

Effective Defense Voir Dire: Making Sense of Jurors' Experiences

Knowing the backgrounds of jurors enables trial counsel to conduct an effective voir and to communicate easily with jurors during trials

By Cynthia R. Cohen

WHAT every lawyer wants is a favorable verdict. Effective voir dire can be the key to that. A good voir dire followed by an effective opening statement can shape the direction that a case will take. A competent jury consultant can assist an attorney in communicating with the jury by making predictions regarding how each juror will view the case.

These predictions are based on discovering individual juror's biases. A juror's past experiences, including any exposure to media coverage, creates biases. Jury research is a means for identifying these biases and dispelling stereotypes. Besides understanding jurors' experiences and perceptions, lawyers must recognize other obstacles to effective presentation of the evidence and constructing clear analogies.

JURORS' EXPERIENCES

The strongest influence on jurors is their particular experience with and exposure to issues pertaining to the trial. During their lives, jurors have experienced many things that filter how they will view the trial process. The closer their experiences match the central case issue of a case, the stronger their convictions about the issue. Searching for the behavior or experiences that reveal the core belief of each juror is critical. This epicenter, so to speak, will influence convictions in the deliberation room.

The closer to the epicenter, the stronger the experience. If on January 17, 1994, you were at the epicenter of the Northridge, California, earthquake, your experience with earthquakes is stronger than if you were 30 miles away. Someone 30 miles from the epicenter has a more memorable

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experience than someone 300 miles away. If more than 300 miles from the epicenter, but watching television news, people may believe that they know what it is like to be in an earthquake.

Attitudes are more likely to change when there are no personal experiences reflecting the issue. During voir dire, jurors could be asked about their attitudes about drunk driving, but it is more revealing to ask about their experiences with automobile accidents or drinking. If a person was a passenger in a deadly accident, that experience will never be forgotten. A bystander witnessing a fatal accident may remember it. Seeing a serious accident on television news may fix it in one's memory, but it will fade away more quickly. Again, the closer one is to the actual experience, the stronger the effect of that experience.

Experiences are a stronger determinant of verdicts than attitudes. Individuals are products of their genetic makeup and environment. Events and cognitive processing shape their attitudes. Attitudes shift, but events and experiences are unchangeable.

THE MEDIA

In deciding on a verdict, jurors draw on their experiences and their knowledge base, which can vary drastically. Jurors, other than jurors who are lawyers or law students, obtain most of their knowledge of the law from television.

A. What Jurors Have Heard/Seen/Read

Even if a particular case does not have a high profile, jurors have heard or read something about the legal system prior to their jury service. Virtually all jurors watch television. Some jurors have become addicted to depiction of trials à la *Ally McBeal*, *The Practice*, *LA Law*, *Matlock*, *People's Court*, and *Perry Mason*, all of which have been hit television series. John Grisham's many popular novels often show up on the laps of jurors waiting to be called into the courtroom. Whether television drama accurately shows the courtroom, this depiction becomes part of the jurors' knowledge base. What matters to the outcome of the trial are the perspectives that the jurors bring to the courtroom.

B. Combating Negative Media Influences

If there has been a toxic spill, chances are the newspapers and television stations in the vicinity of the venue have covered the story and jurors have seen the coverage. Jurors also may have read the book or seen the movie, *A Civil Action*. A plaintiff's lawyer will be smart to bring out the negative media influences if the judge allows it. The good defense lawyer then must use the jurors' responses to the plaintiff lawyer's questions to advantage.

For example, plaintiff's lawyer questions: "Ms. Jones, have you seen the movie, *A Civil Action*?"

Answer: "Yes."

Question: "Do you remember when the families of the children who were killed weren't allowed to testify?"

Answer: "No, I'd forgotten about that."

Question: "Do you think that it is fair that the victims or the victims' families are

not always in court to speak for themselves?"

Answer: "Fair? They should tell their story!"

Then the defense counsel questions: "Ms. Jones, you said earlier in response to the plaintiff's attorney's question that you thought that the families should have been given an opportunity to tell their story. In *A Civil Action*, the trial was divided into two stages to separate the cause of the spill from any sympathy about these children who may or may not have been affected by the spill. Can you separate cause of a toxic spill from sympathy?"

Many jurors also watch "real crime" television—*Hard Copy*, and the television newsmagazines such as *60 Minutes*. Television newsmagazines have become more prevalent in the last decade with the addition of *Dateline* and *20/20*. The increased number of newsmagazines that are aired on multiple nights generally throw negative light on defendants. With the increased demand for new stories, producers are looking more closely for stories of possible misdeeds from some giant company. Being portrayed on a newsmagazine is more common today as are the chances the jury pool has been poisoned by the portrayal before the jurors are selected.

Dateline has hammered the car industry in rollover and tire defect cases. We can assume the jury pools have been poisoned by tales of Firestone tires. *Dateline* aired a tire story the night before we picked a jury in Los Angeles for a tire manufacturer (other than Firestone.) We looked at the jury questionnaires and gleaned that a majority of the jurors had heard of the Firestone incidents. It did not make sense to eliminate all the jurors who had heard of Firestone's quandary because in essence we would have been left with a pool that was less educated. During voir dire the defense attorney did a remarkable job in focusing on the cause of the tire separation, the jurors' experiences with driving, and sympathy factors. When jurors talked of their experiences with road conditions, the obstacle seemed to be overcome.

Often news stories provide only incomplete knowledge about a case—for examples, McDonald's coffee spill, General Motors' truck fires, claims about the harmful impacts of tobacco, silicone breast implants, reactions to fen/phen, rollovers, and tire separations. It is never clear whether this coverage will be helpful or harmful to the defendant. In jury research discussions, the McDonald's award inevitably comes up. Jurors often mention it as a gross injustice to the legal system.

To be effective in *voir dire*, lawyers need to know jurors' perceptions of the news coverage. Sometimes giving the jurors additional information about the case can change attitudes. Other times, the issues are best left alone.

STEREOTYPES

A. What Stereotypes Are

Just as habits in daily life help people remember where they put their keys, stereotypes help one to make quick decisions about people and things. We use stereotypes every day. Many occupations are gender stereotyped—"male" includes doctor, lawyer, judge, college teacher, scientist, laborer, police officer, bank official, mechanic and bus driver. Occupations stereotyped as "female" include sales clerk, secretary, schoolteacher, phone operator and social worker. A person in a hospital corridor who sees two physicians—a man and a woman in white coats—tends to approach the woman as if she were the nurse. Stereotypes constitute people's beliefs about groups—beliefs that may be positive or negative, accurate or inaccurate.

In *The Nature of Prejudice*, Gordon Allport defined stereotypes as exaggerated and saw this exaggeration as the result of both cognitive and motivational mechanisms.¹ Stereotypes are likely to be exaggerations of whatever real differences may exist between groups. Exaggerations gen-

erally grow from scapegoating or group conflict. That is, the more conflict one has with a particular group, the more one is likely to exaggerate the stereotype. A classic example is the Jets and the Sharks from *West Side Story*.

Stereotypes can be generalized from personal characteristics (*e.g.*, attractiveness) and personality traits (*e.g.*, outgoing). People tend to make attributions for certain personal characteristics and traits. For example, attractive people are often seen as more credible, outgoing people as more liberal, and librarians as more introverted. The reality is that personality traits are not stable; they shift from situation to situation. A person can be outgoing in a familiar setting and reticent in an unfamiliar situation or vice versa. The librarian who is knowledgeable about the issues of a case and generally a mouse at work, could be vocal in the jury room. To assume that she will not be vocal because she is a librarian could be a costly mistake.

B. How Stereotypes Help

Stereotypes can be helpful. In the absence of personal knowledge of an individual, stereotypes about a group to which that individual belongs give us useful information. Knowing a person's occupational group gives us insight into what this person's day might be like. For instance, a construction worker's day generally is filled with interactions with men. There are plenty of accidents that might occur, and the risks increase with the number of stories of the building under construction. If the case being tried involves a degree of physical risk, the defense might choose to have a construction worker remain on the jury because a construction worker may be more likely to view risk as part of the job and take responsibility for accidents that occur.

C. How Stereotypes Mislead

- I never want any teachers or postal workers on my jury!
- Women are more sympathetic to plaintiffs.

1. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (Addison-Wesley 1954).

- African Americans award higher damages in inner cities.

These are examples of stereotypes that can be misleading. As we have learned, some people will not fit the stereotypes that we attribute to them. Many racial and gender issues get us in trouble. Stereotypes often approach the extreme. The stereotyped characteristics are seen as too common within the group and too rare outside the group. For example, “All Germans are precise and exacting. No non-German is precise and exacting.” “All Swedes are liberal and sexually free. No one other than a Swede is liberal or sexually free.”

More often than not, we try to prove rather than disprove the stereotype. We disregard information indicating moderation or neutrality because this information is more difficult to assimilate. Stereotypes lead people to ignore individual differences. The more information people have about individuals, the less they rely on their social stereotypes in arriving at judgments about those individuals.

Adhering strictly to stereotypes can lead to incorrect peremptory challenges. In developing a juror profile, empirical research assists in determining factors that readily are seen, such as demographics, together with those that are not so readily seen, such as attitudes and past experiences. Trial counsel need to be wary of challenges that pertain to a particular classes, for instance, based on race or gender. A competent jury consultant can guide you through *Batson*.²

JURY RESEARCH

Jury research gives the trial team an advantage in developing case strategy, jury selection and settlement decision making. One goal for jury research might be to test different case strategies, another to test which jurors to strike, and another to evaluate potential awards and damages. Some trial counsel simply want practice trying the case in front of a mock panel. Occasionally, in-house lawyers may want to evaluate who should try their company’s case.

A. Methods and Limitations

Jury consultants identify the trial team’s needs, determine what is feasible, and match methods to the client’s time and resources, together with the risks involved. For example, lawyers who want help in jury selection the night before trial obviously will not secure the benefits of testing the case. Jury selection can be done relying solely on the expert’s intuition and knowledge base. Hypothesizing about jury profiles without empirically testing the case is less costly. In less complex cases, a few hours of case strategy consultation may suffice. Using empirical techniques to test hypotheses or hunches is costlier, but it may save the defense millions of dollars in preventing runaway juries from awarding damages.

Matching the research design (*e.g.*, focus groups, mock trials or case scenario research) to research goals is a critical step. The process of developing case strategy has many variables that need to be considered when measuring the issues or comparing trial tactics or strategies. There are many ways of conducting jury research.³ Carefully planning and conducting the research is critical for strategy decisions.

Limitations to scientific jury selection have to do with the number of jurors needed to generalize to the venire. It is easier to test issues and attitudes about the case than to find predictors for jury selection. To test for occupations in order to discover if there are trends in how engineers, teachers or bartenders view the case, the sample size for each of the categories must be increased. To test perceptions of gender differences requires a simple analysis. However, not all women are alike; nor all men, for that matter. To test within gender, a larger sample is needed. This per-

2. *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court held that the equal protection clause of the 14th Amendment governs the exercise of peremptory challenges, which may not be used in a discriminatory way.

3. Cynthia R. Cohen, *Understanding Jury Research*, 3 PRACTICAL LITIGATOR 73-85 (1992).

mits discovery of what characteristics within the female sample or male sample makes some people pro-plaintiff.

Jury research costs time and money. Trial lawyers take valuable time from the litigation battles to brainstorm and discuss case strategy with jury consultants. Trial teams also allow time for the consultants to develop the research and recruit the jurors. Scientific jury selection takes 10 to 30 days from inception or development of the initial study to the report. It can cost from \$10,000 to \$100,000.

The benefits are that jury research saves time by helping clients understand perceptions of the issues earlier and by avoiding costly mistakes at trial. Jury profiles can be used effectively by trial lawyers and jury consultants at trial.

B. Jurors' Perceptions and Obstacles to Overcome

Jurors will view the case based on their experiences. They sometimes add "facts" that do not exist in the case. In the hundreds of cases that we have studied, there are common obstacles. Viewpoints about insurance companies and about punishing corporations vary. Some jurors just do not like insurance companies. Of course, there also are jurors who strive to keep insurance rates down. Other jurors will add dollars to the damages (or award punitive damages), even if the verdict form does not ask for additional compensation or punitive damages.

How can we spot jurors who will retaliate against a defendant or punish a corporation because of an unrelated incident that happened to them? An effective voir dire should uncover personal incidents that affect the jurors' views. Bringing out the incidents in public, however, could be detrimental to the case. Jury questionnaires are effective in not polluting the entire venire when a juror has a negative experience that could affect perceptions of your case.

In tread separation cases, jurors might be sympathetic to quadriplegics injured in automobile accidents. Uncovering their experiences with tires, driving practices and

maintenance routines is useful. While sympathy is a factor, some jurors are set against using sympathy as a means for determining a verdict. In the tire case, during voir dire jurors were talking about retreads they used to buy when they were students just scraping by. Many jurors had tires separate without the event turning critical. Those who successfully dealt with the situation were less inflamed by the fact that the tire separated. They were aware that road conditions and mileage are factors.

When a juror's experience is close to the epicenter of the case, we often see challenges for cause. In a recent case, there was one juror who physically looked like Erin Brokovich and whose family experience was extremely close to the victim's. Her family had a pending lawsuit with claims for millions in a medical malpractice suit. The obstacle in the case was the judge who let the juror speak from the jury box instead of calling her to the sidebar. When the judge asked her if she would like to talk about it privately, the juror said, "No, I can talk about it from here." She was excused for cause. Jurors' perceptions were probably not tainted badly, since she appeared radical and sounded too sensitive to listen to the case at hand.

JURY QUESTIONNAIRES

What if the opposing side has requested the use of a jury questionnaire for jury selection? Should you agree to its use? The key to using jury questionnaires is to be more prepared than your opponent, especially if it is a lengthy questionnaire or there are a large number of jurors responding.

Consideration of the judge's practices is crucial. There is a broad continuum from judges who allow voir dire to continue for days or weeks to judges who will not allow any voir dire by the lawyers. Some judges will use a jury questionnaire to speed up the jury selection process. Some will curtail any voir dire if a questionnaire is used.

A. Developed from Artifacts

It is a mistake to borrow a jury question-

naire from another case without testing it. You might have the questions, but what do the answers mean for your particular case? The other side might test the questions that you have proposed. It is important to use the right instrument for each case. Have you ever used SAT scores to predict which jurors would favor your case? Some attorneys think these scores might work because smarter people might like the defense's positions better than less intelligent people. Some venues might be lucky to get a single college-educated juror; others are flooded with jurors who have doctorates.

B. Jury Research Basis

There are two types of juror questionnaires: (1) research questionnaires used as instruments during the jury research phase, and (2) questionnaires used to gather information about the individual jurors from the venire. These are distinctly different. The jury research questionnaire employs identifiers or predictor questions. The jury questionnaire used in court will have questions agreed on by both parties. It is important to keep the predictor questions embedded in the in-court questionnaire.

Questions in the jury research questionnaire reflect the issues of the case. Predictors may include questions regarding work experience, family and community orientation, and media exposure. Here is a list of predictor questions compiled from real cases. Of course, these questions will not necessarily be predictors for a subsequent or unrelated case.

1. Media Habits

How often do you read a newspaper?

How much television do you watch?

What are your favorite shows?

What have you learned from the media?

How often do you watch TV law shows?

Have you ever watched newsmagazine shows about airbags, antilock brakes, safety belts, rollovers or tires?

Do you read *Consumer Reports*?

2. Family and Community Orientation

How long have you lived in your community?

Do you have children?

What child safety practices are you familiar with?

3. Knowledge Questions

Are you familiar with quality control procedures?

Are you knowledgeable about health and medicine?

Are you knowledgeable about how machines work?

4. Experience Questions

Have you ever worked for a large corporation?

Have you ever filed for unemployment or disability?

What do you look for most when buying a new car?

Do you look for safety features or cost?

What kind of car do you own? Have you ever owned a Japanese car? German car? Italian car?

Do you listen to traffic reports on the car radio?

Have you ever worked on an assembly line?

Do you try to repair machines yourself?

Do you work with mechanical engines?

Do you tinker with machines in your spare time?

Are you technologically oriented?

Do you tune up your car or change the oil yourself?

Do you read operating instructions when using a new machine?

Have you ever kept maintenance records on office equipment?

Do you read warnings on labels?

Do you take vitamin supplements?

Have you ever taken diet pills?

Has anyone in your family ever worked for a hospital?

Have you ever been involved in a lawsuit? Were you being sued or suing someone? Were you satisfied with the outcome?

5. Attitude Questions

Are you satisfied with your current job or occupation?

What are your views about safety consciousness?

Do you think that passengers should wear seatbelts?

Do you think that an automobile manufacturer should be required to build a fail-safe automobile?

Do you think that a car owner is responsible for maintaining a safe car?

When a brake pedal only goes halfway to the floor, do you think that is a signal for a driver to stop?

Are some people careless?

Do you think that there is quackery in the vitamin world?

Do manufacturers adequately label products?

How do you feel about the FDA's practices?

Do you like doctors?

Are you concerned with environmental wastes?

Do you favor regulation of pesticides, herbicides, and other chemicals?

Do you prefer glass bottles to cans?

Do some people misrepresent a pre-existing condition or illness?

Do you believe that wealthy defendants are common targets for lawsuits?

C. Questionnaire Management Systems

When each of 600 prospective jurors answers a 25-page questionnaire, so much information is provided that it is difficult to decipher or organize it, and this can become detrimental during voir dire. The defense team must be able to focus on each individual as that individual comes into the box. Not having a questionnaire management system in place when jurors have filled out a questionnaire is a major impediment to getting a favorable jury. Searching for the information on each ju-

ror at this point is distracting and a waste of the resources.

COURTROOM COMMUNICATION

A. Judge

Jurors look to the judge as the authority and for direction in what they should or should not do. Jurors take notice of the judge's bias. Judges frequently create biases in jurors.⁴

B. Jurors

Some people will lie to get on the jury. Some people readily communicate that they would like to be somewhere else than in the courtroom. Many will claim hardship or a planned vacation. Detecting lying behavior can be difficult if one is not trained to do so.

C. Trial Counsel

Trial counsel have different sets and levels of skills. Sometimes one lawyer is outclassed by the other. Sometimes one just makes simple mistakes in recalling names. To build rapport, it is important to use the jurors' names, remember what they said, self-disclose when appropriate and be respectful to the jurors.

Sometimes the opposing counsel are not aware that they are alienating the jurors when trying too hard to remove a juror for cause. Never make a joke focused on a juror or put a juror on the spot. Even bantering remarks, such as why the juror was late in returning from the lunch break, may put the juror in the spotlight. The juror may be very private or shy and resent being the center of attention or an occasion for laughter.

D. Batson Challenges

In *J.E.B. v. Alabama ex rel. T.B.*,⁵ the U.S. Supreme Court extended the 1986 Batson rule, which barred race-based peremptory challenges of potential jurors, to apply to gender-based peremptory challenges as well. Justice Blackmun's majority opinion stated that selection by sex was

4. See D. Goleman, *Studies Point to Power of Nonverbal Signals*, N.Y. TIMES, April 8, at 17, 20.

5. 511 U.S. 127 (1994).

an “overbroad stereotype” about gender. Justice O’Connor in a concurring opinion made clear that she did not share the majority’s view that all sex distinctions should be banned. She wrote, “We know that like race, gender matters. In rape cases for example, female jurors are somewhat more likely to vote to convict, than male jurors.” Justice Scalia’s dissent stated that the ruling undermines the concept of peremptory challenges.

What should the defense do if a plaintiff makes a Batson challenge? Justice Blackmun says that if counsel can supply a non-discriminatory reason for exercising the peremptory challenge, the juror can be excluded. To be effective on the challenge, counsel must be ready to supply an answer based on the juror’s attitudes or experiences. Being forced to focus on the juror’s attitudes or experiences is advantageous because gross errors can be made in voir dire if narrowly focused on stereotypes.

For trial counsel, the ramifications of the ruling on gender are (1) a greater challenge to remove an unwanted juror from the panel; (2) less versatility with peremptory strikes by revealing reasons for deselection; (3) a necessary refinement of observational skills during voir dire; (4) an increased need for pretrial jury research to discover predictive attitudes, behaviors and experiences; and (5) a need for better jury questionnaires in court that reveal discriminating factors.

Should the defense take an offensive position and make a Batson challenge? That certainly would force plaintiffs to reveal their hand.

EFFECTIVE VOIR DIRE

A. Know the Audience

During voir dire, the trial team that knows more about the jurors does the best. As well as being quick on your feet, your preparation before coming to the courtroom contributes to successful voir dire. Jury research helps you develop a convincing strategy and target which people you want on the jury.

B. Focus on Developing Credibility

The number one goal of trial counsel should be to develop a respectful relationship with the jurors. You can sell your case, but that should not be your primary goal. Trial attorneys who lose sight of jurors as people and try to stuff their case down jurors’ throats will not be respected. When respect is established, lawyers are seen as more genuine. Jurors are more likely to trust them and believe in their case.

C. Attitudes Change, Experience Lasts

Through juror interviews, we find that some jurors’ attitudes do change during the course of the trial. Some jurors like to gather more data than others and do not make up their minds until they hear all the evidence. Some jurors do not make up their minds until they hear others in deliberations. Still others are obstinate and like being resistant. They may cling to their early perceptions, no matter what the evidence is. Attitudes shift, but experience lasts forever.