
Shadow Juries Help Lawyers Assess Which Arguments Aren't Working at Trial

By Nora Lockwood Tooher

Each day of the six-week murder trial of millionaire Charles Durst, four women and one man arrived promptly each morning at the Galveston, Texas courtroom where the trial took place, quietly took their seats in the spectator gallery and began their day's work,

Remarkably similar in age, appearance, and occupation to five of the strongest jurors in the case, the spectators listened carefully to both sides' opening arguments, viewed exhibits in the case, heard witnesses' testimony and closely followed closing arguments.

Each day they adjourned to discuss the day's proceedings, and at the end of a trial, when the jury filed out of the courtroom to decide the fate of Durst – an eccentric real estate heir who dismembered his neighbor after shooting him – the fivesome began their own deliberations in the case.

Despite their seemingly passive presence in the courtroom each day, the mysterious spectators played a critical role in helping Durst's attorneys convince the jurors of his innocence, according to the Texas trial consultant Nona Dodson.

The five shadowy figures in the case were indeed just that – “shadow jurors” hired by the defense to attend the trial and react to each day's proceedings.

Long a secret weapon in trial lawyers' arsenals, shadow juries are stepping into the light as a useful tool in trial research. Like mock trials and focus groups, shadow juries give attorneys important insights into how non-lawyers may react to the case themselves, witness presentations and demonstrative evidence.

But they do it in “real time,” through daily feedback that lets the attorneys know how their side is doing in the courtroom.

“It made a big difference,” said Dodson, an associate with Cathy E. Bennett & Associates, a jury consulting firm in Louisville, Texas. “There was one lawyer who was kind of loud and in your face, and [the shadow] jurors didn't like that, so we toned him down.”

Shadow jurors also perceived some tension with the defense team, which the consultant's helped dissipate.

The panel also made several negative observations about the defendant's behavior that Dodson and her team were able to correct. For example, shadow jurors noticed that Durst was sitting low in his chair, which they perceived as an attempt to make himself look smaller.

While shadow juries remain the least well-known of jury research tools, trial consultants say they can be an invaluable tool in helping lawyers hone their trial presentation.

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They are very expensive, with total costs averaging \$1,000 to \$3,000 for each day of trial. That includes payments of \$100 to \$200 a day to each shadow juror, plus consultant fees for the professionals who analyze their feedback. Costs can run even higher if the consultant has to rent a facility, such as hotel conference rooms for nightly de-briefings.

Because of their hefty price tags, shadow juries are usually reserved for high-stakes civil and criminal cases.

"Shadow juries are usually used in bet-the-house, big-time litigation where settlement is an issue, where the stakes are high, where the credibility of witnesses is something to be determinative," said Jason Bloom, a litigation analyst with Courtroom Services in Irving, Texas.

"They're very expensive propositions and it takes a special kind of case," Dodson agreed.

Los Angeles trial consultant Richard Gabriel noted, however, that there are many ways that smaller firms can reduce the costs of shadow juries, including using fewer individuals and limiting the amount of the trial they attend. He added that, despite their costs, lawyers who have used shadow juries say they can be extremely useful in determining whether a tactic, witness or piece of evidence is actually getting across to a group of people similar to the actual jury.

Florida trial attorney C. Steven Yerrid agrees that even small firms can make use of shadow juries by using three, two or even just one shadow juror to provide daily feedback on what issues are of concerns to jurors.

"I find them very effective," said Yerrid, founder of a four-lawyer firm in Tampa, Fla. "You don't always have to use it, but at least being exposed to it gives you the opportunity to pick up nuggets that might otherwise remain unmined."

Bloom said shadow juries can give lawyers added confidence in their own instinctive impressions.

"It eliminates the guesswork," he said. "A lot of time you see lawyers leave the courtroom after a day of trial either excited or disappointed, but they're really just guessing.

"It's a reality check," he added. "It's a real-time jury research project."

Gathering Shadows

While each trial consultant has individual methods for organizing a shadow jury, the basic steps are the same.

Recruiters, usually from a market research firm, gather

a pool of about 30 panelists, and then narrow the group down to anywhere from four to 12 shadow jurors. To control costs, several consultants told Lawyers Weekly USA they generally recommend a panel of four to eight shadow jurors. The shadow jurors should be people who are similar in age, gender, race, education and occupation to jury members who are considered the strongest of the actual jury, based on their occupations, leadership roles or other indications.

To ensure they are not influenced in their opinions, the shadow jurors aren't told which side is employing them.

During the trial, shadow jurors sit in the spectator gallery, usually separately from each other, rather than as a group. The shadows are spread out so that they are less likely to pass notes and chat with each other, and also so that they appear less conspicuous to actual jurors. Several consultants said they encourage shadow jurors to take notes during the proceedings, so that they have detailed feedback each day of the trial.

A facilitator, usually a jury consultant, sits in the courtroom with the shadow jurors. To avoid tipping off the shadows as to who hired them, the facilitator does not speak to the hiring attorneys while the shadow jurors are present.

Some consultants inform the court there is shadow jury present, while others leave that decision to their clients. Several consultants told Lawyers Weekly USA they believe the process works better if as few people as possible are aware that a shadow jury is in the courtroom.

The most critical aspect of a shadow jury, Dodson said, is that, "Shadow jurors only hear what the actual jurors hear."

So, when the actual jury is asked to leave the courtroom during the proceedings, the shadow jury also steps outside.

Each night, the facilitator debriefs the shadow jurors to get their assessment of the case. Shadow jurors fill out questionnaires and individually answer questions about the trial, such as how attorneys for both sides are doing, how the defendant or plaintiff is coming across, whether the expert witnesses are credible, and whether they understand the themes of the case.

The consultant then either turns in a report of meets with the hiring lawyers to discuss the shadow jurors' reactions to the day's proceedings.

Some lawyers hire shadow juries just for the opening arguments and the first few witnesses so they can get

an idea of how the case is starting off. But in high-stakes case, shadow juries sometimes sit through the entire trial, and even deliberate at the end of the trial just as actual jurors do.

In the Durst case, the shadow jury deliberated for an hour before finding Durst “not guilty,” the same verdict delivered four days later by the actual jury.

‘The Shadows Know’

Ted Donner, a Chicago solo who specializes in business and commercial law for small- and medium-sized businesses, said he finds shadow juries are most useful in long trials.

“If it’s going to be a case that’s going to last a few weeks, having a shadow jury can be useful,” he said. In a case where the trial lawyers are working until late at night, sleeping in a hotel and rising early, it’s easy to lose track of how your case may be coming across to a group of non-lawyers,” Donner said.

“You want to know how it’s reading to an audience that’s only here during the trial and goes home,” he said.

“That’s where shadow juries can be immensely useful,” Donner said. “When you’ve got a lot of evidence in a case, you’ve got to be sure that the key points you’re going to be hammering in your closing argument actually came up.”

For example, shadow jurors may say they don’t recall seeing a particular document or piece of evidence. Based on that feedback, the attorney is able to refresh actual jurors’ memories by asking a witness to look again at an exhibit.

“Memory is more important than judgment,” Donner said. “I care a lot less about what they decide from the evidence they hear than I do about whether they actually heard the evidence – if they’ve gotten the point and they’re grappling with it.”

La Verne Morris, a jury consultant in the Chicago office of Kroll Ontrack-TrialGraphix, recently had a shadow jury sit through nine months of complex construction litigation in a state court in the Southwest.

“The exposure level in the case was very high,” Morris said. “The client was concerned because of the complicated information. [The lawyers] wanted to make sure as they presented their case that it was clear. And also, because of the level of exposure, they wanted to make sure their arguments would resonate.”

The shadow jury actually helped shorten the proceed-

ings, Morris said. They said they had so much information that Morris’s client – a plaintiff in the case – decided not to put on a rebuttal case.

David Graeven, president of San Francisco-based Trial Behavior Consulting, said a shadow jury can help attorneys focus on key factors in a trial, including:

- Comprehension: “Are they understanding our case themes?”
- Expert witnesses: “How are our witnesses doing?”
- Attorney performance: “They might find one member of a trial team is more effective”
- Client demeanor: “How is the client doing at the table? Is the client looking at the jury too much?”

Risky Business

Despite their benefits even proponents of shadow juries say there are risks involved, including:

- Lawyers may focus too much on the shadow jurors and lose sight of their most important audience – the actual jurors.
- Attorneys may expect a shadow jury to predict the actual outcome of the trial.
- The actual jurors may figure out there is a shadow jury present and resent their presence.
- Opposing attorneys may figure out who the shadow juries are and try to intimidate them, thereby tainting the process.

In the heat of trial, attorneys can easily become too fixated on responding to shadow jurors’ daily reactions, Donner said.

“It’s kind of like overnight ratings. If you’re hearing from your shadow jurors that they’re not believing your expert witness about the economics of the case, there’s going to be a tendency to react to that and have the witness focus on the answer that was missing the day before,” he said.

But by doing so “you may be highlighting the shortcomings of your case, rather than paying attention to the big picture,” Donner explained.

“If they’re talking about one layer of the case and that’s not where your trial theme is, you don’t want to fix the bandages on the little problems that come up,” he said. You want to get them focused on your theme again.”

Michael Haggard, a personal injury plaintiff’s attorney

in Coral Gables, Fla., said he has never used a shadow jury, and described their use as a “misplaced science.”

“I would say that you put a lot of energy into an exhibition game, when at the same time you’ve got the real game going on,” Haggard commented.

Even trying to read the actual jury can be a mistake, he noted.

Haggard recalled that the jurors in a \$104.4 million pool injury case didn’t even look at him during his closing argument. Instead, they were focused on a timeline Haggard’s team had prepared that showed a series of pool injuries over several decades that were allegedly related to a faulty pool pump.

Because the jury didn’t make eye contact with him during the dosing argument, Haggard was nervous that the verdict would be unfavorable. But instead, the jury found in favor of his client. “As a trial lawyer, you have to go off of what you feel,” Haggard said.

Defusing Landmines

Gabriel, who is president of the American Society of Trial Consultants, conceded that shadow juries have some drawbacks. But, he said, “If we can get someone to use it once, chances are they’ll use it for a second, third and fourth time.”

And they’re not just for large firms with huge corporate coffers, he said. Smaller firms can amortize the cost of a shadow jury by using it in one case, and then applying the same feedback to similar cases. For example, this would work well in products’ liability cases, he said. For example, he said, a shadow jury can help attorneys learn how a jury might view an expert witness who will be testifying in several similar cases, such as fenphen lawsuits. The shadow jury may report that the expert witness has an impressive resume, but just doesn’t come across as a good communicator, Gabriel said. That gives the trial team a chance to improve the witness’s communications skills before the next trial.

Although lawyers can reduce costs, by having shadow jurors sit through only a portion of the trial, Gabriel noted that many attorneys find their feedback so useful, they want to hear what verdict they would have delivered in a case.

“It’s very common at the end of the process to conduct a focus group and have them deliberate,” Gabriel said. “It doesn’t do you any good in terms of the trial, because the jury is already deliberating. But, our clients say, ‘We’re going to use this in subsequent trials.’” As for how the

shadow jurors’ verdict compares with the actual jurors, Gabriel said: “Although the actual verdict may you can track the issues and find out they track very well.”

Shadow juries are most often done in conjunction with pre-trial research, but can also be done in lieu of focus groups or mock trials.

The difference between shadow juries and pre-trial research is that shadow juries can provide feedback on the “innumerable variances in the course of a trial,” according to Gabriel.

“Witnesses may not be doing as well as expected on the stand, or doing better than expected,” he said. It’s an opportunity for the attorneys to see where the jurors maybe getting confused in the case, what they’re focusing on, what they feel is important, what they feel is missing in the case.

“The feedback enables [the trial team] to make slight adjustments, even in examination,” he said.

For example, Gabriel said, in a commercial case where the product at issue involves electronic circuitry, shadow jurors may report they don’t understand the difference between two electronic circuits the expert witness is testifying about. That gives the trial team the chance to produce a graphic that illustrates the distinction.

“I think it is the most valuable tool a consultant can offer,” Gabriel said. “It’s real time.”

“Our experience has been that they’re fairly accurate,” said Daniel Wolfe, a consultant with Kroll Ontrack-TrialGraphix, who has organized about 25 shadow juries over the past 18 years. A shadow jury, he said, is “fairly predictive of how jurors will look at certain issues, and ultimately the verdict.”

Bloom cited one breach of contract case in which his client, the defendant, was “very scared of the verdict” and was anxiously trying to settle the case. Surprisingly, the shadow jury came back with no liability and zero damages.

“The general counsel for the defendant had a \$40 million check he ripped up, based on the feedback from the shadow jury,” Bloom said.

Yerrid, the Florida plaintiffs’ lawyer, had a similar experience with his first shadow jury 20 years ago. He was defense counsel in the case, representing a utility company that had been sued for \$63 million by the families of several youths who were seriously injured when their car hit a utility guide wire and flipped over.

At the end of the trial, his six shadow jurors deliberated, rendered a verdict for the defense and were a key factor in his decision not to settle the case. The actual jurors soon came back with the real verdict which was also in favor of the defense.

Other consultants cautioned, however, that a shadow jury should not be used to predict the outcome of the case.

“You really have to be careful to tell the clients this is not to predict verdicts,” Gabriel said. “Clients always ask us how a jury’s going to vote. We have to spend time telling them you cannot replicate the exact attitudes and life experiences of the jurors.”

Instead, he tells them that the feedback from the shadow jury – even if it includes a verdict – is purely for informational purposes.

Given those caveats, he said he tells attorneys that a shadow jury “sure gives you a good sense of what the core issues are, and where the landmines are.”

“It’s not necessarily to say where the case is going to go, but here are my problems that I better address,” Gabriel said.