INSIGHT

Jury Consulting Assists Defense Counsel in Assisted Suicide Trial

Today, litigators rely more than ever before on jury research to help them test case theories and pick juries they hope will be receptive to their arguments. In the recent high-profile trial of Dr. Jack Kevorkian for assisted suicide, the authors of the article below were retained as jury consultants to the defense. The consultants surveyed potential jurors in Detroit before trial and employed a court-approved jury questionnaire. Perhaps most importantly, the consultants also conducted a mock jury, the results of which formed the basis for their strategic recommendations. In the following article, the authors explain the techniques they used and how they were helpful.

By Louis Genevie and Sharon Sebolt

Litigation Strategies, Ltd., was privileged to be involved in jury selection and strategy development in the assisted suicide case against Dr. Jack Kevorkian in Recorder's Court in Detroit, Michigan. We helped defense attorney Geoffrey Fieger to understand the psychology behind the jury's decision making and pinpointed the best way to get the most favorable jurors on the panel. Our advise during jury selection was based on a survey of potential jurors in metropolitan Detroit conducted the weekend before the trial, along with the aide of a court-approved questionnaire which was distributed to potential jurors at the start of the process. Separately, we conducted a Deliberation Analysis™ with a mock jury, the results of which formed the basis for our strategic recommendations at trial.

The trial involved the accusation that Dr. Jack Kevorkian had illegally assisted in the suicide of Thomas Hyde, who was 30 years old at the time of his death. Mr. Hyde had been diagnosed with amyotrophic lateral sclerosis, a degenerative nerve disorder more commonly known as Lou Gehrig's disease. Within one year of the diagnosis, Mr. Hyde lost almost all control of his voluntary and involuntary muscles which severely limited his ability to speak and swallow. In addition, when he contacted Dr. Kevorkian, he was experiencing immense pain, the result of muscle cramping due to the disease. Mr. Hyde had no chance of survival and would ultimately choke to death on his own saliva.

As part of his procedure before assisting any patient, Dr. Kevorkian consulted with Mr. Hyde and his wife, Heidi Fernandez, in order to determine whether or not Mr. Hyde was fully aware and in no way coerced into his decision to ask Dr. Kevorkian for assistance. This consultation was videotaped and later admitted into evidence for the defense at trial.

Jury Selection

Voir dire began with the court's administration of a detailed attitudinal questionnaire to each of the 66 individuals called for jury duty. The questionnaire focused on jurors' attitudes toward Dr. Kevorkian, suicide generally and assisted suicide in particular. The questionnaire also detailed potential jurors' attitudes toward the Michigan law forbidding assisted suicide, whether or not they thought Dr. Kevorkian should be prosecuted, and whether or not they thought they could be fair and impartial.

Analysis of the questionnaires revealed that the individuals called for jury duty were, from an attitudinal perspective, more negative about Dr. Kevorkian and assisted suicide than the general population of metropolitan Detroit. Our survey of potential jurors found that about 60 percent of all metropolitan Detroit residents approved of Dr. Kevorkian's assistance to people who are terminally ill and want to commit suicide. Only 27 percent disapproved while the remaining 13 percent were not sure.

Analysis of the questionnaires administered to the venire, however, indicated that 41 percent were anti-Kevorkian and only 39 percent were pro-Kevorkian. The remaining 20 percent expressed contradictory attitudes. Further analysis of the response provided by the venire confirmed what we had found in our survey: The vast majority of those in the venire with strong traditional religious beliefs were more likely to feel negatively about suicide in general and Dr. Kevorkian's actions in particular. These jurors felt that Dr. Kevorkian should be prosecuted and that the law forbidding assisted suicide should not be changed.

Because the explicit nature of the questionnaire made it easy for both the prosecution and the defense to identify jurors who were likely to be favorable or unfavorable to them, it was clear to us that preemptory challenges would not provide a basis for gaining much advantage. We also anticipated that Judge Thomas E. Jackson would not want to dismiss many jurors for cause even though at least 80 percent of the

Louis Genevie is president of and Sharon Sebolt is a senior research associate at Litigation Strategies, Ltd., a jury research, witness preparation, and graphics evidence production firm based in New York City.

veneer was strongly biased, about half pro- and half anti-Kevorkian. We believed that the judge would have little choice, however, but to dismiss those who were obviously biased and who would stick to their biases under pressure.

At the request of the defense, the court began the process of de-selection with the seven jurors who had indicated on their questionnaires that they felt they could not be fair because of their strong religious beliefs against suicide. Every juror who said they could not be fair on religious grounds had indicated on their questionnaires that Dr. Kevorkian should be prosecuted and that the law against suicide should not be changed. These findings gave us considerable confidence in the results of our research and in the focus on strikes for cause.

Defense attorney Fieger requested, and the judge agreed to bring these seven individuals into the courtroom separately for questioning. When asked by the judge why they thought that they could not be fair, each potential juror spoke about his or her intense religious beliefs and strong personal opposition to suicide. District attorney Timothy Kenny tried to rehabilitate these jurors by asking if they felt they could try someone for murder. They all answered that they could. "You're against murder, aren't you?" he asked. "Of course," each one said. "So, just because you are against something does not mean that you can't be fair, right?," Kenny asked. Each agreed, temporarily providing Judge Jackson with a rationale for keeping them on the panel. It was the very strength of these individuals' beliefs, however, that allowed Fieger to lead them back to their original position. Under Fieger's questioning, each said that they were against suicide, that they felt it was a sin and did not believe that they could be fair. Despite both the judge's and the district attorney's best efforts to dissuade them of their prejudices, six of the seven held firmly to their conviction that they could not be impartial and were eventually dismissed for cause. The seventh individual, an elderly woman, after several minutes of verbal pressure from the judge, finally agreed that she could be fair. She failed to arrive for jury duty the next day, however, and was dismissed from the panel. Sixteen members of the venire were then selected by lot for the jury with four alternates to be de-selected just prior to deliberations.

Analysis of questionnaire data provided by the venire indicated that *four* of the sixteen jurors selected to hear the case were strongly anti-Kevorkian, very religious, opposed to suicide, and personable enough to influence other jurors. These jurors indicated on the questionnaire that they could be fair but their attitudes indicated otherwise, mirroring the jurors who had been dismissed for cause. Under Fieger's questioning, three of the four jurors indicated explicitly that they could not be fair, and district attorney Kenny found considerable resistance to his efforts to dissuade them. When the "But you could try a murder case" tactic failed to rehabilitate them, Mr. Kenny tried another approach: "But you can keep an open mind, can't you?" Every juror agreed that he or she could keep an open mind. Who, after all, is going to admit to being closed-minded? None of the anti-Kevorkian jurors did, and it seemed as though they would remain on the panel. We nonetheless continued to target each of these four jurors as possible strikes for cause, using their responses to the questionnaire as the basis for questioning them.

Attorney Fieger was able to get three of the four strong anti-Kevorkian jurors removed with a sequence of questions that took advantage of Kenny's "open mind" tactic and basic legal standard that requires a potential juror to presume the innocence of the defendant. Fieger's questioning of each juror went something like this:

Q: Now, you say you have an open mind, right?

A: Yes.

Q: Of course you have an open mind. And you can be fair too, can't you?

A: Yes.

Q: But you have some strong beliefs about suicide, don't you?

A: Yes.

Q: You believe it is a sin, don't you?

A: Yes.

Q: And you believe that what Dr. Kevorkian does is murder, don't you?

A: Yes.

Q: But you still think that you can be fair, don't you?

A: Yes.

Q: You can be even-handed too, can't you?

A: Yes.

Q: You haven't made a decision about this case one way or the other, have you?

A: No, I haven't.

Q: For instance, you don't believe Dr. Kevorkian is guilty, do you?

A: No.

Q: And you don't believe he is innocent either, do you?

A: No, I don't believe he is innocent either.

Both Judge Jackson and Kenny made attempts to rehabilitate the first juror who admitted that he could not presume Dr. Kevorkian to be innocent. After several minutes, however, it became clear to the judge that a statement regarding failure to presume a defendant's innocence was an obvious dismissal for cause. After securing an admission from two of the first three strong anti-Kevorkian jurors on the panel that they could not presume Dr. Kevorkian's innocence, Fieger came to the fourth juror we had target-

ed for cause. By this time, everyone in the courtroom, including the jurors, knew the sequence of questioning and even the judge cracked a smile as the fourth juror admitted his irreconcilable bias. All told, this brought the total number of strong anti-Kevorkian jurors dismissed for cause to ten. Not one strong pro-Kevorkian juror was dismissed for cause.

Kenny's strategy failed because he did not realize that religious biases are usually stronger than secular biases and are therefore more apparent and easily uncovered during voir dire. Secular beliefs are by nature more flexible than religious beliefs, which tend to be dogmatic and often intolerant. Secular beliefs, on the other hand, are more pragmatic, making it easier for the individuals who hold them to profess a sense of fairness and adherence to the rule of law when questioned in open court. In this case, anti-Kevorkian jurors' strong religious beliefs created a moral certainty in their minds about Dr. Kevorkian's behavior and therefore, could not presume his innocence.

After the ten highly religious, anti-Kevorkian jurors were dismissed for cause, preemptory challenges were, as expected, basically even: Kenny struck three pro-Kevorkian jurors and the defense struck four anti-Kevorkian jurors.

Due to our success with strikes for cause, the pool from which replacements were selected was more favorable than unfavorable to Dr. Kevorkian . The panel that was ultimately formed to hear the case consisted of nine jurors (56 percent) who were pro-Kevorkian , four (25 percent) of whom were anti-Kevorkian and three (19 percent) of whom were ambivalent. This represented a substantial improvement for the defense over the original composition of the venire and more accurately reflected the opinions of the venue that we found during our survey.

Had this advantage been sustained during the final process of de-selecting the alternates to form the group that would actually deliberate, the jury would probably not have deliberated as long as it did before finding Dr. Kevorkian innocent. The final de-selection process, whereby four jurors were de-selected by lot as alternates, proved very unlucky for the defense, however. All four were strong, pro-Kevorkian jurors. If the advantage had not been gained with strikes for cause during voir dire, the defense would probably have been overwhelmed and the case lost. As it began deliberations, the jury consisted of five pro-Kevorkian, four anti-Kevorkian and three ambivalent jurors. In essence, pro- and anti-Kevorkian forces were evenly matched going into deliberations. We knew we were in for an intense battle.

Post-trial interviews with several jurors revealed that the group was deadlocked 6-6 at the end of the second day of deliberations. The battle lines were clearly drawn between those with strong religious values and those with secular values, just as they had been during our mock deliberation group. The outcome of the trial rested on understanding how jurors would decide the case, which we had learned during the Deliberation Analysis™ we conducted prior to trial.

How Mock Jurors Reacted to the Case

Litigation Strategies' Deliberation Analysis™ is a powerful research tool designed to provide counsel with jurors' perceptions of the key facts and issues in a case gleaned through individual questionnaire data and qualitative analysis of group deliberations. Strategic recommendations are then developed based on jurors' hierarchy of case issues: the key facts that will form the basis of the jury's decision-making.

After hearing the defense, mock jurors gravitated to the legal argument that Dr. Kevorkian's intent was to relieve pain and suffering.

Prior to the trial, we recruited 12 mock jurors who were demographically matched to metropolitan Detroit: about 75 percent black and 25 percent white. After acquiring basic demographic and attitudinal information from the mock jurors through a brief questionnaire, a summary of the prosecution's case was presented by one of Fieger's partners, Michael Schwartz, a former prosecutor himself. Schwartz presented a strong case which included a videotape of a complete confession of the act by Dr. Kevorkian that had aired on the evening news. Commitment Scores™ recorded by the jurors immediately after hearing the prosecutor's case indicated that most (60 percent) were strongly committed to finding him guilty. Three out of four were at least moderately committed to finding Dr. Kevorkian guilty.

The most convincing argument in the prosecution's case, according to the jurors, was that Dr. Kevorkian violated the law; he acted above the law and he confessed to the crime. The law was the core of the prosecution's case and 90 percent of the mock jury found it convincing. We knew then that the case could easily be lost if we allowed Kenny to claim the law as his exclusive domain.

Fieger then presented Dr. Kevorkian's case, after which commitment measures were taken to determine if the prosecution's case could be defeated. We were encouraged by the results. Overall, Fieger's presentation had reduced the number favoring a guilty verdict by 42 percent, from 75 percent after the prosecution's case to 33 percent after the defense's case. We knew we still had to do better at trial, however. Even though we had successfully attacked the prosecution's case, we had not created a strong commitment for the defense. In fact, strongly committed jurors were equally divided between the prosecution and the

defense with 25 percent favoring each side after hearing summaries of both sides of the case.

After hearing the defense, jurors gravitated to the legal argument that Dr. Kevorkian's intent was to relieve pain and suffering. A slight majority of jurors (57 percent) indicated that the most convincing defense argument was that Dr. Kevorkian's actions were not criminal because his intent was to relieve pain and suffering. Jurors were clearly looking for a legal argument to counter the district attorney's argument that the law is for everyone and must be obeyed. Very few jurors thought the defense should argue that the law is unfair or unconstitutional. We knew then that we would have to rely on the jury's interpretation of Section 7(3), subsection (1) of the Michigan Compiled Laws Annotated if we were to win the case. The law under Section 7 states that assistance to suicide is a punishable felony but subsection (1) reads that the above "does not apply to prescribing, dispensing, or administering medications or procedures if the intent is to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death."

Deliberations

Going into deliberations, there were equal numbers of pro- and anti-Kevorkian jurors just as there would be in the actual jury. As the discussion developed, the mock jury found itself deadlocked. As was to be seen at trial, the primary argument rested between those highly religious individuals and those not so religious. Jurors for the prosecution stood by the "law is the law" argument and refused to budge. Defense jurors first pointed to Mr. Hyde's choice and his family's support. When that argument failed to move prosecution jurors from their position, defense jurors then pointed to subsection (1) but failed to persuade the prosecution jurors who refused to believe Fieger's interpretation of the law. They wanted to see it in black and white. When defense jurors heard this, they retreated to personal choice arguments focused on the individual's and the family's right to decide how much pain and suffering one should have to endure.

Deliberations slowly ground to a halt. The group agreed that they needed to know more about the law. Assured that the group was truly deadlocked, we interrupted the process and read the entire Michigan law forbidding assisted suicide. We then left the jury room after asking the group to continue their deliberations. Observing through a one-way mirror, we watched and listened as the foreperson carefully read each section of the law and then read it again. As we had hoped, the group focused on subsection (1) which provided a possible exemption to the assisted suicide law provided that the intention was to relieve pain and suffering, not to expedite death. Most jurors interpreted the subsection as a "loophole" — a "loophole" that those in favor of Dr. Kevorkian were looking for and those biased against him were willing to accept. The group came to its decision — not guilty — shortly after reading the law. We knew then that an emphasis on the law — the fact that Dr. Kevorkian followed the letter of the law — and on Dr. Kevorkian's intent — he never intended to kill Thomas Hyde, only to end his pain and suffering — would be key elements in the defense strategy.

During the trial, Kenny tried to persuade Judge Jackson that this part of the law was merely designed to protect physicians administering experimental medication and did not apply to administering carbon monoxide which was how Mr. Hyde had died. But Jackson ruled that the jury would have to decide what the law meant since it said nothing about physicians or experiments.

The group decision making process worked as it did because the very religious jurors were uncomfortable in their role as tryers of such a moral crime. When the push came to decide the case, they accepted the legal loophole in order to justify changing their position. In interpreting the Michigan law on assisted suicide, the very religious could stifle their beliefs because Dr. Kevorkian did, after all, intend to relieve pain and suffering. No one believed his purpose was solely to kill people. The not so religious jurors were looking for legal leverage to gain ground in the discussion against the highly religious. As one mock juror put it, "Look, I believe that what Dr. Kevorkian is doing is the right thing. I admit it, I'm looking for a reason to find him innocent and here it is, right in the law."

In addition to the core legal argument, it was clear that Thomas Hyde's personal wishes and those of his family were very important to the jury. Defense jurors in the mock deliberation group were especially concerned about individual choice in this matter. Since Thomas Hyde himself could not testify, most jurors wanted to hear testimony from his family about his desires and whether or not they supported his decision.

At trial, we knew the defense had made a major breakthrough when the videotape of Mr. Hyde's consultation with Dr. Kevorkian in which he asks to die was admitted into evidence. Later, Thomas Hyde's wife and brother testified about the severity of his suffering and his wish to die. Jurors heard the tape again during Fieger's strong, emotional closing. We knew we were on target when the actual jury asked for the equipment Hyde used to end his life. They wanted to see first hand the equipment he used to assure themselves that the act was his decision and his decision alone.