

COMMENTARY

Shadow juries help with evaluation, trial tactics

By Michael D. Wade
and Tara L. Veling



WADE



VELTING

Our civil procedure provides various opportunities for counsel to realistically evaluate their case in order to resolve the matter short of trial. Mediation under MCR 2.411 is usually held early to mid-case; case evaluation under 2.403 is held late in the case, usually after close of discovery; the court may hold settlement conferences under MCR 2.451(c)(1)(g). Of course, counsel themselves may discuss the case between and among themselves.

An infrequently utilized though valuable method of evaluating one's case is the shadow jury. A "shadow jury" is defined as 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 shadow jurors, who are matched as closely as possible to the real jurors, provide counsel with information about the jury's likely reaction to the proofs.

The shadow jury was conceived by defense counsel in a California federal court action in the 1970s involving *California Computer Products v IBM*. See *Vinson, The Shadow Jury*, 68 A.B.A.J. 1242 (Oct 1982). Defense counsel engaged an expert in behavioral science to recruit a jury to reflect the demographic and psychological characteristics of the actual jurors. The shadow jury entered and exited the courtroom when the actual jury did and heard the same evidence. The behavioral scientist debriefed the shadow jurors separately each evening in order to learn:

- the decision-making process among jurors;
- whether the jurors understood the evidence;
- how defense tactics and strategies were working;
- what changes to tactics and strategies might prove helpful;
- the effectiveness of the defense to determine if settlement was indicated.

Utilizing a shadow jury is not indicated for the average case, due to the time and expense involved. The jury consultant or behavioral scientist is hired so that the shadow jurors do not know which side hired them. The jurors are paid for their time, usually per diem.

The actual jury panel is extensively investigated, principally through social media, so as to obtain shadow jurors who reflect the actual jurors psychologically, economically and attitudinally. The shadow jurors are instructed to discuss the case with no one other than the consultant, who must remain neutral. In the California case, the surrogate jurors were told they were engaged in social research and were asked to sign confidentiality agreements.

The debriefing at the end of each day may be done separately or as a group. The questioning must be pointed, in-depth and pre-prepared. The consultant relays the information to counsel, who then utilizes the information uncovered in preparing for the next day, retaining or changing tactics, and emphasizing portions of the evidence.

Of course, the daily information from the shadow jurors is used to evaluate the option of settlement, as well. The debriefing can be done by questionnaire, as well as verbally by the consultant. Likewise, the debriefing can be by phone or in person. The shadow jurors can be interviewed separately rather than as a group so as to obtain personal feedback, not a collective response.

Some difficulties are apparent with shadow juries. The process is expensive and has some methodological difficulties, such as difficulty matching shadow jurors to actual jurors. Another difficulty

is the debriefing process, which can alert the surrogates to the issues in the case, identify the hiring party or redefine their reactions.

Few cases address shadow juries, but some significant cases exist. In *BASF Corp v. Lyondell Chem. Co.*, 2010 N.J. Super. LEXIS 3106, plaintiff's counsel referred to defendants not trusting the jury because defendant was using a shadow jury and the judge then stated that she needed to know who was in the courtroom at all times. The appeals court disapproved the court's statement by observing that trials are open to the public. The appeals court stated:

A general requirement that individuals attending a trial identify themselves appears to us to be inconsistent with the spirit of that rule.

The appeals court would only permit the trial court to inquire if someone entering the courtroom is a witness, when a sequestration order is in place. The appeals court also observed that questioning a witness regarding shadow juries is irrelevant and aimed at prejudicing the actual jury.

One commentator suggests advising the court but not counsel of the existence of the shadow jury. *Schaefer, Testing Your Evidence Before and Even During Trial*, 42 Litigation 43 (Sum 2016). We suggest that any mention of the attendance of a shadow jury should be kept private as work product, unless a direct question is asked by the court. Then court and counsel should be advised and a motion made to preclude adverse counsel from referring to the shadow jury.

In *Lafferty v. Stevens Mem. Hosp.*, 2006 Wash App LEXIS 2825, a shadow juror had minimal contact with an actual juror. The trial court refused to grant a mistrial and the appeals court upheld the denial of a mistrial. Such problems can be avoided by clearly instructing the shadow jury to avoid all contact with the actual jurors and also instructing the shadow jurors to listen to and follow the jury instructions given by the judge.

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In *Evans v. Lorillard Tobacco Co.*, 2011 Mass Super LEXIS 293, the court refused to permit a taxation of the costs of the shadow jury.

The crucial part of the process is the debriefing, as it provides the information to counsel which then forms the basis for changing trial tactics or settling the case. The consultant must not disclose the affiliation with the hiring party while still obtaining useful information. Open-ended questions best accomplish the purpose, such as:

- What impressed you most with each attorney?

- What disappointed you most with each attorney?
- Was any evidence not explained well?
- What questions do you have about the evidence?
- Are you distracted by anything in the courtroom?
- Do you have criticisms of any attorney?
- What are the important evidentiary issues in the case?

The ultimate question, "which party will win the case and if it is the plaintiff, what would your award be?" should probably not be asked until after closings to ensure sufficient evidence exists

on which the shadow jurors can base a decision. At that point, counsel can attempt to settle or await the verdict.

A "poor man's shadow jury" may be used, i.e., using an unmatched shadow jury at minimal cost recruited from the unemployed. For the jury consultant, an associate attorney is substituted. In that case, neutrality, matched characteristics to the actual jury, and scientific validity are compromised. Likewise, one may use three, two, or even one shadow jurors, but then one sacrifices matching characteristics with the actual jurors, invalidating the concept. Mere observers to a trial do not constitute a shadow jury.

We suggest that shadow juries are a val-

id way to assist counsel in an appropriate case to evaluate and settle cases during trial, as well as a device for assisting counsel with trial tactics and strategies on the road to a successful jury verdict.

Michael D. Wade serves of counsel in Garan Lucow Miller PC's Grand Rapids office. He defends insurance companies, corporations and individuals in complex litigation cases. Tara L. Velting is a member of Garan Lucow Miller PC and also works out of the firm's Grand Rapids office. She also defends insurance companies, corporations and individuals in civil litigation cases.