Committee News

TORT AND INSURANCE PRACTICE

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Trial Techniques Committee

YOU CAN DO YOUR OWN FOCUS GROUPS

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This article is excerpted and adapted from *How To Do Your Own Focus Groups: A Guide for Trial Attorneys* by David Ball (National Institute for Trial Advocacy, 2000).

WHEN TO DO YOUR OWN

When the budget for a case does not allow you to use a trial consultant, you can conduct your own focus group for under a thousand dollars. It's always better to hire a trial consultant, but smaller cases don't always allow that. If you do your own focus groups for smaller cases, you are more likely to find yourself eventually working on larger cases -- for which the cost of a trial consultant will be available and justifiable.

WARNING LABEL

Before entertaining the idea of doing your own focus groups, decide whether you are willing *and able* to meet the first requirement: that of presenting the opposition case in its strongest possible light.

You have to give the opposition case equal time.

Equal weight.

Equal persuasive power.

You must present the most effective opposition arguments you can think of, including those you fear most.

Some attorneys cannot do this.

If you cannot, the only other way to do your own focus groups is to enlist another attorney (preferably one who normally works the other side of the aisle) to both prepare and present the opposition side. This enlisted attorney must be willing to put in the substantial amount of time needed for careful preparation of the opposition case. You have to help, because you know the case well. And he or she must be no less skilled and persuasive than you.

If you or an enlistee can present the opposition case in its best, weightiest, and most persuasive light, then you can do your own focus groups. Otherwise, do not try. You will dangerously mislead yourself and your client when it comes to preparing your case for trial.

Now that you've read the warning label, it is safe to proceed.

WHAT ARE FOCUS GROUPS?

A focus group is pre-trial research in which information about a case is given to a group of laypeople selected to represent the jury-eligible population

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THE REAL PURPOSE OF VOIR DIRE

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The psychological underpinnings of voir dire are not consistent with the legal limitations and customary practices for questioning of jurors. There is conflict between the inherent purpose of voir dire, which is to find impartial jurors from a pool representative of the community, and the true yet unstated purpose of every attorney, which is to find jurors predisposed to their position. Towards those ends, the court allows attorneys to question jurors. Lawyers want the greatest possible latitude to delve into juror proclivities and psychological indicators of bias. The court, on the other hand, restricted by the notion that the object is impartiality and justice, limits the questioning within parameters established by case law and predicated, at least in theory, on notions of fairness.

This paper will examine, first, the history and judicial parameters for voir dire. Then, using case study, I will compare the practical objectives and methodology of a trial team, including attorneys and jury consultants. It will include interviews with trial judges,

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... bringing together plaintiffs' attorneys, defense attorneys and insurance and corporate counsel for the exchange of information and ideas.

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Message From The Chair

Our lives were changed forever by the terrorist attacks on September 11. Every day seems to bring some new awareness of a changed world.

The legal landscape has also been altered.

One major impact is a landmark piece of legislation: the September 11 Victim Compensation Fund of 2001. This Act may lead to fundamental changes in our civil justice system by establishing a guaranteed non-jury government sponsored remedy in lieu of litigation.

Under the Act, the government will provide a no-fault damage recovery for wrongful death or personal injury caused by the September 11 attacks. The victim who accepts the fund remedy forfeits the right to proceed with civil litigation. The recovery includes economic damages under state law and a broad range of non-economic damages. The awards will be determined by a Special Master appointed by Attorney General Ashcroft. The Special Master's damage awards will be final and not subject to appeal.

It is expected that most of the September 11 victims will choose the Fund recovery because of the difficulties of proving a case and the uncertain prospect of a full recovery, given the limited available insurance coverage (the Act also limits the liability of the airlines to their coverage).

There are many unresolved questions regarding how the Fund will operate in practice. Most important, it is not known whether the Special Master's awards will approximate the range of verdict and settlements reached in personal injury and death cases. Also, will the Special Master establish a schedule of damages to ensure that victims receive similar levels of compensation?

If the claims resulting from the September 11 attacks can be successfully handled by the Fund, it may serve as the basis for legislation to provide an even broader group of claimants with a choice to opt out of traditional litigation.

Our Committee is planning a program for next year's Annual Meeting in Washington, D.C., in August. We will be joining forces with the ADR Committee and the Aviation and Space Law Committee to address how to use trial techniques in arbitration and mediation. We had planned to use examples from recent aviation disaster cases, and I expect that the program will be broadened to address the September 11 tragedies and the new Fund legislation.

Kind regards, Steven Pounian, Chair, Trial Techniques Committee

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of the trial venue. Discussions, written questionnaires, mock deliberations, or some combination of all three are used to gather the opinions of the laypeople about the case.

WHO SHOULD CONDUCT FOCUS GROUPS?

You can -- and should -- use experts to do focus groups for you. However, when a case is too small to justify that expense -- from five thousand to tens of thousands of dollars -- you can do your own focus group for well under a thousand dollars.

But you have to do it right. Doing a focus group wrong is like getting a serious misdiagnosis from a doctor. You confidently believe it -- and it kills you.

WHEN SHOULD YOU USE A CONSULTANT?

You can learn a lot from focus groups by doing your own. But the experience and training of trial consultants enable them to help you learn far more about your case than you can on your own.

But if using a trial consultant to conduct your focus group is beyond your budget, do your own.

The first personal computers were primitive by today's standards, yet light-years ahead of typewriters. Those first computers radically transformed the way we process information. My old KayPro II wasn't much compared to my newest Compaq, but it was a miraculous improvement over the typewriter. Think of focus groups in the same way: doing your own is like using the old KayPro II: not the best possible, but still an astounding improvement that, once tried, can never again be done without.

When you do your own, be sure to do it right. Decades of research and experience by a wide variety of specialists have provided guidelines.

NOMENCLATURE:

You may have heard such terms as "focus groups," "mock trials," "surrogate juries," "concept focus groups," and others. Strictly speaking, "focus group" denotes a discussion-based or debriefing session (you question the focus jurors), and "mock trial" denotes a deliberations-based session (you watch the focus jurors deliberate). But among many people, the generic term for every variety has now defaulted to "focus groups," meaning any session in which the case, parts of the case, or concepts related to the case are presented to a group of laypeople for their responses in discussion, written, or deliberative form.

WHY DO FOCUS GROUPS?

There are several broad reasons for doing litigation focus groups.

First, focus groups show how different kinds of jurors are likely to react to and interact with the issues, arguments, evidence, exhibits, and personalities of a particular case. In this sense, focus groups provide a reality check: are jurors going to be on your wavelength? Exactly how or how not? And what can you do about it?

Second, focus groups show you in advance of trial what you need to present in trial.

Third, the process of putting on a focus group forces you to organize your case.

And fourth, when you run focus groups for every case, you learn more and more about how jurors perceive what they see and hear in court, and how they arrive at decisions individually and then as a group. You'll learn more about these things with every focus group you do. In this way, focus groups provide a reality check: are your general instincts about jurors at odds with what jurors actually think and do?

HOW DO FOCUS GROUPS HELP?

Properly conducted focus groups, including those you do on your own, will:

--identify the important issues (which are often not those you thought) and the probable range of juror reaction to them.

--show you the reasons jurors are likely to lean either way on each issue and on the case as a whole.

--show you which of each side's strategies and approaches are likely to work and which are likely to misfire or backfire.

--give you new ideas for how to present the case.

--show you that some ideas you had are weak or harmful.

--show you the kinds of questions jurors have about the case.

--show you what else jurors want to know.

--provide you with themes, arguments, and analogies.

--show you how jurors are likely to talk about the issues of the case, so that in trial you'll know how to talk in ways that will resonate with jurors and in ways that your favorable jurors are likely to use on your behalf in deliberations.

--show you which beliefs, attitudes, life experiences, and backgrounds jurors are likely to bring into play when listening to the case, when making decisions, and when deliberating.

--show you how jurors are likely to react to some of the personalities in the case (if you present witnesses to the focus jurors).

--tell you how well your exhibits work and how to improve them.

--tell you what is clear and what is unclear. You get so close to a case after months and years of working on it that you may not realize

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when something will be unclear to jurors hearing the case for the first time.

--help you conduct negotiations by showing you how laypeople see the case.

--help guide discovery by showing you what jurors want to know and what things might be persuasive.

Some attorneys even do focus groups to help them decide whether to take the case.

In brief: properly conducted focus groups are the differential diagnoses of trial practice, because they structure and guide your planning and decision-making, and alert you to the critical considerations.

PREDICTION?

Focus groups are not intended to predict who'll win or for how much. Instead, they show you how to negotiate, conduct discovery, and better present the case in trial. They are a preparation guidance tool, not an outcome predictor.

Use careful judgment in deciding whether to tell your client the results of your focus groups. If the focus jurors respond well to the case, your client may blame you if the same thing does not happen in trial. Some clients will respond this way even if you explain that focus groups do not reliably show who will win or for how much.

DO FOCUS GROUPS WORK?

I have conducted hundreds of focus groups for attorneys who are at all levels of skill, experience, and success -- beginners at the bar through some of the most successful attorneys in America. Every single focus group altered the attorney's view of some number of important issues and had meaningful impact on how the attorney pursued the case.

Some attorneys still believe they don't need focus groups. These attorneys are dangerously and mistakenly reliant on their ability to project themselves into the minds of various kinds of laypeople.

When you're as close to a project as you are to your own case, and when you have spent years in law school and in practice, you no longer think about a case the way a layperson does. Even if you could, you could not project yourself into the multiple minds of a jury or the dynamics of its deliberations.

In fact, the longer most attorneys practice, the less they tend to see things the way jurors do. Focus groups help you offset this problem as your career progresses.

CAN YOU REALLY DO YOUR OWN?

Some trial consultants warn against doing your own focus groups. This is because attorneys can mislead themselves by doing focus groups improperly. But attorneys can learn to do them well enough to avoid being misled.

THE PRIMARY REQUIREMENT: As the warning label says, you must be able to see and present the case in a balanced way for both sides. You must give the other side its due. Not everyone can do this. If you are one who cannot, do not do your own focus groups.

In that circumstance, if the case is too small to use a trial consultant, trade favors: get another attorney to put together the case presentations and conduct the focus group for you. (In return, do the same for that attorney some other time.) An attorney unconnected with the case is more likely to see the strengths of both sides.

A LITTLE HELP

Some attorneys start by hiring trial consultants to do focus groups -- and then watch them carefully. By watching trial consultants do focus groups, and by combining that observation with the guidelines in *How To Do Your Own Focus Groups*, the book from which this article is adapted, or its companion video *Do Your Own Focus Groups*, you will learn how to do focus groups very well. One Raleigh attorney (E.D. Gaskins, Jr.) who learned by watching me and other trial consultants now does them well enough to offer them to other attorneys.

While you're watching a consultant, feel free to ask questions: ask why he or she is doing what he or she is doing the way he or she is doing it. Most will answer your questions because they know that not all your cases can support the use of a consultant, so you need to learn.

WHAT KIND OF FOCUS GROUP SHOULD YOU DO?

There are many kinds of focus groups. You should start by doing those that culminate in deliberations.

In a deliberation focus group, you:

1. summarize each side's case for laypeople,
2. elicit written responses as you go,
3. watch deliberations, and
4. (optional) debrief the laypeople.

There are several reasons you should start with deliberation groups:

A. REPLICATION OF CONDITIONS

Among the various kinds of focus groups, deliberation groups differ the least from the ways real jurors receive and respond to information in trial, and from the processes by which real jurors make decisions.

B. ATTORNEY PARTISANSHIP

When conducting a focus group, you must conceal your partisanship. This is more easily done in deliberation groups. Non-deliberation focus groups involve interactive discussions, during which focus jurors closely observe and interpret your facial expressions, body language, and tones of voice. These clues reveal, or at least raise suspicions of, your partisanship. This is less likely to happen in a deliberation focus group than other kinds.

C. FACILITATOR SKILLS

Deliberation focus groups do not require the level of facilitator skills required by other kinds of focus groups.

D. AGREED-UPON EFFECTIVENESS

Among experts, there is knowledgeable disagreement about the effectiveness of some kinds of non-deliberation focus groups, even when conducted by a jury consultant. But almost all experts agree that deliberation groups provide useful information.

Deliberation groups teach you a lot about the case as well as about jurors in general, so you will probably continue to use them even when you acquire the skills to do other kinds. Many of America's best attorneys and trial consultants rely mainly and often exclusively upon deliberation groups.

WHO SHOULD PRESENT THE CASE?

To present the case to the focus jurors, the moderator reads a neutral overview of the facts and laws of the case. Then one attorney can read one side and a colleague can read the other side.

If you or a paralegal or colleague can present both sides with equal potency and without allowing partisanship to be even slightly visible, then that person can act as moderator and read both sides as well. But do not make that decision lightly. If focus jurors feel that the reader is leaning even slightly towards one of the sides, the usefulness of the focus group can be undermined.

So if you have any doubts, choose the safe route of enlisting different readers for each side of the case. That way each reader can be partisan.

Either way, the moderator must be seen as neutral. Thus, if you have different readers for each side of the case, the moderator cannot be one of them.

HOW IS THE CASE PRESENTED?

The case will be presented via three (sometimes four) carefully prepared scripts. Do not speak extemporaneously or from notes. Read from scripts written out in full. This is research, and research requires a high level of control that you are likely to best achieve by reading from scripts.

In court, reading an opening or closing to the jury is an amateurish blunder. (Preparing by writing them out in full is useful, but you must then reduce them to notes.) But reading the case to focus jurors is advisable. It allows you to be sure you have included every important point for both sides, and to be certain in advance that the opposition case is fully and forcefully presented -- which can be hard to do when working extemporaneously or from notes. It also lets you be sure that each issue raised by one side is rejoined by the other side (unless one side's strategy is to say nothing about a particular issue).

A written script is assurance that everything you want said for each side actually gets said.

Read the case presentations live. Don't use video. Focus jurors do not listen well to talking-head videos. (Neither do real jurors in court.) The few talking heads on TV who can hold attention without wearing funny hats or standing on their talking heads are so rare that they are highly paid. Everyone else is boring -- especially to jurors brought up watching a lot of TV, because they're used to professionals, not you. That's why videos in focus groups (and in court) impair juror attention.

NEUTRAL STATEMENT: The first script you read to jurors is a neutral statement of the case and a description of the applicable laws.

PLAINTIFF OR PROSECUTION STATEMENT: This script is an opening-with-argument (some call it a "clopening," meaning closing/opening) that lays out the plaintiff's or prosecution's case. It tells the plaintiff's or prosecution's version of the facts, cites witnesses, makes arguments, and shows why the plaintiff or prosecution should win.

In the prosecution or plaintiff statement and in the defense statement, you should include arguments as well as facts.

DEFENSE STATEMENT: This script, also a "clopening" – an opening-with-argument -- lays out the defense version of the facts, cites witnesses, makes the defense arguments, and tells the focus jurors why the defense should win.

PLAINTIFF REBUTTAL STATEMENT: This response to the defense is used *only when your client is the defendant* and only when the plaintiff or prosecution cannot clearly make every necessary point in its initial presentation. This happens when certain plaintiff or prosecution points do not make sense until after focus jurors understand the corresponding defense points, or when explaining a particular prosecution or plaintiff response would be unwieldy before the defense point is made.

HOW MANY FOCUS-JURORS PER DELIBERATION PANEL?

You can have as many as 12 focus jurors in a deliberating panel regardless of jury size in your venue. But the optimum number for discussion is 6 or 7, because many people are more forthcoming in smaller groups. You'll get more different sets of opinions with more people. But with fewer people you'll learn more about each opinion.

HOW MANY DELIBERATION PANELS?

A single deliberation panel is never enough, because any one panel can react peculiarly. You want at least two deliberating panels, preferably more. If panels respond similarly, they validate each other. If their responses are different, you can often see why by comparing the composition of each panel.

It's most efficient to have two or three panels deliberate at the same time in separate rooms. You'll start by presenting the case to between 20 and 24 focus jurors, and then dividing them into three deliberating panels.

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The logistics of running two or three deliberating panels at the same time are more complex than just one. You need a second (or third) deliberation room and monitoring system. Lacking that equipment or room, you can run two or three consecutive focus groups with just one deliberating panel each.

Just one two-panel focus group will tell you a lot about your case. But you're better off doing more, such as two, three, or four two-panel or three-panel focus groups at intervals of several weeks. This gives you time to use what you learn in one to refine and reposition your case for the next one, thus testing your improvements. (If you do this, refine and reposition *both* sides' presentations, not just yours.)

If you do, say, five three-panel sessions, you will have tested your case in front of at least 100 people. This will not only help you refine and re-refine your case, but also provide enough individual jurors' responses to show you how different kinds of people will react to the issues in the case. This is useful in jury selection. Ten or 20 focus jurors are too few on which to base any such generalizations.

Many attorneys -- including the most successful one I know -- regularly "lose" their first two, three, or four focus groups. But based on what they learn each time, they continue refining and repositioning, incrementally improving until focus jurors begin siding with them. Then and only then do they feel ready to venture to court.

Conduct enough focus groups until most of your focus jurors consistently respond optimally to every case issue.

In very small cases you may not be able to do more than one two-panel focus group. But that is the minimum. The responses of a single panel are never enough because they can mislead.

WHAT'S WRONG WITH WINNING?

You don't test a car's crashworthiness by hitting it with pillows. You slam it into a steel wall so you can learn to reinforce its weaknesses. A focus group is a crash test. Thus, without weakening your own case, do your best to lose the focus group. The opposition case should be stronger than what your opposition will present in court.

The most serious error that focus group do-it-yourselfers make is to set things up to win. Remember that the goal is to test the case in an adversarial, not friendly, context.

Setting yourself up for a win gives you a false win. You learn nothing reliable about your case strengths and you don't learn your weaknesses.

Forcing yourself to prepare and present a powerful opposition case also helps you prepare for trial. You see the case from the other side and gain a better feel for the other side's strengths.

To strengthen themselves in practice, athletes build higher obstacles against success than the obstacles they'll encounter in their real games. Batters swing several bats to warm up, boxers spar in heavier gloves, hurdle runners train by jumping higher hurdles, and long-distance runners train by running farther than the actual course. This overloading makes athletes more likely to do well in the real event. It will do the same for you.

Once you have written the opposition presentation, ask yourself, "Is it truly the best that the opposition can do in court?" Even if your opponents are not very good, the answer is almost always, "No, they'll do more and better." Then incorporate the rest into the presentation.

If you cannot write an opposition presentation at least as strong as you'll encounter in court, it's dangerous to do a focus group without a trial consultant. You will only mislead yourself and your client.

HOW LONG BEFORE TRIAL?

Some plaintiffs' attorneys conduct a focus group early enough to help them decide whether to accept the case.

Some attorneys do their first focus groups before discovery to help them learn what to seek in discovery, who to depose, and what the jury consequences might be of material the opposition may request.

For trial preparation purposes, do your first focus groups long enough before trial to allow time to reshape your case based on what you learn, and, if possible, to re-present the new approach in more focus groups. Ideally, do a few focus groups at several-week intervals ending five or six weeks before trial.

If you can do only one focus group, do it five or six weeks or more before trial.

Especially because you get so busy, doing focus groups the week or two before trial leaves insufficient time to incorporate all that the focus group shows you. This is especially true when, as often happens, much of what you learn is different from what you expected. Doing a focus group a week or two before trial is better than nothing, but far from ideal.

EVENING OR WEEKEND?

A deliberations focus group requires at least four hours. Thus, you can conduct the session on a Sunday through Thursday evening (6:00 - 10:00 p.m.), Saturday morning (9:00 - 1:00 p.m.), or Saturday or Sunday afternoon (1:00 - 5:00 p.m.).

Any case will profit by a longer session, and some cases require it. For example, some complex medical cases and many intellectual property or business cases need longer, as do cases in which you want to present video or live segments of witness testimony. Six hours or more are often necessary to give you the time to explain the complexities and present exhibits and witnesses.

Sessions longer than four and a half hours must be done on Saturdays (morning through afternoon) or Sundays (afternoon through evening). Longer sessions cannot fit into a weekday evening and should not be done on Monday through Friday during the day, because you cannot get a representative cross-section of the venue during those daytime hours. You'll get mostly the unemployed, the retired, and a few folks who are willing and able to escape their jobs. This unrepresentative assemblage may not give you the same responses as a group that more closely resembles the jury pool.

WHERE TO DO FOCUS GROUPS

Apart from the exceptions below, do your focus group in the trial venue. A juror's place of residence shapes how he or she thinks about many issues, some of which will be important in your case.

While people who live in the same area don't all think alike, many opinions, attitudes, and life experiences are influenced by such locale-dependent factors as the following:

--The daily lives jurors live

--The kinds of lives people around them lead

--The locale's political and social nature and history

--The jurors' attitudes and those of the people around them

--Local news

--Local events and circumstances

--Local reaction to regional, national, and world news

--The way jurors were brought up and the different ways others around them were brought up

--The ways jurors and people whom they know customarily judge and categorize other people

--The factors by which jurors feel themselves categorized and judged by their neighbors and acquaintances

A raft of other factors is also influenced by locale. What they are varies enormously from place to place.

So do not try to gauge the reactions of jurors from one venue by means of focus jurors from different venues, even adjacent counties. When at all possible, do your focus group in your trial's venue so that your focus jurors have as much as possible in common with those who are likely to be the real jurors.

Some commercial providers of focus groups for litigation and marketing maintain elaborate facilities, which they must keep full to pay the monthly overhead. Some of these providers claim they can adequately reproduce the characteristics of any venue right in their own area. They can't. If a focus group facility in Raleigh claims to reproduce in Raleigh the characteristics of Charlotte or Asheville or Tarboro or *even juries from nearby areas*, it is selling false goods. You have to go "on location." Whether you are working on your own or with a trial consultant, doing any kind of focus group out of venue (or outside of a carefully chosen, very similar venue) is just plain bad research.

EXCEPTIONS

Sometimes you are forced to find a substitute locale for the trial venue. For example, if your trial venue is sparsely populated, the odds may be unacceptably high that your focus jurors will know and talk to citizens who may eventually become jurors on the real case, or who personally know the parties, opposing counsel, or key witnesses. Although your focus jurors sign confidentiality forms, people are people, and people talk.

If confidentiality concerns or other factors mean that you cannot conduct the focus group in venue, follow the recommendations below to select a substitute locale.

However, there are sometimes consequential factors in the case that will elicit strong responses solely among jurors who live in the trial venue. This can happen when, say, one of the parties is locally well known. When something like this happens, it is difficult to adequately test even in a very similar locale. Community knowledge of a relevant stretch of a dangerous local highway, or community attitudes about a local hospital or well-known local personage may figure so strongly into juror decision-making that the case cannot be tested by focus groups in substitute locales where the highway or hospital or personage are unknown, or known only from a distance. When such factors force you to keep the focus group in the trial venue, but when there are confidentiality problems caused by, say, a sparsely populated venue or other factors, a brief consultation with an experienced trial consultant can help you find a workable solution.

SELECTING A SUBSTITUTE LOCALE

When you must conduct a focus group out of venue, select the substitute locale carefully. Don't just pick a nearby county. Without careful investigation, you cannot assume that an adjacent or superficially similar locale is appropriate. In my home state of North Carolina, for example, Durham County is adjacent to Orange and Wake Counties. But the three counties are strikingly different, so jurors in each will respond differently from jurors in the others. Thus, a Durham County focus group for an Orange County case will likely mislead. You need a county carefully chosen for its similarity, not its proximity.

Choose a substitute locale that is similar to your trial venue with respect to kinds of people, family patterns, ethnic and religious backgrounds, educational and occupational backgrounds, economics, commerce, rural-urban ratio, population distances from metropolitan centers, community concerns, politics, and other characteristics that could affect juror decision-making in your particular case.

When assembling your group of focus jurors in a substitute locale, use the trial venue's demographics, not those of the substitute venue. If among other factors the jury-eligible

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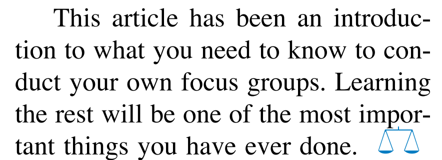
population of the trial venue is 40% married, 25% Hispanic, and 30% college graduates, then 40% of your focus jurors in the substitute locale should be married, 25% should be Hispanic, and 30% should be college graduates. (You can use the demographics of the general population in locales where jurors are drawn from driver's license lists as well as voter registration lists. Where jurors are drawn solely from voter registration lists, your recruiting should be based only on the demographics of registered voters.)

CONCLUSION



This article has been an introduction to what you need to know to conduct your own focus groups. Learning the rest will be one of the most important things you have ever done.

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trial attorneys, and jury consultants who use principles of psychology to assist attorneys in jury selections. I have shadowed a jury consultant and will interpose my experience. The cases I have followed contain a classic examination of prejudice, and the parties believed that the outcome was largely dependent on jury selection.

History of the Jury

The earliest juries of our time were required to have personal knowledge of the case and to base their verdicts solely on that knowledge. Evidence was not relied upon in the determination of guilt until the year 1330 when the jury began to fill the role as the defendant's protector against government persecution.[1] Historically, juries were representative not of the masses but only of elite, white males, who owned property, were educated, and of good character. It was not until hundreds of years later when women and African-Americans were included on juries and the modern "cross section of the community" standard became the norm.[2]

What is Voir Dire?

The literal translation of voir dire is "to see and speak the truth." Technically, voir dire is the preliminary stages of a trial where prospective jurors are examined to determine their suitability to serve as jurors on the particular case. Otherwise known as jury selection. The stated purpose of the procedure is to excuse jurors holding biases that are likely to interfere with their impartiality.[3] Because of the Sixth and Fourteenth Amendments of the U.S. Constitution which provide for a fair and impartial jury, voir dire is important in order to achieve a broad representation of the community. This should include members of the defendant's own persuasion represented on the jury to preserve the appearance of fairness and to function as a hedge to overzealous prosecutors.[4]

While potential juror lists were formerly compiled from voter registrations, most states now supplement the voter lists with drivers' license lists. There are some general disabilities that may disqualify someone for jury service: a male or female under 18 years-old, a non-citizen of the United States, a non-resident of the state of jurisdiction, and those previously convicted of a felony.[5] People of unpredictable character and behavior who may be drug addicts or alcoholics are initially eligible to be questioned during voir dire. The test for determining competency is whether a juror can disregard any prejudice he/she may have and render a verdict solely on the evidence presented and the judge's instructions. There should ideally be no preconceived opinions; thus, a juror should be excused if there is a question[6] of his/her remaining impartial in his/her decision.

The voir dire may be conducted by either the judge or the attorneys. Although there is not any empirical studies to measure the quality of the information elicited, it is suggested that judge-conducted voir dire not only saves time and money but also increases juror candor because of the formal demeanor of the judge.[7] Critics argue, however, that there is less candor on the part of the jury because they are concerned about displeasing the judge; thus, they simply tell His/Her Honor what they think he/she wants to hear.[8]

In 1965, a researcher by the name of Broeder found that potential jurors distort their replies to questions posed during voir dire.[9] Also, in an empirical study designed to measure juror disclosure, it was found that jurors disclosed more to those whom they liked, who shared equal status with themselves, and who reciprocated by disclosing self information of their own.[10] The method in this experiment was to have half of the 116 eligible community residents questioned by the judge and the other half questioned by the attorneys.[11] Results of the study showed that the jurors changed their answers twice as much when questioned by a judge, were more candid in disclosing their beliefs when questioned by an attorney, and were more forthright and honest when questioned by an attorney with a personalized rather than formal demeanor.[12] It further seemed apparent

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1 Deidre Golash J.D., Ph.D., *Race, Fairness, and Jury Selection*, 10 BEHAV. SCI. & L., 155-177 (1992).
2 Id.
3 Susan Jones, *Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor*. 11 LAW & HUM. BEHAV., 131 n. 2 (1987).
4 Deidre Golash J.D., Ph.D., *Race, Fairness, and Jury Selection*, 10 BEHAV. SCI. & L., 155-177 (1992).
5 *Florida Civil Trial Practice. Jury Selection*, Chapter 3.
6 *Trial Handbook for Florida Lawyers*. 3d. Chapter 8.
7 Susan Jones, *Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor*. 11 LAW & HUM. BEHAV., 131 n. 2 (1987).
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.

that if the interviewer presented a warm and friendly persona, then not only would he/she gain positive regard for his/her clients, but the jurors also disclosed more because they did not think they would be punished for their answers.

After the jurors are questioned on their background and views of the law, their impartiality must be assessed. Based on this determination, the attorneys have two procedures for excusing a juror incapable of rendering a fair and impartial decision: peremptory challenges and challenges for cause. For those jurors that do not meet the statutory requirements or admit a prejudice, attorneys can challenge them for cause. In that case, the judge has the discretion to grant or deny excusal. Peremptory challenges can be exercised for no stated reason, even if it is just a gut feeling of the attorney. "Prudent use of either challenge is, of course, contingent on getting honest, accurate information from potential jurors regarding their background, attitudes, and beliefs."[13]

Jury Demographics

Historically, under-representation of racial minorities was ensured by the use of registered voting lists, individual state requirements such as ability to read and write, absence of convictions of record, the state resident requirement, and the stereotypes actually behind peremptory challenges.[14] Federal Law states that jury selection must be random and representative within specified geographic districts in the court's jurisdiction.[15]

In *Baston v. Kentucky*, the Supreme Court held that peremptory challenges could not be used to exclude jurors on the basis of race.[16] The Court reasoned that by enforcing a discriminatory strike, the lower courts are in essence becoming a party to the biased act.[17] The judge has discretion in conducting voir dire, and the Constitution does not always entitle a defendant to ask questions on voir dire specifically directed towards matters that may prejudice him/her.[18] However, in some cases where a significant issue concerns the race of the defendant, the constitution requires that the panel be so questioned. In another case, *Ham v. S. Carolina*, in which the defendant was a known civil rights activist, the Supreme Court required lower courts to ask jurors whether they could be impartial and disregard any prejudice they may keep.[19] Since this question is unlikely to produce any telling information about the jurors, attorneys are likely to supplement it with questions about interracial friendships, voting patterns, views on race, and other private matters.[20] In order for the excluded person to be part of a racially protected group, the person must have common ideas and attitudes representative of that group so that the community of interests would not be represented if that person were excluded, and the person must have experienced discriminatory treatment and be in need of protection from community prejudice.[21]

Until recently, courts were split on whether the Batson rule extends to gender. However, the Supreme Court has, in a five to four decision, in *JEB v. Alabama*, made an affirmative ruling on the matter, concluding that Batson should and does extend to cases of gender bias.[22] If it is a false assumption that members of the same race would be partial to one of their own, then it follows that the same must hold true for members of the same sex.[23] Gender, like race, would be an unconstitutional proxy for juror competence and impartiality; thus, the Supreme Court decided that peremptory challenges can not be used to remove jurors based on sex either.[24]

Individual attitudes are more revealing then gender stereotypes. Extending the *Batson* rule to gender may open the door for exclusion of potential jurors based on age, religion, employment, and political affiliation. Therefore, if attorneys were allowed more latitude in questioning prospective jurors, then there would be no need for the controversial peremptory challenges.[25] However, while peremptory challenges would not be necessary if lawyers could more freely explore for bias, they may still be desirable. This is because the challenges allow lawyers to question prospective jurors intensely without too much fear that the juror will retaliate against the lawyer's client in the event that a challenge for cause is not granted. Further, if a lawyer has an intuitive negative feeling about a juror (or visa versa) and there is no viable way to get a challenge for cause granted, then the peremptory challenge could be used to get that juror off the panel.

If, however, the lawyers were permitted more latitude in questioning prospective jurors, the court's resources would be taxed because of the extraordinary lengthy voir dire examinations. Efficiency and economic issues would have to be taken into account. Therefore, in order to protect privacy and speed up the process of selection, judges limit the type and number of questions attorneys can ask potential jurors.[26] In order to strike a balance; the judge has the discretion to set a time limit at the outset of the case. In doing this, he may want to consider the length and complexity of the case as a whole and then place a time limit on the voir dire that would coincide.

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13 Id.

14 Hirashi Fukurai, Edgar Butler, Richard Krooth, *Where Did Black Jurors Go? A theoretical synthesis of racial disenfranchisement injury system and jury selection*.

15 U.S. 90th Congress House Report. 1968.

16 *Baston v. Kentucky,* 746 U.S. 79 (1986).

17 By Paul Cassell, *200 year old tradition of peremptory challenges fades away*, at A21.

18 *Ristaino v. Ross*, 424 U.S. 589 (1975).

19 *Ham v. S. Carolina*, 409 U.S. 524 (1973).

20 Id.

21 *U.S. v. Dipasquale*, 864 F.2d 271, 275 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989).

22 511 U.S. 127 (1994).

23 By Paul Cassell, *200 year old Tradition of Peremptory Challenges Fades Away*, at A21.

24 *Sex Bias Barred in Jury Selection*. Sun Sentinel, April 20, 1994, at Court 9A.

25 Id.

26 Susan Moses-Zirkes, *Does Gender Matter in Choosing Juries?* Public Interest Directorate Monitor. P40.

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Thus, in a capitol case, with issues of grave importance, voir dire should be unlimited in time and scope in order to better learn about juror proclivities.

In a capitol case, jurors are also selected or rejected based on their views of the death penalty. If a potential juror could fairly determine guilt or innocence but could not impose the death penalty, then that person may be excluded from the jury; this is true even though these people tend to engage in more vigorous debate and discussion before reaching their decision.[27] If, on the other hand, the potential juror could fairly determine guilt or innocence but could impose the death penalty, then they are includable as part of the jury; this is true even though these people are more likely to consider a defendant guilty and convict him before hearing any evidence.[28] Thus, the death qualification process seems to produce a biased jury as opposed to the sought after impartial jury. In an experiment conducted with 600 participants, 500 were includable jurors who would impose the death penalty in a series of murder vignettes they were given to read.[29] The study showed that even people opposed to the death penalty (excludables) would apply it anyway in especially heinous or cruel crimes.[30]

Excludable jurors are also, however, more favorable to the insanity defense than the death-qualified jurors who will actually be hearing the case.[31] In another case study, where jurors read insanity vignettes and made judgments of guilt or innocence, it was found that death-qualified jurors were more likely to vote guilty in mental disorder cases (i.e.: schizophrenia).[32] The experiment also made clear that people who favor the death penalty are more likely to favor the prosecution, distrust the defendant and his attorneys, take a punitive attitude, and believe the insanity defense to be a cop out.[33]

One of the most important reasons for not selecting a member of the panel to sit on the jury is prior knowledge of the case. Because of the tremendous growth of the media, news coverage of a trial has the potential to become imbedded in the minds of the community and affect the defendant's right to a fair trial. In this respect, the First Amendment right to free press is in conflict with the Sixth Amendment right to a speedy and impartial trial because the more people who know the media's version of the facts, the longer it takes to find an impartial jury. Jurors with more extensive knowledge about a case are more likely to favor the prosecution even if it is a new story covering no specific facts about the case (i.e.: prior record, failed lie-detector test, confessions, etc.).[34] While judges can instruct jurors to base verdicts solely on the evidence presented in court, jurors lack the cognitive control to prevent the information from influencing their judgments.[35] Voir dire is the remedy that the defendant must rely upon to protect him from the adverse effects of pretrial publicity.[36]

By selecting a jury from a panel comprised of many demographic groups, we do not necessarily obtain an impartial jury, but we do acquire a jury that better reflects the actual biases of the population.[37] The hope is that the combination of opposing biases will cancel each other out in deliberations and provide for impartiality in the decision.[38] The wider the variety of life experiences, beliefs, and background of the jury, the more likely it is that the verdict will err on the side of fairness and impartiality.

But Is Impartiality the True Objective of Jury Selection?

While the socially accepted purpose of voir dire is to screen out and excuse potentially biased jurors, the true unstated purpose of the process is to reject jurors biased against your side. Attorneys select jurors whom they will be able to persuade, not jurors who will be "fair and impartial" to both sides. The art of manipulation is used by both sides to precondition the jurors to each client's advantage. Since voir dire gives the jury its first impression of the attorneys, it is the counsel's best chance to sell himself/herself and his/her client. The questions on voir dire enable the attorneys to ascertain how a juror thinks and what he/she will be receptive to hearing.

Attorneys can educate jurors on the facts and the law through the voir dire questions. The attorneys should become adept at asking questions in a way that will elicit the desired response. Many attorneys attempt to educate jurors not only to ascertain which ones would be favorable but also to make them more favorable by educating them about the issues in the case. By asking questions of one potential juror, the lawyer can educate and bias the others on the panel. If one juror replies in the sought-after manner in front of the rest of the panel, then the other potential jurors become exposed to that way of thinking. For example, consider the case where the main issue was proper installation of a child seat in a car. There is one mom on the panel, and the rest of the jurors are older men. The attorney can ask her how she installs her car seat to best keep her child safe. If the attorney can get her to say that a particular installation is unsafe, then she becomes an expert witness of sorts. This may plant a lasting impression that the lawyers would want to make in the mind of

27 *Lockhart v. McCree*, 476 U.S. 162 (1986); Robert Robinson, *What does unwilling to impose the death penalty mean anyway? Another look at excludable jurors.* 17 Law & Hum. Behav. n. 4 (1993).
28 Id.
29 Id.
30 Id.
31 Phoebe Ellsworth, Raymond Bukaty, Claudia Cowan, and William Thompson, *Death Qualified Jury and Defense of Insanity*. 8 Law & Hum. Behav., n. 1/2 (1984).
32 Id.
33 Id.
34 Geoffrey Kramer, Norbert Kerr, and John Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*. 14 Law & Hum. Behav., n. 5. (1990).
35 Id.
36 Id.
37 Deidre Golash J.D., Ph.D., *Race, Fairness, and Jury Selection*, 10 Behav. Sci. & L., 155-177 (1992).
38 Id.

other jurors who may not have had similar experiences.

Open-ended, non-directive questions that require more than a yes/no answer are best in order to get the desired answer. For example, instead of saying, "Can you abide by the principle of law that a defendant is not deemed guilty if he/she chooses not to take the stand?," more would be learned about the juror by stating the question in a different way: "Defendant is not required to take the stand and testify, and if he/she does not, it can not be taken as evidence of guilt. Some jurors have difficulty with this, and that's okay. How would you react if the defendant did not take the stand and testify on his/her own behalf?"[39] A case study on non-directive voir dire found that the informal style of asking questions created an atmosphere where jurors felt less constrained to give a socially desirable response and freer to express his/her actual feelings.[40]

During voir dire, the attorney must set the stage for the jury so they know what to expect if they are chosen. It is often said that a case is won or lost on voir dire because it is the first time that the attorney has the chance to build a rapport with the prospective jurors. Since it is essential that each juror serving be sympathetic to the case the attorney wishes to present, voir dire must be utilized as a tool to precondition jurors.[41] Preconditioning serves two important functions: it prevents the jury from thinking that the attorneys are trying to hide information because the bad evidence is admitted right away, and it causes the jury to be familiar and sympathetic to the client's case.[42] While preconditioning may not be a "proper" role for voir dire, we do not live in a perfect world and sometimes justice is best served by preparing prospective jurors to be receptive to views they may not have otherwise had coming into court.

Jurors not only learn about the law and facts of the case by listening to the others on the panel, but they also may learn incorrect information or various strategies to get excused from serving. Jurors can be questioned individually or in front of the rest of the panel. As suggested previously, because individual voir dire is time consuming, most judges prefer group voir dire. For this reason, many jurors may imitate answers they have heard given by their peers. This creates an obstacle for attorneys who are trying to discover backgrounds and attitudes and isolate prejudices. Because attorneys have found that delving into juror proclivities is a psychological task, experts called jury consultants are hired. Consultants practice scientific jury selection, which entails linking demographics and personality traits to juror predispositions in order to predict verdicts.[43] There are many different remedies, types of questions, and techniques the attorneys and judge can implement in order to ensure a "fair" trial.

Remedial Measures and Techniques

When a potential panel has been tainted by pretrial publicity, one of the jurors yelling out biased misinformation in front of the others, or the identity of one of the parties/attorneys, the judge has various remedial measures at his disposal to counteract the negative effects. Because of this prior knowledge, potential panels in the community may have preconceived notions about the facts or a dislike/distrust of one of the parties.[44] In this case, a judge may be inclined to grant a motion for change of venue. Trial consultants conduct change of venue studies to determine the extent of community knowledge, pre-existing community attitudes, and the prospects of a prejudiced jury pool. Two techniques are utilized in order to accomplish the change of venue study: media content analysis (ie: publicity research) and community attitude surveys.

A venue study entails researching the demographics, media coverage (print and television) in the nearby counties, and community attitude surveys conducted in those areas. First, contact the chamber of commerce in the county to research the general demographics of the area (i.e.: how many women, how many Hispanics, the mean age, etc). In order to measure the extent of knowledge the surrounding counties have of the specific case, visit a library in the county and read back issues of newspapers dating back to when the case actually occurred. The community's attitude can be measured by calling people in the area or going to a local mall and asking them questions about a "hypothetical case." Ask people if they knew about the case, how much they remembered, where they learned it from, how much they know, how they felt about it, and general demographic questions (i.e.: age, income, status, occupation, and what newspapers they read). "Even if the court denies a motion for a change of venue, evidence of potential prejudice may persuade the court to expand the questioning of prospective jurors during the voir dire, may convince the court that individual as opposed to group questioning is appropriate, and may increase the willingness of the court to grant challenges for cause when a juror gives some sign of predisposition in the case."[45]

Since it has already been established that voir dire is crucial to the outcome of a trial, it would behoove the attorneys to find out as much as they can about the jurors who will be deciding their client's fate. Because extended voir dire accounts for more guilty votes and people tend to lie when questioned in public,[46] attorneys should ask a variety of questions

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39 Kathy Middendorf and James Luginbuhl, *Value of a non-directive voir dire style in jury selection*. 22 Criminal Justice & Behavior, n. 2 American Assoc. for Correctional Psychology (1995).
40 Id.
41 *Florida Civil Trial Practice. Jury Selection* Chapter 3.
42 Id.
43 Gary Moran, Brian Cutler, Anthony De Lisa, *Attitude toward tort reform, scientific jury selection, and juror bias: verdict inclination in criminal and civil trials*. 18 Law & Psych. Rev., 309.
44 Shari Seidman Diamond, *Scientific jury selection: What social scientists know and do not know*. 73 Judicature, n. 4. (1990).
45 Id.

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covering a wide spectrum of beliefs, attitudes, and backgrounds in order to determine juror bias. Good questions to ask jurors which tend to build a rapport with them and delve into their privacy include: age, number of children, marital status, spouse's occupation, children's occupation, attitudes toward big corporations, stock held in any corporation, political affiliation and views, religion, education, publications read and the frequency with which they are read, views on the death penalty, experiences with the legal system, social organizations, hobbies and interests, etc.

There are many other techniques implemented by trial consultants in order to expose juror proclivities and prejudices and select the jurors most inclined to vote for that side's client. These techniques are used to guide attorneys in analyzing juror attitudes, identifying strengths and weaknesses of the case, and predicting the outcome of the case. Aside from case analysis and stratagem (the psychological effects of the attorney's chosen words on the juror), the trial consultant also conducts witness preparation (how to answer questions, eye contact, body language, etc.), focus groups, mock trials, and voir dire research.

In a focus group, mock jurors hear abbreviated arguments presented by the trial team and are given actual jury instructions. They are carefully observed and evaluated during deliberation to pinpoint problem areas that may require more explanation. The main goal of the focus group is to analyze issues in a case in order to shape or refine the case. A mock trial is a more in depth and extensive focus group, which also tests the effect of opening and closing statements on the jury. Jurors fill out questionnaires before, during, and after the evidence is presented. The questionnaires before the trial begins seek background information on the jurors as well as their views on the particular facts and law in the case. The questionnaires during and after the trial enactment ask, among other things, what issues the jury believes to be the most important, why they voted a certain way, and what could have been said that would have changed their minds. After comparing the questionnaires, it becomes possible to determine what type of person would likely be pro-plaintiff (or state) and what type would be pro-defendant. Lawyers are sometimes so involved with the case that they think they are explaining all the pertinent information in an understandable manner. However, "A pretrial test of juror reactions to the facts of the case and arguments that both sides are expected to make can provide a crucial warning that the message is unclear, that the theme initially selected is not plausible, that jurors will be unconvinced by the message, that jurors are troubled by missing information,"[47] or that emphasis should be placed on an issue that the attorney deemed minor.

While profiles of favorable juror prospects can be compiled through pre-trial attitudinal questionnaires, a trial consultant implements techniques in the courtroom as well (i.e.: jury selection, demonstrative evidence, structuring opening statements and closing arguments, and jury instructions). In-Court rating of attitudes and non-verbal communications can be accomplished during voir dire by asking questions and taking notice of body posture, speech disturbances, and tone of voice.[48] In an effort to curb the extensive jury questioning on voir dire, judges have been more willing to allow the use of jury questionnaires. Lawyers can use these questionnaires effectively to screen jurors for more extensive inquiries at voir dire by finding on its face an indication of bias in the juror's answers. This would allow freer and more expansive questioning of the potential jurors; however, it is very unlikely that the jurors would be honest and readily reveal bias on the questionnaires. There are other ways to detect bias and determine which of the jurors would be the most advantageous to select. Attorneys can help with this by asking the right questions in the right way.

Who Do We Want on the Jury?

We want those who will vote for our client. Each case requires certain individual attitudes and beliefs on the part of the jurors in order to accomplish the desired objective. Few cases will ever be the same; however, Ward Wagner, author of *Art of Advocacy--Jury Selection*, discusses some generally accepted theories in the profession.[49] Wagner says that women are good potential jurors if the defendant or his attorney is handsome because women tend to distrust other women. He states that since the desired juror is one whose mind can be molded, those between 28-55 are preferable because they are the most alert and receptive to complex defenses. As far as the ethnicity of the jurors are concerned, Wagner points out that a vigorous cross-examination of a person of certain descent may be resented by jurors of the same background. On the other hand, if the defendant is of a particular persuasion, jurors of that nationality should be placed on the jury. According to Wagner, police officers, military men, and their wives are usually not good selections for a jury because they tend to believe that an arrest is a bona fide indicator of guilt.

Further, if a juror can promise the court that his/her prejudice against the defense of insanity will not impede his/her ability to be impartial, then he/she will not be disqualified. However, if the attorney can get the person to admit that he/she would require overwhelming proof of insanity before acquitting the defendant, then the potential juror will be excused.

46 Gary Moran, Brian Cutler, Elizabeth Loftus, *Jury selection in major controlled substance trials: the need for extended voir dire*. 3 Forensic Reports 331-348. (1990).
47 Shari Seidman Diamond, *Scientific jury selection: What social scientists know and do not know*. 73 Judicature n. 4. (1990).
48 Jeffery Frederick, Ph.D., *Social Science Involvement in Voir Dire: Preliminary data on the effectiveness of "scientific jury selection."* Vol. 2 n. 4. (1984).
49 Ward Wagner, Jr., *Art Of Advocacy--Jury Selection*. (Matthew Bender ed., Times Mirror Books 1989).

Wagner assures us that this rule applies similarly to pre-trial publicity. If a juror can satisfy the court that he/she will be impartial despite his/her exposure to outside knowledge and preconceptions, then he/she will not be disqualified. If, however, the juror has already formed a fixed opinion based on prior knowledge or prejudice related to a material issue in the case, then he/she will be excused from serving on that jury. For example, if the juror has knowledge of prior case procedural history and knows that the defendant has already been convicted by a jury, he/she may be of the opinion that there is no reason for a second trial occurring just because of some technicality. It is for this reason, Wagner states, that if the attorney can persuade a potential juror to say that they have knowledge of a prior conviction, then the person will be excused because of the potential for bias and the inability to be impartial. But how do the attorneys get the prospective jurors to give the desired answers during voir dire?

Is there a Right Way to Conduct Voir Dire?

The true, yet unstated purpose of voir dire is to attempt to select those jurors who will be receptive to the attorney's view of the facts. This can be accomplished by building a rapport with the juror, preconditioning the juror, and delving into each juror's private thoughts and experiences. The comments of the attorneys explaining who the principals are, what is going to happen, the applicable law, the jury's function to obey the judge's instructions and decide the case impartially, while necessary, elicit no useful information about the jurors.[50] Attorneys should ask the juror to discuss his/her background, experiences, hobbies, interests, and activities in order to procure information that can "help the lawyer decide what kind of person the venireperson is and if he/she will make a good juror" to his side.[51] Are there certain techniques that should be utilized in pursuing this goal? Of course, as there are in any craft.

Attorneys should begin by introducing themselves and their client and discuss various aspects of the law. For example, the pool of jurors should be informed that the plaintiff has the burden of proving the case, what that standard of proof entails, and a quick sketch of the facts in the case. The lawyer should ask the jury panel right away whether they can hold the plaintiff to his/her burden, if they know anything about the accident or crime, if they have any bias against the particular law to be used in the case, and if they know any of the parties or witnesses in the case.[52] Silent responses reveal much about a person, so during the potential juror's response, the attorney must carefully watch his/her movements, body language, facial expressions, and mannerisms to determine if the juror will be receptive to his/her later arguments. For example, a juror who can not look his/her interrogator in the eye or who can not stop playing with his/her top button may just be nervous, or he/she may be telling a verbal untruth.

It is extremely important to sound sincere and express genuine interest in each juror. One way to do this is to apologize ahead of time for any prying personal questions. Jurors resent having to display their personal life in public, so the attorney should explain the purpose and ask forgiveness of the jury pool as a whole. The jury should be addressed in a friendly, calm, courteous, and respectful manner that allows the juror to feel like an equal to the attorneys. Attorneys can make each juror feel like the most important person in the room by addressing each juror by name, active listening, and some humility. An attorney should never be sarcastic because it may offend jurors, but if the attorney inadvertently embarrasses a juror, he/she should apologize immediately.

Attorneys should avoid repetition, so that the jurors will not become bored. If routine questions are repeated for each juror, the panel begins to feel as if the attorney does not really care about the responses or about them as human beings. Also, jurors should be prepared for harmful evidence against the lawyer's client. If jurors discover damaging information at a later point in the trial, they will become distrustful of the attorney because of the belief that he/she was trying to cover up the secret. Similarly, the lawyer should quickly object to misstatements of law made by opposing counsel during voir dire. He/she should object in a clear, calm, informative manner, using simple language so the potential pool does not think he/she was trying to block the truth. If a prospective juror should become antagonistic, the attorney should "refrain from exhibiting belligerence at all costs because the venireperson may be on a future panel or another venireperson selected to hear the case may resent the display of attitude."[53] The best thing to do would be to politely and unobtrusively move on to questioning the next juror.

Friends should not sit on the same jury because they may be more apt to be persuaded by the other. Jurors who are experts on the particular issue in the case should also not be impaneled because of the potential for impressing his outside knowledge upon the rest of his peers. The athletic looking juror is hard to convince, but once convinced he will usually be loyal to the chosen side.[54] When excusing jurors, counsel should be very careful to be extremely polite. This is because that person may have become friendly with a juror who was selected to hear the case, and offending that person could be enormously detrimental to one's case. The smartest attorneys are those that remember the juror's responses concerning issues and beliefs during voir dire and proceeds to use those very words in closing argument.

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50 Florida Practice and Procedure. Chapter 23 p376.
51 Id.
52 Id.
53 Id.
54 Ward Wagner, Jr., *Art Of Advocacy--Jury Selection*. (Matthew Bender ed., Times Mirror Books 1989).

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Counsel should make a concerted effort to display a laid back demeanor. Attorneys may want to consider turning their chairs around to the other side of the desks in order to face the jury pool. Begin by acclimating the jury to the courtroom procedures, facts of the case, and relevant law, and then ask all prospective jurors the same general questions: What do you do for a living? What does your spouse do for a living? What are your feelings on the law? Have you ever been a victim of a crime? Did they catch that person? What do your children do? What do you teach? Is there anyone close to you in law enforcement? What are your hobbies? Have you sat on a jury before? Did you reach a verdict? etc. If the attorney is a local, he/she should make sure that all the venirepeople are aware of that fact. One may make comments such as, "Barney is your brother? He can sing so well! .... I heard you give a speech yesterday .... You are a stay at home mother? God Bless You." It is also important to ask how much pre-trial publicity or outside knowledge they have of the case.

Attorneys should be sure to introduce themselves, remember everyone by name, and relax people with humor. Before questioning the panel, make a brief 'speech' as follows: "Are you nervous? Well, it's okay to be nervous and it's normal. I read a poll a few days ago that said the biggest American fear is public speaking. Number two is death. I am nervous speaking in public too. I am especially nervous because I have to ask you some very personal questions. I am not trying to pry, but this allows us to know more about you. I want to apologize for those questions right now. I promise not to embarrass you, and if I inadvertently make you uncomfortable, just tell me you'd rather answer that question in private. I also want to thank you now for your time and your honesty."

There are ways to make people reply in the desired manner. The best thing to do is slightly change around their words when repeating their answer to get the answer you want. For example, "Would it be fair to say .... If I understand you correctly, you are saying ...." Also, just by asking the same question repeatedly in a different way, the jurors will change their answers. The jurors will begin to open up, tell personal stories (i.e.: rapes, murders, accidents, etc.), and share feelings. With active listening and one-on-one friendly conversational style, the attorney will make it easy for those jurors to disclose the most private of information. Above all, respect should be displayed for everyone, no matter the occupation or status because they all have their own stories to tell. By asking case specific yet general questions, the attorney is essentially suggesting what the theories of the case will be and planting the seed as to how the prospective jurors should be thinking.

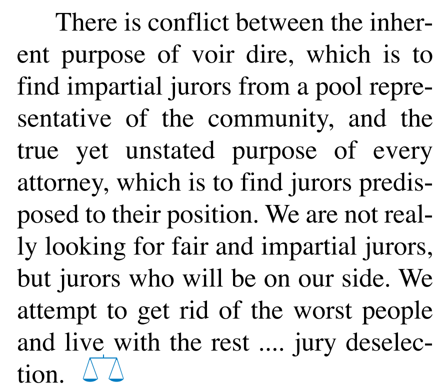
Conclusion

Cases are won and lost on voir dire. While the socially accepted purpose of voir dire is to isolate and excuse potentially biased jurors, the true, yet unstated, purpose of the process is to reject jurors biased against your side. A balance can be properly struck between the justice system's desire to select impartial juries and the lawyer's interest in selecting sympathetic ones by better training and preparing our lawyers or eliminating jury trials and leaving the voir dire to be conducted by the judge. However, this would ignore that judges have bias too, and sometimes their bias is more deeply rooted than that of the community. Attorneys attempt to select jurors whom they think they will be able to persuade, not jurors who will be "fair and impartial" to both sides. The art of manipulation is used by both sides to precondition the jurors to the attorney's theories of the case. Attorneys strive during voir dire to build a rapport with the potential jurors on the panel because studies show that venirepeople are more likely to disclose private attitudes, beliefs, and experiences to a friendly, informal person who treats them as equals.

The questions on voir dire enable the attorneys to ascertain how a juror thinks and what he/she will be receptive to hearing. Effective attorneys have perfected the art of asking questions in a way that will elicit the desired response or disclosure of information. Because human beings are complex and attorneys want those jurors who are predisposed to vote in favor of their client, the trial team usually hires a consultant to analyze and strategize the case. Techniques such as focus groups, mock trials, community attitude surveys, and pretrial publicity research help to educate the attorney about the extent of knowledge the prospective jurors will have about the case, their preconceived opinions and views on the case, problem areas that need to be emphasized or refined, and how the wording of their arguments will psychologically affect the jury.

It is extremely important to be or at least sound sincere and express genuine interest in each juror. One way to do this is to apologize ahead of time for any prying personal questions. The jury should be addressed in a friendly, calm, courteous, and respectful manner that allows the juror to feel like an equal to the attorneys.

There is conflict between the inherent purpose of voir dire, which is to find impartial jurors from a pool representative of the community, and the true yet unstated purpose of every attorney, which is to find jurors predisposed to their position. We are not really looking for fair and impartial jurors, but jurors who will be on our side. We attempt to get rid of the worst people and live with the rest .... jury deselection.



SIMPLE DOES NOT MEAN BETTER: THE IMPORTANCE OF JUROR ROLES

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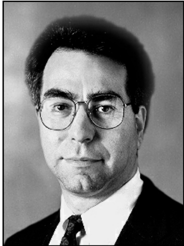

Jury selection is an exercise in prediction. We are trying to predict whether a prospective juror can be unbiased; whether he or she may be more likely to favor one side or the other; whether the person will be able to listen to and understand the evidence; and whether the prospective juror will play a leadership or more passive role in deliberations.

With the exception of cases in which certain demographic characteristics are central issues (a race discrimination case, for example), it has been quite well established that demographics are very poor predictors of future behavior. The focus has been much more on the attitudes, values, and experiences that prospective jurors bring to the courtroom. These have proven to be far more effective predictors. However, this approach makes an implicit assumption about human behavior that greatly oversimplifies how it works and therefore, misses a lot in its attempt to predict future behavior.

The assumption is that individuals have personalities that contain certain attitudes and values based on experience; that these personalities are core to us and relatively unwavering. What it does not do is consider the way in which personality characteristics become more or less salient as the role a person is playing changes.

The concept of role is a familiar one that has become deeply embedded in our everyday language: "He's just playing a role." ; "That role is not suited for her." ; "She was just engaging in the role reversal." Yet, it was a concept that was not really developed until early in the twentieth century. Indeed, some argue that it was not until the times of the ancient Greeks that the concept of a self, separate from the rest of the community began to exist. Today, some social scientists argue that there is no such "thing" as a personality, but that we all play different roles depending on the context within which we find ourselves. Different roles have different demands and expectations, which lead to the expression of different behaviors and which make different attitudes, values, and beliefs, and experience more or less important.

Therefore, in thinking about jurors, we should not just see them as a collection of attitudes, values, beliefs, and experiences; some held more strongly or of more importance than others. We should see them as playing one or more important roles. A particular individual may play many roles during the course of a day; mother, employee, daughter, neighbor, shopper, supervisor, wife, and so on. For the trial lawyer the following questions should be key:

1) What role or roles is this trial likely to evoke in a particular juror? 2) What attitudes, values, and beliefs are associated with that role? 3) How can the trial lawyer affect which role a juror is likely to play during the course of a trial?

Certain types of cases are more likely to evoke particular roles than others. But it is by no means clear which particular role will become paramount. In a sexual harassment case, a male juror may take on the role of the "father" viewing the plaintiff as a "daughter" in need of protection; or he may be a supervisor viewing the plaintiff as a troublemaker who disrupts the workplace; as an employee seeing the defendant as uncaring in its treatment of its workers; or any series of other roles. Clearly how the role plays out depends a great deal on the attitudes associated with it. Another male juror may take on the role of the father who thinks his daughter would never have acted the way the plaintiff did; a supervisor who views the plaintiff as someone who should have received more help and assistance; or an employee who looks at the defendant as a caring and concerned organization. Another male juror may experience role conflict, on the one hand playing the concerned father and, on the other, the loyal employee.

In approaching jury selection it would be important to first think about the possible roles a case may evoke in jurors and then explore the prospective jurors' attitudes, values, and beliefs as it relates to each of those possible roles. In the above example, it is not enough to simply find out how a juror feels about how employers treat employees or how he or she thinks an employee should act in the workplace. It is necessary to relate those to potential roles and look for a consistency or lack of consistency across them.

In jury selection it is also necessary to explore which role the juror sees as having more importance in his or her life. As an example, one way in which this may be determined is by questions like: "Tell me a little about yourself"; "What kinds of things are important to you?"; "Who are the people you admire most?"; and, "How would you describe yourself?" Listening carefully to responses may give an indication of what the prospective juror perceives as his/her key identity or role.

In trying the case it is possible to affect what role jurors play. Plaintiff lawyers often intuitively ask jurors to play the role of the sympathetic family member in a product liability case, while defense lawyers frequently ask jurors to play the role of the scientist who dispassionately evaluates the validity of scientific studies. It is worth asking which is likely to have more salience and primacy to a juror. Other ways in which lawyers intuitively ask jurors to play roles is through the use of analogy. The car analogy is probably the most used and overused analogy in litigation. In employing it, lawyers are asking jurors to take on the

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role, or at least imagine themselves in the role, of a car driver. A more effective case might explicitly ask jurors to assume certain roles and ignore others. This can most easily be done in openings and closings when jurors can be told to, "Imagine you are..."; or, "It is not your job to..."; when the lawyer says, "You know, I am a mother..."; and so on. During the presentation of evidence it can be accomplished through the use of examples, analogies, metaphors, and demonstrative exhibits. What I am arguing is that it be done in a thoughtful and strategic way. What are the roles that are most important to these jurors? What roles will they feel comfortable playing? How can I structure the evidence to evince those roles?

Jurors not only play roles in relationship to the case itself, but also in relationship to fellow jurors. This becomes particularly evident during deliberations when jurors intensively interact with each other. Although this is especially difficult to predict, trial lawyers should try to sense whether a juror may play the role of leader, follower, trouble maker, iconoclast, and so on. One of the few truisms of jury behavior is that it is a small minority of jurors who drive jury deliberations and the outcome. It is not just having a strong personality that determines which of the jurors it will be, but also the role the jurors will be forced into or will assume.

There are other factors that cannot be ignored even as we pay attention to roles in thinking about jurors and how they might evaluate the case. The first is what the jurors know; how extensive their knowledge of the issues and actors in the case is. This obviously affects the nature of the attitudes, values, and beliefs that will be involved in role performance as well as the salience, strength, and consistency of certain roles the jurors may play. The second factor is personality. Certain personality characteristics only become important when certain roles are played (for example, the man who is hostile and aggressive at work, but caring and nurturing at home). It is helpful to learn which personality characteristics are connected with which roles.

Jury selection takes place in a tension filled atmosphere with extraordinary time constraints. The tendency is to simplify the thinking behind this process as much as possible. Unfortunately, the juror decision making process is far more complex than can be accounted for by simplifications like: "We don't want anticorporate people"; "Stay away from women with children"; and so on. At a gross level this probably does create improvements over chance. But imagine a typical case and then try to predict how someone you know very well would decide that case. In many instances that will be difficult for you. How then do you do that with perfect strangers? At the very least, spending time to plan the voir dire process by generating hypotheses about which roles may be invoked by the case and how they may result in particular judgments of the evidence, will lead to a more thoughtful jury selection process.

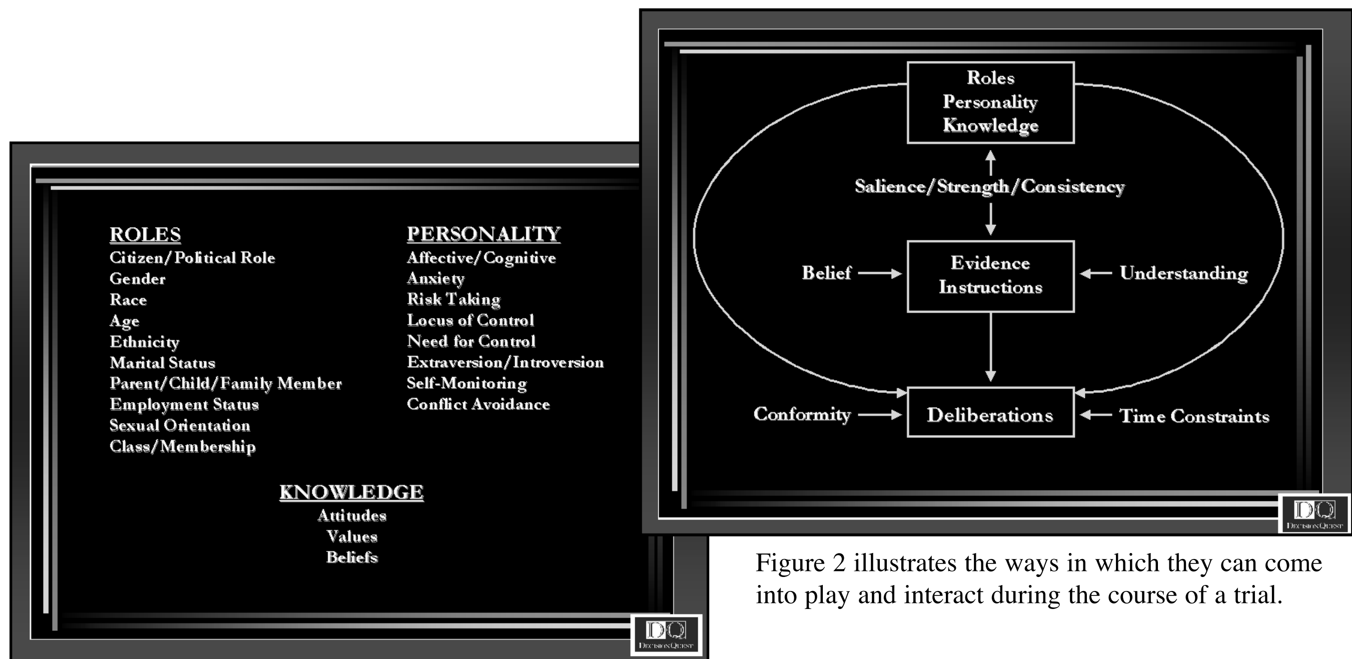

Figure 1 illustrates some examples of the types of roles, personalities, and knowledge that are often important in jury trials.

Figure 2 illustrates the ways in which they can come into play and interact during the course of a trial.