The Jury EXPERT
The Art and Science of Litigation Advocacy
from MAY/JUNE 2013
Volume 25, Issue 3
A publication of the American Society of Trial Consultants Foundation

Pretrial Publicity and Courtroom Umami

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As litigation technology support specialists, we have a unique courtroom vantage point from our involvement with over a half dozen high-profile capital cases where there has been immense and very negative pretrial publicity. Over the past dozen years, we have sat side by side with death penalty qualified attorneys and trial teams of defense attorneys, paralegals, mitigation specialists, jury consultants, investigators and trial consultants who rally for the defendant's '*heart and hope*' throughout the proceedings. We are typically brought in to help the team manage the digital evidence and assist with technology throughout the discovery phase and during trial, including presentation of the evidence. Our role as technologists also helps the teams to capture and manage the media onslaught.

We marvel at the breadth of knowledge, skills and passions assembled for these cases, and believe it to be umami[1] in the courtroom. Just as Chef Vongerichten has realized in the kitchen, a legal team on a high profile case similarly requires their own umami bomb.[2] They must strive for a potent combination of traditional resources and contemporary, sometimes unusual, strategies mixed together with a comprehensive and integrated use of technology as an indispensable ingredient. Too little or too much of any single element can result somewhere between ineffective and disastrous.

This is our daily challenge. In our team role, we focus steadily on how to marry traditional litigation strategies to new technologies and methodologies. Because of the nature of these cases, this naturally includes helping the teams technically in their efforts to manage the forces of pretrial publicity.

Strategy 1: Media Management

In *State v. Komisarjevsky* (capital jury trial held in Connecticut in 2011), both traditional[3][4] and pioneering strategies were employed for media management. While counsel operated under a gag order, news reporters were allowed to tweet live from the courtroom from their iPads, smartphones and laptops during the trial. Meanwhile, prior to trial, there were massive amounts of negative publicity, including over 600 "*hate groups*" on Facebook and 10,000 articles from newspaper coverage worldwide, as well as Twitter, blogs, and other social media coverage.

At the direction of counsel, we captured and maintained a database of this content for the defense team to use as the basis for a motion for a change of venue. Dr. Lofink testified at the venue change hearing in an effort to convey to the court the enormity of the ongoing public conversation about the defendant. She testified to not only the quantity of social media but also about patterns of coverage and the nature of the sentiments. Supporting evidence (over 4 GB at the time the motion was filed) was submitted on a computer flash drive rather than paper (estimated at 10,000+ pages). Despite this volume, the motion was denied.

Tactic:

Designate a single point of contact to respond to the media's questions. "*No comment*" does not count (unless you are under a gag order) – unfortunately it implies that you are hiding something. For example, we witnessed this strategy in the *State v. Mills* case (capital case in Connecticut in 2004 resulting in a life verdict) where one attorney served as the spokesperson for the defense team.

Technical tips:

a. Maintain a database of content for access by the team (e.g., in Komisarjevsky an extensive database for media Q&A was maintained not only for a change of venue motion, but also to keep pulse on pattern and tone of public conversations, community chatter, and venue culture).

b. Utilize a content analysis technique of compiled pretrial data, such as that presented by Christina Studebaker, et al.[5]. This is helpful for trial strategy, developing themes, and learning jury and venue makeup.

Strategy 2: Facts and Bytes

Tactic:

Facts should be released judiciously – it is necessary to build a like and trust with the public if possible by telling the defendant's story in way that the public can understand. And as suggested above, having a designated spokesperson for the team is helpful to consistently compete with the many stories being told. Confirming this strategy we see the team of lawyers now representing Ariel Castro, the Cleveland suspect recently in the media accused of the kidnapping and torture of three young women for over ten years, "*speaking exclusively*"[6] to an investigator. Attorney Craig Weintraub stated that, in conjunction with his client's not guilty plea, *"[t]he initial portrayal by the media has been one of a 'monster' and that's not the impression that I got when I talked to him for three hours. I know that family members who have been interviewed by the media have expressed that as well.*"[7]So they begin to tell their story.

Interestingly, however, we learned that Attorney Judy Clarke, appointed for the Boston Marathon bombing defendant, never communicates with the media[8]and yet has achieved enormously successful results for high-profile defendants in the national media spotlight who appeared destined to receive capital punishment, e.g., Ted Kaczynski (the Unabomber) and Susan Smith.

Technical tips:

a. Make strategic use of media from the get-go to prevent a one-way circus (including social media). Robert M. Entman and Kimberly A. Gross share insights from the Duke Lacrosse case, including a helpful table of tactics to combat pretrial publicity. They remind us that the journalists covering this infamous case received substantial criticism for the way they basically "*convicted the defendants in the press*."[9]

Lessons learned from the Duke Lacrosse Case (from Entman and Gross)[10]

1. Find ways to balance coverage and combat journalism	Provide alternative narratives that challenge the prosecution's narrative and the public's presumption about the facts. Press for new equitable ABA guidelines on contacts with the media.
2. Frame your media narrative early in the process	Get accurate information out in front of misinformation and employ all channels, including blogs, social media and other outlets on the Internet.
3. Recognize the role of Defendant's race / origin	Voir dire on jurors' exposure to and agreement with general stereotypes of crimes and criminals.
4. Encourage responsible journalism	Educate journalists on their professional obligations - and economic self-interests - to mitigate the unintended consequences of standard operating procedures; suggest new practices.

b. Create a story spine[11]early on as a helpful tool to manage facts being released to the public and to maintain a bridge between the legal details and the public narrative. Once the story is drafted, the team can assess what bytes to release when and how to engage in the public conversation using a consistent storyline. See Figure 1 for an illustrative example of how a story spine can be used to build a narrative.

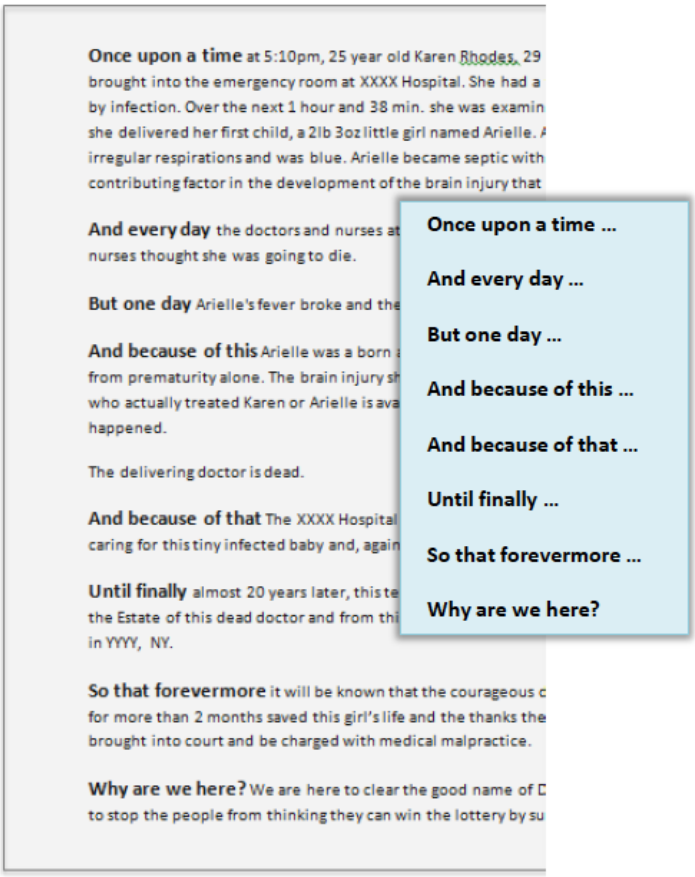

Figure 1: Example of Story Spine Format

Strategy 3: Mitigation Specialists

Tactic:

The humanizing element and comprehensive insights that the mitigation experts bring to a case are enormously important. Their social forensic skills dive deeply into early experiences, family dynamics and prepare the attorneys for the best witness testimony for the mitigation phase. We have learned to treasure their expertise.[12]

Technical tips:

a. Aid mitigation specialists with database support so they can more easily manage fact patterns and documents. Not only databases, but also aid in the development of charts, graphics, presentations and other visual aids.[13]

Strategy 4: Be a Technology Enabled Team

Tactic:

Trial teams need to be able to function easily and swiftly as they are often geographically dispersed. It is imperative to take advantage of online communication tools, as well as litigation support software tools, using open source, free online tools whenever possible. We encourage use of these tools and train our teams to combine open source 'recipes' of software whenever possible.

Technical tips:

a. Screen sharing: Join.me, Skype, Google Hangout

b. Video conferencing: Google Hangout, Skype, Facetime (Mac)

c. Document sharing: Google Docs, Sugar Sync, Box, Dropbox

d. Case analysis/chronology: CaseMap, TimeMap, Adobe

e. Database prep: Summation, Concordance

f. Graphics: PowerPoint, Adobe products (Photoshop, Illustrator)

g. Trial presentation: TrialDirector, Sanction, PowerPoint, Keynote (Mac)

Strategy 5: Pretrial Jury Research

Tactic:

Conduct mock trials whenever possible. Often used only in capital cases or high-stakes civil litigation, the benefits of a mock trial are nothing short of phenomenal. While some naysayers may decry that information gleaned from pretrial jury research will never show what the real jury will think, our experience has been that the results are indisputably valuable. Our involvement with traditional mock trials as well as online jury research supports often astonishing benefits – from discovering previously unknown juror-defined issues to planning trial strategies to helping achieve best possible outcomes.[14]

Technology has evolved (and is evolving!) at light speed. Attorneys and jury consultants can now get early mock juror feedback quickly and conveniently, without breaking the budget.

Technical tips:

a. Traditional mock trial: present actual evidence and include proposed visuals in a mock trial to more closely resemble the anticipated trial proceedings and to increase the reliability of the mock jury feedback.

b. Online jury research: make use of evolving online services such as Jury Workshop™, Micro-Mock™, Looking Glass, etc.[15]

Strategy 6: Jury Consultants / Trial Consultants

Tactic:
Make use of jury and trial consultants early on. These advisors comprehensively help attorneys in myriad ways, from conducting jury research to witness preparation to honing the attorney's courtroom 'theater' skills. If the jury's first impression is negative, this is what a jury will remember.

A 2011 study conducted by Adam Trahan and Daniel M. Stewart[16] analyzed former capital jurors, their impressions of defense and prosecuting attorneys' personal characteristics, and the impact these perceptions have on sentencing outcomes. Their findings showed that jurors' impressions focused on the physical appearance and personalities of the attorneys. Defense attorneys were viewed more negatively than prosecutors and significantly related to sentencing outcomes – negative impressions of defense attorneys were associated with death sentences. Trial consultants are critical guides, experts who knowledgably coach and lead attorneys from the legal world view of their case over a bridge to the real world - and to a place where a jury will really hear them.

Technical tips:

a. Use video: attorneys coached by their consultants can practice, develop, modify, change, study, and refine how they tell the story of their case as well as perfect their presentation skills – using webcams on their laptops or their iPads.

b. Use emergent technologies to capture key clips of these videos for evaluation by traditional group research sets or online mock jurors.[17]

Strategy 7: Break the Mold

Tactic:
We get it – the defense does not have the burden of proof. Nevertheless, we have seen too often that this standard seems to work against them. In post-trial interviews and in general conversation with people who have served as jurors, we hear that jurors want an explanation from the defense, however implausible. When they don't get one, they either fill in the blanks with their own version of the facts or they go with the prosecution's story.

As emphasized by Karyn Taylor in her 2008 visually-rich and example filled article entitled, "Discover the Power of Conceptual Persuasion," she presents the need for good legal graphics as essential. She states that there is only one true measure, "does it persuade the trier of fact to 'buy in' to your client's point of view?" She further details the need "to forge an *emotional* bond between fact finders and your client. That's the job that conceptual graphics are designed to do."[18] Taylor explains that conceptual graphics "turn[] words or concepts into memorable images."[19]

An excellent recent example of this concept in action was defense attorney Cheney Mason's burden of proof chart utilized in the closing arguments of the Casey Anthony trial. He visually presented the high level of proof that '*beyond a reasonable doubt*' requires. (See Figure 2 below.) The burden of proof chart Mason used outlined all of the different feelings that would be encompassed under "*not guilty*," showing that even a small sliver of uncertainty would prevent a guilty verdict. He told a story, supported it visually, and gave enough of an explanation that caused the jurors to pause and return the not guilty verdict.[20] Because prosecutors were not able to provide the jurors with sufficient evidence to prove the important link between mother and daughter, jurors were not able to produce a guilty verdict within the required standard of proof.[21]

Technical tips:

a. Arm the jurors: The defense needs to present plausible explanations or at the very least arm jurors with arguable points to withstand/persuade during deliberation room discourse. Don't leave the jury to fill in the blanks! The importance of a compelling story along with visual presentation cannot be overstated – help the jurors to remember.

b. See the point: Seeing the point while hearing the point explained will engender a more complete understanding of the facts in a case. When jurors listen, they try to picture it in their minds. Using a visual aid ensures that the jurors will form the mental picture of the facts intended by the trial team.[22]

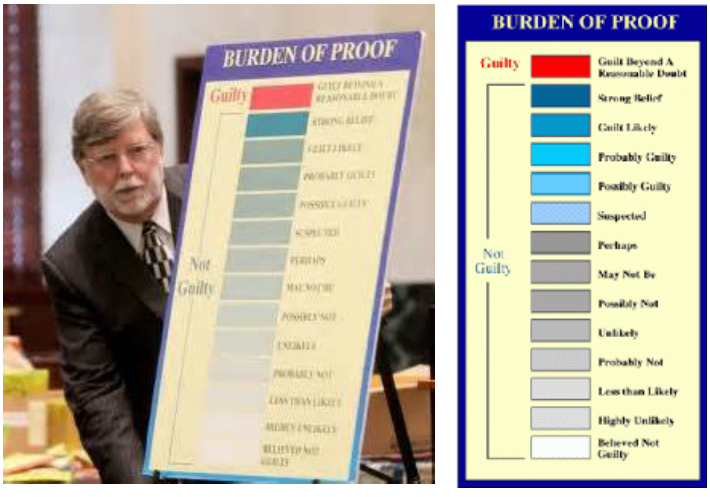

Figure 2: Visual aid used by Attorney Cheney Mason in closing arguement of Casey Anthony trial

Conclusion

Potential jurors live in a new world, able to be always online with unfettered access to ubiquitous media 24/7. Confront

this by building powerful courtroom umami through various techniques – traditional and unconventional, online and offline, in-house or outsourced. Thoughtful integration of technology in combination with traditional legal strategies is essential for litigating these days, and can be the surprise factor where there is a high level of negative pretrial publicity.

May these 'savory strategies' nourish your case.

Illustration by Sully Ridout of Barnes & Roberts

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References

[1] Umami = savory (It is one of five basic tastes (together with sour, sweet, salty and bitter.) Umami-rich ingredients, alternatives to traditional salt or spices, open up an entire pantry of new resources for that elusive taste sensation that makes every dish memorable. Judicious use of surprising ingredients – think vinegar – can vitalize and improve flavor, making a dish remarkable and memorable.

[2] For a more powerful effect, Chef Jean-Georges Vongerichten offers what he calls "umami bombs," dishes that pile on ingredients naturally rich in umami for an explosive taste. Source: McLaughlin, Kay, A New Taste Sensation, Wall Street Journal (12/8/2007), <http://online.wsj.com/article/SB119706514515417586.html>

[3] In a 1996 American University Law Review article entitled, "Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong," Robert Hardaway and Douglas B. Tumminello argue for the creation of a uniform judicial or constitutional standard. They provide a comprehensive analysis of the history of pretrial publicity and modern court treatment, including a thoughtful critique of the circumstances test. "The totality of the circumstances test is derived from the Supreme Court's opinion in Irvin v. Dowd, 366 U.S. 717 (1961). In Irvin, the Court defined the totality of the circumstances test as consisting of three parts: (1) an examination of the voir dire for juror hostility; (2) an examination of the general atmosphere surrounding the courtroom at the time of the trial; and (3) an examination of the length to which the trial count must go to obtain impartial jurors." Supra. at 58. The authors analyze various remedies which attempt to neutralize the prejudicial effects of pretrial publicity and propose "the adoption of a specific constitutional standard that clearly sets forth procedures that must be applied by a court in a criminal case of national notoriety" particularly when courts are faced with clashing constitutional standards, e.g., free speech v. free press. They further propose the following remedies:

1. Restrain the press from publishing details of a crime, investigation and judicial proceedings.

2. Restrain the lawyers by imposing constraints on what the parties attorneys may say to the press.

3. Closure of judicial proceedings including the pretrial proceedings, the voir dire and the trial itself to the public in an effort to control the pretrial publicity. Hardaway, Robert & Tumminello, Douglas B., Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong. American University Law Review 46, no. 1 (October 1996), 39-90. <http://digitalcommons.wcl.american.edu/aulr/vol46/iss1/2/>

[4] In his recently published book, Eric Kasper discusses the U.S. Supreme Court decision rendered in Sheppard v. Maxwell (1966) which addressed "the balance between two of the Constitution's commands: the right of a criminal defendant under the Sixth Amendment and Fourteenth Amendment's Due Process Clause to receive a fair and impartial jury trial [ ] pitted against the First and Fourteenth Amendment right to the freedom of the press." He states that, throughout the Sheppard decision, Justice Clark identified a "long list of potential methods for a trial judge to ensure that a jury remains impartial when there is prejudicial pretrial publicity," including:

Suggestions from Sheppard v. Maxwell to address prejudicial pretrial publicity:

1. Ordering a change of venue

2. Sequestering the jury

3. Holding a short continuance until after the upcoming judicial elections

4. Limiting the number of reporters in the courtroom

5. Placing reporters farther away from counsel tables, witnesses, and jurors

6. Prohibiting the media from interviewing witnesses before and during the trial

7. Placing a gag order on the police, witnesses, and counsel for both sides

8. Warning the media to check the accuracy of their accounts

9. Declaring a mistrial and ordering a new trial Kasper, Eric T., Impartial Justice: The Real Supreme Court Cases that Define the Constitutional Right to a Neutral and Detached Decisionmaker, Lexington Books (2013), p. 22-26.

[5] In an article entitled, "Assessing Pretrial Publicity Effects: Integrating Content Analytic Results," Christina Studebaker and her colleagues share a scientific approach to performing content analysis of pretrial publicity. They draw upon data sources such as legal commentary and past empirical social science research. They present their analysis technique as a systematic approach employable by both prosecution and defense when presenting arguments to the court about whether a change of venue should be granted. They share how they applied the use of their content analysis technique to efforts expended in preparation for the change of venue hearing in the case of the Oklahoma City bomber, Timothy McVeigh.

Studebaker, Christina A., Robbennolt, Jennifer K., Pathak-Sharma, Maithilee K., Penrod, Steven D., Assessing Pretrial Publicity Effects: Integrating Content Analytic Results, Law and Human Behavior (June, 2000), Vol. 24, Issue 3, pp. 317-336.

[6] Meyer, Tom, Investigator: Castro loves daughter, will plead 'not guilty', WKYC.com (May 14, 2013), http://www.wkyc.com/news/article/299605/489/Investigator-Castro-loves-daughter-will-plead-not-guilty

[7] Ibid.

[8] "In an era when defense lawyers routinely use the media to sway judges and juries, Clarke, her friends claim, is an anomaly, avoiding anything that might harm the fragile trust between her and her clients. She did not return calls from TIME to discuss her work on the Loughner case, and when she was reached in person in Phoenix, she chose not to talk at all. "Most lawyers who do this type of work talk to the media to create a counter-narrative for their client," says Kuby. "You make them seem less evil as part of a legal strategy. Judy Clarke has always refused to do that — with fantastic results."" Friedlander, Beau, [The Legendary Lawyer Who will Defend Loughner: Judy Clarke] (http://www.time.com/time/nation/article/0,8599,2041943,00.html#ixzz2Ryq6d2pF), Time Magazine (1/12/2011), with reporting by Adam Klawonn/Phoenix.

[9] Entman, Robert M. and Gross, Kimberly A., Less Bad News: What Defense Advocates Can Learn from the Duke Lacrosse Case, The Jury Expert, 2010, 22(3), 27-42.

[10] Ibid. at 33.

[11] Story spine format courtesy of Stanley Brodsky, Principles and Practice of Trial Consultation (2009 Guilford Press).

[12] For an excellent exploration of the importance and benefits of this role, see, Hughes, Emily, Mitigating Death, Cornell Journal of Law and Public Policy, Vol. 18:337 (2009). <http://www.lawschool.cornell.edu/research/JLPP/upload/CJP202-2.pdf>

[13] In State v. Komisarjevsky, mitigation specialist Lisa Rickert of Wisconsin was grateful for the database, document management, and visual graphic support available to her, enabling her to present her work to the defense team in a visually compelling way. Similar experiences with mitigation experts in US v. Perez, US v. Gonzales, US v. Aquart, as well as several ongoing cases, has proven helpful and beneficial to the trial team.

[14] A Case Study: Jury Workshop™ Helps Maximize Case Settlement, (2013), <http://www.litigationsolutions.net/casestudies.html>

Attorney Robert F. Danzi of Westbury, NY recently shared that the online jury research tool, Jury Poll™, was helpful in settlement negotiations and that it changed his damages calculations. When asked, "[w]hat did you like about the Jury Workshop™ service?" Danzi stated, "Portability. It was available on my iPad and phone so [it] was with me as I was negotiating the case. I was actually able to show select results to my adversary to counter his view on the percentage of fault he expected the jury to assign."

[15] http://www.juryworkshop.com, http://www.a2lc.com, http://www.lookingglassjuries.com

[16] Trahan, A. & Stewart, D. M., Examining capital jurors' impressions of attorneys' personal characteristics and their impact on sentencing outcomes, Applied Psychology in Criminal Justice, 7(2), 93-105. (2011).

[17] http://www.juryworkshop.com, http://www.a2lc.com, http://www.lookingglassjuries.com

[18] Taylor, Karyn J., Discover the Power of Conceptual Persuasion[SM], The Jury Expert, 20(4), 1-7.

[19] Ibid. at 2.

[20] Crumpton, Matt, Public Outrage at Casey Anthony Verdict: Understanding the Differences in the Burden of Proof from Civil to Criminal Cases, Crumpton Law LLC, http://crumpton-law.com/public-outrage-at-casey-anthony-verdict-understanding-the-differences-in-the-burden-of-proof-from-civil-to-criminal-cases/

[21] Alvarez, Lizette, Casey Anthony Not Guilty of Slaying of Daughter, New York Times newspaper, (July 5, 2011), http://www.nytimes.com/2011/07/06/us/06casey.html?pagewanted=all&r=0

[22] Siemer, Deanne C., Rothschild, Frank D., Stein, Edward R. & Solomon, Samuel H., PowerPoint for Litigators. National Institute for Trial Advocacy (2000).