The Jury Environment in 2003

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INTRODUCTION

The general perspective by American society and the legal world in particular is that the actions and general environment in the jury room at the turn of the twentieth century seem to be different than they have been in the past thirty to forty years. These changes are really an extension of new social and behavioral patterns that have been emerging in American society as a whole for decades. While there is much argument among many parties (i.e., corporate executives, attorneys, legal scholars and academics) as to the nature of these changes–good or bad–our job here is not to remedy the situation, nor attempt to change social behavior. We seek to understand juror behavior in the context of this changing social milieu.

In this short paper, we are going to briefly summarize these trends in the American social patterns over the last forty years, and examine what these changing patterns might mean for courtroom communication strategies. We will also review these emerging issues as they relate to the September 11 tragedy and other recent events. We want to see how much these changing patterns influence how we, as trial consultants, must do our job to better support the legal team and their clients.

BACKGROUND

Research conducted in the United States within the past thirty to forty years by numerous sources–academic institutions, private foundations, professional associations - seems to point to a trend that Americans are adopting more and more of an individualistic attitude. Individualism has always been a strong American trait and highly valued. However, within the past three to four decades that need for individual rights seems to sometimes overshadow the need for communal responsibility. The result, one might speculate, has been that there are less agreed upon communal responsibilities or "standardized" values. As individual differences increase, fewer generalizations about group behavior can be made. Since courtrooms are microcosms of our larger society, it is logical to speculate that fewer generalizations can be made about what will happen in the courtroom due to the multiple conflicting values and scenarios presented in a case.

The consequence of changing American norms is that the traditional legal context known to most lawyers is changing. Using assumptions about legal strategy of five or ten years ago is like trying to drive a car by looking in the rear view mirror. These social trends indicate the increasing isolation of

the average American. These trends and their consequences exist across every venue in the United States. This pattern used to be attributed to the growth of suburbia. However, current research indicates that Americans are becoming more isolated and less and less socially engaged whether they live in the east, west, north or south; whether they live in a city, suburb or a rural area. Furthermore, these trends are becoming more exaggerated with every passing decade.

What are these trends that seem to be affecting our communal psyche? Robert D. Putnam, in using multiple sources of information in a book called Bowling Alone, The Collapse and Revival of American Community (1), cites the following areas of decline of communal activity or grass roots democracy:

- Decline in formal political activity
- Decline in civic activity
- Changing relationships and structure at work
- Less time with family and friends
- Less volunteering, less giving
- Less trust, honesty, reciprocity

In short, in Putnam's opinion, American citizenry has been slowly losing its historical, social currency that was such an integral part of our society for decades. These changes have required a substitute for the personal resolution of differences. The increase in the number of lawyers and formal, legal conflict resolution is one of the outcomes of these changes. A stark factor in this change is the loss of trust and reciprocity between individuals. The changes are not recent. They have been occurring over the last one-third of the twentieth century.

This seeming movement away from communal bonds and toward a more isolated lifestyle can be identified in several key areas of community engagement according to Putnam: political participation, civic engagement, religious affiliations, the work setting and family and friends. To understand this trend of increasing isolation, it is helpful to review aspects of the social behavior of the American citizen over the last four decades. The record seems to state that we are losing certain essential communication tools we once thought to be workable.

POLITICAL PARTICIPATION

The most common form of communal participation in a democracy is probably that of voting. Unfortunately, it has been common knowledge that Americans are voting in fewer and fewer numbers for the past two centuries, with the most serious declines within the past four decades. The decline of this simple act of communal activity is even more startling when we take into account that more and more persons are eligible to vote (women), that there are fewer and fewer restrictions for voting (on the spot registration with a drivers license), and less discrimination against minorities who have increased access to the voting booths (African-Americans). In 1960, 73% of all eligible American citizens voted in the presidential election. In the last presidential election, only 51% voted.

This pattern of decline is increasing according to Putnam's thesis. Cooperation is falling more rapidly than self-expression, and may well be encouraging the disparity of our social behavior.

CIVIC ENGAGEMENT

The definition of civic engagement (as opposed to political engagement) is generally established by participation in non-political civic associations (Lions Clubs, Boy Scouts, PTA's etc.) For instance, in 1970 33% of all parents attended PTA meetings. In 1998, that number had dropped to 18%. Americans have continued to increase their memberships in associations or clubs. However, these newer associations do not require social interaction. Rather, they represent passive, as opposed to active, participation. Statistics that are gathered in this area seem to indicate that any increase in association memberships tend to be in organizations like the AARP, where there is virtually no active involvement, just a willingness to send in a check for certain real or perceived benefits.

On the other hand, associations that demand live participation and engagement, such as charities, youth groups, participative sports groups and unions, have plunged. There has been significantly less face-to-face social activity. Participation in voluntary associations and clubs has been cut in half in the past three decades. Although Americans continue to claim that we belong to more organizations, in fact these organizations themselves are less participative in the community and we are less participative in the organizations. The organizations tend to be based more upon observing activities rather than doing activities.

Furthermore, many of these organizations are really lobbying efforts that promote self- interests but require no active participation.

Of course, much of this decline can probably be attributed to increasing demands on a family's time. We know that there has been a dramatic increase in families with two working parents. These parents have significantly less time to donate. Spread too thin, we are forced to cut corners. Not attending a PTA meeting, for example, might mean the opportunity of a precious evening at home. This, however, comes at a cost. Failure to participate in community and civic events reduces a family's ties to the community. The failure to participate in the PTA meetings means that these parents will have less influence in their children's education. It also means that we have less understanding of the immediate world around us and less input into how our communities are managed.

RELIGIOUS AFFILIATIONS

Churches are traditionally incubators for civic activity. Statistics reveal that a regular church attendee is more likely to be engaged in all forms of communal activities, from voter participation, to active memberships and jury participation. Traditionally, regular church attendees are more conversational and help promote interaction between people. Consistent with the evolution of our changing social environment, Americans are going to church less and less often than they did four decades ago. Furthermore, the churches themselves are less engaged with the wider community, fostering again a more isolated environment where only people with very similar or identical values interact. Since 1960, church attendance has declined by 10%. In the decade between 1990 and 2000, thirty million fewer Americans went to church.

THE WORK SETTING

Fewer and fewer American workers are participating in the work place in a permanent environment. The shift, particularly dominant in the 1990's, has been increasingly toward more part-time and temporary employees in the work place. There are also increasing contract and on-call workers. Nearly one-third of all American workers fall into this temporary work category, whether they wish to or not.

Why is this trend important? Of course, there are many pluses to this more flexible work environment. For instance, women can have children and continue to work part-time. Other workers can now work at home or at distant sites away from the office and still make a significant contribution to the work force. However, there is also a downside to this part-time and contractual employee relationship. These employees are not involved in discussions around the water cooler, and they are not interacting face-to-face on a regular basis with other employees or their employer. When the link of communication is more limited to phone calls and email, we lose some of the face-to-face interaction that is so critical to developing communication skills in either a friendly or adversarial environment. Furthermore, the interpersonal bonds of the work place are less strong when there is little face-to-face contact with the part-time or contractual employee and his fellow employees. There may also be less loyalty of the employee to the employer, and equally there may be less loyalty of the employer to the employee.

FAMILY AND FRIENDS

As summarized above, Americans are less and less likely to communicate with people in more formalized settings such as churches, politics, work and civic associations. However, this trend toward less face–to-face interaction extends even into the American family.

The extent of this decline of interaction within the family and even among family friends puts into question the viability of the social fabric that is so important to our everyday interactions. Fewer and fewer families have dinner together. Families that eat together fell in number from 50% to 34% in the past two decades. When they are eating together, the television set is frequently turned on. Fewer people have friends over for dinner. Fewer people are "dining out" and more and more people are grabbing a bite at a fast food restaurant. Americans are participating less and watching more. They watch TV in growing numbers. They attend sports events and the theatre and the movies. They go to museums and concerts. However, Americans are "doing" less and less. We play fewer musical instruments, we cook less, we participate in sports less, and we visit with our friends less.

One can speculate that these patterns of diminished social and more individual engagement reduce the ability of the average American to actively and constructively participate in positive social interactions. The vitality of the concept of social currency requires an acceptable level of communication skills. Communication in this context means learning to listen effectively as well as speaking effectively and persuasively. The more socially isolated you are, the more difficult it is to nurture these communication skills. Some current news analysts have dubbed this trend as the "argumentative society."

Why should this seeming decline of trust and reciprocity matter to the legal community and lawyers? We do know that in the same time period that Americans seemed to be losing their "social currency", their reciprocity and their trust, there was a dramatic increase in the number of lawyers in the United States. Conflicts that were formerly resolved by a handshake or informal dialogue have all but disappeared. Until the 1970's, the lawyer to citizen ratio in the United States remained stable. Approximately three decades ago the legal profession started to expand dramatically. While there may be many explanations to this growth, such as higher divorce rates or a more complex business environment, Robert Putnam speculates in Bowling Alone:

> *"Almost imperceptibly, the treasure that we spend on getting it in writing has steadily expanded since 1970, as has the amount that we spend on getting lawyers to anticipate and manage our disputes. In some respects, this development may be one of the most revealing indicators of the fraying of our social fabric. For better or worse, we rely increasingly-we are forced to rely increasingly-on formal institutions, and above all on the law, to accomplish what we used to accomplish through informal networks reinforced by generalized reciprocity-that is, through social capital." (2)*

While this decline in social capital of Americans might on the surface benefit the legal profession, it also affects the ability of the lawyer to do his or her job effectively. As common values among our citizenry seems to be more amorphous, it is harder for the lawyer to speculate on what he or she will confront when in an adversarial situation. For instance, a good example of the possible implications is sited in a recent New York Times newspaper article entitled, "Tempers Seem to Be Growing Shorter in Many Jury Rooms":

> *"Court officers mention fistfights they broke up, chairs hurled out windows and jurors who screamed so loudly they were heard on other floors…jurors have complained about being bullied and humiliated during deliberations. In an extreme case, five black jurors gouged the eye of a holdout white juror and accused him of racism, according to a judge in a 1996 survey on juror conduct, the most recent one conducted. That sort of conduct has led courts around the country to give jurors booklets on how to debate while being courteous and even-tempered. Other courts are focusing on reducing stress…these include hints on how to deliberate and making them more physically comfortable. Another source of conflict comes from jurors who increasingly allow their politics or their consciences to enter the deliberations…that practice has led to open warfare in a number of jury rooms". (3)*

In summary, all of the social characteristics that we have briefly examined above, contribute to a much more unstable environment in which today's lawyer has to present his or her case.

CURRENT EVENTS

Adding to the uncertainty and change outlined above are the deluge of unpleasant current events. Questions have arisen frequently over the past months about how the September 11 terrorist attacks have affected the nation as a whole. As this article is being written, we do not know of the impact that

a war with Iraq would have with jurors. As jury consultants, we are frequently asked what we believe the impact of September 11 is having on jury verdicts. And since the implosion of Enron and the subsequent impact on such corporate institutions as Arthur Andersen and Merrill Lynch, many questions have also arisen as to how these events will affect life in court.

Short of having a crystal ball, it is impossible to predict the exact impact of these current events. However, we can reflect upon past situations, immediate reactions and begin to develop some hypothesis about what we think might be in store for us. The most important element to keep in mind is that each individual situation is different. Each experience is different and consequently reactions are different. Simply applying one theory to all lawsuits, all lawyers, all judges and all individuals would lead us to a gross over simplification of the potential impact of these events on our United States institutions. Even a war with Iraq may not change these imbedded trends.

We see a very limited impact from September 11 today. As early as March 7,2002 an article in USA Today stated that, "The national mood, dubbed "war normal" after September 11, is beginning to seem like just plain normal, especially outside the country's northeastern quarter. For example: In October, 59% of Americans said they were very or somewhat worried that terrorists would harm them or a family member, according to a USA Today/CNN/Gallup poll. Today, (only) 35% report such fears. And weekly attendance at a house of worship, which spiked to 47% at the end of September, is back at the pre-September 11 rate of 41%…Many of the flags that seemed to adorn every other car and home after Sept. 11 have begun to fade and fray and fall. One New Jersey highway maintenance crew picks up 10 to 20 flags a day."

Since September 11 SLR has been conducting research exercises throughout the country. In accordance with our role as trial consultants, we have been examining the effects that current events have had on individuals based on our existing database of mock jurors, past and current social and political trends, and the individual qualitative responses obtained from jury research subjects. We are closely examining what psychological and social underpinnings are relevant to jury behavior as it pertains to all aspects of litigation. To date, we have seen no visible differences in juror behavior or verdict preferences. As was pointed out in a recent article in the New York Times Magazine:

> *"We should be wary…of ever attaching too much importance to any single event…. September 11 was the historical equivalent of a violent and unpredictable storm. But the storm did not alter the fact that summer was slowly fading into fall. In just the same way, the attacks on New York and Washington, however shocking, did not alter the direction of several underlying historical trends. In many respects the world will not be so very different in 2011 from the world, as it would have evolved under the influence of those trends, even had the attacks not happened."(4)*

I know we all want to believe that September 11 shifted the decline in our communal world into an America bonded by a common cause. Temporarily, it did just that. Americans generously gave to the victims of September 11. Some Americans signed up to serve in our armed forces. Temporarily, church attendance went up. Flags flew in record numbers. However, this event was not like Pearl Harbor. Despite the deep emotionalism that pervades our consciousness and subconscious about September 11, tens of thousands of soldiers are not going overseas. We are not rationing food and supplies. And unless we are unfortunate enough to experience another attack, it is unlikely that we can

sustain the bonding that we temporarily experienced. Life for the vast majority of the population goes on as it did before the attacks. Summing up, in the many juror questionnaires we have reviewed, and in the many discussions we have had with jurors since September 11, the terrorist attacks are simply not on the radar of jurors when they are considering a verdict. They are seen as separate and unrelated issues.

Whereas the effects of September 11 are not dramatically affecting juror behavior, there does seem to be an effect from corporate scandals, such as the Enron matters. This is not a reversal of any of the trends we have seen, but rather an acceleration of them. As a New York Times editorial on April 21, 2002 entitled "Once Bitten, Twice Shy: A World of Eroding Trust", unlike September 11, a one-time dramatic event, there has been a virtual landslide of bad business news since November 2001. The bad news has nurtured the feelings of distrust and cynicism that we have pointed out as developing over the last three decades.

The suspicion of corporations is clearly more evident, and there is an erosion of the mantle of confidence once given to the accounting profession. As one surrogate juror recently pointed out in deliberations about the valuation of a private company, "Who did their accounting? Arthur Andersen?" There is even some fallout upon the legal profession as well. At the same time that there is greater overall confidence in government, there is less confidence in the integrity of the private sector. Previous assumptions are open to review and questioning. The decline of confidence and trust in corporations is not new, it is simply a deepening and continuing feeling that has been developing for decades. Also, the resulting cynicism is not new; it is merely accentuated. During a recent trial in which we participated, the defense team felt compelled to obtain a motion to exclude the mention of Enron in the belief that it would be prejudicial to their case with the jury.

It would seem that the Enron situation has acted more like a catalyst to speed the changes that we have documented over the last three decades. A number of current events have lead the way to opening the doors to give an aggressive prosecutor the public support for a more assertive stance. Recent events strongly suggest that prosecutors are now willing to be significantly more aggressive in challenging past precedent, assuming that they have public support, and proceeding to change the system by their actions. Two excellent examples are the new SEC rules and the Catholic Church. The SEC is formulating more regulations focused upon a true separation between the Corporate Finance departments and the Research departments in Wall Street investment firms. It also appears that even the previously honored separation of church and state is under scrutiny. This also holds true in accounting. Previously accounting was an area that the government and agencies such as the SEC, with some notable exceptions, generally left alone. But it seems that the gloves are off due to the events of the past twenty-four months, especially the last six months. For instance, Enron is not a watershed event for corporation accountants but a breaking point instead. Indeed, it was the precedent of the Waste Management case that brought a first indictment for Arthur Andersen. There are common threads to these scandals: conflicts of interest, failure to fully disclose self-dealing, failure of executives and Boards of Directors to fulfill fiduciary duties and sometimes a failure to provide moral leadership.

The companies and institutions sited above are not alone. A number of other companies continue to make negative news. This is probably, at least in part, a result of the added vigilance of regulatory authorities that are under public pressure to find and purge abuses in the system. There is also a

cascading effect as the results of one situation lead to other related parties. The list of recent articles in periodicals gives us the flavor of what is coming out with the flow of this bad news:

- "SEC Charges Ernst & Young With Audit Violation", Financial Times, May 21, 2002.
- "FBI is Investigating Kmart for Possible Criminal Violations", New York Times, May 17, 2002.
- "WorldCom CEO Quits Amid Probe of Firm's Finances", Wall Street Journal, May 30, 2002.
- "Computer Associates Accounting for Revenue is Probed by US", Wall Street Journal, May 21, 2002.
- "Bad News Good News: Corporate Entanglements Embarrass Both Sides of (California) Governor's Race", The Economist, May 5, 2002.
- "DeLoitte is Said to Face Inquiry Over Adelphia", New York Times, May 29, 2002.
- "Lawyers of Enron Faulted its Deals, Didn't Force Issue", Wall Street Journal, May 22, 2002.
- "KPMG Called 'Reckless' in Xerox Audit", New York Times, January 30, 2003.
- "Enron and Corporate Law, All Guilty", The Economist, February 1, 2003.

While Enron and other corporate scandals are certainly not "top of mind" of your average American in 2003, bad corporate news must batter the consciousness of your average juror. Whether conscious or unconscious, any continuing bad news in a 24-hour-a-day news world, can formulate the backdrop to a continuing erosion of public trust in American public and private institutions. And a deteriorating economy cannot help build public confidence in a world where corporate misbehavior seems to continue. Unfortunately, many lawyers, bankers and accountants are still on the hook for their perceived participation in these corporate scandals. In The Economist February 1, 2003 article cited above, "Enron and Corporate Law, All Guilty: Lawyers and other advisers can again be held responsible for firm's crimes", the article argues:

> *"Lawyers and bankers are celebrating last week's lobbying triumph, which quashed efforts to interpret the Sarbanes-Oxley act to make them legally liable for involvement in corporate scams. But they may not be off the hook. A surprising decision in the Enron case by a Texas district court…is only now getting any attention. It may become the most important legal legacy of America's recent corporate scandals. The 307-page ruling by Judge Melinda Harmon, in a shareholder class-action suit against Enron, is becoming a "must-read" at big law firms, because it concludes that a slew of America's most prominent banks, along with one of Houston's (prominent)…law firms, could be prosecuted for their role in Enron's alleged fraud. A motion to dismiss the case, on behalf of J.P. Morgan, Citigroup, CSFB, CIBC, Barclays, and Merrill Lynch, along with Vinson & Elkins, was itself dismissed."*

On the other hand, lest the impression is created that all corporations, professional enterprises and financial services are unwilling to accept the mantle of favorable dealings within our society, there are examples of unjustified publicity and accusations. Two examples are American Airlines and Cisco Systems. American Airlines was accused of using off balance sheet debt for its airplanes just after the Enron disclosures. In fact, these leases have the underlying airplanes as the security for the leases without recourse to American Airlines. Clearly this is a situation that allowed for legitimate off

balance sheet treatment. When the legitimate accounting concepts became clear, American Airlines was dropped from the headlines.

Another seeming example of responsible corporate behavior is Cisco Systems, Inc. of San Jose California. As public opinion against off balance sheet transactions increased following the Enron disclosures, Cisco, the world's largest maker of computer-networking equipment, decided on May 7th to discontinue its use of off balance sheet, synthetic leases. It bought back the involved properties for $1.9 billion and ended the leases to reduce investor concerns about debt not on its balance sheet. Cisco common shares rose 14% after the announcement of the change. This is certainly a visible reward for their accounting modification.

The misdeeds of Enron, Merrill Lynch and Adelphia are not new to our society, but the current response of society is much stronger than it has been in prior years. What makes these current scandals different than, for instance, the savings and loan scandals of years past? First, Americans have dramatically increased their participation in the equities markets, so they are monitoring the activities of public companies much more closely. Second, this same investor now has to deal directly with his or her own 401(k) retirement plan and its investments. That 401(k) program is usually the financial shelter for the future. The old "defined benefit" plan of yesterday now represents a very small part of the retirement programs. The result of this more active individual participation in the public equity markets means that more Americans will be impacted by corporate misdeeds and they will speak up when things seem to be going wrong.

Furthermore, one has to observe that the declining confidence in those institutions that were previously held in such high esteem, will bring about a greater willingness by society in the longer term to have these institutions more regulated, or at least held more accountable, by the appropriate governmental body. The SEC is setting new rules to avoid repetition of the practices that have come under scrutiny. The determination with which the regulators and the justice department have pursued Arthur Andersen and the quick extension of these allegations to other companies like Merrill Lynch, KPMG and Xerox, shout loudly that the government is feeling more empowered to pursue these issues. "The SEC was caught napping on Enron, and now its goal has to be deterrence," said Gregory J. Wallace, a partner specializing in financial services litigation at the New York law firm of Kaye Scholer in the April 11, 2002 edition of the New York Times. As a society we seem to approve of this pursuit. Our editorial pages and the television are crammed in pursuit of these failings. Our legislatures on the state and national levels rumble with the possibility of new laws to try to prevent deception of this kind from happening again in any quarter.

A TRIAL CONSULTANT'S ROLE

Since we have seen no significant or even modest changes in juror behavior to date, we must assume the trends of the past thirty to forty years remain constant. Even if the events of September 11 and its aftermath eventually lead to some behavior changes, these changes will occur over the long term. A single event does not instantly change societal trends that have been in the making for decades.

The variations in jury behavior will most likely become greater as common social norms dissipate and highly individualistic views prevail. Possibilities for calm, communal dialogue generated from

generally accepted social norms will likely continue to diminish. That is to say the greater deviations around the mean of juror behavior will make the use of generalizations less and less meaningful. This will make a trial lawyer's life inherently more difficult. What role can trial consultants play to help lawyers better manage this changing social environment?

To date, the focus on trial consultants has been on their participation in the jury selection process. A recent article in the Dallas Morning News in June of 2002, entitled "Judging Juries", focuses on the wrong issue, almost exclusively jury selection. In declaring that jury selection is an art, not a science, it states in a quote,

> *"Many trials are won and lost during jury selection….But it's not because jury consultants are trying to stack the deck. It's because jury consultants and lawyers are successful or unsuccessful in figuring out which jurors are unreceptive to their message and getting rid of them."(5)*

This is a good example of focusing on the wrong issue. The important concept here is not "jury selection" but the "message" or story that needs to be conveyed. It is difficult to know what is needed in jury selection if the themes of a case have not been tested with prospective jurors. It is not uncommon for trial lawyers to have little input into jury selection or voir dire, particularly in federal court. Therefore, it is much more important for the litigation team to know how to best present their case, weaving a simple and compelling story for the jury. It should be a story that helps put the spotlight on the strengths of your case and diminishes your weaknesses. That is not jury selection. The article itself, if read by potential jurors, would adversely affect their attitude toward the judicial system. Such shallow information circulating in the general public adds further to the adverse trends already being established in the American society and an increased cynicism toward the judicial system.

How does the general public see trial consultants? Do they see them as people who select or stack juries? That seems to be true. How do lawyers see trial consultants? Some lawyers see us as not regulated and therefore question our competence to do the job. Other lawyers consider it almost malpractice not to use consultants in an important trial. Frequently lawyers are confused about how to use trial consultants beyond jury selection. However, those who do use trial consultants tend to be big re-users. We believe that the sophisticated user thinks of a good trial consultant as someone who can help better communicate their best and most persuasive story. Furthermore, a good consultant can help prepare witnesses to be more comfortable in the courtroom and to help better support the story they are trying to communicate to a judge or jury.

For trial lawyers, the continued erosion in the ability to generalize about juror behavior will probably make trial consulting and particularly mock jury research more important in the future. Good jury research will become more important in setting trial strategy. However, in turn, the trial consultants who are executing this research must take much greater care. Setting the specifications for the recruiting of the mock jurors is one example of the need for particular care and attention. More attention must be given in seeing that the recruiting matches the specifications of the venue. A closer look at the diversity of the potential juror base is necessary to determine what population is required to have meaningful results, given the observed range of diversity in the juror population for any particular region.

Trial consulting and mock jury consulting will require a much higher standard of professional preparation. Gone is the day when a person not trained in research methods or group dynamics is able to conduct valid mock jury research sessions. It will require knowledge of statistics and the willingness to collect and analyze the profile of every venue in which a research is to be done. It will require a better record keeping system on the behavior of jurors to be sure that the expectations of the research are met. The trial consultant will have to become involved earlier in the process of setting trial strategy in order that the legal team has a better idea of what they are likely to face in any particular venue.

As the American population adopts more of an individualistic attitude and has less of a reliance on communal responsibility or standardized values, individual differences will increase. The result will be that fewer generalizations about jurors and group behavior can be made. Fewer and fewer accepted "norms" will be valid as people become more and more inner or self directed. Trial consultants can be of particular value because, if properly trained and experienced, they see the world through a different set of lenses than a lawyer. From a different perspective, they can see the juror audience and how to communicate with them effectively.

What do you look for in a good trial consultant? First, you look for someone who has proven technical training in research methodologies; a Ph.D. or a Masters Degree is essential as these techniques are not emphasized in law school or in a standard Bachelor Degree program. For instance, a good consultant should know how to develop a good questionnaire, how to select the proper surrogate jurors to participate in a mock trial in that particular venue, how to properly analyze any data that comes from a mock trial, from a community attitude survey to a change of venue study. For example, you can get a false read on your case and your venue if you do not carefully select the proper cross-section of citizens to participate in a mock jury exercise. Witness preparation and jury selection are then by-products of good case research.

A second criteria for a good consultant is that he or she be familiar with focus groups and is properly trained to effectively run them. This results from good academic training as well as some on-the-job experience with a good trial-consulting firm. Even experience in some other practical research area, like market research, is helpful.

Third, a good consultant is someone who is not afraid to give you strategic advice, rather than just parrot back the information obtained from the research. A good consultant will focus on the strengths and weaknesses of your case, your opponents' strengths and weaknesses; make recommendations on strategies, themes and a possible storyline. The job of a good consultant is to interpret information obtained from any research from the perspective of your potential future audience. A consultant who just summarizes what you have all heard or read is of limited value. You should be able to rely on your consultant to tell you what the results of the research mean for your trial strategy.

Fourth, trial consultants should have some acquired knowledge about how our legal system works. This is mandatory. However, it is odd that a jury consultant is expected to be quite knowledgeable about the law but a lawyer, who has turned jury consultant, is frequently not questioned about his or her knowledge of social science research techniques. The sword cuts both ways and all parties should be familiar with both the legal processes and the social science research techniques required for good jury research

Fifth, doing a thorough document and case review is a standard part of the job. Your consultant should be as familiar with the key facts and issues of the case as you are. Today this aspect is a glaring weakness in a lot of jury research. A trial consultant will be of little use to you or your client if he or she cannot run a focus group because they are unfamiliar with the key facts of your case. Furthermore, a trial consultant will be unable to add useful comments about trial strategy if he or she does not know your case well. This mandates that your trial consultant must be an active member of your trial team.

Sixth, regarding pricing, beware of bargains but also beware of price gouging. A certain financial commitment must be made in order that the job can be done properly. Furthermore, as mentioned above, a good consultant must be intimately familiar with your case and this requires extensive document review by the consultants. It may also require many personal meetings with the trial team. This review should be either included in your research costs or negotiated well in advance because the hourly fees for document review and case meetings with the trial team can add up very fast.

What do you want to avoid when you are looking for a trial consultant? First, avoid anyone who makes exaggerated claims about their ability to select a favorable jury. Second, avoid consultants who make misleading claims that jury research is “predictive”. While extremely valuable, jury research provides “indicators” of what strengths and weaknesses your case includes and can provide you with an excellent backdrop for trial strategy.

In summary, as lawyers, you are working in an ever-changing American society. The services of competent, well-trained trial consultants can help you stay on top of these changes.

Through our work as trial consultants we find certain strategic tools more important than ever before. While several of these tactics seem more oriented to a defense strategy, they are important whether you are in the role of plaintiff or defense. Using the format that we frequently employ in our trial consulting reports, let me set out a few points with comment:

1. **The Best Defense is a Good Offense**. While this may seem obvious, when we are in the role of advising our clients about the best strategies in front of a judge or a jury, we consistently advise our trial lawyers to get the bad news out, and, if possible, before our opponent has the opportunity. This advice is grounded in the simple idea that once a judge or jury feels that you have mislead them they are less likely to trust anything else you tell them. This just feeds into existing cynicism. Worse, jurors in particular can get downright angry if they feel that they have been deceived. This will do nothing but harm you and your client. Failing to disclose an important piece of information will be treated as harshly as actually lying about an important fact.

   This problem will increase in importance in the current environment, as people become more cynical about scandals associated with major business, church and other institutional headliners.

2. **Think Long Term**. If your client finds itself in a bad situation that may lead to possible lawsuits, make sure that the client thinks about the long-term implications before they act. For example, firing or singling out an employee to “fall on the sword” may not be the automatic solution. Arthur Andersen’s firing of David Duncan for shredding documents was an apparent attempt to put the spotlight on Duncan as a rouge employee and take the spotlight off Andersen. Yet Andersen’s lawyers had to ultimately try to rehabilitate Duncan at trial as an “honest” person who

did not know what he was destroying. From the Court's perspective, which was it? Was Duncan a good, honest employee (who was fired) or an employee intent on destroying evidence (a bad employee who we fired but are now saying was good and honest)? In an article for the Wall Street Journal, dated May 20, 2002, entitled "Star Witness for U.S. Loses Some of Shine as Memory Falters", it was stated that, "At the outset, Mr. Hardin appeared to be taking on a quixotic task: proving Mr. Duncan is an innocent man."

On the other hand, the prosecution may have hindered its future Enron litigation with its use of Duncan. As was sited by The New York Times on May 24, in an article entitled "How the Trial of Andersen Could Hurt a Fraud Case", Robert Mintz, a former federal prosecutor, is quoted as saying, "The problem for the government is that when you present a cooperating witness to a jury you essentially vouch for their credibility. So, while Duncan has bolstered the obstruction case, his testimony vouching for the soundness of the accounting may come back to haunt the government in an Enron trial down the road."

3. **Know Your Witnesses.** A well-prepared witness is of course critical to the success of any trial. Again, this will be magnified in the current environment where so many high level executives will be testifying, and in many instances executives from the same company will be telling contradictory stories. For anyone who has been heavily involved in preparing senior executives for deposition or trial, it will come as no surprise that these individuals are among the hardest to adequately prepare. First, many of these executives will be angry. If they are testifying for the defense, they might have already been tried and convicted by the press. Second, these men and women are used to "being in charge, being in control" and have great difficulty following the lead of anyone, even a top-notch lawyer whom they might trust. It will take additional patience, skill and time to prepare these highly successful professionals for trial.

   A good example of what can go wrong without thorough knowledge of your witness emerged in the Arthur Andersen trial. In a Wall Street Journal article entitled, "First Witness for Andersen Delivers for US" dated May 29, 2002, "Arthur Andersen LLP first witness turned out to be better for the government than many of its own…. Mr. Corgel's statements were as surprising to Andersen's lawyer as they were damaging to the firm."

4. **Think About Public Opinion**. While the public's attention span is short, these cases will continue to get a great deal of media attention for the foreseeable future. In that light, any sign of arrogance or a cavalier attitude will hinder any institution or company's opportunity for a fair hearing. The court of public opinion for the near future will deal harshly with institutions that have taken advantage of their power. It will be important from the outset to think of all of your actions as "public" actions, subject to review and scrutiny by millions of interested Americans, and in some instances, scrutinized by the international community. Obtaining crisis management advice as soon as bad news appears eminent might be advisable. Whether plaintiff or defense, you may want to help craft public opinion. An example is shown in a recent New York Times article entitled, "A New York Official who harnessed Public Anger" that describes Eliot L. Spitzer, New York's Attorney General, who garnered public opinion to go after a number of companies, most recently Merrill Lynch, " For weeks, he (Spitzer) confronted the company with accusations that

its investment advice was tainted by conflicts of interest. In the end, Merrill agreed to pay a $100 million penalty and sever the links between its equity analysts and its investment bankers." New York Times, May 22, 2002.

5. **Know Your Audience.** Good news travels fast, bad news travels even faster. In this age of information overload, any region that a case is tried in may be tainted with a public that has already developed viewpoints on your guilt or innocence, or the merits of your case. Even a change of venue may not solve your problem. Therefore, it is critical that you are keenly aware of how potential persons in your particular venue view your client and its predicament. Since a judge is also influenced by public opinion (and is frequently voted into office), it is important, rather it be a bench trial or a jury trial, that you are intimately familiar with your public's view of the issues related to your case and the over-all opinion of your client in the community. There are many tools to discover these community perceptions, including Community Attitude Surveys that give you a reliable, statistical overview of current opinions in your community. In addition, there is surrogate jury research that will help you understand your audience and what key themes might work best. In "knowing" your venue, beware that it is a moving target, subject to the vicissitudes of the day.

6. **Don't Overreact**. Avoid emotional exchanges. Be very factual in your presentations. A businesslike and professional manner will convey the message that you are presenting the truth. If you attack or seem overly defensive it will appear that you have something to hide. If you attack a witness, it might turn the witness into a "victim" in the eyes of the jury. This is something you definitely want to avoid.

7. **Explain Organizational Responsibilities**. When dealing in corporate or institutional matters, take responsibility for actions at the appropriate level. A jury, in particular, expects the CEO to know about all matters in his/her organization. "I delegated it" will not carry much weight with a jury. We frequently refer to this as the Nixon syndrome, or the ostrich defense. Therefore, it is important that you clearly define the various roles and responsibilities of the Board of Directors, the CEO and key managers without being defensive or attempting to shift responsibility. Site specific reasons why certain tasks are delegated. Bring home the point that the responsibility for tasks are required of each member of the team for effective management and stress that one person cannot do everything required in a complex organization.

8. **Tell a Simple and Clear Story**. The more confused your explanations become, the more likely a judge or jury might believe that you have something to hide. No matter how complex the matter, it is imperative that you focus on your most important facts and themes, helping your audience to hear and understand the story from your perspective.

The variations in judicial and jury behavior will most likely become greater as common social norms dissipate and highly individualistic views prevail. Possibilities for calm, communal dialogue generated from generally accepted social norms may diminish. That is to say that the greater deviations around the mean of juror behavior will make the use of generalizations less and less meaningful. This will make a trial lawyer's life inherently more difficult.

CONCLUSION

In this volatile framework, the legal team is expected to chart a strategy that best represents their client's interests. Relying only upon recent historical information on juror or judicial attitudes to set trial strategy may be risky. The little information that we have been able to find seems to reinforce the idea that damages are increasing in at least the personal injury and medical malpractice sectors. Since there is no reliable reporting of the damages in the civil sector, no overall conclusion can be reached. Even if there were a better reporting source for the civil sector, it would be very hard to know that you were indeed comparing like situations. We are speculating that the trends of social disengagement and the focus on the individual that has happened over the last forty years, might be affecting a possible willingness to award larger damages. This may be happening with limited understanding of the economic or political implications behind it. Whether we personally believe that this is a "good" or "bad" trend for our overall society, we cannot put all of this seeming increase in awards at the feet of the juror. The legal system, through precedent and allowable procedure by judges, helps to shape the environment in which verdicts are rendered.

Our legal environment is the product of the current and changing nature of our society. Justice Oliver Wendell Holmes eloquently stated this fact over a century ago in <u>The Common Law</u>:

> *"The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices that judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."(6)*

We should be aware of those changes in order to set a valid course for any legal strategy employed on behalf of our clients. For lawyers, accountants and other professionals, current times demand a greater due diligence on our part. While the impact of current events on judges and jurors is mostly speculative to date, what is not mere speculation is the reality that corporations and professionals such as accountants are now facing greater scrutiny than ever before. This trend will likely continue into the near future. It is important to the maintenance of the credibility of our legal system that current practitioners are keenly aware of any problems inherent in conflicts of interest or self-dealing.

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Susan A. Powell, Ph.D. is recognized as an expert in providing strategic trial research to the legal community. Whether uncovering just the right research analysis or translating the information into the foundation for winning legal and courtroom strategies, she has proven her ability to be consistently "on the mark". Her experience has ranged from patent and product liability claims involving major US pharmaceutical companies to class action suits involving US Fortune 500 companies. Within this range there have been contract and anti-trust issues, personal liability from death or injury, fraud and security cases. She has assembled mock juries and mock bench trials from the Atlantic region to the Pacific Coast. She assists in witness preparation and jury selection. Dr. Powell is also an expert in corporate organization. She brings this background to the design of trial research and information management.

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