Focus

When all eyes are watching: Trial characteristics and practices in notorious trials

by Paula L. Hannaford-Agor

The term "notorious trial" brings to mind images of celebrity parties or witnesses (and sometimes celebrity lawyers and even judges), heinous crimes, unusual legal issues or factual situations, and unrelenting media coverage in the press, on television and radio, and even online. But notorious trials come in many shapes and sizes. Most often we think of criminal trials, but civil cases such as the Vioxx product liability trials, the Walmart employment discrimination case, and even complex shareholder suits in business fraud cases qualify as notorious. The term connotes national notoriety, but local or regional notoriety is also quite common, especially in political corruption cases or cases involving significant local or regional employers. For present purposes, the simplest definition of a notorious trial is simply one that is widely known and discussed.[1]

Nationally, notorious trials are very rare. Approximately 150,000 jury trials are conducted each year in state and federal courts, but only a dozen or so receive sustained national coverage. But because they are so closely watched, how courts manage them has a disproportionate impact on public trust and confidence in the justice system. Ironically, because they are so closely watched, notorious trials also pose a tremendous challenge for judges, court administrators, and lawyers to ensure actual fairness for the parties. Extensive pretrial publicity shapes public opinion, potentially jeopardizing the ability of prospective jurors to be fair and impartial. Notorious trials also complicate the logistics of trial practice by placing unusual demands on courtroom seats for spectators, on courthouse security to maintain order, and on others trying to carry out business in the other parts of the courthouse as the trial goes forward.

In part because of their relative scarcity and the uniqueness of each new notorious trial, it is difficult to generalize the effects of trial notoriety. However, a recent study by the National Center for State Courts Center for Jury Studies reveals information about the prevalence of notorious trials and their impact on trial procedures and practices. The State-of-the-States Survey of Jury Improvement Efforts collected trial reports from nearly 12,000 jury trials conducted in state and federal courts in all 50 states and the District of Columbia.[2] The vast majority of trials took place between 2002 and 2006.

In the survey, judges and lawyers were asked to describe their most recent jury trial, including the type of case, the location of the trial, and the procedures employed during voir dire and trial. One survey question asked whether the respondent's most recent jury trial was a notorious or high profile trial. Respondents identified a surprising 718 trials (6.2 percent) in the dataset as notorious. This article discusses the characteristics that are most often associated with those notorious trials and the trial practices most often employed by judges and lawyers in notorious trials.

Trial characteristics

As a preliminary matter, it is clear that trial notoriety does not strike randomly across the country. Rather, the rate at which judges and lawyers reported notorious trials varied tremendously from state to state, and not necessarily in predictable ways. (See Table 1). Overall, the frequency of notorious trials ranged from zero in Delaware to 17 percent in Wyoming. California and New York, two states that frequently appear in the press as the location of many notorious trials, had rates just at or only slightly higher than the national average (6.1% and 6.7%, respectively).

There did not appear to be any relationship between the notorious trial rate and either the rates of jury trials per 100,000 population or other plausible statewide factors (e.g., state population, geographic proximity). Nor were notorious trials

1. *See* Timothy R. Murphy, Paula L. Hannaford, Genevra Kay Loveland and G. Thomas Munsterman, MANAGING NOTORIOUS TRIALS (1998).

2. *See* Gregory E. Mize, Paula L. Hannaford-Agor & Nicole L. Waters, The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report (April 2007) (available at http://www.ncsconline.org/D_Research/cjs/state-survey.html.

significantly more prevalent in federal courts as compared to state courts. But some trial characteristics did correlate with notoriety rates. (See Table 2). For example, criminal trials generally, and capital felony trials specifically, were much more likely to be identified as notorious compared to civil trials. Trial complexity was also a factor in notorious trials. On a scale of 1 (not at all complex) to 7 (extremely complex), evidentiary and legal complexity in notorious trials was rated 40 percent higher than that in routine trials.

Not surprisingly, jurors impaneled in notorious trials were more than four times more likely to exhibit symptoms of stress than those in routine trials. What was surprising, however, was the rate of notorious trials in suburban and rural jurisdictions, which was more than 50 percent higher than rates in large, urban jurisdictions. In smaller communities, a trial involving local personalities or institutions may, in reality, be the only news in town.

Table 1: Frequency of Trial Notoriety

Percent of Notorious Trials	States (# of notorious trials)
0 to 3.9 percent	AR (1), CT (3), DE (0), ID (2), LA (6), MD (12), WA (6), WI (1), WV (3)
4 to 5.9 percent	AZ (8), CO (10), DC (6), GA (19), IL (39), IN (14), MA (10), MN (18), MO (14), NV (7), NJ (7), OR (22), PA (30), SD (11)
6 to 7.9 percent	AL (7), AK (17), CA (27), MI (48), MS (10), MT (5), NH (3), NM (7), NY (30), ND (12), OH (16), SC (5), TX (36), VA (17), WY (8)
8 to 9.9 percent	FL (33), HI (6), IA (16), KY (20), NE (12), OK (15), RI (6), TN (17), UT (39),
More than 10 percent	KS (12), ME (7), NC (28), VT (6)

Table 2: Characteristics of Notorious Trials

	Notorious Trials (n=718)	Routine Trials (n=10,837)
Case Type (% of trials)		
Capital Felony	36.5	63.5
Felony	9.0	91.0
Misdemeanor	2.2	97.8
Civil	3.6	96.4
Court Type (% of trials)		
State Court	6.3	93.7
Federal Court	6.7	93.3
Location Size (% of trials)		
Population more than 1 million	4.8	95.2
Population 500,000 to 1 million	5.4	94.6
Population 250,000 to 500,000	7.6	92.4
Population 100,000 to 250,000	7.2	92.8
Population less than 100,000"	7.0	93.0
Trial Complexity (mean score)		
Evidentiary Complexity	5.1	3.6
Legal Complexity	4.9	3.5
Juror Stress (% of trials)	20.5	4.7

Voir dire practices

A major finding of the State-of-the-States Survey of Jury Improvement Efforts was the extent to which voir dire practices varied from jurisdiction to jurisdiction across a variety of measures. In some jurisdictions, the questioning of jurors is done exclusively or predominantly by the trial judge, but in others, attorneys take the lead. Some jurisdictions rely almost entirely on questions posed to the entire jury panel while others engage jurors individually either in the jury box or at sidebar. Some jurisdictions routinely supplement oral questioning with written questionnaires, yet others almost never do so. The average amount of time to impanel a jury ranged from less than 30 minutes in South Carolina to more than 10 hours in Connecticut.[3]

Regardless of statewide and local jurisdictional practices, however, trial notoriety has an impact on how judges and lawyers conduct voir dire. (See Table 3). For example, we see that trial notoriety exerts a moderating influence on who actually does the bulk of questioning. Less than 24 percent of questioning in notorious trials was conducted exclusively or predominantly by judges compared to nearly 30 percent in routine trials.

On the other end of the spectrum, fewer than 9 percent of notorious trials involved voir dire conducted exclusively by lawyers compared to 12 percent of routine trials. In contrast to the extremes of exclusively judge or exclusively attorney-conducted questioning, the proportions

3. Mize et al., *supra* n. 2, at 27-31.

Table 3: Voir Dire Practices in Notorious Trials

	Notorious Trials (n=718)	Routine Trials (n=10,837)
Questions posed … (% of trials)		
Exclusively by judge	8.1	9.3
Predominantly by judge	15.4	20.3 **
By judge and lawyers equally	21.5	18.6
Predominantly by lawyers	46.3	49.2 **
Exclusively by lawyers	8.8	12.5 *
Jurors questionned … (% of trials)		
Collectively in the jury box	83.4	84.2
Individually in the jury box	65.7	61.1
Individually at sidebar or in chambers	46.1	29.5 ***
Written questionnaires used (% of trials)		
General Questionnaire	36.8	33.4
Case-Specific Questionnaire	22.6	4.5 ***
Voir dire length (mean # of hours)		
Capital Felony	18.4	11.9
Felony	7.2	2.9 ***
Misdemeanor	3.7	1.6 ***
Civil	3.5	2.1 ***

* p < .1
** p < .01
*** p < .001

of equally judge and lawyer-conducted voir dire and predominantly lawyer-conducted voir dire were higher in notorious trials compared to routine trials. Even controlling for prevailing state practices and case type (criminal versus civil), trial notoriety was a significant factor in who did the majority of questioning during voir dire.[4]

For trial lawyers, this is good news insofar that the bulk of empirical literature supports the contention that jurors respond more candidly to questions posed by lawyers.[5] There are also compelling arguments that litigant participation in voir dire through counsel increases litigant and public perceptions of fairness.[6] By the same token, the shift away from exclusively lawyer-dominated voir dire suggests that trial judges are concerned that an appropriate level of judicial supervision be exercised in notorious trials, ostensibly to protect jurors' dignity and expectations of privacy and to ensure a reasonably efficient voir dire.[7]

Similarly, trial notoriety affected the methods judges and lawyers employed during voir dire questioning. They were significantly more likely to question jurors individually at sidebar or in chambers in notorious trials and to supplement oral questioning with case-specific written questionnaires, even after controlling for prevailing state practice and case type. Possibly this is done to screen jurors for the influence of pretrial publicity and other potentially prejudicial knowledge or views about the case without exposing all prospective jurors to each individual's responses to questions. Such practices have also been shown to improve the likelihood of juror willingness to disclose personal information completely and candidly.[8]

While highly effective for improving the quality and quantity of information available to the court and parties during jury selection, some of these methods tend to increase the amount of time needed to impanel a jury. This is well illustrated by the amount of time needed for voir dire in notorious trials, which averaged more than 50 percent to nearly 250 percent longer, depending on case type, than the time needed for voir dire in routine trials.

Trial and deliberation practices

A major objective of the State-of-the-States Survey of Jury Improvement Efforts was to document the extent to which various jury trial techniques designed to improve juror comprehension and performance are routinely employed in jury trials. Examples of such techniques include permitting jurors to take notes (and providing them with notepads and writing utensils with which to do so); providing jurors with trial notebooks; permitting jurors to submit written questions to witnesses; permitting jurors to discuss the evidence before final deliberations; preinstructing jurors on the substantive law governing the alleged charges or claims; and providing written copies of instructions to the jury.[9]

In most jurisdictions, these techniques are permitted "in the sound discretion of the trial court," but until the State-of-the-States Survey, we had little idea how often trial judges exercised their discretion to do so. We were pleasantly surprised to find that some of these techniques appear to be the prevailing practice in many jurisdictions and even the more controversial techniques, such as juror questions and juror discus-

4. The level of statistical significance is indicated by asterisks in Table 3.

5. Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire,* 11 Law & Hum. Behav. 131 (1987); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis,* 56 Ind. L. J. 245 (1981).

6. American Bar Association, Principles for Juries and Jury Trials Principle 11(B) (2005).

7. *Id.*

8. Gregory E. Mize, *Be Cautious of the Quiet Ones,* available at http://www.abota.org/publications/article.asp?newsid=94 (2003); Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room,* 36 Ct. Rev. 1 (Spring 1999); Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine,* 69 S. Cal. L. Rev. 1105, 1118-20 (1996).

9. G. Thomas Munsterman, Paula L. Hannaford-Agor, and G. Marc Whitehead, Jury Trial Innovations 61-67, 102-03, 124-29, 132-33, 151-52 (2d ed. 2006).

sions before final deliberations, were more prevalent that we initially believed. But are trial judges more or less willing to employ these techniques in notorious trials? For the most part, use of these techniques was substantially greater in notorious trials compared to routine trials. (See Table 4).

In particular, jurors were significantly more likely to be permitted to take notes and to be given note taking materials; to be given trial notebooks; to be permitted to submit written questions to witnesses; to be pre-instructed on the substantive law; to be given final instructions before closing arguments; to be given guidance on conducting deliberations; and to be given a written copy of the final jury instructions for use during deliberations. The only technique that showed reduced use in notorious trials was permitting jurors to discuss evidence before final deliberations. Jurors in notorious trials were not sequestered at any greater rate than those in routine trials. Using regression analyses to control for additional factors that affect their frequency use (e.g., trial complexity, case type, state law governing the use of specific techniques, and prevailing state practice), we find that trial notoriety continues to be a factor in juror note taking, juror questions in criminal trials, pre-instructions on substantive law, and guidance on deliberations (indicated by asterisks in Table 4).

Table 4: Trial Practices in Notorious Trials

	Notorious Trials (n=718)	Routine Trials (n=10,837)
Juror notetaking (% of trials)		
Civil trials	82.6	68.9 *
Criminal trials	74.1	65.4 **
Jurors provided with trial notebooks (% of trials)	9.7	5.7
Jurors permitted to submit questions to witnesses (% of trials)		
Civil trials	21.0	15.1
Criminal trials	15.0	13.3 *
Jurors permitted to discuss evidence before final deliberations (% of trials)		
Civil trials	.7	2.1
Criminal trials	.4	1.8
Jury instructions (% of trials)		
Jurors pre-instructed on substantive law	23.0	16.7 **
Jurors instructed before closing arguments	43.6	39.2
Jurors given guidance on deliberations	58.9	53.6 *
Jurors given written copies of instructions	79.1	67.8
Jurors sequestered (% of trials)	24.5	24.3
Length of deliberations (mean # of hours)		
Capital Felony	9.4	8.0
Felony	7.1	4.0 ***
Misdemeanor	3.4	2.2 *
Civil	9.0	4.0 ***

* p < .1
** p < .01
*** p < .001

In the State-of-the-States Survey, we found that deliberation length was affected by the use of some of these techniques. Jurors who were permitted to take notes, given trial notebooks, and given written copies of the final instructions tended to spend more time on average in deliberations than jurors who were not given these aids. Jurors who were instructed before closing arguments, in contrast, tended to spend less time in deliberations. The asterisks in Table 4 indicate that trial notoriety is also a factor in deliberation length. After controlling for all of these factors, as well as case characteristics that were found to affect deliberation length (e.g., evidentiary and legal complexity, number of jurors, whether the jury was sequestered, and whether the verdict was required to be unanimous), we find statistical evidence that trial notoriety continues to increase the length of deliberations for all case types other than capital felony trials.

Compliance with state law

In the earlier analyses of the use of jury trial techniques in notorious cases, we thought it important to control for state law governing the use of various techniques. Most jurisdictions permit the use of these techniques "in the sound discretion of the trial judge." Yet some states are more explicit in their advocacy for or denunciation of these techniques, explicitly mandating or prohibiting the practices in court rules, statutes, or case law. Other states are completely silent on the issue. For example, both Pennsylvania and South Carolina prohibit juror note taking in criminal trials, while Arizona, California,[10] Colorado, Indiana, and Wyoming require judges to permit juror note taking. Juror questions are prohibited in criminal trials in 11 states and in civil trials in 10 states, but mandated in Arizona, Colorado, and Indiana.

One of the more intriguing findings from the State-of-the-States Sur-

10. California mandated that jurors be permitted to take notes in 2007. California Rules of Court, Trial Court Rule 2.1031 (*eff.* Jan. 1, 2007). None of the California trials in the State-of-the-States Survey data set were conducted under this rule.

vey was the extent of judicial noncompliance with legal prohibitions on the use of these techniques.[11] For example, despite the explicit prohibition, judges in Pennsylvania and South Carolina permitted jurors to take notes in 27 percent of criminal trials and 42 percent of civil trials, and provided note taking materials in 23 percent of trials regardless of case type. As a general matter, judges are more likely to violate prohibitions on the use of these practices than to fail to comply in those jurisdictions where they are mandated, although the extent of noncompliance in both situations varied somewhat according to the technique in question.[12]

What impact does trial notoriety have on noncompliance rates? Interestingly, it appears to enhance the tendency for some techniques, especially those that are widely supported and practiced in other jurisdictions. For example, there were 230 criminal trials in Pennsylvania and South Carolina, the two jurisdictions that prohibit juror note taking, of which 20 were reported to be notorious trials. Yet judges permitted jurors to take notes in more than half (55 percent) of the notorious trials, but only 25 percent of the routine trials, a statistically significant difference. In the four jurisdictions that require judges to permit jurors to take notes, 26 of the 349 criminal trials were reported to be notorious, all of which complied with the mandate although only 94 percent complied with the mandate in routine trials.

We see similar effects of trial notoriety in the use of other techniques. For example, providing jurors with written copies of the final instructions is widely regarded as an effective way to improve juror comprehension of and ability to accurately apply the law. In jurisdictions that do not permit jurors to have a written copy of the instructions, judges nevertheless provided them in one-third of notorious trials compared to only 20 percent of routine trials. In jurisdictions that mandate written instructions for jurors, judges complied with the requirement in 95 percent of notorious trials compared to only 90 percent of routine trials. On the other hand, permitting jurors to submit written questions to witnesses is a more controversial technique. Even in jurisdictions that mandate the practice, judges in notorious trials were actually less likely to comply compared to judges in routine trials.

Conclusions

Practices employed in jury trials have been increasingly scrutinized over the past two decades in response to concerns about the competence of jurors to decide today's more complex trials and about jurors' satisfaction with jury service and its relationship to trust and support for the justice system. These have led to dramatic changes in voir dire and trial procedures. Some of these techniques are designed to elicit candid and complete information from prospective jurors while protecting their dignity and legitimate expectations of privacy. The intent of other techniques is to provide jurors with common-sense tools to facilitate recall and comprehension of evidence, and juror confidence and satisfaction with deliberations. A large body of empirical research confirms the effectiveness of many of these techniques and a number of prominent bench and bar organizations have endorsed their use, including the American Bar Association, which espoused them in its 2005 *Principles for Juries and Jury Trials.*

What is clear from this analysis of voir dire and trial practices in notorious trials is that many of these techniques are even more likely to be employed in a notorious trial than in a routine trial, especially in criminal cases. Those of us who spend our lives observing courts know that judges, lawyers, and court staff can be extremely reluctant to adapt to and implement change. So in some ways, this finding is very counter-intuitive. Why would judges and lawyers be more likely to employ such innovative techniques in cases that are being closely watched in local, regional, or even national media?

One possibility may be an inherent selection bias in the judges who presided in the notorious trials that were included in the State-of-the-States Survey dataset. To the extent that these judges were deliberately selected based on experience and judicial demeanor, rather than randomly assigned, they may be more confident in their ability to manage these types of trials, more knowledgeable about the benefits of innovative jury trial techniques, and thus more comfortable using them in notorious trials.[13]

A second possibility is purely in response to the increased public scrutiny on notorious trials. Judges and lawyers may be more willing to employ these techniques precisely because the appearance of a case tried by a fair and competent jury is as important as its reality. Thus, judges and lawyers may be willing to spend extra time to question jurors more thoroughly using methods designed to solicit more candid and complete information than is generally possible with traditional voir dire methods. They may also be more willing to provide jurors with tools to facilitate juror comprehension and performance because jurors, and the watching public, believe that they are likely to help jurors arrive at a fair and accurate verdict. Indeed, we see in some instances that judges and lawyers are even willing to blink at state and local prohibitions of these techniques in order to promote juror competence and the appearance of a fair trial. Which begs the question, if these techniques are perceived by judges, lawyers, and the public as effective methods to improve jury trials, why don't judges and lawyers employ them in routine trials when the eyes of the world are not watching? ⚖

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11. Mize et al., *supra* n. 2, at 32-37.
12. *Id.*
13. Murphy et al., *supra* n. 1, at