

The Star-Ledger

THE VOICE OF NEW JERSEY

When lawyers want to know what the Vioxx jurors are thinking ... the shadow jury knows

Legal battles involve a lot of strategy -- and sometimes a little intrigue

BY SUSAN TODD

February 13, 2007

After a dozen Vioxx trials, a case now being heard in Atlantic City has not attracted the kind of attention the media and Wall Street paid to earlier cases. Yet for past three weeks, a mysterious group of spectators has shown up every day for the often-tedious legal wrangling inside Superior Court Judge Carol Higbee's courtroom.

Their number has fluctuated between 10 and 13, and their casual clothing -- sneakers, sweats, leather jackets, pullover sweaters -- sharply contrasts with the dark suits and overcoats worn by the attorneys who fill up much of the courtroom.

The group has followed the proceedings closely, listening intently as the witnesses drone on, laughing at quips tossed out by the charismatic lead plaintiff attorney, Mark Lanier. Some have kept notes. They have largely kept to themselves, refusing to discuss why they are attending the trial.

In many ways, they resemble a jury. That's because they're being paid to. In the world of high-priced trial attorneys and big-time legal cases, the group is known as a shadow jury.

Court TV buffs, take note.

In high-stakes cases like the Vioxx litigation -- Merck faces about 27,000 product liability lawsuits -- trial attorneys routinely hire consultants, mock juries and focus groups to help them prepare and finesse their cases. Shadow juries are used in a similar way, providing lawyers with a sense of what the real jury thinks about evidence, witnesses or an attorney's style.

"At the end of the day, the lawyers are saying, 'What are you feeling? Did you get this? Was that point made effectively?'" said Edward Ohlbaum, a professor at Temple University Law School. "It can be tremendously useful, like having a plant in the jury room."

"There is nothing wrong with it," Ohlbaum said. "It makes all the sense in the world."

HIRED FOR A REASON

According to one person familiar with the shadow jurors' work in Atlantic City, the group is provided with a generous lunch. Each has received two checks, paying them roughly \$125 a day, or \$625 a week.

For that, they spend the day listening and watching. When court is recessed, they are led to a nearby office building. In a sparsely furnished first-floor office, the men and women take turns answering questions from an unidentified woman on the telephone.

Those questions, according to one member of the shadow jury, always relate to what has occurred in court that day: Who was the better attorney? Who had the better witnesses? Who's winning so far? Did you hear anything emotional? The person requested anonymity because of an agreement signed at the outset of the job.

Members of the group have received paychecks from Market Research Dallas, a Texas-based company. On its Web site, Market Research Dallas describes itself as a full-service market research firm known for its ability to handle challenging projects. The company's Web site said it provides nationwide jury services, including jury recruiting, legal consulting and shadow juries.

A woman who regularly escorts the shadow jurors to court declined to answer questions from a reporter.

Lawyers on both sides of the current Vioxx trial have denied hiring a shadow jury. "There are people who appear to be shadow jurors in the courtroom," said Hope Freiwald, an attorney with Dechert LLP, who is part of Merck's defense team. "We have not hired them."

Lanier, who has used shadow jurors in previous Vioxx trials, has said he had heard Merck's attorneys were using a shadow jury in Atlantic City. "Don't believe everything you hear," he replied in an e-mail when the same thing was suggested about the plaintiffs' attorneys.

Typically, shadow jurors are not told who they are working for. That's part of what makes them effective, according to **Thomas Kline**, an attorney from Philadelphia who is playing prominent role in the Vioxx litigation.

"When it's done correctly, the shadow jurors are strictly monitored," Kline said. "You try to insulate them. You want them to act like a real jury."

"Every night, they're debriefed with questions like what impressed you, what didn't, how did you view this piece of evidence or that piece of evidence. Generally speaking, it's an independent sounding board for the lawyers to go back and adjust their strategies."

TOUGH TRIAL

The actual jury that was convened for the Vioxx trial is predominantly male. There are six men and three women. It is racially mixed and mature; only one juror, a male, appears to be in his late 20s or early 30s. Many of the jurors -- like their shadows in the courtroom -- take notes.

The shadow jury is not a mirror image of the real jury; it is more racially mixed and younger. But like the real jury, it has more men than women.

It is not an easy trial to sit through. Marked by detailed science and medical testimony, clinical studies and esoteric medical journal articles, the trial is divided into two phases. First, the jury must decide whether Merck failed to adequately warn consumers and doctors about the risks associated with Vioxx, a once-popular painkiller the company withdrew in 2004 over links to heart attacks and strokes.

If Merck loses the first phase, the jury will be asked to focus on the circumstances of two individual plaintiffs and whether Vioxx caused their heart attacks. The plaintiffs are Frederick Humeston, a tall, white-haired postal carrier from Idaho who suffered a heart attack after taking Vioxx, and Kyle Hermans, a 20-year-old whose father, Brian, died from a heart attack in 2002 after using Vioxx.

There's a lot at stake -- for both the plaintiffs and drugmaker.

Merck will pay out millions of dollars each time it loses a case, and with each loss, the specter of costly settlements becomes a possibility. But so far, Merck has won more than it has lost. Of the 12 cases that have gone to trial, the drugmaker has won eight.

As Merck's court victories add up, the lawsuits could start to shrink. Meanwhile, the effort to prove Merck wrong is a costly endeavor for the plaintiffs and their attorneys.

Louis Raveson, a professor at Rutgers Law School in Newark, said one of the most difficult problems trial lawyers face in a lengthy trial such as Vioxx is leaving members of the jury with memorable details and a believable story.

"One of the things you can do with a shadow jury," Raveson said, "is to find out what made an impact and then figure out ways of emphasizing things."

"In New Jersey, attorneys are not allowed to speak to jurors after the trial is over," he said. "In a case like Vioxx, there will be many, many cases with the same issues. They can talk to the shadow jurors about all the things they'd like to talk to the real jury about."