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Scrushy's game of jury jeopardy

Jackson goes free, Ebbers faces life, Scrushy waits. Experts say jury selection is key -- usually.

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By Krysten Crawford, CNN/Money staff writer

NEW YORK (CNN/Money) - As much as Dennis Kozlowski and Richard Scrushy dream of the kind of day that Michael Jackson is now having, the not guilty verdict in the pop singer's child molestation trial can't offer them much solace.

In fact, the public dissection of the Jackson case that dominated the airwaves Tuesday -- notably the mistakes Jackson's prosecutors were said to have made -- serve only as a reminder that trials are about much more than simple guilt or innocence.

They're a lot about jurors. And picking the right jury is crucial but also extremely difficult, legal experts say.

"You can lose a case before it even starts," said Jerry Bernstein, a former federal prosecutor now in private practice.

Frank Quattrone knows just how unpredictable juries can be.

At the former Credit Suisse First Boston banker's first trial for obstruction of justice in 2003, the jury deadlocked on a verdict. A new trial was ordered and a separate jury found Quattrone guilty six months later.

Similarly, some legal experts note the following puzzle: ex-WorldCom CEO Bernard Ebbers was found guilty of directing an \$11 billion accounting scandal at the telecommunications company after one former chief financial officer testified against him.

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Meanwhile, Scrusby, former CEO of HealthSouth, had five former CFOs point their fingers at him at his trial over a \$2.7 billion accounting fraud at the health services company.

Now in their fourth week of deliberations, Scrusby's jury is having a hard time reaching a verdict. Last week the federal judge assigned to the case took the final step toward declaring a mistrial when she issued what's known as an "Allen charge," a last-ditch attempt to force jurors to decide Scrusby's fate.

The 'bulge in the middle'

Legal experts debate just how critical jury selection is to a trial's outcome. Some say there are many other factors that influence a result -- including the evidence allowed and whether opposing lawyers can use it to their advantage. In Scrusby's case, some legal experts blame the 78 pages of complex instructions that were given to the jury for the apparent deadlock.

Still, a cottage industry has grown in the last three decades to help lawyers spot sympathetic jurors during pretrial selection. Scrusby's defense team hired jury consultants. So did lawyers for Martha Stewart and John Rigas, the Adelphia Communications founder.

The consulting costs can range from \$20,000 to more than \$1 million, according to Dr. Neil Kressel, the author of *Stack and Sway: The New Science of Jury Consulting*.

But as guilty verdicts in both Stewart's and Rigas' trial last year show, the investment doesn't always pay off.

"I think (jury consultants) are useful, but you've got to be careful," said Bernstein, now a partner in Blank Rome, a New York-based law firm.

Picking the right jury, some legal experts say, is more art than science

There are two leading philosophies on jury selection, explained Bernstein. One is that it's possible to know how a potential juror will respond to a case based on things like gender, schooling, social status and even "the way they looked at you or whether they folded their arms" in the courtroom, he said.

The other school of thought holds that detailed profiling doesn't work. "You can have two law students who both read *The New York Times*, have blonde hair, are both 23 years-old women, grew up on Long Island and come from similar upper-middle-class families and to draw conclusions (on their decisions) is like going down the rabbit hole," he said. "You can't tell anything."

Bernstein, for one, says he subscribes to the theory that jury picking is more of a crap shoot.

Kressel, the author and also a professor of social psychology at William Paterson University in New Jersey, agrees. "For every 10 guys who hire a jury consultant to select a jury, 9 are probably wasting their money," he said. Kressel says consultants are far more effective once a trial has begun and critical decisions like whether to have a defendant testify are made.

Jury selection can't guarantee a win for either side, but it can ensure a loss if mishandled, legal experts say. The primary goal is to knock outliers out of running -- not



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to identify ideal jurors.

"It's like the old game of musical chairs," said Samuel Solomon, a veteran trial consultant and the president of DOAR Litigation Support & Trial Services in Lynbrook, N.Y.

"Through the elimination process you end up with a group of jurors," he said. His recent consulting projects include the WorldCom shareholder litigation and real estate developer Larry Silverstein's lawsuit against the insurers of the World Trade Center.

Because the opposing side is also intent on getting rid of potential jurors considered to be unsympathetic, "you end up with what I call the 'bulge in the middle.' People who are not too extreme on either side," Solomon said.

At least that's the hope.

To find out more about the Scrusby trial and other corporate scandals, click [here](#).

For more on Michael Jackson and other celebrities in the news, click [here](#). ■

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