The People Will Decide: Juror Attitudes and Approaches to Cartel Cases

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The way I understood the Jury Instruction, you can talk to competitors, can talk about prices, can copy price lists, but making agreements or mutual understandings is the legal barrier.

—FOREPERSON OF A CARTEL CASE; POST-TRIAL INTERVIEW

JURY SELECTION CAN PROCEED QUICKLY in antitrust litigation, so it is particularly important to be able to anticipate how jurors might absorb and react to such complex cases. There are known hurdles for jurors to overcome in understanding cartel cases and how they come to well-reasoned decisions. Four decades of sound trial research has given us insights into the voice of the jury.

Cartel Cases: A Specific Subset of Complex Business Litigation Cases

Every case is tried in the social, political, and economic climate of a particular time and in a specific location or venue. Cartel cases are especially susceptible to the prevailing and shifting attitudes and opinions about businesses, large corporations and government regulation. The current outlook has been influenced primarily by the broad economic downturn and recession starting in 2007–2008, as well as the sluggish recovery of the past few years. Survey research supports the notion that many Americans view the economy as the most important issue facing the country,[1] and we see these concerns expressed repeatedly and on a very personal level across all forms of jury research. A recent 2013 Pew Research Center study indicated that eight of ten U.S. voters identify strengthening the economy and improving the job situation as the top priorities for the President and Congress.[2]

Potential jurors will also have a keen memory for the scandals and controversies of the past three decades. Middle-aged and older people readily recall the Savings and Loans debacles of the 1980s, Arthur Anderson and Enron in the 1990s, and the dot-com boom of the late 1990s and early 2000s. Adults of all ages have fresh memories of the collapse of Lehman Brothers, AIG, and the housing market. We have seen intense debate about who is responsible for these events—with particular focus on the role of government oversight and regulation.

Over the last ten years, there has been a steady decline in Americans' satisfaction with the size and power of the federal government, regardless of political affiliation.[3] At the same time, confidence that major companies will behave ethically can only be described as "moderate," with 55 percent of those polled expressing some confidence or better and 44 percent having not much or no confidence.[4] It is also interesting to note that many people believe that they would favor individual plaintiffs and small businesses who are engaged in litigation over large corporate defendants.[5] Jurors' pretrial attitudes are likely to favor an individual plaintiff against corporate defendants in the insurance, oil and gas, finance, pharmaceuticals, and automotive industries. However, jurors are less likely to be biased against large tech firms.

In many ways, it can be helpful to consider cartel cases as a specific subset of complex business litigation. Like other such business cases, antitrust litigation can include companies of various sizes, from mom-and-pop stores to multinational corporations. Adherence to laws governing how companies conduct business is typically at issue, as can be the nature of contracts and how businesses communicate with each other. Attorneys will be challenged to define, describe, and place economic value on harm, and there will be argument over complex sets of contracts, laws, and regulations. Most features of a well-designed and thoughtfully constructed litigation approach in any complex business case will apply in the antitrust matter.

Antitrust cases, including cartel cases, involve elements in the law that address business competition, including promoting and ensuring healthy competition, curbing restraints of trade, and protecting the benefits that consumers obtain from competitive business practices. It is reasonable to assume that jurors will understand the fundamental constructs of competition as they see it in their daily lives. They see, for example, that they can shop around for the best price for a consumer item, and merchants will compete hard for their business. At best, some will have heard of the Sherman Act and have some sense that our economic system does not

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allow monopolies, as it affects the market-driven underpinnings of fair consumer prices.

Jurors will also likely have some familiarity with government regulation of business. While not unique to cartel cases, their opinions about the extent and usefulness of government oversight of private business will affect their views of the case. However, very few jurors are likely to understand how antitrust laws actually work, including how cartels are defined and when competition moves from legal to illegal in the eyes of the law. The typical juror also likely has little experience applying the law to the day-to-day workings of business, whether big or small.

To make things even more challenging, the increasing globalization of business and trade means that cartel cases often involve foreign companies and executives. Thus, jurors may also face the task of understanding business practices and traditions in other cultures, not to mention laws and regulations in foreign countries and how they interact with U.S. statutes.

Finally, some antitrust cases carry the compelling and confusing convergence of both civil and criminal allegations. While not always the case, in instances when an individual or corporation has either been found guilty of a crime or accepted a plea agreement, the very existence of a criminal conviction can influence how jurors approach the civil antitrust case involving the same defendants.

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The Role and Importance of Jury Research During the Pretrial Phase

For almost four decades, social scientists have been studying juror attitudes and decision making in the full range of cases brought to trial, including cartel and other antitrust cases. Through a variety of research modes, the ideas, values, experiences, and perspectives that jurors bring with them when they absorb evidence and listen to argument have come into sharper focus.

To reliably use this research, it is important to understand how juror behavior has been studied, as well as the assets and drawbacks that come with each research mode. On one end of the spectrum is large scale survey research in which hundreds and potentially thousands of jury-eligible individuals are interviewed, typically via phone and more and more online, in order to glean their views and attitudes about issues relevant to the case. One of the advantages to conducting community-attitude research is that attorneys can obtain statistically valid data regarding views of specific trial-related themes in the venue in which the trial will take place. Community bias can be uncovered. Analysis of this data can help identify high-risk jurors. While there is statistical strength in the large numbers of individuals who are interviewed, attorneys must be cautious and avoid rote application of "group data" during jury selection. For example, survey data might indicate that individuals of a specific demographic profile are disposed to specific views of corporate executives. However, there will still be individual differences within that demographic group.

More intimate and in-depth data about a specific cartel case can be obtained through focus groups and mock trials. These venues bring together smaller groups of jury-eligible people to listen to and discuss general themes related to the case (focus groups) and case-specific argument and evidence (mock trials). In these research exercises, attorneys can hear reactions to specific arguments, witnesses, and themes. They lend enormous value to understanding how jurors see the strengths and weaknesses of the case from both sides. Mock trials also add the dimension of learn-

ing how individuals make decisions about actual issues in the case and yield invaluable information about potentially high-risk jurors. On the cautionary side, attorneys should not hover too closely over mock trial voting on specific verdict questions or rely on simplistic profiles of ideal or worst-case jurors. After all, mock trials rarely include more than 45 to 50 people. The value is in testing the effectiveness of themes and arguments, not in vote tallies.

Selecting a Jury in a Cartel Case

Personal Experience and Character Shape Attitudes. Given the power and salience of the issues inherent in the antitrust case, jurors bring to the courtroom direct experiences, personal biases, and at times specific agendas that inform their approach to the case at hand. It is important for attorneys to mine for these attitudes and mindsets in some specific areas via supplemental juror questionnaires (SJQs) and in voir dire.

The Impact of Direct Personal Experience. General life satisfaction, but more specifically recent employment experiences and interactions with large corporations will shape jurors' attitudes in large business cases. In times of hardship, many people are prone to lay blame on others for their circumstances to counter feelings of helplessness and fear. It is not uncommon for jurors to express the feeling that a large company they had previously viewed in positive terms is now cold, uncaring, and impersonal. These jurors identify with perceived victims (i.e., plaintiffs).

Jurors who are unable to see a larger perspective of compelling and problematic national and global economic factors are likely to retaliate against large corporations and identify with plaintiffs. On the other hand, jurors who have had more success even in the face of adversity, and view opportunities as opening up and not collapsing around them, will look at plaintiffs with a more critical eye. The situation gets less clear when the plaintiff is also a large corporation. In those situations, attorneys cannot rely on jurors identifying with "the little man" or a party that is more like them.

Needless to say, jurors should be asked about their direct experiences in the industry that is the subject of the lawsuit. Even events that appear to be peripherally related to the industry can influence jurors and lead them to favor one party over another. During voir dire, it is critical to ask open-ended follow-up questions about how a prospective juror has experienced specific events, including the impact on their lives in both the short term and the long run. Attorneys would do well not to limit inquiry to the personal experiences of the jurors themselves, but should also ask about family members and others who are emotionally close to the juror.

Character Traits. Jury research in cartel cases also suggests that some specific attributes should be explored to determine better versus worse jurors for particular sides of a case.

• **Personal responsibility.** People who place high value on personal responsibility generally believe that you reap what you sow. Because they think that individuals should be aware of the contracts into which they enter, as well as the information that is available to them, these jurors can be skeptical of those who complain. In antitrust cases, this can cut both ways. Jurors who rate high on personal responsibility measures can either turn a skeptical eye toward the plaintiff or argue that defendants should expect the consequences of their actions (sometimes referred to as corporate responsibility). Pretrial research can help attorneys determine which side is favored among personal responsibility jurors for their particular case.

• **Black-and-white versus complex thinkers.** Some jurors tend to analyze situations in more detail than their peers, irrespective of their intellectual capacities or level of education. When a case relies on more nuanced thinking and in-depth and subtle weighing of evidence, it will require jurors with an interest in that level of detail, as well as more patience and persistence. Jurors who are rigidly wedded to "right or wrong" views of events and situations form opinions quickly, often ignoring or rejecting detail that an attorney believes is critical for their side. Attorneys will do well to match the complexity of the case they are trying to the willingness and ability of their jurors to analyze at that level.

• **Compliant versus questioning/cynical/activist.** Compliant people prefer not to make a tough call or disappoint others, so they shy away from too much responsibility. They also likely have not pushed to attain leadership or management positions in their work, often opting for roles that are safe and security-oriented. Rocking the boat and calling attention to oneself and one's plight makes these people uncomfortable. As a result, individuals who are more passive and compliant are often not disposed towards plaintiffs in cartel cases.

On the other end of the spectrum are the questioners, cynics, and activists. They are ready to scrutinize the actions of corporations and executives and listen to testimony and evidence with a degree of skepticism. However, questioners and activists are not necessarily obstructionist or anti-authority. In fact, they can be quite rule-bound and often claim a higher moral authority for their positions. Through their employment and life experience, they have typically shown that they are willing to speak up and ask questions, and are unwilling to take things simply at face value. They also do not shy away from responsibility or controversy. Activists, in particular, have been very critical of corporate executives and/or government during the economic downturn.

Activists also tend to be leaders on juries. Some of these views can be elicited by asking prospective jurors about their employment history. In addition to obvious questions about what their job is and how long they have been in their current position, it is often helpful to find out how much responsibility they have, whether they have received promotions, and whether they are working with specific goals of moving up in their place of employment.

• **Generally optimistic/satisfied versus pessimistic/dissatisfied.** Jurors who express general satisfaction with their lives are more accepting of the vicissitudes of life. They do not

look to blame others when things go badly and are more willing to accept that you "win some and you lose some." However, this should not be confused with passivity. In fact, people who are optimistic and generally satisfied in life are often pro-active, motivated individuals. They also can be more trusting and less quick to ascribe blame than their pessimistic/dissatisfied counterparts. Pessimistic and dissatisfied individuals are more prone to seeing malicious intentions when things do not go well. Their reflexive thinking leads them to suspect that they have been taken advantage of, and they are often intrinsically disposed to plaintiffs' cases in antitrust litigation. However, if pessimism is accompanied by pro-corporate identification, this trait can be an advantage to defendants, assuming that the defendant corporation has a positive image in general. The pessimism may then turn against plaintiffs, especially if it appears that the harm is questionable. Some of these attitudes can be elicited on voir dire and in SJQs.

Biases and Agendas. Apart from personal experiences and character attributes, many people develop very strong leanings, or even biases and agendas that must be flushed out by attorneys during jury selection. Ideally, biases are brought out during voir dire at a level that can substantiate a cause challenge. In reality, however, voir dire conditions do not allow much exploration. Even in permissive voir dire conditions, many jurors hold underlying biases in check and overtly claim the capacity to be fair and open-minded during trial. As a result, SJQs can be critically important on the issue of bias, as people are far more likely to describe their biases in a written SJQ than they would in oral questioning in a crowded courtroom. For cartel cases, we have seen the following biases and agendas directly impact juror behavior:

• **The impulse to protect corporations and resist government regulation.** Many people have strong views about the fundamental need to support big business as the backbone of our economy. While they can acknowledge some corporate malfeasance, their agenda is to protect large corporations, lest our way of life be endangered. "Job creation" is a mantra for these jurors, and lawsuits are often viewed as coming at the expense of jobs. These individuals will be sensitive to events that are seen as distracting corporations from their productive purpose and preventing a business from maximizing its bottom line. These individuals are also sensitive to issues of government overreach and intrusion, as well as the possible impact of class action litigation on the viability of corporations. The strength of these views can be obtained via responses on SJQs. For example, ask the question "What is your impression about how common or uncommon it is for companies to engage in illegal business practices?" This can open the door for follow-up questioning during voir dire.

• **The drive to punish corporate executives.** It is important to keep in mind that jurors make distinctions between the actions of corporations and the behavior of corporate executives. Individuals may essentially be supportive of large businesses and pro-business in general but still react strenuously to what they consider to be the greed of those at the top. If an antitrust case hinges on the actions of a discrete set of individuals, rather than the more generalized behavior of groups of companies, then the desire to punish will be activated. In-depth and/or follow-up questioning is needed to parse these distinctions. A good SJQ question to test this issue is: "Generally speaking, do you have a positive or negative opinion about the money that corporate executives make?" Jurors should be given three options (positive, neutral, negative). Issues of compensation will often stimulate expression of other views and opinions.

• **Feelings about race and ethnicity.** As more and more businesses have a global reach and involvement, jurors increasingly will see foreign companies involved in cartel litigation. This means that underlying feelings about race and specific cultures are likely to impact juror attitudes. This is an area that people do not like to talk about. They will not necessarily acknowledge negative views about racial or ethnic groups. Instead, views must be unearthed via more subtle means. Especially when cases involve foreign corporations, attorneys are significantly aided by community-attitude survey data about the case venue.

In addition, questioning is needed to understand the fabric of communities and direct experiences of the specific jurors who may serve. This includes probing the extent of diversity in the community in which jurors live and work; opportunities to interact with people of the case-specific ethnicities; direct personal experiences with individuals of the ethnicities in the case, either positive or negative; and jurors' relative levels of comfort talking about race. An example of this more subtle approach is a SJQ question that asks: "This case involves international companies, and certain witnesses may use a translator or may speak English with difficulty. Would you be more inclined to believe a witness who speaks English very well than one who does not?" Jurors should be given the option of answering only "Yes" or "No."

• **Pro-versus anti-tort reform.** Time and again, the debate over tort reform is played out in antitrust cases. Jurors described as "pro-business pragmatists" are concerned about large or excessive damage awards that will jeopardize corporations that provide essential services or products. On the other hand, some jurors see damages as an opportunity to "teach a lesson" or "right a wrong" by sending a message to others that unethical and illegal actions will not go unpunished. People with an agenda on either side are difficult to exclude from a jury for cause. Thus, it is imperative that these views be revealed during the jury selection process. This can be done by asking specifically about whether the potential juror believes that there are too many frivolous lawsuits versus backing the utility of the court system and their views of damages awards.

Procedural Mechanisms to Improve Jury Selection. Questioning jurors in cartel cases can be challenging because the issues raised in these cases are not typical parts of jurors'

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day-to-day lives. The terms "cartel" or "antitrust" carry heft and significance. Ironically, jury research indicates that attorneys should not assume that jurors understand what these terms mean. Many jurors are reluctant to acknowledge that they do not understand certain terminology, especially when it appears that others in the jury pool do. It assists jurors when attorneys educate them on specific language and terms, starting in voir dire. While it can be helpful to use alternative terms like "anticompetitive" to assist with comprehension, these labels may not convey the importance of the case. When negotiating the neutral statement of the case with opposing counsel, it is important to avoid relying too much on technical language and legal terminology and to give jurors enough information about the biases that are of concern so that jurors are able to assess whether they can be fair and impartial.

Counsel's challenge is to obtain voir dire conditions that allow them to explore and expose individual juror biases. This is particularly challenging in many federal courts where voir dire is extremely limited. Convincing the judge of the need for more probing voir dire often requires that counsel submit a motion for expanded voir dire. This motion should include an overview and analysis of the pretrial publicity in the case, including a chronology of specific articles. If judges are made aware that there has been publicity about the case just prior to jury selection, they will be more likely to include preliminary questions about jurors' knowledge of the case.

For example, in the recent *Apple v. Samsung* damages trial,[6] Judge Lucy Koh began jury selection by dividing jurors into two groups—those who were aware of pretrial publicity in the case and those who were not. Jurors who had heard about the case were then questioned in small groups to avoid tainting the entire pool with detailed knowledge about the case. During this questioning, other biases were also exposed. This demonstrates that even a slight modification from extremely limited voir dire can reveal important juror attitudes and biases.

Counsel can strengthen a motion for expanded voir dire in several additional ways. Apart from the sheer numbers of articles, the motion should analyze the content of the pretrial publicity. Counsel should highlight biased statements in these articles, as well as any statements about any evidence likely to be deemed inadmissible in court. It may also be useful to provide news coverage of issues related to case themes, even if articles do not reference the specific case. Data from public opinion surveys can also contribute incremental value, particularly when it includes verbatim statements of bias. Even if the motion is denied, a detailed motion can help educate and alert the judge to specific biases that should be scrutinized during jury selection.

Trial

After the jury is selected, we suggest shifting focus onto factors that are most important in influencing how jurors respond to the case.

Comprehension Is at the Core of Communicating Effectively with the Jury. Most jurors are invested in "doing right." They understand that their verdict is likely to have significant impact on individuals and companies. They want to come out of the jury room at the end of the day feeling that they can explain and justify their verdict.

The ability to understand the case is fundamental to a jury's ability to arrive at a just decision. Poor comprehension of important issues and testimony can lead a jury down the wrong path. One or two strongly opinionated jurors may influence others to adopt positions that are not supported by the evidence. Furthermore, jurors who do not adequately understand a case are often frustrated when they get into deliberations. At times, this frustration turns into anger, which is typically directed at the party who has made the case confusing and/or inaccessible to them.

Making a Complex Case Accessible. Social science research on juror decision making over the last 25 years has shown that jurors are competent to handle complex cases like antitrust litigation.[7] However, in many trials, jurors are hampered in their decision making by the lack of support from the court and the attorneys. There are many ways to make the evidence and arguments more comprehensible, but it requires focusing on simplifying, educating, and assisting jurors in understanding both the big picture and the all-important details. Jurors give a great deal of credit to attorneys and experts who show respect for the jury by working hard to explain complex matters in terms they can understand. The following suggestions can go a long way towards making the case accessible to jurors:

- **Identify the specific challenges.** This task needs to start early and can be quite different from preparing argument for motions or hearings. Attorneys would do well to analyze their case in terms of the comprehension challenges for jurors and, specifically, where the complexity lies. Complexity in the cartel case comes in various forms, such as understanding: the nature of businesses that individuals may be familiar with but only on a surface level; intricacies and peculiarities of the law; difficult economic concepts; highly detailed timelines; and frequently, multiple players or parties with complex relationships with each other.
- **Vary your modes of communication.** The key to trial preparation is to develop ways to explain difficult content and conceptual material effectively. Sometimes it will be through carefully selected expert witnesses and at other times

through the presentation of documentation in lay witness testimony. Counsel should also carefully consider how many causes of action they want the jury to grapple with and decide. Furthermore, jurors need reinforcement of learning. This does not equate with simple repetition. It is important to refresh jurors' understanding of evidence and concepts throughout the trial, and this is best accomplished by using different models or words to describe ideas or sequences of events. Since there will invariably be jurors with different learning styles, it can be particularly helpful to mix verbal explanation with visual demonstratives.

• **The all-important case narrative.** It is equally important to develop the client's story. Sometimes the narrative can be relatively linear and straightforward, but the analysis of whether the conduct was warranted or illegal can still be much more difficult to present clearly. Jurors need context and background, which can take several forms, including an appreciation of market forces during the period in question, the specific pressures on individuals or companies, motivation in response to adversity and competition, and cultural norms that affected the behavior of the executives and employees.

Especially during the preparation phase, attorneys should consider what kinds of questions average people would ask to get a sense of what is happening in a case. In this way, juror perspectives and concerns are kept at center stage during presentation of trial evidence. Questions that may help a litigator develop a rich and coherent story that is accessible and compelling to jurors include:

- Where is the key to the case? On what information or events does the case turn?
- What is the nature of the marketplace and economic climate in which the case resides?
- What has been the client's experience in that marketplace and business environment?
- What is the story behind your client's successes or failures?
- Where is the smoking gun?
- What is the human story? Who are the people? What did they do and why? What happened as a result of their actions?

• **The intelligent use of smart witnesses.** Of necessity, cartel cases are heavy with both lay and expert witnesses, each of which pose distinct challenges. Mock trials and post-trial interviews reveal that jurors can be scathingly critical of witnesses. With lay witnesses, their radar is finely tuned to detect dissimulation, lack of believability, and honesty. With experts, jurors are easily lost by witnesses who are experienced as arrogant, confusing, or pedantic. At the same time, these witnesses are critical to the cartel case as comprehension of complex information is essential to both sides.

Much has been written about the keys to effective testimony in general as well as the virtues of ample witness preparation. Based on findings from mock trials as well as post-trial interviews, the following suggestions can contribute to effective testimony:

- With expert witnesses, aim testimony at a mid-level. Experts are often told to adopt a teaching mode on the stand. But people teach to different levels, and approaching a jury as if it were a Ph.D seminar will lose most jurors. Look at the education level of the jury, which should be obtainable by a supplemental juror questionnaire. It is likely that aiming at roughly the high school graduate level will capture the audience effectively.
- Experts should make extensive use of graphic demonstratives. Multi-modal testimony—both verbal and visual—is most effective in terms of comprehension and sustaining juror attention.
- Do not give experts too much free rein. There is a temptation to allow experts to "do their thing" on direct examination, and they will try to convince you that they can do this effectively. The more arrogant the expert appears, the more control he or she will need. Since the overly confident expert will usually disagree with this, attorneys must work on the attorney-expert relationship prior to simply walking through the expected testimony.

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- Experienced trial consultants can also be particularly helpful with lay witnesses, as the attorney may not be the best judge of how testimony will appear to others less familiar with the case. There is a fine line between preparing a witness and practicing so much that they look rehearsed.
- When the antitrust case involves witnesses from foreign countries and cultures, be especially careful to understand the mores, traditions, and customs of that culture. Research into these issues should come before meeting the actual witnesses.

It is important to remember that jurors do not leave common sense at the door just because an expert is presenting evidence. For example, in one cartel case where a plaintiff alleged unfair business practices, the plaintiff's damages expert attempted to demonstrate that the plaintiff's market share was harmed by the defendant's alleged actions. However, the model that the expert presented assumed that, but for the defendant's alleged wrongful conduct, the plaintiff would have had 100 percent market share. Post-trial interviews with jurors revealed that the plaintiff's damages model was perceived as so far-fetched that it weakened their liability arguments as well.

Theme Development. The more complicated the case, the more important it is to have a core of solid themes that jurors can hang onto as they get inundated with testimony and documents. Themes are conceptual narratives around which information, impressions, and experiences coalesce. They are touchstones and reminders that work to organize juror thinking. Thus, they must also be powerful. A good theme is one that people can embrace based on their personal experiences and the values they hold. It must be understandable and makes sense on its face. In cartel cases, there are many themes that jurors can relate to on both sides of the aisle. The stories of businesses are replete with images like these:

- ***The Little Company that Could . . . Until It Was Squashed by a Bunch of Bullies:*** Employees and executives do their best to get a foothold into a market, only to find that larger companies conspire to use their power wrongfully to block access to the market.
- ***Collusion Instead of Competition:*** Competitors decide that they are all better off if they control instability in the markets. They collude instead of compete.
- ***They Don't Play by the Same Rules that We Do:*** Foreign competitors do not respect U.S laws. They are more likely to be corrupt.
- ***U.S. Companies Should Follow U.S. Laws:*** Threatened in the global marketplace, U.S. companies will walk the edge of legal business practices so they can compete with foreign corporations. Sometimes they cannot help going over the line.
- ***Sometimes U.S. Companies Just Don't Get It:*** Foreign corporations often have governmental, political, and cultural differences in the way they do business. U.S. companies do not understand those differences and so do not understand the intent and behavior of its foreign competitors.

Turning Points in the Story. In many cases, jurors will identify one or more important turning points in the events underlying the case. These events become symbolic of a company's choice to either follow the law and risk losing profits or turn down the road of illegal conduct. In cartel cases, jurors are likely to focus on how companies and individuals react to powerful economic pressures. For many jurors, wrongdoing is not justifiable just because a company is facing difficult circumstances that might even threaten its viability. This absolute decision can occur abruptly no matter how compelling and sympathetic the story is. Other jurors take a more contextual approach. They feel that a company's actions are more understandable and justifiable when economic pressures threaten their survival or their success. Heated exchanges between these kinds of jurors often crop up in deliberations.

Pretrial research with juror-eligible respondents will often preview which events or communications are likely to trigger such strong reactions. This, in turn, can then guide case presentation. For example, in the *Disposable Contact Lens* case,[8] state attorneys general and a private consumer class alleged that the American Optometric Association and several contact lens manufacturers reached an illegal agreement to restrain trade. In pretrial research, the plaintiff-leaning respondents singled out a meeting where the defendant, American Optometric Association, threatened the contact lens manufacturers by communicating that optometrists would stop prescribing the manufacturers' lenses unless the manufacturers stopped selling lenses to pharmacies and mail order houses. The trial team successfully targeted this meeting as the critical turning point where the defendant made the wrong decision.

Connecting the Dots for the Jury. People have generally been exposed to all kinds of information about large corporations and small businesses, government regulation of business, foreign competition, and the dominance of powerful corporations. However, most people know very little about the antitrust laws. In focus groups, most people are unable to articulate the basics of the antitrust laws. At best, a few might recall renowned cases from the past. This means that counsel should pay close attention to how they educate the jury on these key legal issues at the beginning of trial and how they tie their case back to these issues throughout trial. The opening statement, even with time constraints, is a great opportunity to help jurors get a strong grip on the main issues in the case. Equally important in opening is linking the evidence with the ultimate decisions that the jurors will have to make.

Post-trial interviews in antitrust cases and other complex matters reveal some very common themes. Jurors report that they worked hard during trial. This included taking copious notes about the witnesses and considering their credibility. In addition, they report striving to understand and remember the legal concepts that were briefly described in pre-instruction, if they were fortunate enough to receive any such pre-instruction.

Jurors understand that they need to hear all the evidence before coming to a decision. However, the reality is that they are making judgments and developing opinions every day as they process testimony. What this means is that jurors are often searching for the connections between the events being described and the claims that are being made while they are hearing the evidence unfold at trial. To the trial team that has worked on a case for years, these connections are second nature and may seem clear, if not obvious. But the interweaving of people, documents, events, and assertions is often a mystery to jurors. Comments like these from post-trial interviews are legion:

> There was a lot of time, during questioning, I would write down, "How will it tie together, and what is the point? What is the relevance?"

> When you bring in evidence, remind us why this is important so we can write it down. It was hard to sort through later.

The need for education on applicable antitrust concepts is apparent to everyone in the courtroom, but the actual learn-

ing is hampered by insufficient attention to it. Instructing the jury on the basic antitrust concepts at the beginning of trial is certainly helpful. Economic experts are also in an excellent position to help jurors understand the applicable concepts. However, all too often, jurors describe expert testimony in general to be difficult to understand and too narrowly and technically focused for jurors to comprehend. We cannot emphasize enough the importance of sound preparation of witnesses and the concurrent use of visual demonstratives as a way to educate jurors.

The Controversies of Criminal Conspiracies, in Particular. While there is plenty of cynicism about what happens in the corporate executive suite, there is also considerable concern about the size and the power of the federal government. A January 2014 Gallup Poll reported that 66 percent of Americans feel dissatisfaction with the federal government's size and power.[9] In a criminal antitrust case brought in federal court, there most certainly will be quite a few people in any jury pool who are going to question the government's use of power. The idea of pressuring employees and executives to agree to guilty pleas and requiring testimony in exchange for immunity makes some people very uncomfortable. Likewise, targeting a manager or executive who claims not to know about illegal practices can create sympathy.

Equally important is that people have varied reactions to the notion of "conspiracy." There can be a very fine line between the sharing of information within an industry and conspiring to conduct business in an illegally collusive way. Some people are ready and eager to see conspiracies and others are skeptical because the evidence can be susceptible to conflicting interpretations.

A case in point is the prosecution of Gary Swanson, a senior sales executive of Hynix America.[10] In a criminal indictment charging Swanson with a violation of Section 1 of the Sherman Act, the government contended that Swanson had conspired to fix the price of DRAM with a Micron Senior Vice President for Marketing, who subsequently received amnesty and testified at Swanson's trial. Top Hynix executives based in Korea had pled and testified in Swanson's trial. The defense focused on proving that Swanson was unaware of the conspiracy. Swanson was included on a number of superficially incriminating email communications with both executives and the sales people under Swanson. The defense team dissected the troubling emails, and through testimony and argument, they were able to provide substantive alternative meanings to the language in the emails, phone calls, and meeting notes. Defense graphics included a map of the world to show the jury the vast distance between Swanson's location in the United States and the countries in Asia where Hynix operated, and where the inner circle of Korean executives had conspired to fix prices. An important defense theme stressed the importance of keeping an open mind as to why persons in the same company might have different levels of knowledge and participation in the conspiracy.

In post-trial interviews of the jurors seated in the Swanson case, jurors reported that they were initially divided, with a majority leaning towards conviction. Over the course of seven days of deliberations, the jurors went through a large binder containing the evidence. As one juror put it, "He would have been guilty in 3 hours if we didn't open that binder." The documents in the binder were of great interest to the jurors, and they sparked debate and changes in opinion. However, the difficulty of finding particular documents tested the fraying nerves of some jurors. As one juror said, "It was very frustrating how it was organized. . . . It took a lot of patience. . . . I wanted to find e-mails that would help put a bad email in perspective, but it was hard." Many of the jurors eventually came to the conclusion that the evidence supported the defense theme that Swanson was in a "bubble"—isolated from the wrongdoing of the Korean executives and unaware of the questionable dealings of sales people below him. A crucial determinant for those arguing in favor of a not guilty verdict was a trio of jury instructions:

> Price exchanges among competitors are only a violation of the Sherman Act if the exchange is done pursuant to an agreement or mutual understanding.
>
> It is not unlawful for a person to obtain information about competitors' prices, or even to exchange information about prices, unless done to an agreement or mutual understanding.
>
> Presence at the scene of the crime and knowledge that a crime may be committed by others are not sufficient to establish a defendant's guilt. Mere association with conspirators or those involved in a criminal enterprise is insufficient to prove a defendant's participation or membership in a conspiracy.[11]

In a post-trial interview, one of the jurors discussed the impact of hearing so much talk about conspiracy during the trial. She said, "In the closing, Bartko[12] was a little dramatic about 'These are our liberties and we can't give them up.' I needed to be reminded of that, I was so overloaded with conspiracy. Having suspicions does not equal guilt. The prosecution was very good at raising suspicions. . . . Just because you think something is suspicious, it does not mean a person is guilty."

One of the lessons of the *Swanson* case is how important it is for the defendant to be able to project the positive and honorable aspects of his persona. The jurors leaning towards acquittal responded positively to Swanson's testimony and felt that he was an honest man trying to do his best in a complex job. He was able to project his positive qualities, even when his testimony under cross was a bit rough. The support in the courtroom from a large number of family members suggested that people believed in him and his innocence.

Newer Additions to the Attorney Toolbox. Numerous reforms to improve the trial process for jurors in complex cases have been adopted in many courts. In 2007, the ABA adopted Civil Trial Practice Standards that address a wide range of approaches to improve juror comprehension. We believe jurors in antitrust cases would be enormously grate-

ful and feel that they have worked more effectively if judges and attorneys would adopt at least some these approaches:

- The use of juror notebooks[13]
- Jurors' written questions submitted to a witness at end of his testimony (subject to the judge's approval)[14]
- Pre-instruction at the beginning of trial[15]
- The use of neutral tutorials to educate the jury about relevant technology or any other complex subject matter[16]
- Interim statements and arguments throughout the trial[17]
- Access to demonstrative evidence in deliberations
- Note-taking by jurors (many jurisdictions still forbid note-taking)[18]
- Expanded use of courtroom technology[19]
- An organized approach to providing the evidence to the jury in deliberations[20]
- Providing copies of the jury instructions to every juror[21]

Courts vary widely in their willingness to adopt new approaches, but many courts have recognized the problems that jurors face and are changing procedures to help jurors do a better job and to provide a more satisfactory jury experience. The harder you work to make the case simple and visual, the more the jury will appreciate you and your case.

Deliberations—Harder Than You Think

Post-trial interviews of jurors in complex cases have revealed the serious challenges that jurors face when they sit down around the table in the jury room. Jurors want to get organized for their deliberations—they want a timeline of events; they want the documents and the emails organized in binders; and they want them ordered by date and by exhibit number. They want the names of the witnesses and the positions that each witness holds. However, juries rarely receive this kind of help and will frequently spend a significant amount of time trying to organize the materials in the early stages of deliberations.

In the criminal antitrust trial of Gary Swanson in the DRAM case, the foreperson described in a post-trial interview the experience of the jury as they began their deliberations:

> It was hard for us to focus; the case was not presented chronologically. Only one juror had done a good job of writing down exhibit numbers. So many emails were out of sequence. There was one great big binder with exhibits for the prosecution and defense. At first we had one copy of the judge's instructions and that was not enough we asked for more—we got four copies to share. The binders were in order of exhibit number but not chronological. I thought it had been done that way on purpose by the prosecution. It made it easy for them to say that these things happened, but things were going on in different years. So we had to sort out the timeline . . . every time I read an email, I would say this is from this date and this year . . . There were no boards in there, we had to beg Post-Its from the court. We also wanted to know who worked for whom, who was whose boss, and who was on which account and which company he worked for. We needed some kind of an organizational chart. So it took a long time and it was difficult.[22]

In another complex case that lasted four months on the liability phase, the jury experienced even more problems.[23] The jury deliberations lasted three weeks. The first week of their deliberations was spent simply organizing enormous volumes of case material that included four extra-large binders filled with documents in no order that was apparent to the jury, along with 230 pages of jury instructions and 130 verdict questions to answer. The jurors soon realized they could not debate the case intelligently without being able to find the evidence they wanted to use in support of their positions. It was only after days of identifying, organizing, and labeling materials that jurors could proceed to discuss the case with any degree of confidence.

In post-trial interviews, one juror described the experience this way:

> It's like doing a book report on *War and Peace*; there are 1,500 chapters and you are supposed to pick all of them. We were saying who is this guy? They did give us a breakdown in the courtroom, but it was not in the jury room, which would have made it a lot easier. We were wringing our brain cells on this. We would be talking—who is this guy? Don't you remember? We were having to filter everything out. It was such a cerebral workout; it's like if you have never worked out in ten years, and someone says, okay, now let's do a marathon.

No jury should have to go through this organizational challenge, but it is actually a commonplace problem in complex trials. While some courts have adopted basic procedures to assist jurors, such as providing jurors with a detailed list of all exhibits, courts and attorneys could do more to help jurors who will have to decide a complex case. In addition to the jury instructions, the most helpful aids to jurors are the demonstrative evidence, which can be excellent summaries of important information that the jurors need. As one juror said in reference to the jury's inability to access charts done by the damage experts for each side in deliberations:

> That was another one hard to figure out. If it was me, I would have had the visual presentations side by side. It was so hard to put them side by side and match them, and so difficult to compare testimony . . . . If you are comparing a Volvo to the Hummer, show us the pictures, we can see the difference in the tires.[24]

Seeing and Presenting the Case from the Juror's Perspective

Cartel cases are complex, often long, and invariably demanding trials for jurors. Most jurors are motivated to meet these demands and are invested in performing their civic duty responsibly. It pays for attorneys to spend the time to learn as much as they can about prevailing attitudes in the community and the personal experiences and characteristics that individuals bring into the courtroom. Effective use of supplemental juror questionnaires and voir dire can bring into focus jurors' attitudes about key issues in the cartel case, such as business practices, current and recent economic forces, as

well as race and culture. Efforts to improve the jury selection process are essential because biases that are left hidden can be determinative of the outcome.

It is important to remember that attorney comprehension is not the same as juror comprehension. Jurors apply common sense, personal experience, and knowledge to wade through weeks of evidence and argument. Seeing the case from the juror's perspective should be a constant reference point. Identify the challenges of the case, especially focusing on the need for jurors to comprehend difficult concepts, complex stories and technical aspects of the law. Organize or choreograph the case to make information accessible. Use a variety of presentation techniques, reinforcing juror learning in a refreshing but non-repetitive way. Give jurors sound, compelling themes to anchor their thinking and organize their views. And draw connections between evidence and narrative. Humanizing your story as much as possible will allow people of many ways of life to walk in the shoes of your clients. ■

[1] See Pew Research Center for the People & the Press, September 2012 Political Survey (survey conducted by telephone September 12–16, 2012 among 3,019 adults aged 18 and older nationwide), *available at* http://www.people-press.org/2012/09/16/september-2012-political-survey/.

[2] Pew Research Center for the People & the Press, Five Years after Market Crash, U.S. Economy Seen as "No More Secure" (Sept. 12, 2013), *available at* http://www.people-press.org/2013/09/12/five-years-after-market-crash-u-s-economy-seen-as-no-more-secure/.

[3] Gallup News Service, Gallup Poll Social Series: Mood of the Nation [hereinafter Gallup Poll 2014], (survey conducted by telephone January 5–8, 2013, among 1,018 adults aged 18 and over nationwide).

[4] *See* Public Affairs Council, 2013 Public Affairs Pulse Survey (survey conducted by telephone among 1,604 adults aged 18 and over nationwide), *available at* http://pac.org/pulse/files/2013/2013_public_affairs_pulse_survey.pdf.

[5] *See* DRI: Voice of the Defense Bar, The DRI National Poll on the Civil Justice System (Aug. 2012) (survey conducted by telephone among 1,020 adults aged 18 and over nationwide), *available at* http://www.dri.org/contentdirectory/public/polls/2012%20DRI%20Survey%20Analysis.pdf.

[6] Apple, Inc. v Samsung Elec. Co., No. 11-CV-01846-LHK (N.D. Cal).

[7] Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497 (2003).

[8] *In re* Disposable Contact Lens Antitrust Litig., No. 3:94-MDL-1030-J-20A (M.D. Fla.) (action brought by the State of California, 31 other states, and a private consumer class against contact lens manufacturers and the American Optometric Association).

[9] *See* Gallup Poll 2014, *supra* note 3.

[10] Robert H. Bunzel & Howard Miller, *Defending "The Last Man Standing": Trench Lessons from the 2008 Criminal Antitrust Trial* United States v. Swanson, ANTITRUST SOURCE, June 2008, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun08_FullSource.authcheckdam.pdf.

[11] United States v. Gary Swanson, No. CR-06-00692PJH (N.D. Cal.).

[12] John J. Bartko and Robert H. Bunzel of Bartko Zankel Tarrant & Miller were lead trial counsel for the defendant in *United States v. Gary Swanson*, No. CR-06-00692 PJH (N.D. Cal.).

[13] *See* ABA Principles for Juries and Jury Trials, Principle 13B (1–3) [hereinafter ABA Principles].

[14] *Id.* at Principle 13C (1–4).

[15] *Id.* at Principle 6C (1–4).

[16] *See* ABA Civil Trial Practice Standards, Standard 7 [hereinafter "ABA Standards"].

[17] *Id.* at Standard 9.

[18] *See* ABA Principles, at Principle 13A (1–5).

[19] *See* ABA Standards, at Standard 20; *see also* Hon. Herbert B. Dixon, Jr., The Evolution of a High-Technology Courtroom (2011) (reporting survey findings of 151 jurors who served on complex trials in the DC courts with 94% agreeing or strongly agreeing that "Overall, the use of technology in the courtroom improved my ability to serve as a juror in this case."), *available at* http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Technology/~/media/Microsites/Files/Future%20Trends/Author%20PDFs/Dixon.ashx.

[20] *See* ABA Principles, at Principle 15B.

[21] *Id.* at Principle 6C(4).

[22] Post-trial interview with foreperson, United States v. Gary Swanson, No. CR-06-00692PJH (N.D. Cal.).

[23] Boeing Satellite Sys. Inc. v. ICO Global Commc'ns, No. BC320115 (Los Angeles Sup. Ct.).

[24] Post-trial interview with juror, Boeing Satellite Sys. Inc. v. ICO Global Commc'ns, No. BC320115 (Los Angeles Sup. Ct.).