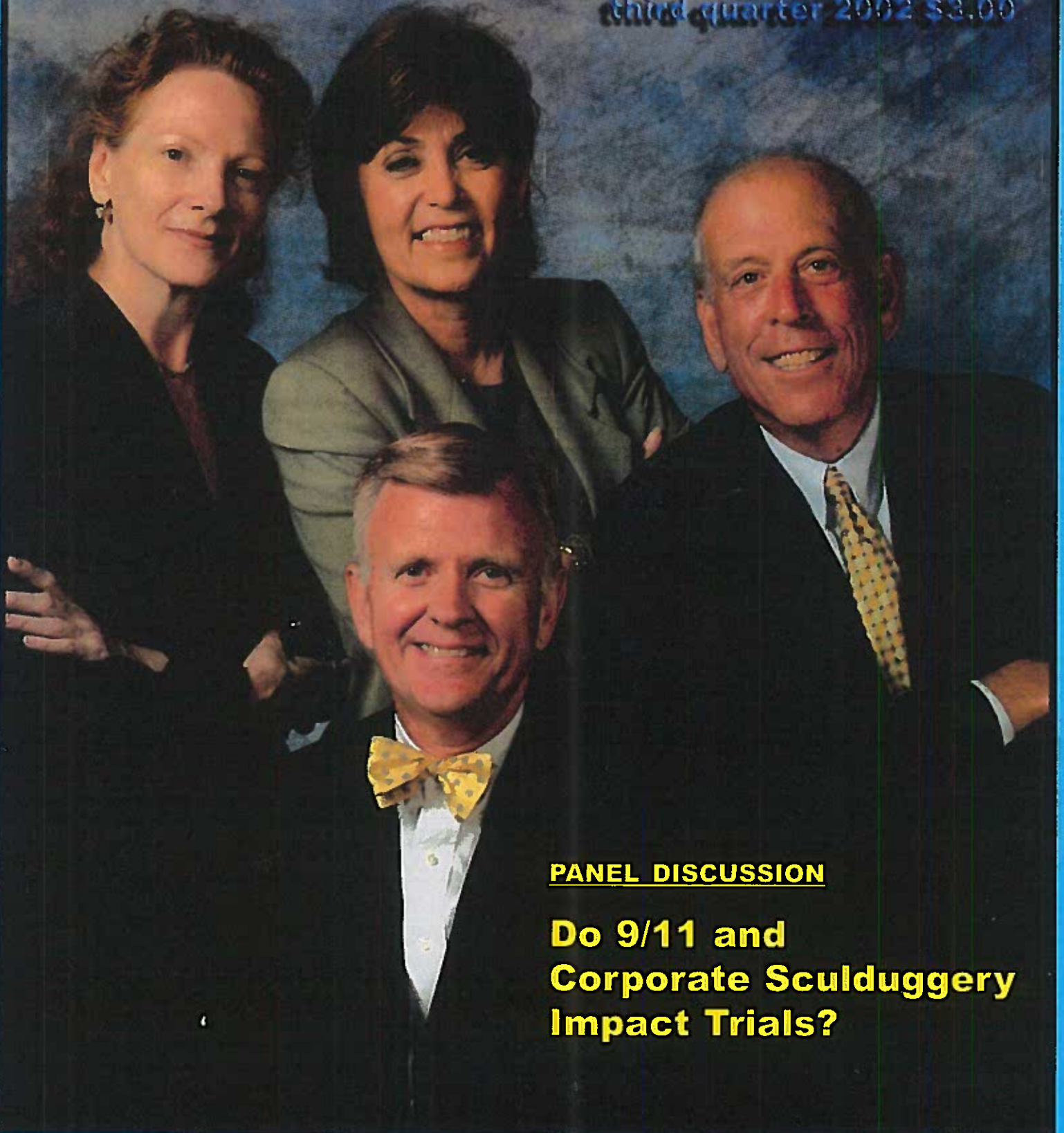


association of southern california defense counsel

verdict

third quarter 2002 \$3.00



PANEL DISCUSSION

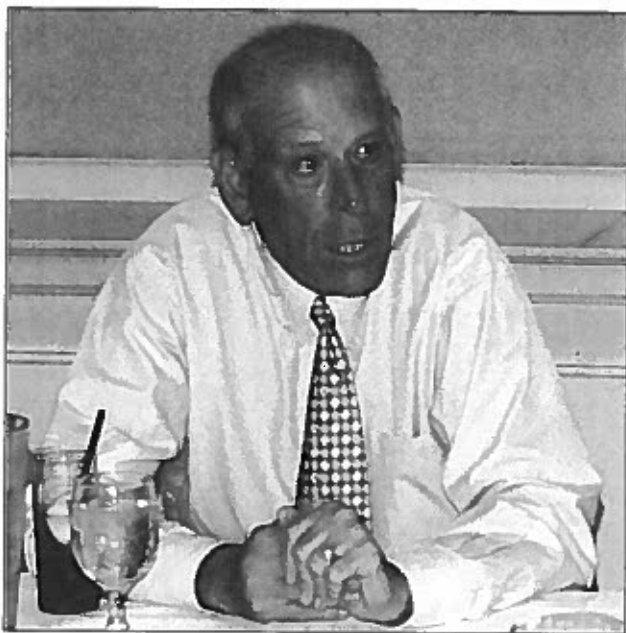
**Do 9/11 and
Corporate Sculduggery
Impact Trials?**

Panel Discussion

Do 9/11 and Corporate Scullduggery Impact Trials?



On September 11, 2001, life changed. Juror's attitudes changed. This, along with a year of corporate scandals and the public's growing mistrust of big business, has forced attorneys on both sides of the courtroom to re-evaluate basic assumptions in how they prepare their cases, conduct *voir dire* and select juries. In October, *Verdict* met with a panel of distinguished legal professionals who shared their insights and first hand experience on how the events of this past year has changed the legal landscape. The panel included J. Lee Meihls, Ph.D., Senior Consultant with Trial Behavior consulting in Los Angeles (*above, standing left*); Larry R. Feldman, plaintiffs' attorney with Fogel, Feldman, Ostrov, Ringler & Klevens in Santa Monica (*standing right*); Linda Miller Savitt, defense attorney with Ballard, Rosenberg, Golper & Savitt in Universal City and member of ASCDC Board of Directors (*standing center*); and Judge Charles "Tim" McCoy, who hears complex and long-cause litigation in Los Angeles Central Civil West Court (*seated*).



Larry Feldman, plaintiff's attorney.

Verdict: Larry, what effects have the events of the past year had on your practice?

Feldman: I'll start with the corporate effect first. It has made jurors more interested in business type cases and business tort type cases. They believe that corporate America today is dishonest and that there are bogeymen in the boardroom. On one hand, it makes it a more favorable playing field for plaintiffs in business cases and on the other hand, plaintiffs in personal injury cases are being impacted in a negative way by 9/11.

When you have people complaining about some unfortunate thing that happened to them and on the other hand you have this tragedy of 9/11, that makes jurors less sympathetic to injured plaintiffs. So plaintiffs have it tougher today because of 9/11, and yet injured businessmen and businesswomen have it easier because of the feeling that corporations aren't playing fair.

Verdict:

Larry, have you had an opportunity in the last year to try any of these cases that you're talking about?

Feldman: I have. In the last three months, I tried two cases. One was for a woman lawyer who was raped and the other

was for a talent agency who was suing the Disney Company for breach of contract.

My sense was in the rape case the jurors themselves did not concede they were less sympathetic because of 9/11. But there was this sense that this rape couldn't be avoided, that if someone wants to rape you or get you they're going to do that. There was great sympathy for the third party and that they shouldn't be responsible. There is this sense out there that 9/11 is this tragedy that occurred and no matter what kind of safety precautions you had, you can't prevent it.

In the case of Disney, Disney once had a great reputation but they've managed to destroy that over the years. I tried the lawsuit on the issue of trust — that Disney was not to be trusted and they were trying to avoid paying.

Verdict: In these cases, did you raise the issue of 9/11 and corporate skullduggery during *voir dire*?

Feldman: I did, and every time I raised the issue of Enron, it was

like I was burning the defense lawyer's hand because he would jump up and make sure the jury understood that maybe he had something to hide (*laugh*).

I think there is an aspect going on in the courtrooms that people don't trust executives.

When you see on the front pages that these people are lining their pockets at the expense of the shareholders today, everybody gets tarnished with that brush. Right now is a good time for plaintiffs to be trying these cases.

Savitt: I've tried three or four cases, all employment cases. Two were major corporations, and one was a small law firm. My sense is that the problems of the corporations are definitely spilling over into the jury's attitude about corporations. There's a cloud over corporate judgment. Juries are somewhat suspicious of what the corporation gives as their explanation for taking action or for taking inaction.

I recently got hit for a small amount of punitive damages in a case and in talking to the jury afterwards, they thought that the supervisor person made a bad judgment call and yet they still imposed punitive damages. I was pretty astounded and I think that was because of the negative aspects about corporations.

On the personal injury side of it, right after 9/11, I tried a case where the jury told me they did think there was sexual harassment going on but it wasn't very pervasive. They gave me a defense verdict. That was a couple of months after 9/11 and I was positive that it had an impact. But it is dissipating a little bit. As defense lawyers, we have to be careful and

try not to exploit it because it will backfire on us, too. I find myself trying not to deal with that aspect of it because either they feel it or they don't feel it, and my telling them to compare this to 9/11 is not a very good tactic.

Verdict: Did you explore these topics in your *voir dire*?

Savitt: I did not because I my case involved a low level supervisor making a business judgment and I didn't think that it would have much of an impact because it didn't get all the way up to the corporate level. Afterwards, I do believe that it had a major impact.

Another thing that I've seen, at least on the personal injury side of it, is that the plaintiffs' lawyers in my cases are not overreaching quite as much. I've seen fewer diagnoses of post traumatic stress disorder because they just open up to unbelievable cross examination of a traumatic event. So I've seen more modest reaching by the plaintiffs' lawyers in trying to resolve their cases.

Verdict: Larry, is this something you've seen? Are people reigning in just a little bit.

Feldman: I've seen this before 9/11 because the insurance defense industry has done a good job of pointing out the phonies that get involved in automobile accidents. They are much more sophisticated in these automobile cases in showing that what happened couldn't produce what the plaintiffs say.

And you have economic times turning for the worse right now. Jurors aren't just giving money away for pain and suffering. On the big, big cases, you're going to

get it, but on the medium-sized cases, they tend not to give that kind of money away.

The other thing that is impacting all of this is that you're getting all different types of jurors today. Jurors that have a much higher education. There are much more sophisticated businessmen and all different types of people. And surprisingly, business people get in to disputes with corporations all the time and so they're used to somebody cheating them. (*laugh*). This is more so than the person who works for the post office.

Verdict: That's interesting because that's the kind of people

"Right now is a good time for plaintiffs to be trying these cases."
— Larry Feldman.

defense lawyers have wanted on their juries.

Feldman: In the Disney case, I had the most diverse jury that I have ever had in downtown Los Angeles. I had a jury that I never would have picked for a plaintiff's case. Some of these people in *voir dire* talked about corporations and had business deals that went sour. They had contracts that were interpreted in a way that they didn't agree with. One person talked about how they were defrauded by someone in business.

It isn't so black and white in

my mind as to what we're seeing. But that's business.

With these business cases, the mix is a little different. It isn't the traditional thing that you see. When defending Exxon, it was an all minority jury and they were all there for Exxon at the end of the day. So it is interesting. You've got to get beyond the color of their skin and see how they feel about things.

If I think back to the last trial, two major things occurred. One involved an expert who showed something that wasn't produced and during cross, the lawyer pulled this document out of his brief case. There was a lot of drama.

The second thing involved a lawyer who testified. It came out in cross, "where are your notes, how many conversations have you had?" "The lawyer must have taken notes. Where are your notes?" "Well, I don't have any notes." "Have you looked for them?" "No." "Well, how do you know you don't have any notes?" "Well, somebody looked for me for these notes." I said, "Well, who looked for you?" He said, "The defense lawyer looked for me." "You mean you trusted the defense lawyer to tell you whether you have notes on the most important conversation in the case?"

So those kinds of corporate issues that get tried in the courtrooms just play into what they are hearing day in and day out, and reading about day in and day out.

Judge McCoy: Jurors may give a witness the benefit of the doubt and be neutral at the start, but when a corporate executive demonstrates a degree of dishon-



J. Lee Meihls, Ph.D., jury consultant

esty, the willingness to forgive them in other areas may be diminished and the reaction of the jurors to that dishonesty could be intensified.

Verdict: Judge, what is your opinion on the influence that 9/11 and corporate malfeasance have had in the courtroom?

Judge McCoy: In the corporate area, distrust of corporate America has been with us for as long as I can remember. It has been intensified somewhat by the present circumstances.

When lawyers *voir dire* juries, they should be very cautious and avoid asking generalized questions such as "Now ladies and gentlemen, you have to treat a corporation the same as an individual. Can you all do that?" And they all bow their heads and say, "Yes." Or looking at one particular individual and asking the question, then repeating the same question to each member of the jury.

If this issue is important to the case, then inoculation is just

not enough. You have to treat it as a real area of potential bias when focusing on individuals. If you want to get to the heart of the issue, it's not just enough to talk about the generalized situation of corporate America. You have to focus on the individual's experiences in

life. What have their experiences with corporations been? What have their business experiences been? And understand that their life experiences form the lens through which they are going to filter their perceptions of the world and a given situation.

So I would be very hesitant to generalize about it all. It should heighten our concern and prod us perhaps to dig deeper on the individual basis.

In *voir dire*, if you need to question a juror privately, all you need to do is tell me why and I will cooperate and provide the opportunity to do that.

Some people, for example, are reluctant to ask potential jurors their opinion on corporate America because they're afraid they'll poison all of the rest of the members of the panel. Well, if you really think that is a concern, then I will be willing to provide an opportunity for those questions to be asked outside the presence of the other jurors. This involves any inquiry of an individual's own life experiences that

might spill over to the remainder of the jury.

In significant areas I allow that, particularly where a person starts expressing their opinions. They can turn into an advocate in front of rest of the jury even before the trial has even started.

September 11 frightened people. They are still frightened. When you frighten a person, they get skeptical. They lose their ability to trust others — life in general becomes a less trustworthy proposition. And once a person's view of life shifts that way, then it spills over into everything that they do.

So it wouldn't surprise me to find that jurors today are less willing to trust not only corporations but lots of other things. They are less willing to take things at face value, because they think that is one of the mistakes our government made — they were too superficial, they weren't looking deep enough.

Feldman: I think there's a difference in *voir dire* about an issue of substance like in a rape trial when someone was raped or had been the subject of sexual abuse. It is embarrassing for that person to tell that story. So you need to protect that juror.

On the other hand, I used to worry about poisoning rest of the jurors in *voir dire*. I no longer worry about that. I'd rather get it out. If I said to someone in that case, "What do you think about holding this company liable for the rapist that did this?" There's no question about it. This rapist raped her and this rapist is in jail. "Now what do you think about this company?"

Twenty years ago I would have been afraid of hearing bad

answers and poisoning the jury. But now, I take the answer and ask other jurors, "Do you feel like that?" "Do *you* feel like that?" "Who else feels like that?" It's because I want to know what these people are thinking about and I want to create an environment in which they're able to tell me. I want to exercise challenges intelligently. I don't mind doing it in front of everybody else because if one juror thinks that he or she wants to hold a corporation liable in a rape case, others probably have the same thought. They're not alone and it's a normal thought.

Savitt: I don't know if it totally poisons the jury panel because everybody has such strong opinions today and they're not afraid to vocalize them. I don't think that one person on a jury is going to all of a sudden convert people who didn't have that opinion. I'm curious to hear what our jury consultant has to say about that.

Meibls: In the wake of both the 9/11 and Enron/WorldCom/Tyco scandals, jurors tell us over and over again that in the case of the 9/11 attacks, "It absolutely won't affect me." And, I have to agree with them. In the majority of cases, I don't think there will be a connection.

But in regards to corporate malfeasance, jurors admit it could influence them, and I've seen that happen in several trials already this year. Jurors are more likely to be candid in a private written questionnaire whereas they might feel intimidated to state how they feel in open court.

I've been involved in well over a dozen cases that went to trial

since 9/11 and our firm has conducted post-verdict interviews with jurors in over six trials in the past year.

In fact, I was involved in two trials going on when the 9/11 attacks happened. One of the cases was an airline crash case and it went to verdict on September 12th. Of course, the airline, which was my client, was very nervous because the feeling we all shared was that people's confidence would soar for the government, for the military, or some other institutions, and we feared that people's confidence would take a dive when it came to airport security. And we didn't know how that reaction would play into

"Jurors tell us over and over again that in the case of the 9/11 attacks, 'It absolutely won't affect me.'

—J. Lee Meihls, Ph.D.

jurors' anger or sympathy for the parties in which the plaintiff had survived a plane crash but was claiming post-traumatic stress syndrome in addition to various physical injuries. And the jurors, as Judge McCoy already pointed out here, were in a state of shock going into deliberations.

In the end, the reaction to the 9/11 attacks actually helped the defense, we think. We had already been to trial a few times in the previous months for other individual plaintiffs involving the same air crash, and we got the

lowest verdict to date in that case in September. They were only to decide damages, not liability.

Jurors told us during the post-trial interview that 9/11 had absolutely no effect on their decision. But then we were talking to the jurors about things that were happening in their deliberations, and more than one juror mentioned, "Well, she walked away from the crash." There was a bar there that the plaintiff had to meet which was too high when compared to what happened to the 9/11 victims.

In another one of these related air crash cases that was set for trial soon after 9/11, the plaintiff was from Saudi Arabia. His lawyer was very concerned that he couldn't get a fair trial at that time so they settled to avoid a jury verdict.

Verdict: Whom do you consult for most frequently, plaintiffs or defense attorneys?

Meibls: I'd say that it is fairly divided between plaintiffs and defendants, which I think gives me a better perspective as a consultant. However, in terms of civil and criminal work, while I am retained on a fair number of criminal matters, I definitely do more on the civil side.

Savitt: I have to disagree with something that Larry said earlier. I think that the third component in this whole process is that we have a different caliber of jurors now. The last jury that I picked downtown about four weeks ago was for a one day, one trial. I was astounded at the level of professionalism that I hadn't seen before and I got a much different jury



Linda Miller Savitt, defense attorney, ASCDC board member

than I had had before. Of course the plaintiffs weeded out all of the good guys for the defense but I think that it's a different mix and that we're getting a little more measured analysis even in the plaintiffs' verdicts so that the verdicts aren't so high. I don't know if it's the quality of the jurors, if it's 9/11, or all three of those things coming together.

Verdict: Lee, tell us what you've done in the past year to try and get a handle on the effects of these events on civil cases.

Meibls: Well, first of all I'd like to respond to Linda and to what Larry said earlier about jurors. My partners and I are fortunate to be in court regularly. We have always seen very diverse juries in Los Angeles. In the past year, I've seen more and more lawyers in the jury pools coming through, mostly from the D.A. and P.D. offices,

and overall they seem to want to serve. Many do.

As for the difference in jurors since the system changed to the one-day, one-trial deal, my most recent jury pick was the most ethnically diverse I've seen for downtown. I'm used to all-minority juries in Central Civil West, but I was struck with the few number of Caucasians and the larger number of Hispanics in the most recent trial I had in the downtown courthouse. The Court had drawn from a much

wider area geographically than before and I think this explains a lot of it.

To answer your other question, like many consulting firms, we've continued to collect data from real and mock jurors for the past year, both on 9/11 and on corporate malfeasance, and what effect juror perceptions have on civil verdicts and damages. In cases where the corporate defendant's conduct is definitely going to be an issue, we will include questions in a pre-trial juror questionnaire to help identify those prospective jurors who have a pre-existing negative bias against our client because of what is happening elsewhere with companies like Enron or WorldCom. In a case we have starting trial this next week with a jury pool of over 300 people, everyone will be individually *voir dire*d after completing a very extensive written questionnaire.

As I said, this is a case where the corporate defendant's conduct

is clearly at issue and so it was very important that we include a number of questions on this subject in the questionnaire. The jurors have already completed the written questionnaire and the Court has given us a week to review them.

We found that over two-thirds of the prospective jurors admitted to being negatively influenced by the events of Enron and WorldCom. Generally, it raised their level of distrust in corporations. Because we have been tracking juror attitudes for nearly 20 years, we have good baseline data to which we can compare current trends. Twenty to 25% in the late 80s said they agreed strongly with the statement, "I don't trust big business." That has more than doubled today! This cynicism has made it more difficult for a corporate defendant to have their arguments accepted.

Even though liability and punitive damages are separate matters legally, they are not necessarily separate in a juror's mind. From a company defendant's point of view, it is important to find out whether or not a prospective juror comes in with a desire to punish a company.

These jurors are much more likely to vote against the defendant on liability. A significant number of the jury pool in the case I was just referring to admitted right up front, "I am much more likely to find against a corporate defendant today because of Enron and WorldCom, and it makes me want to punish big corporations." I'm not sure if we would get that kind of candor in open court.

The flip side for plaintiffs is to identify those prospective

jurors who are opposed to punitive damages. That is usually a much smaller number of jurors and the plaintiff can often strike them.

Verdict: Larry, do you hire jury consultants in civil cases?

Feldman: I have. Not very often, because what I like them to do is not help me so much pick a jury as help me identify issues that are good issues or bad issues. Sometimes you don't see it.

There was a case that I was representing. It was in the news. It was very popular. When I filed the law suit, the press picked it up and I got mostly positive e-mails from people that I didn't know saying, "Great."

Then, I got a phone call, and this was the only time that this has ever happened to me, from a guy who was conservative as can be and the first question out of his mouth was "Isn't it true that the parents have all of the responsibility here, and how can you do this?" It was a loaded question.

At the end of the day, it was a great focus for me, because what I did hear was there were a lot of people who saw this case differently than I saw it. What a jury consultant can do is point out those kinds of things. I don't care how good of a lawyer you are and who you talk to, you don't get all of this great insight. The jury consultant raises all of these other sides for you to think about and makes you a better lawyer so you can present a better case and deal with some of the things that you might not see. As far as picking jurors, I like my gut and how I relate to them.

Judge McCoy: After 9/11,

many people who lost loved ones received large compensation packages, and those numbers were widely publicized, in the millions and millions of dollars. Has that possibly made the general population more comfortable with larger amounts of compensation for people who really have been injured?

Meibls: I don't think so. People have such strong views about these things. I'm not really sure that kind of information does anything but polarize people even further because some people are so angry when they read about what's being considered as fair compensation for the families of the victims, and other people think the amounts are not enough to compensate the families. There will always be those who focus on accountability and those who focus on personal resilience.

Judge McCoy: What you're saying is it's not increasing in numbers on one side or another, it's just intensifying their willingness or lack of willingness to go in a direction.

Meibls: I'd be reluctant to generalize, but I am saying that's what I'm seeing more recently. The real difference that I see is related to anticorporate attitudes. Going into deliberations many jurors may favor the defense, but when it comes time to deliberate they are not as aggressive or strong in attempting to persuade their fellow jurors. It is harder to stand up for a large company that has been accused of hurting someone or destroying documents or hiding information.

In securities cases, where stockholders lose the value of

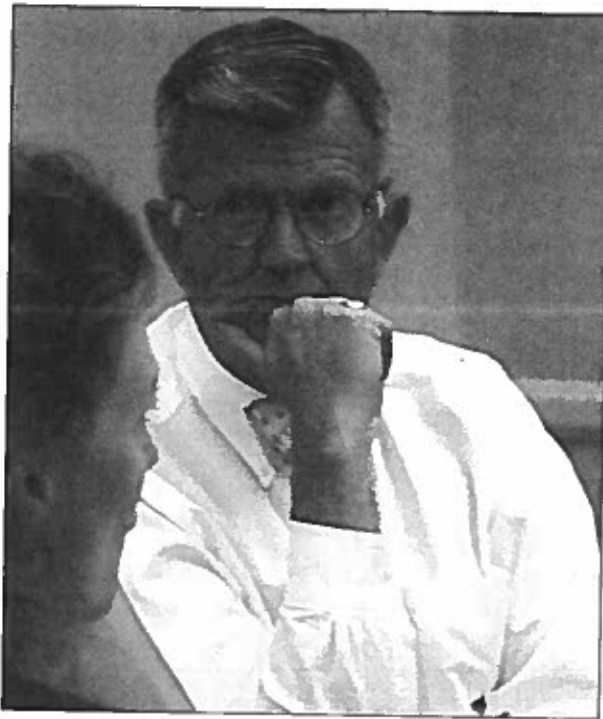
their stock and claim corporate misconduct, one of the more effective defense themes has always been "let the buyer beware." They took a risk and they have to accept what happened. News events of corporate malfeasance have eroded the willingness of jurors nowadays to blame the investor. Jurors are more willing to support the fiduciary obligations of managers, accountants, and attorneys.

Savitt: I talked to a number of plaintiffs' lawyers that have changed their screening practices a little bit because of 9/11, particularly in the employment arena.

I had one lawyer say to me, "I could just tell this guy wasn't a good employee. I just don't want to represent him anymore." We settled the case. I had another lawyer tell me, "My client called me five times on 9/11 and I'm getting rid of that narcissist person because if that's all that she could think about on 9/11, I don't want to represent that person."

Some of the plaintiffs' lawyers that don't get access to the really big cases are looking at the cases that are coming to them and they're deciding if they really want to put their time and energy into a case that may be marginal because their hearts are not in it or they don't think a jury is going to give them money because of 9/11.

Feldman: I think you're seeing a lot of plaintiffs' lawyers do a lot more commercial litigation. What we have found is that when it's a business case, it's nothing for a jury to give you a bunch of money. When it's an injury case or a death case, it's a much differ-



Judge Tim McCoy, L.A. Central Civil West Court.

ent ballgame. They are very cynical and they are very careful.

Verdict: Linda, do you use focus groups or mock juries?

Savitt: I have in the past and on the occasions that I have done it, it has been very, very useful.

We watched the dynamics of a mock jury in one case I did years ago. They came up with an argument during deliberations that I used during trial and won the case. I became a real convert at that point. They saw something a little different from the facts and it was a very good argument. But in terms of picking a jury, I like to go with my instincts.

Judge McCoy: I teach a trial advocacy course at a law school. When my law students get up there and do *voir dire*, I plant a secret fact among the jury. When the law students discover it, they know exactly how to go. Eighty

percent of the time, they don't discover the secret fact, and yet, I make them tell me whether to keep the juror or not to keep the juror and 80% of the time they get it right. The lesson is: your intuition is enormously powerful in this process. And, no matter how old you are, your life is filled with experiences in

dealing with people on the trust level and all the other levels you use in relating with people. You get answers from your intuition, not in words, but in feelings. You have to learn how to trust those feelings to become a good trial lawyer.

Verdict: Do you agree that with things like jury selection that some people just have an aptitude for it and others just don't at all?

Judge McCoy: People who tend to be numbers-counting types have a much more difficult time doing well in selecting a jury.

Meibls: That is so true. Lawyers need to think out of the box when picking juries.

Obviously there are lawyers in this room who have a lot of trial experience. Some lawyers can benefit from a mock trial for a couple of reasons. If nothing else, it gets you ready for trial if you have scripted out your presentation to mock jurors.

Secondly, as Larry and Linda

have said, it really works at identifying what issues will be important to jurors. It isn't always what lawyers think is going to be important.

But, bottom line, I think that it is true what Judge McCoy said about intuition. If you are an experienced trial lawyer or consultant, you may not ask all the right questions in *voir dire*, but your gut is usually going to tell you whether to strike someone or not, and I tend to defer to that feeling. After so many years and so many trials, if there is no empirical research to back me up, I'll trust my instincts.

Verdict: Are you seeing the lawyers treating the cases differently?

Feldman: If you think about the trial lawyer, your job is to establish a credibility with the jury. If you like that juror and that juror likes you, you have a better chance of that juror believing what you're selling. If they don't like you or you don't like them, they are not going to believe what you said.

I did a mock cross examination for the state bar with the jurors there. During the cross examination, I made some joke. Everybody laughed. I got 11 jurors to vote for me and they said it was the most exciting thing they'd ever seen. One juror hated me because of that joke. But you have to trust your instinct and you're not always going to be right.

Savitt: Which is why I never understand the love affair with jury questionnaires because I think you lose the interaction with the jury.

Feldman: There are two reasons why you need a questionnaire. The first is when you have a shortened *voir dire*. A jury consultant can flush out the issues you both want to know. The other reason is you can discover juror misconduct afterwards with a jury questionnaire.

Verdict: Lee, one final question — what advice would you give defense lawyers during difficult times?

Meibls: Do we have another hour? Well, if you are representing a company defendant, then spend time in *voir dire* making sure your jurors understand that you don't have to prove anything. Usually,

two-thirds of jurors believe that a company defendant has to prove that it has done nothing wrong.

Even after the judge explains the burden of proof and the jurors have sat through an entire trial, jurors still tell us in post-trial interviews that so-and-so company didn't prove it hadn't caused damage so they found for the plaintiff.

Lawyers need to confront this misperception right up front. I'd also recommend using a jury questionnaire when you know it will help you and when you need the hard truth. But don't let it replace the face time you have in oral *voir dire*.

Another suggestion I make more and more is to use writers to

help craft those pithy memorable metaphors that will make it into deliberations. I work with a writer who helps me and my clients revise opening statements into compelling stories. Finding the right metaphor or analogy will help jurors to understand a case better. ▣



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