

# Reducing the Prejudicial Effects of Pretrial Publicity



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*“The roadside is littered with the legacies of people who attempted to influence the media or public opinion without the proper tools or understanding of the task”*

*Among all the world's races, some obscure Bedouin tribes possibly apart, Americans are the most prone to misinformation. This is not the consequence of any special preference for mendacity, although at the higher levels of their public administration that tendency is impressive. It is rather that so much of what they themselves believe is wrong.*



John Kenneth Galbraith (1908-2006)

Obtaining positive effects and avoiding negative effects of pretrial publicity are both possible depending upon the situation, but should not be attempted by those who are faint of heart. Influencing public opinion is infinitely more difficult than influencing 12 members of a jury or three arbitrators. The roadside is littered with the legacies of people who attempted to influence the media or public opinion without the proper tools or understanding of the task.

Creating positive effects of a case in the minds of the public is simply a matter of effective public relations, but creating effective public relations is no simple matter. Those who have attempted to influence the public know how complex and difficult it can be to create positive images in the minds of the public (including the jury pool). Conversely, dealing with the effects of negative publicity can be just as complex and difficult.

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However, there are many alternatives for dealing with the negative effects of pretrial publicity in trial. In some instances, where publicity is extensive and localized, it is possible to change the venue of the case. However, in most cases, publicity is either not extensive or is not localized. In this situation, the primary alternatives are continuances, extended voir dire, judicial statements and admissions, natural moderation of jurors during deliberation, and changes of venue. Let's discuss the effectiveness of each of these from the viewpoint of researchers who have tested their effects.

Seeking a continuance is based upon the premise that the negative effects of pretrial publicity will evaporate over time. Extensive pretrial publicity only occurs in a few high-profile cases, whereas most pretrial publicity is momentary and fleeting. Researchers have concluded that continuances may be very effective when pretrial publicity is only factual in nature, but is not likely to be effective for publicity which is emotional in nature. The emotional connection of the information contained in the pretrial publicity tends to resonate with some jurors and is not likely to go away. Conversely for these jurors, refreshing their memory about the case or the issues in the case is likely to rekindle their original feelings about the parties or the evidence.

One of the most widely used alternatives used by a trial attorney and supported by trial courts is extended written and oral voir dire. The premise behind extended voir dire is the belief that inappropriate biases and opinions influenced by pretrial publicity can be identified and jurors who are an appropriately biased or influenced can be eliminated. Sometimes this may appear to be the only alternative because pretrial publicity in a particular case may have been so extensive that it may be difficult to find jurors who have not seen or heard something about the case.

One of the fundamental weaknesses in using voir dire as a safeguard is that judgments about the juror often turn upon a juror's own judgment of his or her ability to be fair and impartial. To compound the problem, some courts take a juror's statements about their own impartiality at face value. They seem to agree with any juror's assertion that he or she can disregard any pretrial publicity and will do so under all circumstances.

Extensive research experimentation has indicated that only a fraction of the jurors who are actually prejudiced by pretrial publicity can articulate their bias and prejudice. Many research studies have indicated that most jurors who denied being influenced by pretrial publicity to which they were exposed voted in accordance with their reactions to the pretrial publicity. Most of the time, jurors are not aware that their perceptions of the case are being influenced or biased by pretrial publicity.

At this point, one might ask whether an attorney's use of peremptory challenges can help to mitigate the problem by eliminating jurors who are inappropriately biased. Most studies have indicated that attorney decisions about a juror's biases without the benefit of information about the juror's case specific attitudes and life experiences are not generally very effective.

Researchers in one interesting study mailed videotapes of mock jurors in a criminal case to a national sample of criminal defense attorneys, prosecutors and trial judges<sup>1</sup>. Summaries of the pretrial publicity in the related case was enclosed with the videotapes along with questionnaires from the jurors and summaries of the case by the litigants. The attorneys and judges did not receive information about the mock jurors' verdicts.

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<sup>1</sup> Kerr, Kramer, Carroll & Alfini, "On the effectiveness of voir dire in criminal cases with prejudicial pretrial publicity: An empirical Study, 40 *American University Law Rev.* 665-701, 1991.

In the study, the attorneys and judges were requested to indicate which perspective jurors they would strike.

Although prosecutors were somewhat better at identifying sympathetic jurors, for the most part there seemed to be no comparison between how the jurors actually voted and the strikes made by the attorneys and judges. Excused jurors were just as likely to convict as jurors who were accepted by the judges and defense attorneys. Jurors who had been exposed to pretrial publicity were more likely to find culpability than those who had not been exposed. Therefore, extended voir dire did not help to ameliorate the negative effects of the publicity.

The results from this study have been duplicated in many other studies in different scenarios. These findings indicate that extended voir dire alone does not likely to erase the effects of negative pretrial publicity. In fact, many times the words and sentence formations used by attorneys relating to the pretrial publicity during voir dire can actually cause bias or prejudice to occur. Although a well-designed written pretrial jury questionnaire and well executed oral voir dire can identify and illuminate some biased jurors and can begin the persuasion process, a more comprehensive strategy of dealing with pretrial publicity as part of the case development is more likely to be effective. In addition, there are public relations measures which can be taken.

With respect to instructions and admonitions from the court for jurors to disregard pretrial publicity, research studies over the past 30 years indicate that judicial instructions and admonitions are not very effective at reducing the bias the effect of exposure to either factual or emotional pretrial publicity in general. In one of the most comprehensive and well-designed studies on the subject, researchers examined the effectiveness of judicial instructions, during deliberations, and continuance in dealing with the negative

effect of different types of pretrial publicity on juror judgment.<sup>2</sup> The researchers included 617 adults from a local jury roster. Half the jurors were given a pattern jury instruction about pretrial publicity and the other half were given jury instructions with no mention of pretrial publicity. In this study, the researchers found that there was no difference in the bias the effect of exposure to the publicity between those jurors who were given the pattern jury instruction and those who were not.

This research is consistent with the general body of scientific research with respect to the effects of jury instructions. It is possible that stronger and more extensive judicial instructions than those in current use could be more effective. However, it is doubtful that instructions, by themselves, can completely resolve problems caused by pretrial publicity.

The third alternative safeguard relied upon by many courts consists of trial evidence and argument. One of the assumptions of our judicial system is that jurors and judges will decide the case based upon the evidence and argument of counsel. Jurors, judges and arbitrators all agree that they will try to lay aside any pre-conceptions and will decide the case based upon the evidence.

With respect to dealing with the effects of pretrial publicity, we assume that fact finders will decide the case based only on the evidence and arguments of counsel and that they will set aside any pre-conceptions based upon pretrial publicity. Perhaps one of the most complicated subjects for scientific study is the role of trial evidence vis-à-vis other factors that may influence the decisions of judges and jurors. Thus far, the most rigorous and well-designed research has indicated the likelihood that pre-conceptions by judges

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<sup>2</sup> Kramer, Kerr & Carroll, "Pretrial publicity, judicial remedies, and jury bias." 14 Law & Human Behavior, 409-438, 1990.

and jurors influence their view of the evidence and, of course, the verdict. However, this research has indicated that roughly 34% of the differences in judgments can be attributed solely to the evidence in the case, with the remainder of the differences explained by other factors such as characteristics of the parties, attorneys, or even the jurors themselves.

Of the alternative safeguards we have discussed, the development of effective evidence and argument appear to have the greatest chance of dealing with the effects of pretrial publicity. However, no single alternative by itself appears to be effective at erasing the effects of negative pretrial publicity.

The final alternative safeguard is reliance upon jurors themselves to moderate the influences of the publicity during jury deliberations. The underlying premise here is that the group deliberation process may facilitate an array of different viewpoints held by various jurors and since deliberation is a consensual process, inappropriate influences will be filtered out. This alternative is also supported by the idea that some jurors will take the judges instructions seriously and will intervene when other jurors try to discuss information outside the evidence, such as pretrial publicity. There is currently debate between those who subscribe to this theory (known as the suppression theory) and those who believe that deliberations that involve discussion of pretrial publicity can actually enhanced bias as opposed to eliminating it.

Thus far, research indicates that deliberation does not significantly reduced bias attributed to pretrial publicity. In fact, several studies have indicated that deliberation may actually magnify the effect of the publicity. Research and experience have indicated that some jurors feel more powerful when they can introduce information into the deliberation process

that they gained from their own personal experience.

Most of the safeguards are not effective because they are premised upon removing bias after it has developed. When people are first exposed to pretrial publicity, they have no reason to believe that the information is either unreliable or inadmissible. Because these cues are not present at the time the information is encoded into memory, potential jurors may see no reason to discount or disregard it. According to psychological research, the timing and efficacy of interrupting the encoding process is complicated and not often effective. About the only time information can be edited at the time of encoding is when someone is deciding whether to pay attention to the information or when such information is believed to be incomplete, misleading, or unreliable.

In addition, extended voir dire, judicial instructions, and deliberation require jurors to disregard pretrial publicity on the heels of giving much attention to it. It is essentially impossible for someone to actively suppress a thought or memory especially when attention to it is high and emotionally stimulating.

Perhaps the most difficult aspect of controlling the effects of pretrial publicity is that thoughts and feelings brought about as a result of pretrial publicity are so integrated into a person's thinking processes that they cannot be excised as surgically as the law would prefer. Everyone makes connections between information, perceptions, and judgments that are unique to each person. We are hopeful that future research will give us more information about this area of study.

A great deal of attention to the potential effects of pretrial publicity is given in scientific jury research during the development of the case. Most full service trial consulting firms regularly study these effects in the course of their work with a trial

team and client and make specific recommendations for the most effective strategy in dealing with these effects. A few such firms also offer special media schools for members of the trial team who will be dealing with media on behalf of clients.

In the final analysis, dealing with the effects of pretrial publicity requires clear thinking about how jurors are affected by it and the different means of dealing with its effects. Considering all of the research in this area, the prudent practitioner will develop a plan for dealing with pretrial publicity that includes pro-active elements of a public relations nature prior to trial and each of the alternative safeguards discussed above.

### **Handling Pretrial Publicity for Your Firm and the Client**

The purpose of this section is to offer suggestions developed by attorneys, trial consultants, and public relations professionals for dealing with the media in pretrial matters. The recommendations included in this section have been proven to be helpful to attorneys in the past. However, these suggestions and ideas should not be relied upon to the exclusion of specific advice from public relations professionals. Because the field of public influence is so complicated and because one simple misstep could be catastrophic, a trial attorney and client are generally best served by retaining a public relations professional to work with the trial team.

### **Communicating With the Media in High Profile Matters**

Working with the media requires attention given to the messages that you want to display on behalf of the client and diligent awareness that media people have a job to do that involves getting information to the public that is not overtly influenced by either side of the case. You must work as hard at preparation of themes and messages as if you were preparing for trial.

### **Tips for Communicating With Media**

1. Do your own investigation. As soon as possible, determine the basic who, what, when, where and how. Don't worry about explaining why early in your communications with the media.
2. Make sure that you or someone on the client's behalf is trained at dealing with the media. Use a trained spokesperson to give an initial press briefing as soon as possible.
3. If you refuse to give official information, reporters will use unofficial material, i.e., rumors, speculation, etc., to fill their broadcasts and stories.
4. Be precise and focused.
5. Treat national and local media people with respect and help them do their job. Don't become impatient if they ask questions that you might at first think are dumb or repetitive.
6. Media people also appreciate being treated equally.
7. Offer the media access to key information and evidence.
8. Prepare your most effective themes and messages and state them clearly and precisely.
9. Demonstrate concern and empathy for the people involved. Show the humanity in your position.
10. If you are defending a company, tell the media what you are doing to fix the problem and to help those affected. There is no need to admit any guilt, however. Research has shown, though, that contrition is often a strong antidote to angry jurors and punitive damages.

11. Review all media accounts quickly and correct any errors without delay. You cannot assume that reporters are always accurate.
12. Declarations of “No Comment” are usually counterproductive. The public (including potential jurors) often state how angry they become when high profile people offer “No Comment.” If you truly have no comment, the best thing to do is to say “We are very concerned about the situation. We have nothing to add at this time. We will make further statements later.”
13. Plaintiffs and defendants should avoid fixing blame until their investigations are complete. Afterwards, they should be allowed to make whatever statements will further their case within the bounds of the law.
14. In ongoing situations, frequent updates will be helpful.
15. Always tell the truth.
16. Always present an image of calm and control.
17. Try to avoid the use of legal terms, acronyms, and technical terms.

### **Avoiding Missteps With the Media**

There are a number of important considerations that trial attorneys and other client representatives must understand before appearing in front of the media. Here are few of them.

1. **Misunderstanding the Role of the Media.** Many people confuse public relations opportunities with free advertising. This confusion has often led to frustration for the spokesperson and reporters. Reporters and their editors do not want to be an advertising outlet for anyone. The most professional media people feel strongly that their role is to provide interesting and useful information to their audience. As a client

spokesperson, you are generally more effective and your image is more enhanced if you will remain focused on the primary goal of getting the client’s message out.

2. **Confusion About Your Role.** As a trial attorney in front of the media, your ostensible role is to inform, not to sell. You can take some comfort in knowing that when you state your position, you will have ample opportunity to state the themes and messages of the case. In this sense you are selling, but in a more sophisticated way. Attorneys who are focused and deliver simple messages without hyperbole are generally more effective, and more sought after by future clients.
3. **Getting the Message Out.** The key to excellence in content is getting brief, clear, and powerful messages out. The themes and messages that you present in public are most likely the same or similar to those you will use in trial. It pays to take time to conduct the proper research to get the messages right, while clarifying who your target audience is. Many times the target audience includes the general public, the likely juror pool, customers of a company, and shareholders. It also pays to hold back a little until you get the messages right.
4. **Why Your Message is Important.** The ultimate goal of a message for the public is to establish a connection for them which has meaning. Going the extra step to tell the media why your messages is important can make the difference in the message getting out or not. Tell the reporter and the public why your message is important and what it means to them.

5. **How Much Is Too Much?** Under the glare of cameras and the heat of the lights, it is easy to let your mind wander while your mouth is in gear. Answers should be brief and focused. Learning to talk in sound bites is like learning a different dialect of English. However, it's a good idea to practice speaking in short powerful phrases and then stopping.
6. **Listening.** It is a good idea to listen carefully to the interviewer's questions and not to interrupt him or her. The reporter is a colleague just like any other person in your firm or your company. Treat the reporter with respect.
7. **Minimize the Jargon.** Someone who is reading or listening to your interview will likely know nothing about the details of the case or the context of it. They most likely will not have any understanding of the jargon or terms that you use if they are too technical. Jargon is like a foreign language to most people. Using acronyms or technical jargon impedes the message that you are trying to get out and might even cause the information you are giving not to be used at all.
8. **Do Not Slam the Opposing Party.** It is so tempting at times to take a swipe at the other party in public. But what does that accomplish? Isn't it enough to take the high road and state your position in a powerful way? In the course of the interview you will be asked your response to the other side's arguments. It is best to simply refute them without taking potshots at the character or ability of the opposing party or attorney. You would not do that in trial. Do not do it in public.

The best advice I ever heard about working with the media is to "leave your ego at the door." He who controls the ink, gets the victory.

## **Developing Your Most Powerful Appearance and Mindset**

In reality, you will have only a few seconds to get your messages out – roughly 40 words. During that time you must be on your mettle, as your grandfather would say. There is no room for error. You must look and sound impressive. Here are some ideas to help you in maintaining a powerful appearance and having a confident mindset.

1. Begin with your overall conclusion, state the evidentiary support, and close with what it means to the audience. For example, if you are a plaintiff in a medical malpractice case, you might say "We believe that most hospitals are safe, but on March 12, XXXX the surgical staff in the hospital did not follow proper procedures. We believe that a jury will find that the hospital staff was negligent and that as a result, hospitals everywhere will be more diligent about following proper procedures." In defense you might say, "The people at the hospital are hard working people and that they did everything they could to save the patient's life. Our hearts go out to the family and we have offered to help any way we can. We are confident that our hospital is safe and all patients who come here will receive the best of care."
2. Use themes and highly descriptive words to flavor your comments.
3. Use analogies and everyday phrases to make points and explanations.
4. Discuss the subject and point of the interview (as well as what the reporter hopes to gain) before the interview begins.
5. Look at the interviewer and give him or her your full attention.
6. Smile genuinely. Smiling builds rapport and credibility.

7. Stand and move with confidence. Your personal power will reveal itself automatically as you talk.

### Giving Effective Interviews

Here are some other tips that have been proven helpful in giving effective interviews.

1. Maintain a positive mindset and do not get defensive. Scrutiny is part of the game. Learn to be scrutinized and enjoy it. Confident answers are short and focused.
2. Welcome discussion about the conflict. Reporters will often test you looking for assurances that you really believe what you are saying. They might test the strength of your response to the other side's case by asking you hard questions. Welcome them.
3. Prepare for the interview by knowing the material so well that you can discuss all the key details and messages spontaneously.
4. Never just say "no comment." Why waste such a beautiful opportunity to help your client to appear to be right in the controversy? There are so many things that are safe to say that can leave a good impression.
5. It is never a good idea to speculate about facts or situations. If you do not know the answer, you should say so and offer to find the answer and get it to the interviewer.
6. Talk in sound bites as we discussed above. Interviews are not free-flowing conversations even though they may appear that way on television.
7. Look at the interviewer, not the camera or audience unless you have some special reason to do so that is a natural consequence of the interview.
8. Always be honest.

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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.

The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, [\*\*Courtroom Psychology and Trial Advocacy\*\*](#), published by American Lawyer Media.

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