

Maximizing Voir Dire and Jury Persuasion

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The relative effects of psychological and emotional factors in any particular jury trial are unknown. Few, however, would totally discount these factors. To do so would assume an unrealistic view of human beings as mechanical, computer-like thinkers, able to process and evaluate evidence with mathematical precision. As an example, it has been noted that the judge's instruction to "strike the previous statement" or "disregard counsel's remarks" often serves to reinforce the importance of the message, exactly the opposite of the intended effect. Jurors are routinely instructed to reserve judgment until "all facts are presented"; however, these instructions run counter to basic human nature and typical decision-making processes.

Due to the effects of psychological and other non-evidential factors which affect jury verdicts, litigators must capitalize on techniques to obtain a more favorable jury panel. Once the jury is seated, litigators can improve success by utilizing research-validated psychological techniques designed to enhance interpersonal communication and persuasiveness. This article provides methods to accomplish these goals.

VOIR DIRE

In the book entitled *Psychology of the Courtroom 1* (1982), Kaplan states, "Unless jurors have been raised in a barrel they have some general conception regarding the likelihood of guilt of any accused, or responsibility of plaintiff and defendant in civil proceedings. In other words, the juror brings to the trial a presumption of guilt or innocence, or of responsibility."

It is well accepted that jurors are unable to put aside pre-existing bias when evaluating a case. Their beliefs, attitudes and morals are well entrenched and everything that transpires during trial will be filtered, perceived, and colored by those attitudes. While many of these attitudes are case specific, researchers have identified several general attitudes that correlate strongly with verdict preference. Consequently, a careful evaluation of these factors will improve success in gaining a favorable jury panel.

Authoritarianism: The most thoroughly researched and consistent finding in juror attitudinal studies is that authoritarians are more punitive, conviction prone, and willing to impose harsh penalties. These types are usually dogmatic, moralistic, prone towards prejudice and racism, and will favor the death penalty.

Voir dire questions designed to identify authoritarians should focus on a juror's feelings towards state and government institutions, law and order, and so on. Ask prospective jurors their feelings toward crime and punishment; for example, "Do you feel the court

system or sentencing is too lenient on those convicted of crimes?" or "How do you feel the courts should deal with someone convicted of murder?"

Just World: An attitudinal predisposition to see life as fair, and that justice always prevails. Consequently, bad things only happen to bad people and they must have done something to deserve their fate. Jurors espousing a just world view interpret events to show that the victim deserves what happened. Examples of questions to determine this attitude include:

"Do you feel people usually get what they deserve out of life?"

"Some people feel 'what goes around comes around.' What do you think?"

Locus of Control: The extent to which a person views life as controlled by fate, luck (external locus) vs. personal control (internal locus) influences judgments regarding blame. For example: He committed rape because he is a bad person (internal) vs. he is the product of an uncaring family and poor upbringing (external). Evaluate how this attitudinal set coincides with your case theory. For example, jurors with an external locus are more likely to accept the idea that accidents happen, nobody is to blame.

Questions designed to elicit prospective jurors' thoughts on why the incident in question occurred may uncover internal vs. external locus. For example, "Do you feel my client may have been in the wrong place at the wrong time and was just plain unlucky?" Followers of astrology and mysticism have a stronger tendency to see life as controlled by fate and forces outside of the individual. They will say, "These things were meant to be."

Cognitive vs. Affective Thinkers: In the old *Star Trek* shows, Mr. Spock's decisions were always derived from inductive reasoning. There will be prospective jurors who are able to use this type of cognitive/analytical processing, whereby the pieces of evidence are calculated and weighed resulting in a logical decision. However, most jurors will be more like Scotty. They quickly form a general conclusion, then fit subsequent pieces of evidence to collaborate it — deductive reasoning. For these types, reserving judgments until "all the facts are presented" is nearly impossible. A careful evaluation of your case will determine whether emotional/affective thinkers are preferred over more rational, logical thinkers. Since it would be inappropriate to ask potential jurors to perform specific problem-solving tasks, watch carefully how they respond to questions during voir dire while utilizing subtle probing to evaluate their rationale. Look for responses based on feelings versus more substantive logic.



Occupational correlates for cognitive thinkers include accountants, bankers, and scientists, versus artists, musicians, and starship engineers.

Intelligence: Community surveys conducted for the purposes of "scientific" juror profiling sometimes reveal juror intelligence to be a significant predictor of verdict. This is found to be highly case specific, however, and you may or may not want intelligent jurors depending on your case (especially if you have a weak one).

The easiest way to assess intellectual level is to review prospective jurors' educational and occupational background. Additionally, subjective evaluations can be made by assessing reasoning used in response to questions, vocabulary, interests, types of literature commonly read, and so on.

Economic Conservatism: This attitudinal type has a positive image of, and confidence in, large corporations and traditional capitalistic values and ideals. They make excellent civil defense jurors. Such persons will favor reduced government spending, particularly on welfare programs. Demographic correlates include higher income, Republicans, and business owners. During voir dire, ask "How much confidence do you have in big business and corporate America?" or "Do you have any specific feelings regarding large corporations?"

Demographics: The complex interaction of juror age, sex, race, socioeconomic status, place of residence, and other biographical data obviously relate to beliefs and attitudes.

Unfortunately, predicting favorable vs. unfavorable jurors based solely on demographics is marginally effective at best. Some experi-

enced litigators have developed stereotypes of particularly dangerous jurors, usually based on generalizations from adverse experiences.

A consistent finding among jury researchers and experience with "scientific jury selection" reveals conclusive findings: potential juror *attitudes* are more predictive than demographics. In other words, there is likely no guarantee that, for example, females are more favorable in a given case; however, a prospective female juror who holds strong anti-corporation attitudes and biases would likely be favorable to the plaintiff in a product liability case involving a large corporation.

Unfortunately, it is not always easy to identify attitudinal biases, particularly under restricted voir dire conditions. Consequently, the next best alternative is to utilize demographics to predict attitudes. Instinctively, this is what experienced litigators do all the time. A recently divorced mother of three on welfare may be seen as undesirable to corporate defense, not because of these demographics, but because of presumed attitudes: depressed, sympathetic to the underprivileged, angry at "the system" and so on. Wisely, trial attorneys typically focus heavily on a prospective juror's occupation. Rarely does a person remain in a career that conflicts with personal attitudinal beliefs and biases. For example, an insurance executive will likely lean towards tort reform.

A recommended procedure for litigators is to utilize a system for recording and tracking voir dire responses based on the theory of the case. This may reduce your reliance on hunches and gut reactions, which may sometimes prove fatal.

A recommended procedure utilizes the following steps:

1. Identify the extent of voir dire questioning you are likely to be allowed. Arriving to court unprepared and finding the opportunity for virtually unlimited voir dire questioning wastes a golden opportunity.

2. Based on a thorough evaluation of the issues, parties and strategy you will invoke, determine what are likely to be the most favorable and unfavorable *attitudinal* types. If the resources are available and the case

warrants the expense, consider a community survey for this step.

3. Determine the questions you will utilize to elicit responses enabling you to identify the strength and direction of the prospective jurors' attitudes. Avoid repeatedly asking questions that begin with "Do you think you can be fair...keep an open mind...reserve judgment...?" These types of questions provide less honest and useful information, as we all like to perceive ourselves as fair and open-minded.

The most informative and predictive questions are open ended and case specific, e.g., "Why do you think work accidents typically occur? Tell me your feelings about safety standards used by corporations." The second most predictive questions are those used to identify the "general" attitudinal types outlined earlier. For example, "When work injuries occur, do you feel they usually could have been prevented, or can accidents just happen?" (locus of control question).

4. Determine what demographic data will likely correlate with the favorable vs. unfavorable attitudinal types, e.g. higher occupational status generally points towards greater economic conservatism, and a housewife may be particularly sympathetic to an injured child.

5. Keep a recording system for use during voir dire. It is highly advisable to have a second party recording responses or scoring jurors while you conduct questioning. The scoring system should produce a sum numerical value that you can utilize to compare with your overall feeling and impression of the prospective juror.

To apply this to an actual case, Litigation Research Technologies was retained to assist in the jury selection in a civil case in which the plaintiff claimed he was permanently injured when a business owner's outdoor awning blew over on him. Pretrial surrogate jury simulations revealed that several key juror attitudes and predispositions, both global and case specific, correlated highly with verdict. Specifically, it was discovered that the majority of jurors had a pre-existing attitudinal set to view an owner as responsible for accidents that occur on his premises or with his equipment. Consequently, defense themes implicating co-defendants (distributor/manufacture), and the owner's lack of knowledge regarding the hazard were dismissed.

An unexpected finding, however, was that a subset of the sample were willing to accept that this incident, resulting from an unusual updraft or "dust-devil", was an unfortunate "Act of God" that could not have been prevented. In fact, of five pretrial surrogate jury's that deliberated on the case, only one found for the defense, citing the "Act of God" as the rationale for his verdict.

Some of the case-specific questions developed to identify jurors more likely to accept the "Act of God" rationale were as follows:

"Do you think victims of floods, earthquakes, and other natural disasters deserve to be reimbursed for their losses?"

"The law recognizes that some accidents are considered to be an 'Act of God', and no one is to blame. What are your thoughts about this?"

"How many of you feel that business owners sacrifice safety for the sake of profit?"

"If the owner of a piece of defective equipment injures someone, but the owner did not know it was defective, how many of you feel the owner is still responsible? Why?"

Questions such as these were augmented by those designed to assess global attitudes noted earlier. Jurors with external-locus-of-control and just-world views were more willing to accept the defense theme. Occupationally dissatisfied and depressed jurors were found to be the least favorable to the defense.

Nearly every case will have key psychological themes that must match with the perceptions and attitudes of jurors. Consequently, it is not always a matter of obtaining a "favorable" jury panel, but, more specifically, obtaining the "right" jurors for the particular strategy of the case. Certain jurors will buy one theme but not another. For example: In a well-known Arizona case, two teenage girls brought suit against the state after they had become snowbound on a state highway that was subsequently closed without being checked. The girls suffered frost-bite injuries, leading to amputation and psychological trauma.

A community attitude survey found one key predisposition distinguished between jurors willing to award millions versus nothing to the plaintiff: Personal responsibility. Even more important than the much-publicized issue of the girls' marijuana use was the extent to which individuals feel "the state is responsible for its citizens" ("That's what we pay taxes for") versus "individuals are responsible for their own actions" (Personal freedom).

Obviously, this case belief structure has ramifications for many types of cases — for example, dramshop lawsuits, deaths occurring as the result of drunk driving, and so on. It has been said that a case is won or lost at voir dire, and, in lawsuits such as these, it may very well be true.

MAXIMIZING PERSUASIVENESS

During the trial, you should seek to maximize all possible psychological techniques of persuasion. Do not count on the facts to "speak for themselves."

Primacy and Recency: What is heard first and last has the greatest impact and is retained longer. It has been suggested that up to 65-70 percent of jurors have formulated tentative verdicts about the case following

voir dire, and 80 percent following opening statements.

In structuring your case, present your most key arguments and witnesses first. Prepare and practice your opening and closing carefully. An inordinate degree of persuasive power exists during these two periods of the trial.

Perceptual Processes: Jurors will evaluate the players in the courtroom drama based on appearance, competence, trustworthiness, expertise, and credibility.

Many of these judgments will be based on factors other than evidence or testimony. For example, when the defendant does not testify in a case, it is often perceived by jurors as an admission of guilt. In other cases, a smile or inadvertent laughter from a presumably traumatized plaintiff, or an amputee plaintiff able to stroll effortlessly out of court on an artificial limb, may effect the jury's award.

Consistently, litigators who utilize pretrial "mock" simulations, or who interview jurors after a trial, find that key decisions and judgments were based on idiosyncratic perceptual factors. It is perhaps for this reason that mock trials are becoming an integral part of pretrial preparation in major litigation.

There are so many factors that affect juror evaluations that it is impossible for a trial attorney to control them all. The task can be simplified by taking command and enhancing two key areas: similarity and likability. Clearly, jurors are more easily influenced by people they like.

Since likability is enhanced by similarity, a primary goal is to enhance the perception of similarity. As an attorney, you may first be perceived as a slick huckster, but as a juror learns that you and your client have similar backgrounds, experiences, problems, and frustrations, he will see you as someone who thinks and acts as they do. The door to receptivity is now open. Communication specialists advocate taking this a step further by seeking to subtly mirror the same types of words, phrases, and mannerisms picked up from jurors.

Emotional Appeals: It is well accepted that the most persuasive and memorable messages produce some type of emotion; pity, rage, fear, joy, guilt, and so on. If a movie does not induce feelings of love or sorrow (drama), joy (comedy) or fear (horror), what type of movie is it? Boring. Advertisers obviously seek to capitalize on the emotional decision-making of consumers.

Most jurors are affective or emotional decision makers. Their personal verdict will be based on what "feels" like the right decision—sometimes whether the evidence supports it or not. This often happens because jurors selectively key in on evidence and statements that fit with their feelings and beliefs about the case based on predispositions and early decisions regarding the case. Evidence contradictory to their beliefs is mentally rebutted, ignored, or altered to fit the current belief structure.

Consequently, in the same case, jurors may be angry and punitive towards the corporation for negligence, or equally incensed by what they perceive as a malingering plaintiff attempting to gouge the system. In either event, one litigator is going to benefit from these strong emotions.

Simplify the Message

The typical juror has far less education, intellectual prowess, and knowledge of the case than the attorney. Presenting evidence and arguments that are confusing for jurors is devastating to your case in two ways — first, the importance of the information is lost due to lack of comprehension; and secondly,

being confused or feeling intellectually inferior may result in antagonism, resentment and dislike for the attorney.

One technique for assessing the comprehensibility of issues and evidence is a pretrial jury simulation. The issues which confuse surrogate jurors are likely to be the same as those that will present a problem in court. Another method sometimes utilized in high-stake cases is the shadow or mirror jury, in which demographically matched surrogate jurors watch the trial as it proceeds. Nightly reports to council via researcher point out areas of confusion.

Visual vs. Verbal: The use of demonstrative evidence is increasing dramatically — we have certainly become a media-oriented society and research indicates we learn faster and retain more of what is presented visually. Additionally, visuals are often more effective than words for inducing emotions. In many cases, a picture is "worth a thousand words." Litigators are wise to capitalize on the use of visuals. Recent technological advances that include computer graphics and animations are particularly effective in complex cases. In lengthy cases, some litigators now use a system that can retrieve videotape deposition segments or testimony to instantly

Communication Style: Attorneys often assume that superb litigators have a certain special personality, charisma or flair. That you are either born with it, or you are not. While there is no disputing that there are seemingly "natural-born" talents that make selling, public speaking and even litigating easy for some, it is a mistake to assume that your presentational style and presence cannot be improved.

The various techniques to improve interpersonal communication and persuasiveness are beyond the scope of this article. However, a willingness to examine your presentational style involves opening up to the sometimes painful scrutiny of your audience's eye. Videotape yourself, utilize mock trials, invite criticism or utilize a speech coach. Know what it is like to see yourself through the jury's eyes.

One of the newer techniques advocated by communication specialists is to present information designed to appeal to the three sensory channels: auditory, visual and kinesthetic. Rapport and persuasiveness can be increased by encouraging jurors to get "a crystal-clear picture" of the case and a "firm grasp" of the facts at hand. Appeal to the sight, sound, and feel of the story.

Conclusion

Many cases that go before juries do so

because the facts and evidence are rather evenly matched. Consequently, the effects of non-legal factors such as sympathy, pre-existing juror attitudes, persuasiveness of counsel and other psychological factors can mean the difference between winning and losing. Time spent evaluating your case for psychological factors, conducting strategic voir dire, and maximizing the persuasiveness of your presentation will improve the odds for success at trial.

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Endnote

1. Kaplan, "Cognitive Processes in the Individual Juror." Chapter in *The Psychology of the Courtroom*, Edited by Norbert Kerr and Robert Bray, The Academic Press, Inc., pg. 201 (1982).