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The Use of Public Opinion Polls in Continuance and Venue Hearings

by Edward F. Sherman • of the Texas Bar (El Paso)

The problem confronting an attorney for a defendant in a widely publicized criminal case, such as those involving Jimmy Hoffa, Billie Sol Estes, Jack Ruby or some other notorious figure, is usually the same. He knows that because the case has aroused intense community interest and feeling, his client may not be able to obtain a fair and impartial jury trial.

The remedy available is to attempt to have the case tried in another community or to have it put off until the publicity and prejudice die down. This is accomplished by a motion to the judge prior to the opening of the trial for a change of venue or a continuance.1

Whether the trial judge will grant the motion is governed by a loose set of guidelines, and usually neither the attorneys nor the judge can be certain just what types and amounts of evidence are required to prove that enough community prejudice exists. It is here that the public opinion poll can be helpful. The public opinion poll, more than any other evidence, is capable of providing a scientific demonstration of the degree of community prejudice.

This article will review the procedure governing motions for change of venue and continuance in criminal cases, explore the recent trend toward the admission of public opinion polls in such hearings and consider the factors governing the accuracy of polls.

A Word about the Procedure Governing Motions

A motion for a change of venue or a continuance is generally based on an allegation that community passions and prejudices have been raised to the point that impartiality is impossible for the average juror.2 The same ground, though with different emphasis, is argued in support of both motions. The motion for a change of venue attacks the place of the trial, attempting to show that in this immediate area a jury cannot be found which has an open mind about the defendant's case.3 The motion for a continuance attacks the time of the trial, attempting to show that the present climate is so biased, prejudiced or emotion-charged that an impartial jury cannot be obtained.4

1. The Federal Rules of Criminal Procedure make no express provision for a motion for continuance. Rule 21(a) provides for transfer of a case to another district or division: “If the court is satisfied that there exists in the district or division where prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division”.
2. Highly publicized criminal cases often involve either a violent or unsavory crime, as in Irvin v. Dowd, 356 U. S. 717 (1951), defendant accused of six murders; Shephard v. Florida, 341 U. S. 50 (1951), four Negroes accused of rape; United States ex rel. Bloeth v. Denno, 312 F. 2d 364 (3d Cir. 1961), defendant accused of being "mad killer" of three persons; or involve a well-known person as in Beck v. United States, 296 F. 2d 692 (9th Cir. 1962), trial of former Teamster president for failure to report embezzled income; Delaney v. United States, 199 F. 2d 197 (1st Cir. 1961), trial of a director of internal revenue for theft; United States v. Estes, Crim. No. 66283 (W. D. Tex. 1963), appeal docketed, No. 20619, 5th Cir. 1963, trial of the Texas financier for mail fraud; United States v. Hoffa, 205 F. Supp. 710 (S. D. Fla. 1962), trial of Teamster president for mail fraud.
3. See United States v. Lattimore, 112 F. Supp. 267 (D. C. 1953), holding that despite publicity the defendant could receive a fair trial in that venue. But see, United States v. Finn, 17 F.R.D. 512 (D. S. D. Tex. 1955), holding that prejudice against a local political boss was so intense that a fair trial was impossible in that venue.
4. See Irvin v. Dowd, 356 U. S. 717 (1961), where eight motions for continuances made during voir dire had been denied, conviction reversed on grounds that "with his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion...".
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The Supreme Court has established the rule that motions for changes of venue and continuances will be denied if the judge is satisfied that the jurors chosen are, in fact, capable of laying aside any preconceived judgments and rendering a verdict solely on the evidence presented in court and the law as given to them by the judge. The trial judge's decision is given strong weight on appeal and will not be overturned in the absence of a clear showing of abuse.

In applying this test the decisions have adopted the further rule that the judge may defer ruling on the motions until the entire voir dire has been examined. The burden is thus placed on the judge to weigh the answers given by the prospective jurors called on voir dire to determine whether there is such a high degree of prejudice that it would be unlikely that twelve jurors could be chosen whose verdict would be unainted by the dominant community prejudice.

Finally, after listening to and evaluating the answers of the venire, the judge is permitted to receive whatever testimony or evidence he feels would be relevant before he must make his decision as to whether a fair and impartial trial is possible. It is in regard to this portion of the hearing that there is a growing demand for techniques which are reliable indicators of the community feeling and an increasing use of the public opinion poll.

The traditional submittals of evidence at this stage of the hearing by the defense to prove community prejudice might include: (1) copies of local newspapers prior to the trial, with prejudicial headlines or stories or incompetent evidence which may have been seen by prospective jurors; (2) testimony of citizens or of opinion "experts" as to the dominant feelings in the community concerning the defendant's guilt; (3) evidence of inflammatory or prejudicial radio or television broadcasts, speeches, public indignation meetings, pamphlets, sermons, etc. This evidence, at best, is an unreliable indicator of community feelings. Inflammatory headlines or prejudicial stories may indicate prejudice within the community, but the degree and extent of prejudice are not ascertainable from them.

It is with knowledge of the unreliability of these traditional evidentiary methods in mind that defense attorneys have turned to the public opinion poll to demonstrate the extent and intensity of community prejudice. The reason generally given for permitting the judge to accept further evidence of community prejudice, after listening to the answers of the venire panel, is that if he finds that substantial prejudice exists in the community as a whole, then a jury panel chosen at random from the community would be likely to contain the same percentage of prejudice.

The advocates of the public opinion poll argue that an opinion poll is capable of showing as an exact percentage the amount of prejudice harbored by the community and is competent to prove that a jury panel is not fair and impartial. A venireman, when interrogated by the court, may not reveal the full extent of his prejudices, because of conscious deceit, fear or poor questioning. However, when interrogated by a skilled public opinion poll questioner, when he is not in court and has no reason to hide his true opinions, that same venireman may reveal a much deeper set of prejudices.

The Recent Cases of Bloeth and Estes

Two recent cases involved the submission of public opinion polls to prove community prejudice against the defendant. In both cases the trial judge admitted the evidence, disregarding the traditional hearsay argument against their admissibility. But each, after considering the evidence, ruled against the motions.

In United States ex rel. Bloeth v. Denno, 313 F. 2d 364 (2d Cir. 1963), the defendant was charged with three nighttime murders within one week. They had created a general hysteria within the community. On the opening day of the trial the defense moved for a change of venue, submitting to the court the results of a survey showing widespread knowledge of prejudicial publicity and formation of opinions of guilt by a majority of the community. The director of the poll testified that he had been retained by the defense to conduct a poll and had interviewed 210 residents of Suffolk County, New York. The answers to four of the questions were:

YES NO

1. Have you ever heard of Francis Henry Bloeth who is accused of murdering three people in Suffolk County? 210 0
2. Do you think he is guilty? 203 0
3. Do you know that he...
The trial judge admitted the results of the poll, but after hearing the examination of the venire panel, he reversed the motion on the ground that Bloeth could receive a fair trial from the twelve jurors chosen. The jury found him guilty of murder and he was sentenced to be executed. On appeal to the Second Circuit, the conviction was reversed on the ground from the twelve jurors chosen. The motion to reverse the judgment of the trial court was sustained. The court referred particularly to the degree of community prejudice shown by the public opinion poll and relied on the poll's findings as a persuasive evidentiary source.

When the much-publicized trial of Billie Sol Estes for mail fraud began in the first week of March, 1963, the United States Supreme Court had just been published. Estes's attorneys, whose motion for continuance and change of venue had previously been denied, hurriedly arranged for a survey to be taken in the El Paso area on the weekend before the opening day of trial. The questions were patterned after those used in Bloeth. Four hundred and fifty interviews were made in two days by nine untrained interviewers, and the findings were as follows:

<table>
<thead>
<tr>
<th>Question</th>
<th>YES</th>
<th>NO</th>
<th>DON'T KNOW</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Have you ever heard of Billie Sol Estes who is accused of mail fraud concerning certain anhydrous ammonia tank transactions?</td>
<td>432</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>(2) Do you think he is guilty?</td>
<td>256</td>
<td>49</td>
<td>134</td>
</tr>
<tr>
<td>(3) Do you know whether or not he has confessed his guilt?</td>
<td>65</td>
<td>366</td>
<td></td>
</tr>
<tr>
<td>(4) Have you read or heard that Estes was convicted of swindling in Tyler, Texas, last November?</td>
<td>278</td>
<td>146</td>
<td>28</td>
</tr>
<tr>
<td>(5) Have you read or heard that the other defendants in the El Paso case have pleaded guilty?</td>
<td>163</td>
<td>255</td>
<td>14</td>
</tr>
<tr>
<td>(6) Have the Estes scandals been widely discussed in El Paso County?</td>
<td>336</td>
<td>54</td>
<td>27</td>
</tr>
<tr>
<td>(7) Do most people in El Paso think Estes is guilty?</td>
<td>288</td>
<td>31</td>
<td>122</td>
</tr>
</tbody>
</table>

The trial judge, after admitting in evidence the results of the poll and volumes of newspaper clippings, decided to postpone making his ruling until the venire had been questioned. Seventy-five veniremen were examined before twelve jurors and two alternates were chosen. Thirty-two stated that they had no opinion as to Estes's guilt, thirty-one stated that they had an opinion, and twelve revealed some conflict of interest which would keep them from being jurymen in this case. On the basis that a large percentage of the panel had no opinion and that all the jurors chosen gave assurances that they had no opinion and would try the case solely on the law and the evidence, the judge denied the defense motions. Estes was convicted on five of the fourteen counts of the indictment, and the case is now on appeal to the Fifth Circuit.

The Bloeth and Estes cases, though not the first to admit public opinion poll evidence to prove community prejudice, do indicate a growing acceptance by the judiciary of this evidence. The trend, while enlightened, is not without its dangers. Because a public opinion poll carries with it an air of authenticity which is highly persuasive, care should be taken to see that the judge is provided with proof of its reliability and evidence of the scientific techniques used.

In the fifty-five years since Louis D. Brandeis submitted a brief to the United States Supreme Court in MalIer v. Oregon, 208 U. S. 412 (1908), with two pages of legal argument and over a hundred pages of economic, social and medical data, social science data have become an accepted source of legal evidence. The public opinion poll, after developing a reputation for accuracy in determining consumer preferences and voters' opinions in the 1920's, became one of the sources of sociological evidence. When Sweatt v. Painter, 339 U. S. 629 (1950), came before the Supreme Court in 1949, Texas, arguing in support of its segregated law school system, submitted findings from a survey by a professional research group showing that four-fifths of the whites and three-fourths of the blacks did not favor integration.

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fifths of the Negroes in the state favored segregated universities.

The public opinion poll was ideally suited for providing sociological evidence of which an appellate court could take judicial notice in determining the constitutionality of a statute, but its acceptance as primary evidence before a trial judge was more difficult to uphold.

One of the first attempts to use a public opinion poll as evidence in support of motions for a continuance and a change of venue occurred in 1953 in State v. Irvin, 66 So. 2d 288 (Fla.). Irvin and two other Negroes had been convicted in Lake County, Florida, of raping a sixteen-year-old white girl, but the conviction was reversed by the United States Supreme Court on a technicality and the trial reset in neighboring Marion County. Irvin's attorneys sought a change of venue or a continuance. The Elmo Roper Research and Public Opinion Organization was hired at a cost of more than $7,000, paid by the N.A.A.C.P. Legal Defense and Educational Fund, and trained interviewers questioned more than 1,500 adults on a quota sampling basis in Lake and Marion Counties and in two more distant counties. The survey director and the field supervisor testified to the methods used in conducting the poll and to the results showing that a much more prejudicial climate existed in Lake and Marion Counties than in the more distant counties. After hearing the testimony, the trial judge excluded it as hearsay because the witnesses had not themselves done the interviewing. The Supreme Court of Florida sustained the refusal to admit the evidence.

There are three theories which have been used by courts to avoid the hearsay stumbling block.

The expert witness theory would permit the professional pollster who conducted the poll to take the stand and testify, as an expert, as to what conclusions he can draw from the results of the poll based on the polling techniques used. This theory, however, has not fared well with the courts. The poll director in Irvin was permitted to testify only as to the methods used in conducting the survey, while only the actual interviewers would have been permitted to testify as to the answers given. In Elgin National Watch Company v. Elgin Clock Company, 26 F. 2d 376 (D. Dela. 1928), in which a survey was taken to determine whether the average person would confuse the names of the two companies involved, it was held that the director of the survey was not giving an expert opinion, but only testifying as to the facts of what the interviewees said, and so he was relating hearsay.

The second theory, the public witness theory, would permit the poll director to testify to the results of the poll as a public witness who is merely relating his opinion of what the community mind on the issue is. This has been the traditional method for getting evidence of community prejudice before the judge in continuance and venue hearings. The drawback to the use of public witnesses is, as Lester Waterbury has written: "The poisonous feature of the public witness method is, of course, that all too frequently they are selected not impartially but because they will testify the way the party selecting them wants them to testify." Nevertheless, courts have been willing to admit the testimony of public witnesses, often knowing that they are testifying as the party who selected them wishes, while rejecting public opinion polls as hearsay.

There have been no direct holdings that the public witness exception is broad enough to include the results of public opinion polls, but the readily granted admissibility of polls in Bloeth and Estes may indicate a growing acceptance of this theory. If the pollster may testify as a public witness as to what he thinks are the opinions of the community, it does not seem to stretch the logic too far to permit him to testify as to the results of questionnaires answered under his direction and as to his conclusions in interpreting the results into mathematical percentages applicable to the entire community.

The third theory, judicial notice, may be the simplest way around the hearsay problem. Since the judge in a continuance or venue hearing is relating hearsay, it does not seem to stretch the logic too far to permit him to testify as to the results of questionnaires answered under his direction and as to his conclusions in interpreting the results into mathematical percentages applicable to the entire community. If the pollster may testify as a public witness as to what he thinks are the opinions of the community, it does not seem to stretch the logic too far to permit him to testify as to the results of questionnaires answered under his direction and as to his conclusions in interpreting the results into mathematical percentages applicable to the entire community.

Thus the judge is placed in the difficult position of being required by law to use his discretion, and yet of having to decide what weight to give to evidence based on mathematical formule and polling techniques with which he is not familiar. If public opinion polls are liberally admitted as evidence, the defense, which orders and controls the poll, should submit proof that standard and proper polling techniques were followed, so that the court will be able to judge the accuracy of the results.

Factors Governing Accuracy of Polling Technique

The accuracy of the results of a public opinion poll is dependent on the polling technique employed and the safeguards for accuracy followed. Polling has in the last thirty years become an accepted social science technique, and experimentation has pinpointed the factors on which accuracy depends. Five factors most often mentioned are:

(1) The sample must be of ade-

17. See Waterbury, op. cit. supra note 16.
18. See Waterbury, op. cit. supra note 16 at 74.
20. Although a million persons were polled by Literary Digest in 1936, faulty techniques in failing to derive a proper cross-section resulted in the prediction that Landon would win the Presidential election by a landslide. The small margin of error by prominent pollsters in the 1948 Presidential election has also been attributed to faulty techniques.

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quate size to provide for high mathematical accuracy.

(2) The questions asked must be phrased so as to provide a true picture of the respondent’s opinion.

(3) A proper cross-section of the community must be interviewed so that the answers are representative of other persons within the community.

(4) Proper statistical techniques must be used to evaluate the answers and to derive the mathematical conclusions which should follow from them.

(5) Competent interviewers capable of using judgment concerning the truthfulness of the respondent and the reliability of the cross-section must be used.

Lack of attention to any of these five factors may seriously jeopardize the accuracy of the results obtained.

Size of the Sample: From the size of the sample (the number of persons interviewed) a mathematical percentage showing the standard error which may be present can be obtained. Statisticians working in the field of probability have derived the following formula to show the standard error a poll may contain based on the number of persons interviewed:

\[
\sigma = \sqrt{\frac{pq}{N}}
\]

When \(\sigma = \) the per cent of standard error
\(p = \) the per cent of persons interviewed who answered the question the same way
\(q = 1.00 - p\)
\(N = \) the number of persons interviewed

This formula will show us how many persons must be interviewed in order to obtain a certain desired percentage of accuracy. For example, if 100 persons are interviewed, and 50 per cent of them answer “Yes” to the question, and 50 per cent answer “No”, then by substituting in the formula:

\[
\sigma = \sqrt{\frac{50 \times 50}{100}} = \sqrt{25} = 5
\]

Thus, in this example, the standard error when 100 persons are sampled would be at least 5 per cent. We know, then, that if only 100 persons are questioned, the smallest error possible from the standard mathematical error alone will be 5 per cent. All of the other factors may cause additional error and decrease the accuracy even more.

Phrasing of Questions: The phrasing of questions asked by the interviewer is a vital factor in determining the accuracy of the poll; of course, it cannot be mathematically determined. If a question is leading, misleading or contains “come-on” words to elicit a certain answer, the accuracy of the poll may be seriously undermined. A number of studies have been made on the influence of the wording of questions on the answers given, and startling conclusions have been found.

In 1940 Hadley Cantril asked persons the question:

Do you think the United States should do more than it is now to help England and France?

Later he asked the same question with the addition of the words at the end “in their fight against Hitler”. He found that the emotion-packed word “Hitler” caused 9 percent more persons to reply “Yes” to the question.

Pollsters have found that there are any number of magic words which carry connotations causing people to answer the question a certain way. “Socialism”, “fascism”, “dictator”, “radical” and “reactionary” are almost certain to color the answer given by the interviewee. Elmo Roper in 1940 found that by changing the question:

Do you think the U.S. should do everything in its power to promote world peace?

to read:

Do you think the U.S. should become involved in a plan to promote world peace?

a considerably higher percentage of “No” answers was obtained. The order in which questions are asked may also affect the nature of the answer given, and this, together with the wording of questions, must be carefully considered to insures maximum accuracy.

Cross-Section of Community: Proper polling technique requires that the community to be sampled must be divided into economic, cultural and social groups and that a selection of representative interviewees or areas be made. A large sampling may negate the possibility of a sizable mathematical standard error, but without proper sampling, accuracy may be seriously endangered. The 1936 Literary Digest poll is the classic example of poor cross-section selection. Readers were permitted to send in postcards with their straw vote for President, and the results were tabulated without any cross-sectioning according to social and economic class and geographical distribution. As a result, the almost one million votes which were received reflected the opinion of more well-to-do economic classes and the poll failed to reflect the opinions of a majority of the American voters.

Statistical Techniques: Pollsters have developed recognized and accepted techniques for translating the answers given by the interviewees into meaningful mathematical percentages. For a polster to assume that because seventy-five of 100 persons interviewed answered “Yes” to a certain question, that 75 per cent of the community would also have the same opinion, is far too unsophisticated for accurate polling. The answers of certain persons and certain areas and groups may need to be given more or less weight than those of others.

The weighting of poll results may demand expertise beyond that possessed by the polster. Large polling

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organizations utilize the services of a variety of persons—political scientists, economists, sociologists, psychologists, statisticians—to determine the proper statistical weight to be given to particular areas and groups in each poll. Random polls have been used and have resulted in some degree of accuracy, but the method of relying on interviewing every one thousand persons, for example, is too risky to be given any strong weight as judicial evidence.

Trained Interviewers: Finally, it is important that the interviewers be intelligent and trained in polling techniques. The ability to establish a proper atmosphere for questioning and for obtaining honest answers, without causing the interviewee embarrassment or anger, is a prerequisite for a good interviewer. The intelligence to discern honest answers from joking or sham replies and to make a judgment as to the classification of the person questioned so that the cross-section schedule may be preserved is also essential.

Competently Conducted Polls Have Value

There is a definite trend toward the use of opinion polls as judicial evidence. Long an accepted evidentiary source in appellate hearings, the public opinion poll has now come into its own to provide proof of community prejudice in hearings for continuance and change of venue.

If the legal barriers against the admissibility of public opinion polls have been overcome, still their ready admissibility is not without dangers. While the results of public opinion polls often look deceptively simple, their accuracy depends on the techniques followed. Public opinion polls represent a specialized area of social science. Unless careful attention is given to the size of the sample, the wording of questions, the structure of cross-section, the statistical techniques, and the competency of interviewers, their accuracy may be doubtful. But administered carefully and used intelligently, the public opinion poll can bring a degree of certainty to venue and continuance hearings which is now lacking.

28 See Gallup and Rae, op. cit. supra note 27.

Nominating Petitions

Delaware

The undersigned hereby nominate Alexander L. Nichols of Wilmington for the office of State Delegate for and from Delaware to be elected in 1964 for a three-year term beginning at the adjournment of the 1964 Annual Meeting:

William S. Megonigal, Jr., George Tyler Coulson, David A. Drexler, Walter K. Stapleton, E. Norman Veasey, John J. Morris, Jr., Albert W. James, Alfred Fraczkowski, Arthur J. Sulliv-

Andrea M. Heron, James R. Stoner, W. Kintner, F. Joseph Donohue, Alexander M. Heron, James R. Stoner, Brice W. Rhyne, Valentine B. Deale and William Blum, Jr., of Washington.

District of Columbia

The undersigned hereby nominate David G. Bress of Washington to fill the vacancy in the office of State Delegate for and from the District of Columbia:


Indiana

The undersigned hereby nominate C. Severin Buschmann, Jr., of Indianapolis for the office of State Delegate for and from Indiana to be elected in 1964 for a three-year term beginning at the adjournment of the 1964 Annual Meeting:

Philip S. Cooper and George O. Chambers of Anderson;

Clarence J. Donovan and Robert W. Short of Bedford;

Thomas H. Braunaman of Browns-