror were friends. [In asking his friend why are you here, the friend said, “Oh, I’m on a shadow jury.” The juror told the court, “I said ‘Oh cool, I’m on a regular jury.’”] The trial proceeded, but the judge dismissed the real juror after he Googled “shadow jury” over a break and told a fellow juror.

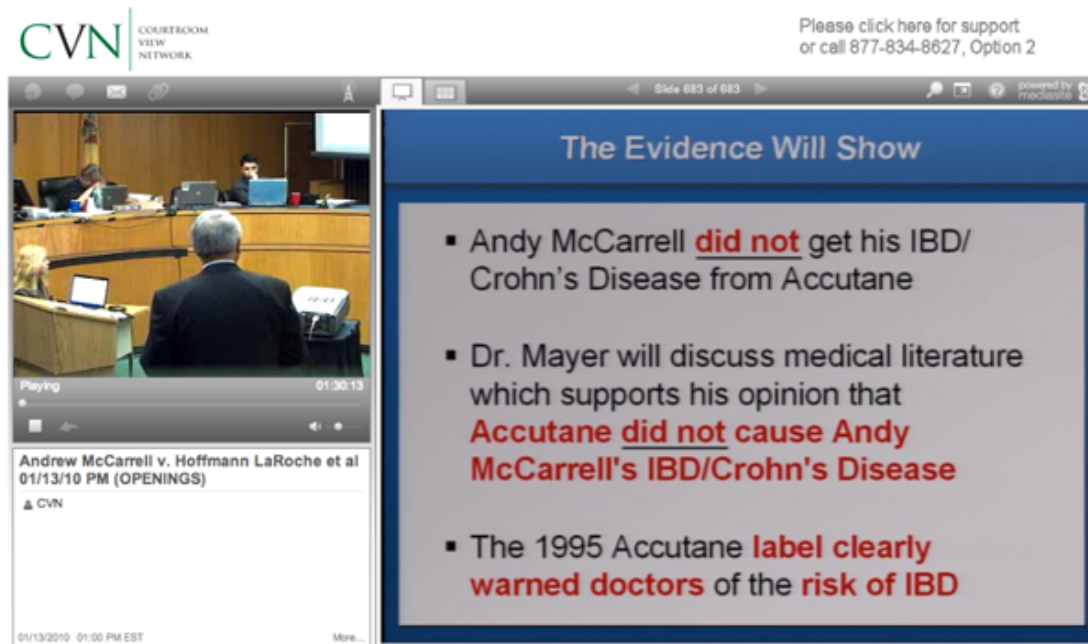
- 10) “Premium Standard Farms’ Expensive litigation fails to score the stinky pork producer a courtroom victory.”<sup>10</sup> This case deals with odor from a pig farm and its effect on neighboring farmers. The real jury and the shadow jury had opposite verdicts. The real jury went on a site tour and the shadow jury stayed home. Another lesson from this case, at least one juror had her mind made up for the plaintiffs, but wouldn’t state it. There is innuendo that she knew the defense was paying and didn’t want to lose her paycheck.
- 11) “The shadow jury”.<sup>11</sup> In reporting on a Baltimore case over carbon monoxide poisoning of 23 plaintiffs at a hotel, the reporter discusses the topic of shadow juries as polarizing for both trial lawyers and trial consultants.
- 12) “Man upset with firing starts protest in front of the federal courthouse.”<sup>12</sup> This was no ordinary employment case – this is a trial lawyer and trial consultant’s nightmare as a shadow juror was let go and protested outside the federal courthouse.

Cautions and Limitations. Many trial consultants and trial teams shy away from using traditional Shadow Juries in the courtroom. The anecdotal incidences that occur when employing a focus group or a shadow jury are rarely the nightmare as mentioned in the last article. However the two incidences noted that raise the hair on the back of any trial lawyer’s neck (shadow jurors familiarity with the real jurors<sup>13</sup> and protesting in front of the courthouse<sup>14</sup>) are factors that can be eliminated when shadow juries are not in the courtroom. Cautions and limitations regarding traditional shadow juries in the courtroom include:

- 1) Visibility. Having a shadow jury in the court is noticeable to the jury, especially if seating is limited as most often is the norm.
- 2) Inappropriate Behavior. To avoid the shadow jury’s inappropriate behavior, training the shadow jurors as to appropriate behavior in the courthouse is imperative. Simple training regarding not talking in the courthouse restrooms can make a difference as well as leaving the courtroom promptly and not chatting with other observers.
- 3) Changing Strategy. Many trial lawyers shy away from shadow juries because they don’t want to upset the strategy. That is a personal choice of the trial lawyer. If feedback during trial shakes trial lawyer’s confidence in the case, then pretrial jury research is a better option. Waiting until trial is a late game change if strategy has not been tested earlier.
- 4) Confidentiality. Signing confidentiality agreements is a general practice for trial consultants who gather mock jurors. Make sure that shadow jurors understand their role and confidentiality.

- 5) Matching Demographics, Experiences, and Attitudes. Matching can be done demographically, but exact matches occur only with twin studies. Even when the mock jurors approximate the real jurors on demographics, differing experiences and attitudes exist. If the central case issues are about race or gender issues (e.g., harassment cases, civil rights), then the matching of demographics is critical.
- 6) Reporting to the Trial Consultant. When the trial consultant also sits through the case, the shadow jurors should not observe the relationship between the trial consultant and the trial team. Granted it may be obvious to the shadow jurors once their recommendations are implemented in trial, extreme care needs to be taken to maintain the objectivity.
- 7) Multiple Interviewers. Gathering the information from shadow jurors in a timely fashion is important. When multiple interviewers are employed, recognize if there is varying ability to synthesize the feedback.
- 8) Deliberations. It is risky to rely on a small sample of shadow jurors so deliberations need to be done for information purposes rather than outcome of the verdict. The shadow jurors are used as a window into comprehension of the testimony, rather than matching the verdict. We cannot replicate the dynamics of the real jury so debriefing with a consultant may be more informative than deliberations.
- 9) Funding Party. Knowing which side is funding the daily rates can influence shadow jurors' views. Keeping silent on who is funding is instrumental in eliminating bias, although mock jurors often guess the party funding.
- 10) Limited Funds. If the funds for trial (and jury research) are limited, then the funds could be used pretrial instead.
- 11) Stealth Jurors. Shadow jurors could have an agenda and not reveal it to the interviewers. Extensive screening of shadow jurors before the trial begins is important because nobody wants a Runaway Shadow Jury.
- 12) Losing Focus of Target Jury. Trial lawyers must keep connection with the real jury. Losing focus on your real target jury and trying the case to the shadow jury is a scenario to avoid. The real jury is the decision maker.

**VIRTUAL SHADOW JURIES.** Now that you considered all the cautions and limitations, there is good news. Shadow juries have gone virtual. Technology using webstreaming from the courtroom gives trial teams an alternative to visible Shadow Juries in the courtroom. Courtroom View Network (CVN) makes viewing court proceedings available to parties via subscription service. Courtroom View Network (CVN) has provided videostreaming and on-demand court trials to subscribers for over five years.<sup>15</sup> This service is valuable for trial teams where there are multiple plaintiffs, multiple defendants, or multi-district litigation. Obvious benefits of CVN are video feed to other attorneys or staff in the war room. Corporate counsel can monitor the case from anywhere they access the Internet. Additional consultants can contribute specific feedback as well.



Benefits. Trial consultants can observe and get feedback with virtual shadow juries anywhere the technology exists. Virtual Shadow Juries are not visible. The same benefits that traditional Shadow Juries have exist for Virtual Shadow Juries. The advantages of shadow jurors being off site outweigh the lack of courtroom aura.

Costs. Budgets should consider daily fees for the CVN subscription, mock jurors, facilities, parking and food, as well as professional services for the trial consultant. As discussed with traditional Shadow Juries, it is important to have a consultant independent from the lawyers. That means having the Virtual Shadow Jurors watch the trial somewhere other than in the lawyer's office to avoid knowing the funding source. Cost of a facility can range from renting a library room to renting a facility with a one-way mirror. Using a facility with a one-way mirror can speed up debriefing and reporting. Professional fees for consultants to debrief have a range depending upon their skill level. The ROI for Virtual Shadow Juries is intellectual and emotional capital for better jury comprehension and case perceptions.

*Listening to the Testimony.* Virtual Shadow Jurors listen and watch the web-streaming together in the same room or at separate stations. It is important to keep the shadow jurors from premature deliberations and bonding over a position taken. The on-demand subscription service can be used if a juror misses a portion of the testimony. Or a Virtual Shadow Jury can be brought in to get feedback on specific witnesses and not the entire trial.

*Strategizing with the Trial Team.* Consultants adept at eliciting feedback can verbally collect information from the shadow jurors or by written questionnaires. Consultants give feedback to the trial team. Whether they cut relaying extraneous feedback depends on the level of detail desired. Synthesizing the feedback into strategy depends on the consultant's skill level. The consultant may have experience with the case from prior research or may be separated from existing trial strategy.

*Cautions and Limitations.* One limitation of the Virtual Shadow Jury is that mock jurors don't see interactions of lawyers with one another, parties, and witnesses off the stand. The real jury pays attention to every nonverbal cue in the courtroom. The same warnings that occur with a regular shadow jury are inherent in small numbers for a virtual shadow jury. We warn in pretrial research, as well as in a traditional shadow jury, that we never replicate the dynamics of the real jury. Larger numbers of Virtual Shadow Jurors can be used to better approximate the community attitudes. One could have a larger shadow jury if virtual because the courtroom size limitation and visibility factors are removed.

**VIRTUAL SHADOW EXPERTS.** Another method that works for trial teams and parties is having a trial consultant view the trial (without the shadow jury) and provide feedback. This consultant is not managing the shadow jury and can spend time directly benefiting the trial team with witness preparation, outlines for cross examinations, and writing closing argument suggestions.

**DEMONSTRATION OF VIRTUAL SHADOW JURY.** From CVN's video library, we selected the retrial of *McCarrell v. Roche* (Accutane) for our Virtual Shadow Jury demonstration at the ABA Section of Litigation, Products Liability Committee, Women in Products Liability Regional Meeting in New York. Professionally recruited mock jurors will participate in observation of an expert witness and be debriefed. Our panel includes a judge, several in-house counsel, a trial consultant, and a trial lawyer. This live demonstration illustrates use of CVN on demand. We chose the expert David Sachar, M.D. for mock jurors' observations, reactions and strategy discussions.

*Description of the case from CVN's files:* Andrew McCarrell sued Hoffman-LaRoche and Roche Laboratories, which manufactured and distributed the prescription drug Accutane. McCarrell alleged that as a result of taking Accutane for an acne condition, he developed inflammatory bowel disease (IBD), which led to the surgical removal of his colon. The first jury returned a \$2.6 million verdict.

The screenshot shows a CVN (Courtroom View Network) interface. On the left, a video feed shows a courtroom scene with a man in a suit speaking. Below the video, a text overlay reads: "Andrew McCarrell v. Hoffmann LaRoche et al 01/13/10 PM (OPENINGS)". The main part of the screen displays a slide titled "Andy McCarrell" with a photo of the man and a list of medical conditions and symptoms. The slide text includes: "Diagnosed With IBD Within Approximately One Year Of Taking Accutane", "Within One Year - Had His Entire Colon Removed", "Has Endured 5 Major Surgeries" (with sub-points: "Colon Removed & Internal Pouch Created", "Abscess Surgically Removed", "External Bag (Colostomy)", "Intestinal Reconnection", "Sphincter Surgery"), and "Suffers From Countless Ongoing Symptoms, Including:" (with sub-points: "Constant Pain", "Nighttime Loss Of Bowel Control", "Intestinal Blockages", "Diarrhea Up To 12 Times Each Day", "Depression", "Need Of Lifetime Care & Medications"). A red banner at the bottom of the slide reads: "Andy Will Live With This For The Rest Of His Life". The CVN logo and "COURTROOM VIEW NETWORK" are in the top left. In the top right, it says "Please click here for support or call 877-834-8627, Option 2". The bottom left shows "01/13/2010 01:00 PM EST" and "More...". The bottom center shows "95".

The Superior Court's appellate division ruled that the defendants in the McCarrell trial should have been allowed to present the background statistics showing that there were five million Accutane users. Openings in the retrial were January 13, 2010. On February 16, 2010, the jury returned a \$25 million verdict in favor of the plaintiff.

**CONCLUSION.** As CVN continues to webstream Accutane and other trials, the technology benefits those who use it. Virtual Shadow Juries are the wave of the future in high stakes and bellwether trials. Looking at headlines and cautions with traditional Shadow Juries, Virtual Shadow Juries are safer and more flexible in gathering feedback on perceptions and comprehension. There is no fear of visibility or disruption in the courtroom. Virtual Shadow Juries can be larger than traditional Shadow Juries. Virtual Shadow Juries are more productive, since debriefing off site is easier during recesses or sidebars. Mock jurors' deliberations give insight, but do not predict verdicts in the real jury. Facilitating Virtual Shadow Jurors through debriefing or discussions, rather than deliberating to verdict, brings intellectual and emotional capital to a higher level of trial strategy. Trial lawyers who master technology in the courts are fearless!



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- <sup>1</sup> January 12, 1998 by Steve Boggan, *The Independent*.
  - <sup>2</sup> May 15, 2001 by Molly McDonough, *The National Law Journal*.
  - <sup>3</sup> July 11, 2001 by Margaret Cronin Fisk, *The National Law Journal*.
  - <sup>4</sup> January 7, 2002 by Diana Diggs, *Lawyers Weekly USA*.
  - <sup>5</sup> November 14, 2003, *Associated Press*.
  - <sup>6</sup> July 5, 2005 by Karen Dean, Law.com
  - <sup>7</sup> August 22, 2005 by The Health Care Blog
  - <sup>8</sup> March 1, 2007 by Marie Price, *The Journal Record*, Oklahoma City.
  - <sup>9</sup> June 30, 2009 by Jordana Mishory, from Law.com.
  - <sup>10</sup> April 8, 2010 by Nadia Pflaum, *The Pitch*, News.
  - <sup>11</sup> July 18, 2010 by Brendan Kearney, *Dolan Media Newswires*.
  - <sup>12</sup> August 5, 2010 by Robin Y. Richardson, *Marshall News Messenger*.
  - <sup>13</sup> June 30, 2009 by Jordana Mishory, from Law.com.
  - <sup>14</sup> August 5, 2010 by Robin Y. Richardson, *Marshall News Messenger*.
  - <sup>15</sup> June 30, 2005 by Kim Moninghoff. Courtroom Connect's Webstreaming of Court Proceedings in *In Re Disney Shareholders*. Courtroom 21 Court Affiliates White Papers.