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Neutralizing Negative Pretrial Publicity: A Multi-Part Strategy

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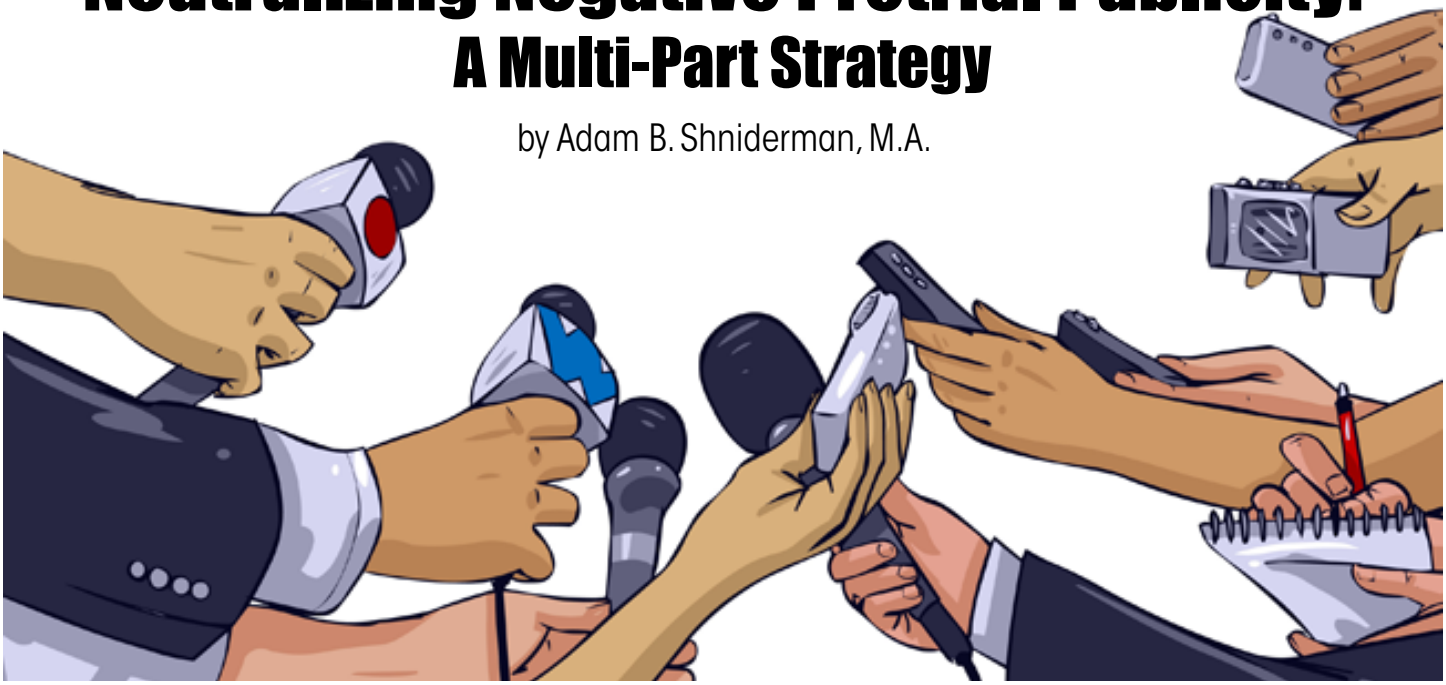

Pretrial Publicity, Voir Dire, and Challenges for Cause

CABLE NEWS, the internet, twenty-four hour news cycles, social media websites including Facebook and Twitter, newspapers, expert and not-so-expert television commentators, interviews of and media releases by participants and observers–some of whom may have agendas which extend beyond the case at hand–have significantly increased the amount of information, speculation, and theories made available to the public, and thus potential jurors, about pending cases. This is all the more true with high profile cases. Consultants and lawyers have long known what psychological research shows – pretrial publicity can have significant impact on jury verdicts. As many in the business of trial consulting know, the law makes an incorrect assumption that potential jurors can compartmentalize the influence of outside information and set it aside. On this assumption, the law has, through statute and/or judicial opinions, constructed a standard for acceptance/dismissal for cause of a juror based on a juror's self-assessment of whether he/she can set aside facts, views, and opinions and decide the case solely on the basis of the evidenced admitted at trial. This article explores the issue of pretrial publicity (PTP) and juror bias, briefly discusses the psychological literature on the realities of bias and decision-making, and offers a multi-part suggestion for addressing PTP prior to trial, during *voir dire* and during the trial.

As we have seen during *voir dire* in the Casey Anthony, George Zimmerman and Andrea Sneiderman cases, significant time and energy is spent trying to ascertain what a prospective juror has seen or heard about the case and whether he/she has formed any opinions about the incident and the guilt or innocence of the defendant. Once these "objective" questions have been asked, prospective jurors are repeatedly reminded that if they are selected to serve, their verdict must be based solely on the testimony and other forms of evidence admitted at trial. Lawyers from both sides follow this admonition with a question about whether the prospective juror can and will "promise" to set aside any information he or she has heard in the media and the opinions he or she has formed, and decide the case solely on the evidence. In part, explicitly questioning whether a prospective juror can and will make an unbiased decision, particularly in Florida, where both the Anthony and Zimmerman case were held, stems from repeated precedent and statute that it is insufficient to dismiss a prospective juror

for cause because he or she has heard about the case or has an opinion, if he or she states that he or she can make an objective decision based on the evidence admitted in court. Florida Statute §913.03(10) states that the "formation of an opinion or impression…shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial [unbiased] verdict according to the evidence." Georgia Statute §15-12-164 provides a series of questions prospective jurors are to be asked during *voir dire* to determine competence to serve. While the statute is less clear than Florida's on the issue of opinions and impressions, it too suggests that a juror's self-evaluation of his/her ability to be fair and impartial should be taken into consideration. The U.S. Supreme Court set forth a similar standard in Mu'min v. Virginia. Significant deference is given to these self-reports, and as research shows, even if lawyers and judges inquire into these biases to make an independent assessment of a prospective juror's ability to act impartially, it is insufficient to eliminate the impact of pretrial publicity.

The Illusion of Picking an Impartial Jury

This standard, set by legislatures and courts, is outmoded in light of a growing body of literature in cognitive psychology on human judgment and decision-making, and has been for quite some time. The logic underlying current standards for dismissing jurors for cause assumes that information influences an individual's judgments and decisions at a conscious level. As such, a prospective juror is expected to know what factors, experiences, and information may impact his or her decision-making, put them in a box, and set them aside during the trial and deliberation. Dating as far back as Nisbett and Wilson's influential piece in the 1970's, cognitive psychologists have empirically shown that factors influencing decision-making often operate at an unconscious level and that individuals are therefore unable to know all of the "inputs" in their decisions or consciously control their biases. Specifically, Nisbett and Wilson found that people often cannot report accurately on the effects of particular stimuli on higher-order inference-based judgments, even after they are told about potential biases in their decisions. As Emily Pronin writes, research shows that individuals recognize the existence and impact of the biases that are known by psychologists to affect human judgment and inference. However, individuals lack recognition of the role these same biases have in shaping their own judgments and inferences. As a result of this "bias blind spot," individuals frequently overstate their objectivity when making decisions. These findings in cognitive psychology have been replicated with direct application to the legal decision-making.

Research assessing the impact of pre-trial publicity on jurors has long found strong evidence for its impact on verdict choice. A 1999 meta-analysis of the 44 empirical studies on the impact of negative pretrial publicity, completed by that time, found an overall damaging effect of negative PTP. The size of the effect varied based on several factors, including the studies' subject pool (students vs. recruited adults) and length of time between exposure and assessment. Unsurprisingly, studies dating back to the mid-1970's have found that the cognitive phenomena described above, in other areas of judgment/decision-making, appear in juror decision-making and self-assessment. Just as individuals making other decisions suffer from the "introspection illusion" and the "bias blind spot," prospective jurors are unable to self-assess bias based on PTP and set them aside to deliberate. In 1975, Sue, Smith, and Pedrozza found that individuals who had been exposed to negative pre-trial publicity, but who said they could render a fair and impartial verdict, were more likely to convict than those who had not been exposed to PTP. Robertson *et al.* found similar results in the civil area. In a paper presented at the Conference on Empirical Legal Studies and the ASTC Annual Conference the researchers found that jurors were biased by PTP, they were unable to accurately self-diagnose, or set aside bias. The mounting scientific evidence that is contrary to the legal system's assumptions and approach cannot be ignored or swept aside. The ultimate question becomes what to do about PTP as you attempt to empanel an unbiased and impartial jury.

Clarifying The Problem

Voir dire has been demonstrated to be an ineffective means of addressing the impact of PTP. Kerr *et al.* found that even with an approach for detecting bias that went beyond simply accepting the jurors' self-diagnoses, judges and lawyers were unable to pick a jury that was more impartial. Dexter *et al.* subsequently replicated this finding, discovering that "extended" *voir dire* did not reduce the impact of PTP. Judicial limiting instructions and admonitions have also been shown to be ineffective. Fein *et al.* found that judicial admonitions were ineffective at reducing the effects of PTP. Robertson *et al.* have suggested a change in the standard. They propose "lowering the bar" by allowing for the disqualification of any prospective juror whose "impartiality might reasonably be questioned." This standard would allow for the dismissal for cause of anyone who has been exposed to "mental contamination" at all. Certainly, long term, a change in the standard to better reflect the state of scientific knowledge seems ideal. And at first blush, Robertson's proposed rule seems like a positive step forward. However, there are several issues with this proposed solution, beyond the risk the authors of the study note in their paper - dismissing individuals who may have ended up being impartial.

First, in many cases, as demonstrated in the high-profile and emotionally-charged Anthony, Zimmerman, and Sneiderman cases, it can be difficult to find anyone who has not been "contaminated" by some sort of PTP. Only those who "live under a rock" and have no interest in any form of news would remain in the jury pool. As such, this approach could empanel a jury that is apathetic about the events of the world around them. Many would likely agree these are less than ideal jurors. Second, the science that undermines the law's approach to assessing juror bias is not new. Cognitive psychologists have demonstrated the inability of people to understand their own decision-making and self-diagnose their own biases for

40 years. Yet, courts and legislatures continue to employ and even reaffirm the dated standard for dismissing individuals for cause. Thus, it would seem the system is in no hurry to change the standard. Certainly, this does not mean lawyers and trial consultants should give up.

Combating PTP

The principal concern associated with negative PTP for attorneys and trial consultants is confirmation bias – the tendency to seek out evidence consistent with one's beliefs and to ignore, dismiss, selectively interpret or undervalue evidence to the contrary. Confirmation bias can also lead to belief perseverance – continuing to hold a belief/view even in the face of unambiguous evidence to the contrary. Like most biases and judgment/decision-making processes, confirmation bias occurs unwittingly. To combat the problems of PTP and confirmation bias, jury consultants and trial lawyers should consider employing "debiasing" strategies. Wilson and Brekke identify four conditions that must be satisfied to avoid "mental contamination" and to "debias" decision-making. While it is impossible to satisfy the four conditions necessary for an individual to *actively* or *consciously* debias his or her decision-making, all hope is not lost.

Research on debiasing is still ongoing and much is still unclear about what biases can be mitigated through debiasing. Generally, debiasing, as the name implies, involves the implementation of techniques to eliminate bias, or at a minimum, significantly diminish the intensity of bias. Scholars studying debiasing techniques have explored a range of biases, their cognitive origins, and in doing so have begun to develop steps to eliminate the influence of these biases. Debiasing techniques, nearly universally but particularly those developed/explored for addressing confirmation bias, seek to move decision-making from automatic, heuristic-based processes into the realm of conscious, carefully reasoned analysis.

A multi-stage approach to debiasing prospective jurors is recommended, beginning before the juror pool is assembled and continuing through *voir dire*. As the case develops in the media, consultants and attorneys should focus on casting suspicion on negative PTP. Casting suspicion has been shown effective in reducing (or even negating) the impact of pretrial publicity. While, many defense attorneys attempt to offer a general counter-narrative and portray their client in a positive light prior to the beginning of trial, the assault on negative publicity should more directly address negative pretrial publicity. Consultants can work with attorneys to gather negative PTP and develop a means of communicating with the public, either directly through the media or through the internet independently, to cast suspicion on the motives of those disseminating the information, particularly highlighting the press' ratings driven behavior, as well as to cast suspicion on the information itself, highlighting and correcting any skewed "facts" being reported (without giving away trial strategy).

Steven Fein and his colleagues tested the impact of pretrial publicity when jurors are also exposed to a news article casting suspicion on the motivation behind the negative pretrial publicity found in the biasing information. Fein defined suspicion as "actively entertaining multiple, plausibly rival, hypotheses about the motives underlying a person's behavior". Their research was concerned with counter-information that caused jurors not only to question the veracity of the pretrial publicity but also "why the information was presented in the first place and to consider the possibility that it was done for ulterior motives." Their study found that jurors who had been exposed to the "suspicion article" were not significantly different in their decision-making from jurors who had not been exposed to any pretrial publicity. Given this empirical research, defense lawyers and consultants in media-heavy cases should formulate and implement a pretrial strategy to directly address and cast suspicion on any media reports that may be damaging. This approach was, to some extent, employed by the defense lawyers in the Zimmerman case, with their website and social media campaign. ABA Rule of Ethics 3.6 on "Trial Publicity" permits such practices and commentary. Rule 3.6 allows for lawyers to "[m]ake a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or his client."

Voir dire should be aimed at gauging to what pretrial publicity potential jurors have been exposed and continuing debiasing strategies. Knowing that the bar for dismissing a juror for cause is high, and that even those who seem unbiased may indeed suffer unconscious bias from even limited PTP, lawyers can take the opportunity to not only deselect jurors, but also debias jurors. Request partially sequestered *voir dire*, as it allows a significant opportunity to debias jurors without potentially "contaminating" others – particularly as these debiasing strategies require addressing very specific information. Partially sequestered *voir dire* is becoming routine in high-profile cases. In both the Zimmerman and Sneiderman cases, prospective jurors were individually questioned on PTP issues. The judge in the Holmes' case in Aurora has issued an order that will allow counsel to question prospective jurors individually, outside of the presence of other jurors, on death qualification and PTP issues.

This stage of the *voir dire* process allows lawyers to gather specifics about what information a potential juror knows and has been exposed to, and to tailor debiasing to each prospective juror. In addition to continuing to cast suspicion, the opportunity to interact with the prospective juror allows lawyers to employ the "consider the alternative" strategy. Using this method, lawyers propose and ask the juror to consider an alternative (explanation, possibility, etc.) to the biasing information - to generate a rival point of view or imagine other explanations for a set of events or information. Research has shown that getting an individual to consider an alternative or consider the opposite (a counterfactual), as an explanation for potentially biasing information is effective in eliminating the

effects of confirmation bias. The strategy is significantly more effective than simply admonishing individuals to be as fair and unbiased as possible. Jurors who go through this debiasing *voir dire* process should make decisions that are similar, if not identical, to jurors with no PTP exposure.

Should sequestered *voir dire* not be available, these debiasing strategies can still be used. However, lawyers must be cautious to avoid "contamination" of other listening/observing potential jurors. In non-sequestered *voir dire,* attorneys can capitalize on the interactive nature of the process and use jurors to debias each other through their responses. This approach will allow lawyers to get prospective jurors thinking about the bias in media reporting, to continue to cast suspicion on negative pretrial publicity in a more general sense, and to further gauge prospective jurors' attitudes.

Contrary to instinct, lawyers should consider jurors who have been exposed to both positive and negative pretrial publicity. Particularly in very high profile cases, individuals who have *no* PTP exposure are likely not ideal. Those who watch, read or listen to the news, and who have been exposed to both *biasing* and *debiasing*, particularly debiasing *voir dire*, may be the best jurors, particularly in complicated cases requiring careful deliberation. These individuals' decisions will closely reflect those of an individual who had been exposed to no pretrial publicity and their decision-making will likely be, because of debiasing efforts, based more in careful, reasoned judgment than automatic processing. Finally, given the limited empirical exploration of debiasing to neutralize the effects of pretrial publicity, any prospective juror exposed to *significantly* damaging evidence, such as knowledge of a defendant's prior crime that would not come into evidence under the Rule of Evidence 404, can be noted for possible peremptory challenge if he or she satisfies the minimal standard to preclude a challenge for cause.

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