

Asking the Right Questions: Current Events Shadowing the Jury Pool

by Cynthia R. Cohen, Ph.D.



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Dramatic and emotional events like that which occurred on September 11, 2001, and the assassination of President John F. Kennedy on November 22, 1963, have a major impact on people's lives and on the nation. Everyone who was alive for one or both of these events remembers where she was and what she was doing at the time she first heard the news. Our emotional reaction to the news influences our views. Jury members are also impacted in different ways by dramatic events and that impact often influences their views of a trial. The extent of the impact on a prospective juror is important to consider during selection. This article addresses current events and intervening factors that should be considered in asking voir dire questions to identify juror bias.

Since September 11, Americans have been united. In the months immediately following the tragedy, it was difficult for jurors to sympathize with plaintiffs' injuries unless they were severe. Because what the 9/11 victims and their families went through was horrendous, questionable injuries in lawsuits were not seen as having as much value. For the lawsuits with serious injuries, it was harder to ask for great windfalls. Still, cases went to trial and damages were awarded. Asking the right voir dire questions in personal injury and product liability trials is of paramount importance.

Trial lawyers cannot pander to the jury. If there are no sympathetic issues in the case, then asking a question like, "How do you feel about the 9/11 events?" does not fit. Don't ask it. In cases where a party is of ethnic descent, it is important to voir dire on views of diversity and culture. This can be done in many ways. One way would be to ask all jurors about their workplace and what measures have been taken to insure that the work place has diversity. Follow

up with how they feel about the diversity measures taken. Would they hold anything against a client who is of [whatever] descent?

Media Savvy

Deciding whether you want the media-savvy juror or the ostrich-like juror with his head in the sand depends upon the case facts and any relationship your case has to current events. Voir dire jurors on how much news they watch, how often they read the paper, and what papers they read. Further explore how concerned they are about national, regional, and local events. It is necessary to discern their level of conviction and passion about the events. Explore other sources from where they get news (i.e., family, friends, the Internet, school, or colleagues at work). Independent information gatherers will want proof and will more likely form their own opinions. Jurors who are lax in gathering information are more apt to be swayed by the majority during deliberations—except for those who choose to hold strong opinions without the benefit of obtaining facts.

Each juror has a different learning style and an individual preference for different modes of receiving information. The particular mode of media (e.g., newspapers, television, national public radio, friends, or newsletters) that jurors prefer, and how much information they collect before trial, filters what they hear in trial. What they do with the information they receive, and the psychological impact of that information, shadows the trial, as well. Emotions about tragedies are hard to set aside. Heavy media exposure regarding Ford and Firestone tires make it difficult for other manufacturers with similar products to have an untainted jury.

Understanding learning styles is helpful because learning styles give clues to the

way jurors process information. For example, most active learners who seek information have college and higher degrees and continually learn throughout their life. They read newspapers. They teach.

Passive learners receive information only through sources that penetrate their environment. They do not seek information and generally are not contingency planners. Events just happen to them. They often are victims because they are not planners and do not prepare to avoid catastrophes. Passive learners also are less able to set aside their own emotions.

Celebrities: Special Challenges

Celebrity trials are a different breed. People like peering into celebrities' private lives. Jurors generally are infatuated and feel important if the case contains a celebrity. The Bonnie Lee Bakley murder trial will not have the scintillating effects of O.J. Simpson's passionate relationship with Nicole Brown Simpson and what that case did to the American people. While Robert Blake is accused of lying in wait and solicitation of murder for hire, the *People v. O.J. Simpson* case added racial tension to an already divided downtown Los Angeles population. Sensitive questions about race that needed to be asked in the O.J. trial are not necessary in the Robert Blake trial. The anger that impassions some people in racial disputes is a different level of conviction.

Prosecutors in the Bakley case should ask jurors about their heroes and role models. Then they should address the celebrity issue and any passion that jurors have for seeing Hollywood stars. For example, "Have they ever camped out to see the stars arrive at the Academy Awards?" or "Have you ever bought a souvenir map or tried to find any celebrities' homes?" Bakley, a confessed celebrity stalker, sent nude pictures to lonely men to solicit money. Questions about Bakley's character should be addressed. The defense will attack her character and say that there were many people who wanted her dead.

The Catholic Church Scandal

The current scandal that brought all the Cardinals to Rome will take a great toll on the Catholic Church. Everyone knows that something must be done. Now the Church has to face the darkest taboos that were

never addressed. It is the alleged cover-up that hurts the Church. Knowing molestation occurred and not preventing further harm will be the basis for multiple lawsuits. How much is pedophilia going to cost the Catholic Church? There will be costs in trust, as well as monetary damages. Child molesters are generally presumed to be the scum of the earth. Having had child molesters as priests will be costly for the Catholic Church and our society.

Whenever there are cover-ups, it is important to gauge jurors' comfort levels regarding self-disclosure and the ability to communicate. How one communicates

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within the family should be voir dired. Questions to ask include: Do your children come to you when things aren't right? Have you talked openly with your children about anatomy? At what age did you begin talking with your children about protecting themselves from strangers or not exposing their body parts?

Examine settings in a juror's life where he or she is most comfortable. There is a continuum of comfort that ranges from talking to total strangers to talking with a best friend, spouse, parent, or child. Somewhere in the middle would be disclosing personal information to a hair stylist or manicurist. Do they readily talk to strangers? Are they open and courteous to cab drivers? Even shy individuals open up to strangers when they walk the dog, especially other strangers who have dogs. Trial lawyers can explore whether jurors are comfortable sitting on a jury. "Would you be willing to sit on a jury and discuss child molestation?"

One Bad Apple

It took only three months for Enron Corporation to morph from blue-chip energy trader into the embodiment of corporate greed and cooked books.¹ Will Enron be to accounting practices and malpractice cases what the McDonald's hot coffee spill is to products cases? Witnesses with Arthur Andersen in their resumes will be less trusted. Voir dire questions to use in cases that em-

ploy accountants include: Are you familiar with what happened to Enron? Has the Enron downfall affected you or any of your family members personally? Have you ever lost retirement funds? Do you have any fears about retirement? What are those fears? Do you trust accountants? Are there just a few bad apples or is the whole bunch spoiled?

Who Awards Damages?

When asking for damages, it is important that the jurors do not feel the case is frivolous. Jurors value their time. Attorneys can facilitate the identification of jurors who

will award damages by asking about their values: Do they portray a higher sense of moral values? That is, do they place life and liberty as the highest ideals, and with which nothing should interfere? Have they ever been victims in any way? Do they portray a sense of compassion? Do they understand the value of money? Are they conservative in awarding damages? If they grew up in the Depression Era, the value of money would seem different to them than to a young adult growing up with inflation. Perceived worth increases in younger generations. Runaway juries are rare, but they do happen. It involves a cohesive unit that agrees to give damages and makes it known that it wants to send a message.

Profiling: Help or Hindrance

In our increasingly multicultural world, trial lawyers look for profiles to categorize jurors during voir dire. While stereotypes are helpful in the absence of any other information, they tend to classify groups rather than consider individual differences.

Trials are affected by how jurors view the world and the beliefs that they hold. Seasoned trial lawyers know that jurors' lifetime experiences shape their perceptions of an issue. How do a juror's family life, work, socioeconomic status, race, gender, political views, and religious orientation influence his or her verdict? It depends. Asking the right questions may reveal in-

dividual preferences that could predict each juror's view of the case.

Trial lawyers hire jury consultants to profile a case and write voir dire questions. Consultants need the case facts first, and

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then they add intervening factors that may shadow the jury pool. Common demographics that are considered include age, gender, and race.

Not all baby boomers are alike, nor are all Gen Xers. As our own eyes age, so do those of our peers. Some say that the juror pool has changed because we see more Gen Xers in our pool. It is true that Baby Boomers have aged some, but the differences between generations can be explained by many factors, including socioeconomic status, learning styles, and psychological factors.

There have always been generation gaps when children rebel against their parents' generation and develop their own identity. Jargon changes at least every six months in the Gen Y culture. What was *hip* or *groovy* in the 1970s may be *phat* today. The up-to-date jargon of the Gen Y culture will change many times before we see these people as a significant portion of our jury pool.

Age may not be the best predictor for jurors' preferences on verdict. It is easier to look at age in decades (20s, 30s, 40s, etc.) than to look at a broader classification, such as Baby Boomers, Gen X or Gen Y. The cut-off dates between Gen X and Gen Y are somewhat arbitrary. Some differences exist between those who grew up in the Depression era and who are less likely to award high damages and Gen Xers who have been given all the technological toys their hearts desire. Sometimes socioeconomic status differences are interpreted as generation differences.

Whether or not demographics are a determining factor in jurors' perceptions depends on the case. In sexual harassment cases, gender may be a factor. In contract disputes, gender may not be a factor. How-

ever, in any case, trial lawyers should be prepared for *Batson* challenges. Removing a juror simply because of the juror's race or gender not only is a bad practice, but also is unlawful. Experiences are better predic-

tors. Relying on stereotypes is inadequate. Juror profiles should include relevant background and experiences such as working in a corporate environment, as well as any prior jury experience or familiarity with lawsuits.

Voir Dire Techniques

Connecting with jurors is natural for some trial lawyers but not for others. I watched a plaintiff lawyer bully a juror in hopes of portraying the juror's bias. Of course, the juror was excused, but the lawyer lost respect from the rest of the jurors. A tip for trial lawyers is, "Keep your tone non-confrontational and avoid alienating at all costs!" Sometimes even humor alienates a juror. When reconvening voir dire after lunch, a juror who worked for Federal Express was late in returning to the courtroom. The lawyer conducting voir dire commented, "I thought that Fed Ex was never late." While it may have been clever and funny, the juror didn't like being singled out.

Using a dose of the Socratic method in the courtroom can help with voir dire questions. Socrates focused on asking the right questions, rather than prescribing the truth.² Asking successively deeper and more probing questions is important in revealing a potential juror's bias, but exposing a potential juror as foolish simply diminishes respect for the questioner.

How a juror gathers information, as well as how he or she communicates, should be assessed. Patterns of communication reveal more about a person than observable non-verbal behavior. Try to reveal whether you have a Chatty Cathy or a Deadwood Doug in the jury box. Does this juror readily disclose and volunteer information, or is it like pulling teeth to get more than a yes or

no answer? Being asked questions about communicative patterns is non-threatening for the extroverted self-discloser, but difficult for the shy, reticent juror.

In addition to questioning jurors, observe their socialization with other jurors. Note whether they attract others or seem standoffish. Ask, "If you were in the plaintiff's shoes, what should the plaintiff know about you?" This should reveal whether the jurors have empathy for the plaintiffs.

In conclusion, current events are one of many factors that can shadow any jury pool. Trial lawyers need to determine the current impacts. Crises in America tend to draw Americans together. Crises abroad tend to split Americans politically. Local crises, such as school shootings, draw a community together. If a tragedy occurs, jurors will often bond more readily. Oklahoma City and New York City have a common bond that is closer today with the establishment of a joint memorial institute. It is important to consider the venue and its unique history, as well as any local, regional, or national news.

The psychological impact of current events may be widespread. Are people feeling insecure or lacking trust or confidence in the economy or the church? Look at to what degree a juror is media savvy and notice how well the juror communicates. Factors outside of the case may have an impact on the trial. It is best to test the case to see what those factors are before trial. Once you understand how those factors impinge on the community, you can find better predictors for jury selection and fine-tune the presentation for a more successful verdict. ■

¹ J. B. Davis, *The Enron Factor*, ABA Journal, Apr. 2002, at 40.

² R.G. Tweed & D.R. Lehman, *Learning Considered Within a Cultural Context*, American Psychologist, Feb. 2002, at 91.