Thursday, December 10, 2009

10:40 am – 12:00 noon

Psychology in the Courtroom – Selecting a Jury
Psychology in the Courtroom: Selecting Your Jury

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Professional Credentials
• Education
• Research
• Experience

Professional Experience
• Number of years
• Number of cases
• Number of jury deliberations

Drawing Upon Professional Experience
• Mock trials
• Courtroom observations of actual trials
• Post trial juror interviews

Program Outline
I. Intro
II. Brief Review of Last Week
III. Voir Dire
IV. Jury Selection

Emphasis is on UNDERSTANDING the jury
Understanding the Audience

- Who they are…
- What they think…
- Why they think what they think…
- What they experience on the other side of the rail…

“Men & Women From the Community”

Understanding the Audience

- How to communicate
- How to educate
- How to persuade

Only Then Can We Learn
Jury Deliberations: Understanding How Jurors Deliberate

Tasks to Reach a Verdict

• **Assimilate** new information (evidence)
• **Evaluate** the information critically (weigh)
• **Learn** the law (comprehend instructions)
• **Apply** the instructions (law) to solve a problem (reach a verdict)
About 40% of a juror's pre-deliberation trial story is factually wrong or incomplete.

Likewise, most jurors forget about 70% of the judge’s instructions.

Jurors Spend 50% of their time in deliberations discussing…

**Personal Experiences!**

**“Filters” of Human Perception**

What Colors Our Perceptions of New Information?

- Personal experiences ➔ Attitudes
- Acquired attitudes
- Beliefs

**Conceptual Filters**

- Result in selective perceptions of the evidence
- We accept or attend to things that agree with our preconceptions
- We fail to hear or ignore things that disagree with them
How Malleable Are Jurors’ Attitudes and Beliefs?

Acquired Beliefs

Acquired Attitudes

Personal Experiences

Prior Life Experiences…

Predispose jurors to process certain aspects of the case more deeply or more personally than others

The Process of Deliberation

Blends the facts of the case we put on, with the perceptions and experiences of the jury

Voir Dire

“The trial is won or lost in jury selection!”

True or False?

Voir Dire

It’s not the voir dire EXAMINATION, rather, think of it as voir dire INTERVIEW
Voir Dire

Remember: During the process of asking for information you are conveying information about...
• Yourself
  • trustworthiness
  • competence
• Your Client
• Your Case
• Your Themes

Voir Dire

Don’t Do It Alone
• Bring a scribe
• Request that the court reporter take down the voir dire

Voir Dire

The Jury Is Always Watching...

Voir Dire

The Jury Is Always Watching...

Voir Dire

One of the opportunities you have to ‘testify’
• Don’t waste it!

Voir Dire

In Listening to Jury Deliberations:
• It is clear that jurors often confuse the source of “testimony”
• They frequently attribute to witnesses statements that were made by the attorneys

Voir Dire

Obtain Information About:
• Personal experiences related to the issues
• Attitudes toward your client and themes
• Attitudes & experiences of those close to the individual
• Beliefs about relevant case issues
Always ask about the experiences of:
- The individual juror
- Their family members
- Their close friends

The Sphere of Influence Is Large in Our Lives!

Voir Dire

You Can’t Change Attitudes & Beliefs in a Short Time
- “Can you set aside…?” is a meaningless question
- Don’t be seduced by your desire to keep a juror

Voir Dire

Suggestion
You may be a persuasive advocate,

Voir Dire

Suggestion
You may be a persuasive advocate,
but you aren’t THAT good —

Voir Dire

Suggestion
You may be a persuasive advocate,
but you aren’t THAT good —
you cannot change a person’s strongly held attitude or belief
in a 3 minute exchange

Jurors will use
PERSONAL LIFE EXPERIENCES
to Assert Authority in the Jury Room
De Facto Experts

Jurors will apply the skills they use in their daily activities to ‘SEARCH FOR THE TRUTH’

Voir Dire Preparation

The best tool to use for preparing voir dire questions (and ultimately) your jury profile:
- Your opening statement

Voir Dire Preparation

Undertake a case assessment (inventory) with the jury in mind:
- Direct relationships to the parties
  - Indirect relationships
- Direct relationships to the issues
  - Indirect relationships

Voir Dire Preparation

- Life experiences related to issues in the case
- ‘Expertise’ with respect to any of the issues in the case

Voir Dire Preparation

- Attitudes and/or beliefs that might come into play in determining liability
- Attitudes and/or beliefs about damages
- Attitudes and/or beliefs about punitive damages
It’s (Almost) Always Best to Ask
Don’t Be Afraid of “Contaminating the Pool”

Voir Dire Checklist

• Opening Statement
• Basic Demographic information:
  • About prospective juror
  • About other adults in his/her household
  • About grown children
  • About his/her parents

Voir Dire Checklist

Description of Work

• Supervise or manage others?
• Satisfaction with job/career?

Voir Dire Checklist

Ask About Previous Occupations:
In one survey in Washington prospective jurors held an average of 3.5 jobs within the prior ten years

Voir Dire Checklist

Educational Background

Special training (expertise as it might relate to the case)

Voir Dire Checklist

• Reactions to hearing the description of the case?
• Ever had a similar situation?
  • Any friends or family members had such an experience or anything remotely like it?
Voir Dire Checklist

- Ever been involved in litigation as a plaintiff or a defendant?
  - Any close friends or family members?

Guard against allowing natural sympathies to impair objectivity?

- That might take some policing or vigilance – Can you? Will you?

Voir Dire Checklist

- Ever been a juror before?
  - Foreperson?
  - Feelings about the experience?

Assessing Leadership

- Management/supervisory experience at work
- Membership in social, political or religious organizations
  - Leadership positions
  - Military experience

Voir Dire Checklist

- Burden of proof — Hold plaintiff to it. A tie does not go to the runner
- Wait for the defense — it’s human nature to form opinions as information comes in…
- Rooting for the underdog

Voir Dire Tactics

- Set the tone
  - Use self disclosure to elicit reciprocity effect
  - Express empathy
- Individual questions are better than group questions
  - Talk show host style
- ‘Loop back’ - open the discussion to the whole group when it is fitting
Voir Dire Tactics

Educate
Explain your role:
• To be non-judgmental
• To help the juror reflect on his/her life experiences
• To help the juror decide if he/she ought to be a juror on this case

Notes to Self…
Some questions are MORE TELLING than others

Voir Dire Tactics

Voir Dire Extreme Questions:
Also Known As One-Tailed Questions or Skewed Questions:
“Insurance companies almost always put their financial interests ahead of policy holders”
• 90% Agree
• 10% Disagree

Skewed Damages Questions:
• “Do you feel that the number of lawsuits filed today is too high, about right or too low?”
• “Do you feel that money damages awarded in lawsuits today are generally too high, about right or too low?”
Final Voir Dire Question

“Is there anything you’d like to mention that hasn’t come up in our conversation thus far?”

Judge — Conducted Voir Dire

• Don’t give up
• Submit your *entire* list of questions
• Sensitize the judge to the issues
• During voir dire, submit follow-up questions

Skill Sets and Deliberations

Jury Selection

What’s the Best Predictor of Future Behavior?

It’s not “Jury Selection”
• It’s a process of elimination
• We “strike jurors”
• We want to remove the five or six worst possible jurors
Jury Selection

Rate Jurors on Two Dimensions:
1. Constellation of attitudes, beliefs and personal experiences
2. Leadership or “Influence Quotient”

The ultimate question you must ask yourself is, in light of the constellation of all relevant information…

Is he/she likely to be PREDISPOSED against me?

People DO change their minds, but they would RATHER not

Dimension One:
Constellation of Attitudes, Beliefs and Personal Experiences

1. Negative
2. Neutral
3. Positive

Dimension Two:
“Influence Quotient”

1. Non-Participant Persuader
2. Participant
3. Persuader
What Is the First Question Raised in the Jury Deliberation Room?

Who’s done this before?

How to Spot a Potential Foreperson:

• Both male and female forepersons generally come from white collar occupations (50%)

Demographic Traits of Forepersons:

• Male (7 times out of 10)
• White (95%)
• Age 47
• With 2 ½ years of college
• Politically middle of the road

If the Foreperson is Female:

• Average age is 33
• Two years of college
• Slightly liberal politically
First Task During Jury Striking?

Identifying the Persuaders!
- Males tend to speak more than females
- Higher socioeconomic status jurors participate more than lower SES jurors
- People with leadership/management experience tend to lead or manage in new situations

During Deliberations
- On average, 25% of the jurors make 50% of the statements. These jurors are "persuaders"
- About 25% say little or nothing. These are the "non-participants"
- The remaining 50% are opinion generators but not leaders. They are the "participants"

Wish List
- Leaders who have had favorable experiences, or hold favorable attitudes and beliefs
- Participants who have had favorable experiences or hold favorable attitudes
- Participants who have no relevant experiences and have relatively neutral attitudes and beliefs

Strike List
- Leaders who have had unfavorable experiences, or hold unfavorable attitudes and beliefs
- Leaders who have close friends or family members who have had unfavorable experiences or hold unfavorable attitudes
- "Experts" we are unsure about
Develop a Uniform Scoring System

What to Do?

Final Review of Your Challenge Decisions

• When in doubt, remove de facto experts who are 3's, 4's or 5's on leadership
• Double check for “malcontents”

Getting the Inside Track on the Jury Pool:

• Do jurors complete any type of questionnaire that is returned to the commissioner?
• How can you get copies?

Getting the Inside Track on the Jury Pool:

• Remember, the length of the trial will significantly impact the final pool

Getting the Inside Track on the Judge:

Find out from the Court Clerk or from the Judge (well before the day of trial):
• The Judge’s position on hardships and his/her decision rules for hardships
• How the Judge handles hardship requests
Getting the Inside Track on the Judge:

How extensive is the Judge’s voir dire?
• How much are you allowed to do?
• Are there time limits?
• Has the Judge ever used a jury questionnaire?

Getting the Inside Track on the Judge:

- How are prospective jurors seated – where is seat number one?
- How many are questioned at a time?
  • 12, 18 (six pack), more?
  • Are you allowed to ask individual questions or only group questions?

Getting the Inside Track on the Judge:

How does the Judge want challenges for cause handled?
• As they arise?
• At the end of voir dire?

Getting the Inside Track on the Judge:

- How many peremptory challenges per side will there be?
- How are peremptory challenges handled?
  • One at a time?
  • Both parties submit a list?
    • Risk of double challenges
    • Does pass mean lose a challenge?

Getting the Inside Track on the Judge:

How many alternates will there be?
• Number of challenges per side?
• How will alternates be substituted into the jury if the need arises?

Prospective Juror Questionnaires

The Best Tool in the Arsenal for Making Astute Challenge Decisions:
Prospective Juror Questionnaires

The Best Tool in the Arsenal for Making Astute Challenge Decisions:
• More meaningful and more useful information
• Jurors are more candid about themselves on paper
• Jurors have time to provide thoughtful answers to questions, rather than offering the typical ‘minimal’ replies
• Voir dire is also expedited

When To Use a Questionnaire?

Proposing a Jury Questionnaire

• Draft your version
• Submit it to opposing counsel
• Prepare arguments for its use:
  • Protect jurors’ privacy
  • Spare jurors the discomfort of having to speak publicly

Proposing a Jury Questionnaire

Find out which other Courts have allowed them

Developing the Questionnaire

• Length
• Reading level — keep it simple — eighth grade level
• Distinguish between questions that need a yes/no answer and questions that you would like narrative answers

Submitting a Juror Questionnaire to the Court
Logistics of Jury Questionnaires

General Guidelines

• Remember all of the other voir dire guidelines. They still apply
• Be prepared with intelligent follow-up questions

Employment; Leadership Potential

6. Current Employment Status
   - Employed full-time
   - Employed part-time
   - Retired
   - Unemployed, looking for work
   - Unemployed, not looking for work

7. Current occupation:

8. Title or position:

   Please describe your duties at work:

   

Employment Satisfaction; Employment History; Business Ownership

9. Generally, how would you describe your experiences for dealing with your current or most recent employer?
   - Very satisfactory
   - Satisfactory
   - Normal
   - Unsatisfactory
   - Very unsatisfactory

10. If unsatisfactory, what was your last employer?

    Your last employer:

    What do you do at present?

11. Have you ever owned your own business?

    Yes [ ] No [ ]

    If "yes," what type of business:

    Number of Employees:

    Date of Incorporation:

Skill Sets; Leadership; De Facto Expertise

14. Please list all previous occupations and indicate how many years you worked in each.

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Employer</th>
<th>Number of Years</th>
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15. In your work, do you have management or supervisory responsibilities?

    Yes [ ] No [ ]

    If "yes," please describe:

    Number of people supervised:

16. Have you had management or supervisory responsibilities in the past?

    Yes [ ] No [ ]

    If "yes," please describe:

    Number of people supervised:
Union Membership — Grievance History; Leadership

24. Have you or any members of your family ever belonged to a union?
   Yes:____ No:____
   If “yes,” which one____
   If “yes,” off your hand____

25. Have you ever filed a grievance with a union?
   Yes:____ No:____
   If “yes,” please describe____

26. Have you ever participated in a grievance investigation?
   Yes:____ No:____
   If “yes,” please describe____

Socioeconomic Status

27. Do you own ____ or rent ____ your current residence?

Educational Background; Leadership; De Facto Expertise

28. Highest grade you completed at school: (Check one)
   __ High School
   __ College 1 year
   __ College 2 years
   __ College 3 years
   __ College 4 years
   __ Post-Graduate

29. Major area of study____

30. What college, if any, did you attend?

31. Other educational programs (vocational schools, high schools, part-time study, correspondence schools, etc.)

32. Have you ever taken any courses or had any training in any of the following areas? If so, please describe what and when you took:
   a. Legal matters generally____
   b. Personnel or Human Resources____
   c. Paying/Accounting____
   d. Auditing/Accounting____
   e. Labor relations____

Potential Leadership; Activism

33. What topic(s) of consumer work do you do?____

34. Have you ever belonged to any organization which was designed to promote or protect the rights of different groups or individuals, such as civil rights groups, women’s or minority groups, or industrial action groups? Yes:____ No:____
   If “yes,” please describe____

Political Attitudes

35. How would you describe your political style? (Check one)
   __ Very liberal
   __ Somewhat liberal
   __ Middle of the road
   __ Somewhat conservative
   __ Very conservative

Other Adults at Home; Possible Sources of Influence/Information

36. Marital status:
   __ Single and never married
   __ Single, but living with non-marital mate for ___ years
   __ Married, but separated in the past for ___ years
   __ Married and have been for ___ years
   __ Widowed

37. What is your spouse’s occupation?____
   By whom is he/she employed?____

38. Other than as indicated above, does any other adult live in your household? Yes:____ No:____
   If “yes,” please state his/her occupation____
Other Sources of Influence/Information

Leadership

Plaintiff or Defendant in a Lawsuit

Employment: Attitudes About Employment Suits

Employment Cases: Personal Experiences; Experiences of Friends or Family

Employment Cases: Personal Experiences; Experiences of Friends or Family
Employment: Unfair treatment; Personal Experiences; Experiences of Close Friends or Family

20. Have you, or has anyone close to you, ever been disciplined, demoted, or terminated from a job under circumstances that you or the person close to you believe to be unfair?
   Yes  No
   If yes, please describe:_____________________________________________________________________

21. Have you, or has anyone close to you, ever had an experience, either at work or away from work, with a supervisor or employer, or anyone else, which you, or the person close to you, felt was discriminatory in any way? (e.g., race, sex, gender, orientation, religion, or any other form of discrimination.)
   Yes  No
   If yes, please describe:_____________________________________________________________________

Employment Case: Personal Experiences; Involvement in Litigation

25. Have you, or any close friends or family members, ever experienced any sort of sexual harassment or discrimination by a supervisor or manager?
   Yes  No
   If yes, please describe:_____________________________________________________________________

32. Have you, or any of your close friends, or family members, ever been involved in any type of employment litigation (such as job discrimination, sexual harassment or wrongful termination) either as a plaintiff, a defendant, or a witness? Yes  No
   If yes, please explain:_____________________________________________________________________

Source of Attitudes or Beliefs

29. Do you have any close friends or family members who are in the legal profession?
   Yes  No
   If yes, please state the name(s) of the law firms or courts by which they are employed:______________

Leadership; Potential Foreperson

54. Have you ever served as a juror before? Yes  No
   If yes, what court(s)?_____________________________________________________
   What was the case about?___________________________________________________
   How would you describe your experience(s) as a juror?____________________________________

Clean-up Questions

41. Is there anything which you feel should be brought to the court's attention that might affect your ability to be, or be an impartial juror as you would like to be, in any reason why you may not want to serve as a juror in a case involving an employment dispute? Yes  No
   If yes, please explain:____________________________________________________________________

42. Is there any matter you would prefer to discuss privately with the court? Yes  No
   If yes, please explain:____________________________________________________________________

43. Is there any information you wish to discuss which you feel the judge or attorneys should know about?________________________________________________________________
Concentrate on Your Style First and Your Questions Second

Don’t let the title mislead you. It’s very important to ask the right questions during voir dire, but the right questions will be far less revealing if the way you ask the question is wrong. Following are some pointers that will help you get more out of voir dire, and the entire jury selection process.

Point 1: You are making a lasting impression.

First impressions are extremely important. Like it or not, people make assumptions about your character, personality, and motives after only speaking with you for a few moments. First impressions form a starting point from which your future behaviors are judged.

We rely on first impressions because they simplify our thought process. There is so much happening in our environments that we rarely have more than a few moments to think about each person we meet throughout the day. Instead, we often have to rely on "snap" judgments that are based on stereotypes and/or past events in our lives.

First impressions are especially important in the courtroom. Entering a courtroom is a mundane task for most attorneys, but most people who are summoned for jury duty are entering into an unfamiliar setting. Many are first time jurors whose only courtroom exposure has been through a television show or movie. It is important to remember that the venire, while representing a diverse group of people with unique perspectives and backgrounds, still arrives with common stereotypes of attorneys and the legal system.

The only time an attorney may interact directly with jurors is during voir dire. While attorneys are often busily using this time to identify the most undesirable jurors, individuals in the venire are evaluating the attorneys and attempting to gain insight into each attorney and his/her case.

Attorneys sometimes fail to take advantage of this opportunity to build rapport and trust with the jurors. They forget that jurors are making lasting impressions. But this doesn’t stop jurors from observing the attorney. Just how organized is this attorney? Does he remember my name or my previous responses? Why is he asking me the same question I just answered? Is he really listening to me? Is he kind? Is she genuine? Does she act like a salesperson? Are her questions knowledgeable, sensitive, and appropriate?

Point 2: Keep it conversational.

“Open up” the venire by getting the venire to talk, disclose, and share. There are a couple of different ways to think about this concept. You could think
of it like a talk show where you are the facilitator. Or, view it as if you are entering a party with a roomful of strangers that you would like to get to know. How would you get people to talk to you under these circumstances? Well, tell them a little about yourself first, and then start with easy questions that get people talking. Cast the net wide by asking general questions before you move to specific questions or more sensitive topics. When someone responds, reinforce that response, even if it’s not what you wanted to hear. This will set up momentum and get more people talking. If jurors are talking, they are making progress toward sharing valuable information.

Avoid close-ended questions and negative, or non-reinforcing tones. Those will quickly close off the jurors, along with any information they were going to share.

Point 3: Don’t lose them.

Consider an attorney who reads a list of questions in a stilted manner as if he is not familiar with her questions and needs to read them verbatim. The questions may contain unfamiliar jargon. They may be closed-ended, only eliciting a simple “yes” or “no” and little else. The questions might be long and difficult to follow. These discourage dialogue and frustrate jurors. They react by tuning out the attorney; they are not listening or paying attention. Attorneys who do this may appear uninspired and boring, as if they are just going through the motions.

Point 4: Be genuine.

Some attorneys are all too aware of the importance of impressions during voir dire. These attorneys sometimes try too hard to build rapport, so they come across as artificial. For example, the attorney may complement the venire in an attempt to build rapport. That same attorney may use self-deprecation or humor. However, when this tactic is used in excess, it usually fails. When an attorney appears to be “trying too hard” to establish rapport, it only increases a juror’s skepticism of the attorney. Jurors may ask, “What does he want from me? Oh, he is trying to influence me and my decision.” Remember that many jurors use stereotypes to help form first impressions. Attorneys are sometimes thought of as opportunists, and tactics such as humor, complements, and self-deprecation may build upon that stereotype, making a juror question the attorney’s motives.

Point 5: Be aware.

Jurors are watching. They are evaluating your body language, vocabulary, and your appearance, just as people do in any social environment. They are evaluating your motives and deciding whether or not they like and trust you. Keep in mind that your credibility may be as important to your case as the credibility of your witnesses. Use a rapport building tactic that is appropriate and
comfortable for you. Do not force it or try too hard; jurors will feel that it is not natural.

Look organized, attentive, and familiar with your voir dire questions and with questionnaire responses, if applicable. Let someone else take notes during voir dire so you can focus on the people before you.

Point 5: Draw upon personal experiences.

Can you remember any times in your life when someone asked you a question, but the way they went about it was all wrong? Perhaps your response would have been different had the question been asked in a differently way. How do you think the question could have been asked more effectively? Keep that experience close to heart before your next jury selection.

Point 6: Practice!

Practice your voir dire questions in front of friends, family, or colleagues before going into the courtroom. What seems to work? What doesn’t? What works to get people talking? Do any questions confuse your audience?

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