



BAD BEHAVIOR

POTENTIAL PITFALLS IN AND AROUND THE
COURTROOM THAT COULD LEAD TO MISTRIAL

MISTRIAL.

*The very word can set off a cascade
of perspective-driven emotions.*

TEETH-GRINDING FRUSTRATION AS THE
REALIZATION HITS THAT WEEKS AND MONTHS
OF PREPARATION HAVE VANISHED IN
THE SPAN OF ONE WORD.

THE “COLORS-ARE-BRIGHTER” ACUITY
OF THE SURVIVOR, UPON THE REALIZATION
OF A VERY NEAR MISS.

THE CHURNING PIT-OF-THE-STOMACH
SELF REFLECTION: *DID I JUST
COMMIT...MALPRACTICE?*

THE PREGNANT PAUSE AFTER A
SEEMINGLY FRIVOLOUS REQUEST: *IS THE
JUDGE REALLY CONSIDERING IT?*

THE BRIGHT OPTIMISM OF THE
SECOND CHANCE.

THE DARK FUTILITY OF ADDITIONAL DELAY.

CRAFTY LEGAL strategy. Blind happenstance. Ungovernable jurors. Mentally unstable criminal defendants.irate judges. The mistrial encompasses them all.

Collected here are anecdotal accounts of recent mistrials (either sought or granted) spanning a variety of circumstances and jurisdictions. Some are far-fetched; others relatively mundane. Yet despite occasionally outlandish fact scenarios extending beyond civil litigation generally and healthcare litigation specifically, they provide at least two valuable lessons for even the most entrenched pharmaceutical or medical device lawyer.

First, these capsules collectively serve as a cautionary tale to litigators. In the courtroom, more than mere evidence will undergo scrutiny. A lawyer’s appearance, demeanor, and speech are on display. The lawyer must craft and project an image to withstand not only

the attention of the judge and jury but an opportunistic adversary as well.

The second take-home point is a mirror of the first. Effective trial counsel are attuned not only to the documents and testimony but to all the goings-on in and around the courtroom. Just as important as the lawyer’s command of the rules of evidence or an expert’s prior inconsistent statements is an appreciation of the atmospherics of the proceedings, an understanding of how the moving parts interact. This alertness must extend particularly to the jury.

1. THE “SOLE” BASIS?

In Palm Beach County, Florida, a personal-injury lawyer was offended by his opponent’s populist leanings, in particular, his choice of footwear. “It is well known in the legal community that Michael Robb, Esquire,





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wears shoes with holes in the soles when he is in trial,” counsel for plaintiff asserts in his *Motion to Compel Defense Counsel to Wear Appropriate Shoes at Trial*.¹ He concludes, “Upon reasonable belief, Plaintiff believes that Mr. Robb wears these shoes as a ruse to impress the jury and make them believe that Mr. Robb is humble and simple without sophistication.”²

But here’s where the story gets interesting: Apparently, the publicly available motion was circulated to a local newspaper columnist. Chasing the story, the reporter interviewed an amused defense counsel — while the case was still pending: “I’ve been practicing law for 21 years and [plaintiff’s counsel] thinks he’s finally cracked the key to my success? Gotta be the shoes. Like Michael Jordan.”³

The reporter’s second call was to the plaintiff’s lawyer, “whose reaction couldn’t have been more opposite.”⁴ Soon, both lawyers sought to prevent the humor column from being printed until after the jury rendered its verdict.⁵ Inevitably, of course, the story ran in the weekend edition. “[O]n Monday morning, the jurors were allowed to mingle with each other before the start of court, and one of them brought in [the] column and read it to the others while they were left to their own devices in the jury room. They discussed ‘the case’ before deliberating on a verdict.”⁶ Mistrial was granted.

2. “THEY CAN’T MAKE IT STICK.”

In San Diego, Weusi McGowan was tried as a criminal defendant on robbery charges for demanding money from a 54-year-old man and hitting him with a “rock that was inside

a sock.”⁷ McGowan sought a mistrial during jury selection, believing that because certain jury members had seen him in restraints while escorted into the courtroom, he was irreparably prejudiced.⁸ The judge denied his request, but dismissed those jurors implicated.⁹

Trial proceeded for three days. During a mid-morning break, McGowan pulled out a bag of feces from a hiding place in his clothing and proceeded to rub excrement on his lawyer. He then flung the remainder at the jury members, who were filing out of the courtroom.¹⁰

Following the inevitable mistrial, McGowan later pleaded guilty to both the robbery and the assault charges arising from the feces-flinging incident. He was sentenced to thirty-one years in prison.¹¹

3. WHO DO U VOTE 4?

In Fayetteville, Arkansas, a WalMart photo lab employee, Jonathan Powell served on a civil jury responsible for awarding over \$12 million in favor of investors against a building materials company.¹² “Juror Jonathan” was discovered to have sent inappropriate microblogs (or “tweets”) via his cell phone, including: “Oh, and nobody buy Stoam. It’s bad mojo, and they’ll probably cease to exist, now that their wallet is \$12M lighter.”¹³ Powell is also reported to have tweeted “I just gave away TWELVE MILLION DOLLARS of somebody else’s money.”¹⁴ The defendants sought a mistrial.

In a federal drug trial in Florida, a juror admitted that he had done internet research on the case, in violation of the judge’s instructions.¹⁵ Eight other jurors had done the

same thing; a mistrial ended eight weeks of trial work.¹⁶

In another Florida case, a Miami-Dade judge declared a mistrial in a civil fraud case.¹⁷ There, the witness took advantage of an attorney conference at sidebar to text-message his supervisor — who was sitting at plaintiff’s table.¹⁸ The court confirmed that the texts addressed the witness’s testimony.¹⁹

4. JAPANESE FOR “SINGLE NUMBER.”

In Sydney, Australia, a drug trial that had seen over one-hundred witnesses and three months of evidence ended in mistrial.²⁰ The culprit? The jury forewoman and four other jurors admitted to playing Sudoku, the Japanese numbers game.²¹ Despite trial costs in excess of one million dollars, with 60 days of hearings, the forewoman admitted “to having spent more than half of her time in court playing the game.”²² The jurors brought in the Sudoku sheets “and photocopied them to play during the trial and then compare their results during meal breaks.”²³

5. JUDGES ARE PEOPLE, TOO.

In Albany, New York, former Senate Majority Leader Joseph Bruno was tried on corruption charges in federal court.²⁴ Out of the presence of the jury, the United States district judge “lashed into Bruno for trying to upstage him in front of the jury.”²⁵ The judge was reported as saying, “Let’s be clear about who controls this courtroom and who doesn’t” after Bruno “appeared to question the judge’s decision to let prosecutors ask some final questions of a witness before adjourning.”²⁶ The following day, Bruno’s

counsel sought a mistrial, contending that although the jury didn't see the judge "dress down Bruno, they couldn't help but notice his displeasure as he dismissed them."²⁷ The motion for mistrial was denied.²⁸

6. RUSH TO JUDGMENT.

In the Bahamas, the John Travolta extortion case was abruptly halted by mistrial after nearly four weeks of proceedings.²⁹ A local Bahamian official made a public announcement that one of the defendants accused of blackmailing Travolta had been acquitted — before the jury ever returned a verdict.³⁰ Travolta's lawyer was reported as stating the belief that "one of the jurors called a politician in Freeport and told him [one defendant] had been acquitted [...]. That call would have taken place at the same time the jury was deliberating."³¹ Court observers noted that local Bahamian politics likely played a role during the trial.³²

7. A SOBERING THOUGHT.

In Clark County District Court in Las Vegas, Nevada, the kidnapping trial of Dale Jakuchunas ended in mistrial when his attorney arrived over ninety minutes late for the proceedings, smelling of alcohol and in the company of "a young woman wearing a black halter top and tight pants."³³ Given the lawyer's erratic behavior, District Judge Michelle Leavitt ordered that Joseph Caramagno have a breathalyzer test administered in open court.³⁴ The results indicated a blood-alcohol level of 0.075, just below the 0.08 statutory threshold for DUI charges.³⁵ In declaring a mistrial, Judge Leavitt noted "Mr. Jakuchunas is facing a life sentence, so if you came to court intoxicated, you've got a problem."³⁶ Caramagno later denied being drunk.³⁷

8. I CAN HEAR YOU.

In another Las Vegas trial, a criminal defendant sought a mistrial based on courtroom technology.³⁸ Juror Paul Swaim was wearing court-supplied headphones connected to voice-activated microphones placed before the judge, prosecuting and defense attorneys, and witness stand.³⁹ In an affidavit, Swaim stated that he "could hear many con-

versations that were being held at the defense table, between [defense counsel] and the defendant."⁴⁰ The prosecutor contended that defense counsel could have used a pen and paper during trial to communicate sensitive information or manually turned off the microphone located at the defense table.⁴¹

9. THEY HOLD YOUR FATE IN THEIR HANDS.

In Suffolk County, Massachusetts, Richard Glawson was charged with a crime spree including the shooting of a police officer.⁴² At trial, Glawson punched one of the jurors.⁴³ An associate justice of the state's Supreme Judicial Court denied defense counsel's request for a mistrial, directing the trial judge to poll the jurors who witnessed the incident to determine whether they could remain impartial.⁴⁴ Thereafter, four of the remaining fifteen jurors said they could not remain impartial, and the trial judge declared a mistrial.⁴⁵

10. ALL RIGHT, KEEP YOUR PANTS ON.

In Sierra Vista, Arizona, a Cochise County judge declared a mistrial in the murder case of Jonathan Ramil.⁴⁶ Jurors reported that the defendant's brother, Steven Kastner, dropped his pants and gestured and made threatening comments in the presence of jurors outside the courtroom.⁴⁷ Kastner admitted that he dropped his pants "as a joke," not realizing jurors were nearby.⁴⁸ He denied making any threats or gestures.⁴⁹

¹ *Lenkendorf v. Sorrentino*, Case No. 502005 CA 004986 XXXX MB AG, In the Circuit Court of the Fifteenth Judicial District, in and for Palm Beach County, Florida; June 12, 2009.

² *Id.*

³ "Does Lawyer Who Bares Sole Have an Ace in the Hole?" Frank Cerabino, *Palm Beach Post*, June 27, 2009.

⁴ "Story Behind Controversial Court Column." Frank Cerabino, *Palm Beach Post*, July 4, 2009.

⁵ *Id.*

⁶ *Id.*

⁷ "Man Who Threw Feces in Courtroom Draws 31-year Sentence for Robbery." Dana Littlefield, *The San Diego Union-Tribune*, Oct. 26, 2009.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² "Appeal Claims Juror Bias in 'Tweets' Sent During \$12 Million Case." Jon Gambrell, *The Associated Press*, March 16, 2009.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ "As Jurors Turn to Web, Mistrials Are Popping Up." John Schwartz, *The New York Times*, March 17, 2009.

¹⁶ *Id.*

¹⁷ "Mistrial Declared Over Executive's Texting From Witness Stand." Alana Roberts, *Daily Business Review*, May 15, 2009.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ "The Game's Up: Jurors Playing Sudoku Abort Trial." Malcolm Knox, *The Sydney Morning Herald*, June 11, 2008.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ "Judge Denies Mistrial Plea of Former Senate Majority Leader Joe Bruno in Corruption Case." Glenn Blain, *The New York Daily News*, Nov. 14, 2009.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ "Mistrial Declared in John Travolta Extortion Case." Siobhan Morrissey, *People*, Oct. 22, 2009.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ "Kidnapping Case: Alcohol Test on Lawyer Stirs Mistrial." Glenn Puit, *Las Vegas Review-Journal*, Aug. 8, 2006.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ "Defense Attorney Requests Mistrial: Juror Overheard Conversations During Murder-for-Hire Trial." David Kihara, *Las Vegas Review-Journal*, June 18, 2008.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Suffolk County District Attorney's Office Press Release, May 22, 2007.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ "Mooning Leads to Mistrial in Willcox Murder Case." Associated Press, April 25, 2009.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*



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