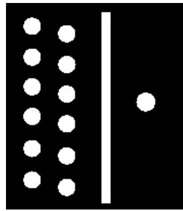

The Jury Expert™

For Excellence in Jury Selection, Communication & Persuasion

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Celebrity on Trial: An Interview with Michael Jackson's Trial Consultant, J. Lee Meihls, Ph.D.

TJE: The Michael Jackson case posed a number of challenges in terms of the massive amount of publicity, celebrity status of the defendant, potential preconceptions concerning the defendant's guilt, the defendant's reputation, and issues involving child molestation, to name a few. How did you go about determining a strategy for the trial, as a whole, and for jury selection, in particular?

Meihls: Yes, you have named but a few of the challenges we were facing! Where else would you find two-thirds or more of the jury pool volunteering to serve on a six-month trial?! I don't know about you, but I am used to seeing just the opposite. I've never seen more people willing to do their civic duty! You could see people downright titillated about being there with their skin literally glistening in some cases as they craned their necks to get a look at Michael.

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Our strategy for jury selection (see below) was part of an overall trial strategy. I am going to have to pass on divulging everything, but I think the following brief excerpts from Tom Mesereau's (defense counsel) 4-hour closing argument sum it up:

From Thursday, June 2, 2005:

> The issue in this case is the life, the future, the freedom and the reputation of Michael Jackson. That's what's about to be placed in your hands. And the question you have before you is very simple. Do you believe the Arvizos beyond a reasonable doubt, or not? If you don't, Mr. Jackson must go free.

From Friday, June 3, 2005:

> Now, we've talked about reasonable doubt. You've heard me mention that a lot. And as I have been saying throughout my closing argument, if you have a reasonable doubt about the Arvizos, the case is over, because the whole case hinges on them. … They have made up stories. They've lied under oath, like they've done for years, and they've been caught at it. You have caught them at it. The instruction reads as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in a case of reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." Why the standard of proof called "reasonable doubt"? Why? Many legal systems around the world don't have it. Many legal systems around the world don't use juries. They use judges. But our country has a philosophy, and that is we cannot convict people who are innocent. We cannot run the risk, because what happens to them is so harmful, so brutal, so devastating. And what they're trying to do to Michael Jackson is so

harmful, so brutal, so potentially devastating to him, that we have a very high standard. It's higher than you find in civil cases where you have disputes over money or over property. If you have any reasonable doubt about this case, about the testimony, about the double-talk, the lies, about their past, about their motives, it's over. You must acquit Michael Jackson to follow the law. It's that strict.

And you know something? Our system still isn't perfect. You still have examples where, years later, DNA exonerates people who were convicted. They've added up like 130 people the last ten years who were actually convicted, by juries who meant well, wrongfully, because DNA exonerated them. But nevertheless, we have to have a system. It's the best system in the world. It can't be perfect, because human beings aren't perfect. But it's the best system in the world. And ladies and gentlemen, I'm begging you to honor that principle. Honor that principle of proof beyond a reasonable doubt. He must be acquitted under that standard, with all the problems and falsehoods and issues that I have addressed. They can't overcome them. They can exaggerate. They can dirty up Michael's background. They can fling dirt everywhere. They can expose the fact that he's a human being who has had his problems. They can do whatever they want. But they can't prove this case beyond a reasonable doubt, and they never should have brought it to begin with once they learned who the Arvizos were. …

The case shouldn't have been brought. This is just an illustrative aid to further explain reasonable doubt to you and what a high standard it is. If you think somebody may be guilty, it's not enough. If you think perhaps they're guilty, it's not enough. If you suspect they might be guilty, it's not enough. Possibly guilty is not enough. Probably guilty, not enough. Guilty likely, not enough. Guilt highly likely, not enough. It's got to be guilty beyond any reasonable doubt. And ladies and gentlemen, when you get in the jury room, ask yourselves, "Do we have any reasonable doubts about this family and this case?" Any. All it takes is one.

You've been instructed by Judge Melville. You must follow this to the T. You cannot run roughshod over these instructions. You cannot treat them lightly. If you have another rational explanation for what these people (the accuser and his family) are doing based on their past and their behavior, it's out, all of it. Michael Jackson goes home — where he belongs. …

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… why did they bring this case against Michael Jackson? Because he's a mega celebrity, and they hope they can get away with it. They only have one obstacle left: You. They're hoping you won't follow these instructions, you won't understand these instructions, they won't have any meaning in the jury room, and you just won't get it. I don't know what they're thinking. How, with these instructions on the table, in your hands — you've already gotten packets of them. How, if you look at these carefully and look at this evidence, can you convict Michael Jackson of anything? Ladies and gentlemen, you can't. You just can't. …

TJE: What was your strategy for jury selection?

Meihls: Coming up with a strategy was pretty simple, but actually accomplishing it was no small feat. Our goal was to get a jury that would acquit and not hang. That is not always the goal in a criminal case, especially for a molestation case in which 1108 evidence (prior alleged bad acts) might be coming in. When we were picking the jury, we did not know whether the judge would let the jury hear testimony from others claiming they were molested by Michael. (Judge Melville ruled on that well into the trial.) We approached jury selection from this worst case scenario and focused on striking prospective jurors that we did not feel confident could follow the law and decide the case ONLY on the accuser in our case. We focused on credibility and reasonable doubt. We felt an evidence-driven jury would see through the accuser's lies and his mother's manipulations. We felt an evidence-driven jury would not lower the burden of proof of beyond a reasonable doubt.

Of course, we could not strike everyone we wanted to strike. In fact, we accepted the jury knowing we were leaving at least three (possibly four) jurors on who were probably prosecution-oriented going into opening statements. Our hope was they would be evidence-driven and not allow any suspicions they might have to influence their verdict at the end of deliberations. A perfect example was Juror number one, Mr. Ray Hultman, a 62-year-old white male with a master's degree in civil engineering. After the verdict, Mr. Hultman went on national television and said he believed that Michael Jackson was a child molester, but that the prosecution did not meet their burden of proof in the case of this accuser. I'd say the system worked and he followed the law instead of his deep suspicions (even if he is recanting somewhat now!).

TJE: It seems like a somewhat unusual decision for the defense to seek a jury that would be unanimous, rather than one that would have a hard time agreeing. What was the basis for this decision?

Meihls: We wanted an acquittal, pure and simple. We wanted Michael Jackson to walk out of that courtroom knowing it was over.

TJE: How did you implement your trial strategy in terms of the questions that were asked and how the defense team conducted voir dire?

Meihls: Both sides were taken by surprise only minutes before the voir dire process began when Judge Melville informed counsel they would have only five minutes per juror for voir dire. He soon relaxed this rule a bit and allowed 10 minutes per juror. I can't speak for Ron Zonen (the prosecutor who did the voir dire for the State), but Tom Mesereau was hoping to spend 30 minutes or more chatting with each juror. We had to decide very quickly what Tom should focus on and shelve almost all the voir dire that was planned. Keeping in mind our overall strategy, Tom talked to jurors about five or six areas: (1) children testifying and whether the juror would be cautious in accepting what kids had to say about inappropriate sexual behavior; (2) whether the juror was a creative person and what form that took; (3) what media the juror paid attention to; (4) a juror's feelings about the effect of the media on the justice system since we did not want jurors who were obsessed with the celebrity aspect of the case; (5) familiarity with Michael Jackson and his music, and with the case; and (6) connections to and experiences with law enforcement.

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TJE: Were there any practical constraints on your approach as a result of the actions by the judge or the prosecution team? If so, what were they and how did you address them?

Meihls: Probably the two biggest practical constraints placed on us by the judge were the extremely short juror questionnaire and the severe time limits for voir dire (addressed above). Both sides submitted lengthy pre-trial questionnaires with the majority of questions identical or very similar to one another. I think the final draft we submitted had about 150 questions. In the end, Judge Melville approved a 41-question questionnaire, so you can imagine how limited the information we eventually obtained about the prospective jurors was.

The judge took both sides' proposed questionnaires and basically gutted them. The final questionnaire did not explore bias for or against Michael Jackson, which was a handicap to both sides in my view. Particularly frustrating was the fact that Judge Melville allowed only a few questions with an opportunity for any explanation by the juror. For example, few questions allowed jurors to explain their Yes or No answers. A question might ask if someone had ever been a victim of a sexual assault or whether someone had ever been accused of an inappropriate sexual act, but he or she was not asked to explain the circumstances. The lack of follow-up in the questionnaire was further compounded by the fact that the judge did not grant requests for in-chambers voir dire with a few jurors who had indicated some experience with inappropriate sexual conduct.

TJE: The juror questionnaire included a question relating to the birth order of the potential jurors. What role did this information play in your decision making?

Meihls: It did not matter to me — unless of course they were the youngest of 7 children and they all slept in the same bed growing up!

TJE: Child witnesses were anticipated to play a key role in the trial. How did you try to ascertain, during voir dire, receptivity to child witnesses on the part of the prospective jurors? How did you try to determine whether someone would be trusting of a young witness, find them credible etc?

Meihls: This was a crucial area of the voir dire. Not only did Tom explore a juror's attitude about children testifying in general, but he delved into attitudes and experience with children being influenced by peers or adults to lie or exaggerate. We were looking for jurors who would be very cautious in accepting a child's testimony about molestation, or at least open to the possibility that children might lie if they feel it would benefit them somehow or if they believed their parent wanted them to lie.

Michael was very involved in sharing his views and asking us questions during jury selection. He passed me notes during the voir dire with his questions, concerns or positive feelings toward a juror. He caught on quickly and listened attentively to our observations and recommendations.

TJE: What was Michael Jackson's level of involvement or participation in the jury selection process?

Meihls: Michael was very involved in sharing his views and asking us questions during jury selection. The process was new to him and he naturally had questions about how it worked. He did not understand at first that we could not keep whomever we wanted. He passed me notes during the voir dire with his questions, concerns or positive feelings toward a juror. He caught on quickly and listened attentively to our observations and recommendations. He did not hesitate to state his opinion. In addition to paying close attention to how jurors looked

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at Michael, I was always interested in what he thought about a juror.

TJE: What do you think was the prosecution's strategy for jury selection?

Meihls: Each side had 10 strikes and at one point the prosecution had used five of their strikes (including striking two black women) and we had used seven of ours. I don't know whether this was an intentional strategy on their part or not, but it meant that the prosecution could take a run at striking jurors after we ran out and we could potentially lose a couple of jurors we felt very good about and be stuck with jurors we did not want. We took seriously the possibility that alternates would make it onto the jury so we considered them too as we calculated whether to continue striking jurors. Because there were three prospective jurors within the prosecution's reach (had they elected to use all of their strikes) that we definitely did not want on the jury, we decided to accept the panel with three strikes remaining.

TJE: How did the strikes play out for both sides?

Meihls: The prosecution struck four women and one man; the defense struck five men and two women. Our view was that women would be harder on the accuser's mother. The final jury included eight women and four men and ranged in age from 20 to 79. The majority was married with kids. Only one juror had been a juror before (Mrs. Cook, Juror number 5). The most striking demographic difference between the seated jury and the jury pool was in education. About one quarter of the jury pool had a high school diploma (21%) or less (3%). Over half had attended technical school (4%), taken some college courses (43%), or completed an associates degree (7%). Eight percent had completed a four-year college degree, and 13 percent had taken some graduate courses (8%) or completed a graduate degree (5%). The seated jury included 17 percent with a high school diploma, 55 percent with some college, 8 percent with a bachelor's degree, and 25 percent with a master's degree.

TJE: Where did you and the prosecution team's trial consultant sit during voir dire?

Meihls: The jury box was immediately left of the prosecution's table. Chairs were placed in front of the jury box for more prospective jurors to sit during voir dire (since Judge Melville used the six-pack method). Sneddon and Zonen were practically touching knees with some of the jurors; it was that close. The three prosecutors Tom Sneddon, Ron Zonen and Gordon Auchincloss sat at the prosecution counsel table. Howard Varinksy (their trial consultant) and their investigator (Steve Robel, I think) sat directly behind them, in front of the bar.

At the defense table sat Tom Mesereau (defense counsel), Michael Jackson, Bob Sanger (co-defense counsel), and Susan Yu (co-defense counsel). I sat behind Tom and Michael (so we could more easily chat and pass notes without calling a lot of attention to it). Brian Oxman (Jackson family business lawyer) sat behind Bob Sanger. Behind our side of the aisle were the few seats reserved for Michael's family members.

TJE: Were potential jurors aware of what role you and the prosecution's trial consultant played during jury selection? If so, did you detect any reaction on the part of jurors, either positive or negative, to the presence of trial consultants for either side?

Meihls: Howard and I were introduced by our respective clients and the jurors didn't seem to react much at all. I think they expected each side to have a consultant. The local press had covered this very subject the weekend before jury selection started.

There were six seats reserved for the press every day in the front row (some behind where Howard and Steve sat) and they were constantly staring at the jurors and trying to peer over the bar to see what we were writing. The courtroom was full of distractions so we didn't warrant any special attention, thankfully.

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TJE: What practical pointers do you have for other consultants and litigators as a result of your experiences in the Michael Jackson trial or in other trials in which you have participated?

Meihls: Stay focused on your job as a trial consultant and do not get caught up in the media hype. Your responsibility is to your client and you are not serving your client if you are busy taking calls from the media.

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- *Jeffrey T. Frederick, Ph.D., Director of the Jury Research Services Division at the National Legal Research Group, Inc. in Charlottesville, VA.*
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- *David Ball, Ph.D., President of JuryWatch, Inc. in Durham, NC.*
- *Becky Jones, M.B.A., of Modlin Trial Consulting in Florence, KY.*

Quick Courtroom Tips

By Bob Gerchen

Sometimes You Just Have to Lighten Up

I was recently involved in a jury selection in a high-profile, high-intensity case. There were three parties and the oral voir dire was being done in rounds. After Round One, we pinpointed a series of questions that needed to be asked, and I pointed out that, on the heels of an unexpected late hardship strike, one juror was coming up that was a potential cause strike and we needed to get him talking.

When it came time for my client's Round Two, he stood up and started asking jurors who they most admired in their lives and why. Then he asked about their favorite TV show. At first I was tense—What about Juror Number 91? I screamed inside. It became clear, however, that my client had read the room far better than I did: the jurors were tired. Including showing up to fill out questionnaires and ask for hardship, individual voir dire for cause and now general oral voir dire, it was Day Three of jury selection. They were tired of being probed and prodded. And the attorney got a lot more mileage—and gained a lot more rapport—by just "chatting them up" at that point. They loved talking about whom they admired, what values drove them to admire people and why they loved "Desperate Housewives."

Sometimes, you just have to lighten up.

Bob Gerchen is the Director of the St. Louis office of Litigation Insights. He may be reached at (314) 863-0909 or by e-mail at rgerchen@litigationinsights.com.

For more information about Bob's new book, 101 Quick Courtroom Tips for Busy Trial Lawyers, visit www.CourtroomPresentationTips.com.

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Juror Research: Revamping a Comparative Fault Finding

By Thomas P. Baggott, Ph.D.

The Case: A 19-year-old college student filed a lawsuit alleging assault and use of excessive force for injuries he suffered during an impromptu street party.

The student, Larry, was visiting an Atlantic resort community during spring break. On the night in question, Larry and several friends were watching the antics of some of the more animated people in attendance. Various levels of intoxication and rowdiness are an expected part of the weekly activities and the police declared an unlawful assembly. Larry was under the legal drinking age but was not intoxicated; he had only consumed two cans of beer over the entire evening.

Larry was described as being merely a curious onlooker. There was never any allegation that he was part of any criminal act, or that he behaved in a riotous way. A dispersal proclamation was read and when the crowd continued to ignore orders to disperse, tactical teams began to clear the streets. There was no reason to believe Larry heard the police read the dispersal order.

Larry and his friends were standing in a vacant lot. There were hundreds of other students watching a tactical team clear the street. Tear gas was fired in advance of the tactical team and people began running to clear away from the area. What had been mere entertainment was now a serious incident. Larry and his friends began to flee the lot when Larry was hit in the face with a beanbag that had been shot from a gun. Larry was immediately rendered unconscious and was dragged by his friends from the area to a first aid station that had been set up approximately a block away. Larry was transported by ambulance to a local hospital, but nothing could be done to save his eye.

There were 40 police officers armed with beanbag guns on the night in question. Of those 40, only seven were ever in a position to have fired the shot that struck Larry. Those seven officers all denied firing the shot and submitted to polygraph examinations, which they all passed. Although no single officer could be connected to the beanbag, the beanbag was removed from the eye socket and it was, without doubt, fired by a police officer. Review of thousands of photographs and dozens of hours of videotape failed to show any wrongdoing on the part of Larry. It also failed to disclose which officer had fired the shot.

Prior to the incident, Larry had a 3.5 G.P.A. at the university and had completed the first half of his freshman year. He had graduated from high school as an honors student and planned to study engineering. It was a full year before Larry could return to college and even then, he had to struggle to maintain a C average. Larry has had several reconstructive surgeries; an implantation initially failed, but was successful on the second attempt. Larry still has constant headaches, an inability to concentrate, and he suffers from many of the symptoms of post-traumatic stress disorder. His damages are past and future medical expenses, loss of earning potential, and the pain, suffering and humiliation caused by his disfigurement and loss of vision.

The Research: Live attorneys made the presentation to the surrogate jurors using videotapes of training and tactical team officers. The design required presentation of the facts to two panels with immediate deliberations (Phase I), followed by a day of adjustments to the case by the attorneys. After the adjustments, the attorneys made the presentation to two new panels on the third day (Phase II). The focus of the project was based strictly upon measuring liability and the reduction of damages.

Case Findings: The Phase I jurors determined the police department knew who fired the shot and were simply covering up. On the defense side, jurors tended to follow the old adage, you are judged by the company you keep. They thought this student intentionally went to a location that had a reputation of wild partying during spring break. While not actively engaged in criminal conduct, jurors assumed he encouraged it by remaining as an observer. When a street disturbance began, the student should have avoided the situation entirely and gone to a safe place. As a result, jurors found the police department liable, but they found more than 70 percent of the comparative fault on the student.

Lawyers who were playing the role of plaintiff attorneys used this information to change the plaintiff tactic with the Phase II jurors. They pointed out that it is "incredible" that with all the pictures taken and all the video recorded, there is no indication of wrongdoing on the part of the student, and the police officer doing the shooting could not be identified. They focused on the wholesale and indiscriminate shooting under very poor department supervision. They disclosed there were more than 600 beanbag rounds fired that evening. Lastly, they made an adjustment accounting for the student's poor decision making.

A very thorough presentation was given on the experience and education of the on-scene commander. It took almost three hours for this highly experienced and trained officer to determine that the situation was dangerous. Graphic comparisons were made between the age, education and experience of the police commander and the student. The lawyers pointed out that if one could not expect a competent police commander to predict a violent encounter, one could hardly expect an untrained 19-year-old to know he was in danger. Further, they pointed out the only obvious danger could have come from other party attendees. In fact, the student was only endangered by the outrageous conduct of police officers run amok. The Phase II jury returned substantial damages that were slightly reduced by Larry's comparative fault of 10%.

Conclusions:

1. This pretrial research disclosed strengths and weaknesses to change comparative fault on the plaintiff from large to insignificant.
2. Descriptive language was carefully designed and tested to invoke juror outrage directed at the police. These word choices successfully incited the jurors.

Comments: Based on this research, the administration became aware that they were very vulnerable to a skilled plaintiff presentation. They determined the plaintiff would be a sympathetic witness and his damages would be substantial. Lastly, and many would say most importantly, the city reflected upon its own responsibility to determine the ethical course of conduct. The case was settled prior to trial.

Dr. Thomas P. Baggott is the lead consultant at Jury Behavior Research Corp., in Tucson, AZ. He is a Fellow of the American College of Forensics Examiners and a Diplomate of the American Board of Psychological Specialities. Dr. Baggott may be reached at (520) 297-9691 or by e-mail at drbaggott@juryadvisor.com.

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Medical Malpractice: Five Questions to Measure Community Attitudes

By Charlotte A. Morris, M.A.

In medical malpractice cases, venue really matters. Cases that plaintiff lawyers win in Cook County, Illinois seem to stand little chance of success in Mecklenburg County, North Carolina. But what is a different venue – besides the obvious geography – really? It is the difference in community attitudes, values and standards that exist in the jury population.

How do we measure a jury's attitudes, values and standards regarding doctors and medical care? We can measure those attitudes in large-scale surveys and we can measure them over time in smaller studies. I've used a series of questions in focus groups for medical malpractice cases quite consistently for the last ten years and the results reveal that the attitudes they measure are also quite consistent over time and across venues. You might consider how these questions would be telling in voir dire during your next medical malpractice trial.

Comparing One Doctor to Many

- On a scale of 1 to 10, how much do you trust doctors **in general?**
- On a scale of 1 to 10, how much do you trust **your own** doctor?

On average, people report trusting their own doctor more than they trust doctors in general. That means you can't assume that if you ask only about jurors' personal experience with doctors, the experience and resulting attitudes or beliefs will necessarily apply to the doctor defendant in your case. Take it one step further and ask jurors to make the comparison between feelings about their own doctor and their thoughts about most others. Don't forget to follow up with the all-important "Why?" questions.

What People Want from a Doctor

- What qualities do you look for in a doctor?

People still want (but may not necessarily expect to find) doctors who are caring, compassionate and communicative. In other words, this is still the "community standard" to which doctors must measure up and any contrast between the doctor in your case and this near-universal "ideal" will be important.

What people don't say when asked this question is "board certified" or "highly specialized." Those things may help when it comes to expert witness credibility, but the treating doctor as defendant will be judged in large part by whether or not she or he has the personal characteristics that matter to the jurors.

Quality & Availability of Care

- How satisfied are you with health care, **in general?**
- How satisfied are you with health care **available to your family?**

People say that they are satisfied with the state of health care generally, but are not as satisfied with the health care available to them personally. This suggests they believe there is good medical care out there, but are frustrated with their lack of choice or access to it. This may have negative implications for a defendant in a rural venue, where choice and access may be extremely limited. Or, it may be a significant disadvantage for a plaintiff in an urban venue where jurors will believe that there were more choices available to the patient.

Given the complexity of medical malpractice cases, it would not be accurate to say that all or even most of them can be assessed along one or two general dimensions. These are just a few of the standard questions I include in a preliminary questionnaire for focus groups. You may consider adding these to your own stock of voir dire questions to assess the community attitudes that jurors will bring to your next case.

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From the Editor

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