THE JURY BOX

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Boo!!!!! Happy Halloween everyone! In this issue of THE JURY COFFIN, we will be reviewing some truly scary things that jurors have been doing lately.

We have more spooky tales of jurors blogging, sleeping, bargaining and just plain refusing to deliberate! We have more evidence that people can't tell tricks from treats when it comes to insincere apologies.

I want to alert all my loyal local readers of THE JURY BOX that I will be giving a presentation on "Trial Consulting for the Rest of Us: Winning the Small and Medium-Sized Case," on Thursday, October 25, 12 – 1:30 pm. The session will be held at the offices of Kerstein, Coren, Lichtenstein and Finkel, in Wellesley, MA. A light lunch will be served. If you are interested in attending, please email me to reserve a place and get directions.

– Edward P. Schwartz

A would-be witch, movie star or super hero no longer needs to wear a costume to **assume a secret identity**. Thanks to the internet, anyone can use a blog, chat room or social networking site to express your true inner-self in relative anonymity. Lawyers and judges are just now coming to grips with the fact that many potential jurors have active online lives (sometimes more so than their regular lives). Given the expectation of online anonymity, a lawyer can't just google a prospective juror's name and expect to find her online persona. One has to get the juror to volunteer the information, which can be quite tricky. I discuss some strategies for eliciting such information, as well as thoughts on how to interpret what you learn, in my latest column for Lawyers USA. In addition to being archived on my website, you can find it reprinted on my blog, at juryboxblog.blogspot.com.

"Don't pick me, don't pick me, don't pick me!"

At least one judge is sensitive enough to the online presence of jurors to ask about it during voir dire. Milwaukee County Circuit Judge Richard Sankovitz inserted a question about blogging into the pretrial juror questionnaire for the Thomas lead paint trial. Sure enough, one juror admitted that he was a regular blogger. The lawyers all threw open their laptops and found not only his blog, but also a series of "Twitter" posts he had submitted right from the courtroom: "Still sitting for jury duty crap. Hating it immensely. Plz don't pick me. Plz don't pick me," Not surprisingly, they didn't pick him.

This little anecdote does raise a tangential concern. If blogging becomes a regular topic of discussion during jury selection, savvy citizens might start turning out vitriolic anti-establishment posts just to get out of jury duty. This possibility highlights one to the topics I muse about in my column: How should a lawyer handle the situation where a juror's public and online personas don't match? Who is the "real" juror?

Prison Guard, Secretary of Defense and Jury Duty?

Some jobs probably shouldn't be given to people who are too eager to do them. Consider the post of a young woman serving jury duty in Illinois, who blogs under the name "Erin":

> *"Yeah somebody actually put me on a jury. I guess I will probably be juror number eight, blowing everybody's minds with charisma and excessive knowledge of forensic psychology. Remember the movie? Twelve angry men? God I hope I get to be the foreman of this stupid jury. MADAM FOREWOMAN OF THE JURY! I can't wait to decide the lives and deaths of men tomorrow."*

"Erin" continued to blog throughout her trial. So, aside from the troubling tone of this blog, is there something intrinsically wrong with a juror blogging during a trial? Some see it as the electronic equivalent of keeping a journal or diary. Surely writing down one's thoughts about a trial doesn't violate any rules against discussing the trial with others while it is ongoing. The problem is not with what the blogger-juror writes, but rather with what she might read. Blogs are typically interactive, with the opportunity for readers to post their own comments and questions. So, depending on how it is set up, and how the blogger uses it, a blog can become more of a conversation than a soliloquy.

The other problem with a blog is its inherently public nature. "Erin"'s blog became known while the trial was still going on. If a lawyer can figure out that "Erin" is sitting on the jury in *his case*, he will be privy to the thoughts of a juror, clearly in violation of the rules of civil or criminal procedure. I think that the ethical response would be to bring such "communication" to the attention of the judge and opposing counsel, but I don't know how many lawyers could be counted upon to take this step.

Most jury instructions now admonish jurors not to look up information on the case on the internet, in the way that jurors have always been told not to consult dictionaries or reference books. Judges are now beginning to admonish jurors not to blog about the case or discuss it with anyone online. By all means, request such an instruction in every one of your own cases. I imagine that such precautionary instructions on blogging will soon become standard.

Love is Never Having to Mean You're Sorry.

In the July issue of THE JURY BOX, I reviewed some recent research about the effects of defendant apologies on jury decision-making. The important finding was that juries did not find apologizers liable more often than those who failed to apologize. Similarly, juries did not ask those who apologized to pay more in damages.

Attorneys have been reluctant to advise their clients to apologize to victims, for fear that such apologies would be seen as admissions of liability in court. This research suggests that those fears are largely unfounded.

The positive reasons to offer an apology include a reduction in the likelihood that an injured party will sue in the first place, and an increase in the success rate of mediation, thereby avoiding expensive court time.

One question that remains is whether a defendant should apologize even if he thinks that he didn't do anything wrong. What if he's not really sorry? New research conducted at Cornell University suggests that an apology can be effective, heartfelt or not.

Jane Risen and Thomas Gilovich, who conducted the study, paired up students to perform a cooperative task with other students watching. The more efficiently the task was performed, the more money the subjects could make. Unbeknownst to the real subjects, in each pair, there was a plant, who intentionally took a cell phone call when he was supposed to be helping and then sabotaged further progress. Sometimes he spontaneously apologized for his behavior, sometimes he only apologized after being scolded by an observer (another plant), and sometimes he didn't apologize at all.

After the task, the real subject was asked to divvy up the team's earnings according to what she believed each deserved. The average subject gave the plant 36% of the earnings when he failed to apologize and 40% when he did, *regardless of whether the apology was spontaneous or coerced*.

By comparison, bystander subjects allocated the plant only 31% of the earnings when he didn't apologize and a measly 19% when he apologized after a scolding. A spontaneous apology earned the plant a 36% share from the average bystander.

In follow-up research, the authors discovered that the relative generosity of "wronged" subjects, and their insensitivity to the genuineness of the apology, seemed to stem from people's innate desire to think of themselves as compassionate and forgiving. They want to believe the apology because they want to be able to forgive the transgression.

In light of this research, combined with what we have learned about apology in the recent past, it would seem to be strategically advantageous to encourage your clients to apologize to those that have been harmed whenever possible. Maybe this explains why Atlanta Falcons fans are so eager to forgive Michael Vick.

In The News...

Suddenly, $1 per song seems a real bargain

Jammie Thomas, the first person sued for piracy by the Recording Industry Association of America, will be paying $9,250 (plus interest) for each of the 24 songs she downloaded from Kazaa, an online file sharing service. According to Michael Hegg, one of the Deluth jurors, it took the jury only five minutes to conclude that Thomas was lying about some unknown hacker stealing songs from outside her bedroom window. RIAA had proved unequivocally that Thomas had used Kazaa to illegally obtain copyrighted material. The remaining five hours of deliberation centered on an appropriate damage award.

Apparently, at least a couple of jurors wanted to fine Thomas the maximum statutory amount of $150,000 per infringement, while at least one juror preferred the minimum amount of $750 per song. According to Hegg, the final amount was a compromise hammered out in the middle.

This case illustrates a few important points. First, while most lawyers spend their pre-trial time and energy scheming about the liability question, often the damages question is more pressing. I have advocated elsewhere the value of focus group research devoted to damages. Secondly, notice how the jurors latched onto the anchors that were available to them in their damages calculations. They had the statutory minimum and maximum in front of them and started from these points. This demonstrates how powerful anchors can be in the jury deliberation on damages. Third, the bargaining over damages did not seem to reflect any discussion of the harm actually suffered by the plaintiff. These are supposed to be compensatory damages, but the jury clearly treated them more like punitive ones, in that they aimed to punish the defendant, not compensate the plaintiff.

Finally, in a tidbit that makes you wonder if we've taken this whole "impartial juror" thing a bit too far, it was revealed that al least one of the jurors in this case *has never been on the internet*.

Maybe he was just discussing one of his dreams...

A juror and an audience member, in James Wesley Stallings' murder trial in Nashville, were arrested and held in contempt of court after they held a conversation during one of the breaks in the trial. The break had been called because the same juror, 79 year-old James Hamilton, had been falling asleep during the cross-examination of a prosecution witness. Maybe Mr. Hamilton slept through that part of the judge's instructions concerning talking to others during the trial.

What's a guy gotta do to be guilty of murder in this town?

Phil Spector's wild and wacky murder trial ended in a mistrial when the jury was deadlocked 10-2 in favor of conviction. The jury requested clarification from the judge on the definition of reasonable doubt, a concept that has long been problematic for the courts. The CA instruction on reasonable doubt reads:

> *"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true."*

How many jurors do you think have any idea what "abiding" means? Well, I guess the good news is that we get to go through the whole lurid spectacle all over again!

Want to know more?

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