

The Effects of Pretrial Publicity on Judges, Jurors, and Arbitrators



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*I don't care what is written about me
so long as it isn't true.*

- Katharine Hepburn

Why We Must Understand The Effects of Pretrial Publicity

Until recently, the only pretrial publicity that most trial attorneys experienced was an occasional mention of a case buried deep inside the local newspaper. But times have changed. With the advent of faster communications and web-based news sites, news organizations find out about court trials more rapidly and can arrive at the scene or in your office within minutes. Trial lawyers frequently find themselves being interviewed by a news reporter in front of a television camera.

What does pretrial publicity have to do with trial advocacy and psychology? In a word, everything. Judges, jurors and arbitrators are often greatly affected by the information about particular situations they receive from news and media sources. Although people in the media do not generally cause attitudes to be formed, they do often frame the discussion and select the issues to be discussed. For this reason, a trial attorney would be wise to understand the effects of pretrial publicity on courtroom and arbitration decision makers and develop particular communication skills to try to influence the media to include the client's perspective.

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Often the publicity surrounding a trial is chaotic. News organizations are paying thousands of dollars for private interviews with witnesses and litigants. Sometimes people who have an interest in the litigation make overt efforts to try to control the outcome in the public domain. Some people will even go so far as to try their case in the news media. In many of these situations, there is simply no control over either content or participation in media coverage, other than professional obligations of attorneys and occasional court orders.

To the media and the public, the trial and attendant circumstances are news. However, to a trial team and client, the coverage is publicity, whether positive or negative. The purpose of this article is to examine how pretrial publicity can affect a juror's perspective and how to influence the publicity that a case receives. After all, as trial advocates, we know that there are many ways to tell a story.

How Pretrial Publicity Affects the Trial Process

The criminal trial of John Bobbitt offers us a good place to begin our discussion. Prior to the trial, Mr. Bobbitt and his attorney felt compelled to respond to the accusations of domestic violence made against him in the press by his wife (who had cut off his penis). The media accounts of the statements were carried nationwide. The subject of the trial became front-page news in almost every newspaper, television station and news web site in the United States. The accusations against Mr. Bobbitt became the subject of scorn by domestic violence support groups and the rights of the accused and accuser became the subject of editorials and columns in national and legal publications.

Mr. Bobbitt's trial team had no money for a media consultant. They had to rely on their traditional skills as attorneys to

try to contain any damage in an effort to protect that their client's rights to a fair trial. Regardless, the media was having a field day framing the issues in the case.

During jury selection, Mr. Bobbitt's lead trial attorney carefully asked each of the jurors if they had experienced any domestic violence problems. Jurors who expressed problems were dismissed and the trial proceeded. After the trial was over, 2 of the actual jurors revealed that they were domestic violence victims. When asked why they had lied, they said that they just wanted to be on the jury.

Although this episode will not surprise most experienced attorneys, we are left wondering how the extensive pretrial publicity affected the jurors who actually sat in the case, but did not or could not admit that they had been affected by the publicity. Let's begin our discussion with a review of available research and reliable information about the effect of pretrial publicity.

How We Study The Effects of Pretrial Publicity

Over the past forty years, social scientists have studied the effects of pretrial publicity and have found justification for concern by courts and litigants. Information contained in pretrial publicity has been found to influence evaluations of litigants' likeability, sympathy for a litigant, perceptions of a litigant's culpability, and, of course, final jury decisions. Field surveys and experimental studies (under controlled conditions) have been used to study these effects.

In field surveys, actual and potential jurors have been used to examine the effects of pretrial publicity on a juror's judgments about actual cases. Typically, participants in the surveys are asked questions about how many new sources they had been exposed to and how often they were exposed. They are asked to

recall or recognize information about specific cases and to evaluate the persuasiveness of the arguments made by both parties and the likelihood of culpability. (In order to assure that respondents are being truthful or accurate, researchers will sometimes include bogus questions or items of information that were not part of the actual case.) In these types of studies, the researchers tried to determine whether there were any correlations between the extent of pretrial publicity to which an individual juror was exposed and the extent and nature of their pre-judgment about the case.

Field studies are sometimes used to support a motion for change of venue. Because of the speed with which information is available and the saturation of our culture with news outlets, frequently large numbers of people in a potential jury pool are familiar with the facts or allegations in particular court cases. As a result, some people may have formed preliminary opinions about the case depending upon a number of factors that we will discuss below.

One interesting study was conducted by Gary Moran and Brian Cutler, two of the most reputable jury research scientists in the United States.¹ In this study, the researchers surveyed 704 potential jurors regarding their knowledge of information that involved the investigation, arrest, and indictment of defendants in two unrelated cases. The first case involved the distribution of large quantities of marijuana and the second involved the murder of a police officer in a drug sting operation. The study was conducted following a year of regular newspaper coverage about the case. The researchers asked the jurors about their knowledge of the case, their

general attitudes about crime, and their attitudes about the particular case.

When the results of the studies were analyzed, the researchers found that pretrial knowledge of one of the cases was related to pre-judgment about the case. They found that the proportion of the research jurors who said there was “a lot of evidence” against a defendant and increased as the amount of information about the case that a juror could recall about the case increased. Furthermore, there was a significant correlation between a juror’s knowledge of the case specifics and perceived culpability of one or more of the defendants. On the other hand, there was no finding that the jurors were willing to admit partiality or bias. The researchers ultimately found that even modest amounts of pretrial publicity might prejudice potential jurors and that self-reports of a juror’s impartiality could not be relied upon.

Experimental studies typically use a controlled environment to expose a research juror to a specific quantity and type of real or simulated pretrial “publicity” followed by a trial presentation which may or may not discuss the same issues as those stated in the “publicity”. Analysis of the results focuses on the effects of the type and amount of pretrial publicity on the perceptions of the litigants, the evaluations of the evidence, and verdict decisions.

The perfect experiment in a particular case would be to present actual jurors in trial with a pretrial questionnaire which asks about their knowledge of the case, their attitudes about information they saw in the pretrial publicity, and their pretrial assessments of litigants and issues in the case. During the trial and after the trial is over, jurors would be asked about their assessments of the litigants, their counsel, the witnesses, and the evidence. The jury would then deliberate and reach individual and group decisions about the case.

¹ Moran & Cutler, “The Prejudicial Impact of Pretrial Publicity,” 21 J. Applied Social Psychology 345-367, 1991.

Afterwards, researchers would look for any correlations between pretrial characteristics of the jurors' perceptions, their processing of the evidence, and their verdicts.

These types of experimental studies are currently being used by litigants prior to jury trials and arbitrations. By choosing a representative sample from the likely jury population or mock arbitrators to correspond to the actual arbitrators, litigants are able to understand the effects of pretrial publicity prior to trial and to develop strategies to deal with their situation.

One major advantage to using experimental studies to understand the effect of pretrial publicity is that they can be adapted to any real-life situation.

Regardless of subject matter and regardless of venue, an experimental study can identify and measure the likely influence of pretrial publicity in a particular case and yield information that will be useful in developing a strategy for dealing with it.

How Pretrial Publicity Can Affect Judges, Jurors and Arbitrators

Using research techniques similar to the ones discussed above, psychologists and other social science researchers have made a number of interesting findings. These findings are corroborated by observations from many years of experience in the courtroom. In hindsight, some of these findings may seem like common sense in the abstract. However, the point of the research and our discussion is to identify the elements of the process by which pretrial publicity can affect a juror's pretrial perceptions and how to respond effectively on behalf of a client.

Here are some of the more important conclusions reached by these researchers.

1. Jury verdicts have been found to be influenced by pretrial publicity even after jurors heard all of the evidence.
2. There is a cumulative effect for negative information. That is to say if the pretrial publicity is consistently negative against a particular party and if all of the key elements of a negative verdict are presented in the publicity, a juror will be more likely to begin and the end a trial with a negative you of that party.
3. Pretrial publicity that has emotional content is significantly more powerful than publicity that is purely factual.
4. Pretrial publicity can influence a juror's memory and impressions of the evidence contrary to actual testimony.
5. Negative information which is global in its scope and judgment of a party or a party's actions is more damaging than information that is limited to a particular facet of the party's actions or the issues.
6. Positive pretrial information about a party's character traits can operate to undermine negative information and make defending the party easier.
7. Most of the time jurors, judges, and arbitrators do not believe that they are biased by pretrial publicity accounts and will vehemently disavow any bias or influence by the publicity. Ironically, jurors will often state that they believe that other people are influenced by pretrial publicity.
8. Knowledge of inadmissible information which appears in pretrial publicity can influence a juror's perceptions.

9. Trial courts' assessments of the influences that pretrial publicity has had on particular jurors and the ability of a particular juror to disregard any resulting prejudiced is often based upon judicial common sense and often reveals a misappraisal or misunderstanding of the abilities and frailties of human decision making.
10. The more time that has passed between pretrial publicity and the beginning of trial, the less likely it is that pretrial publicity will influence a particular juror's perceptions. Conversely, when only a small amount of time has passed, jurors are more likely to have stronger opinions and make judgments about the parties and issues in the case.
11. Pretrial publicity does not generally cause opinions and attitudes to be formed. However, it can frame the issues and cause already existing attitudes and opinions to be called up in a juror's mind.
12. Jurors and other fact finder's tend to believe the contents of news reports unless there is some fundamental reason to mistrust them. In instances where trial teams have been successful in creating an appearance of distrust in media accounts of a case, the resulting verdicts of those jurors who mistrusted the media or no different from those jurors who had not heard the publicity et al.
13. Television exposure and printed articles on the same subject tend to bias potential jurors significantly more often than exposure to print media alone.
14. Repetition of the story or the message contained in pretrial publicity will cause it to stay in the long-term memory of potential jurors over time. However, they are likely to remember the themes and messages of the story rather than the details of it.
15. Because of the anonymous nature and neutral questioning style of professional researchers, community attitudes surveys have not been found to influence a jury pool.

Information about a party's prior bad or good behavior stated in pretrial publicity, even if inadmissible at trial, can have a profound effect on culpability.

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The Advocates is the nation's leading jury and trial consulting firm with offices in more than 17 major U.S. cities. The **trial consultants** and **jury consultants** with **The Advocates** have more than 32 years experience assisting trial attorneys and corporations in some of the most high profile cases in the areas of torts, products liability, complex business litigation, intellectual property, employment and most other areas of practice.

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