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Strategies for More Effective Voir Dire

by Ronald J. Matlon

ALL POTENTIAL JURORS have biases and prejudices. Individual bias stems from all we experience, and shapes the perceptions we, as jurors, have of evidence. These perceptions can certainly influence final jury verdicts.^[1] Identifying juror bias is critical. Yet, “the detection of juror bias is a serious challenge in contemporary jury trials.”^[2]

Lifetime Experiences, Attitude Formation and Juror Bias

Some potential jurors say they can set aside their biases and personal experiences to arrive at fair and impartial decisions. But, is this possible? Supported by numerous social scientists, this author must answer this question in the negative. Experience (accumulated lifetime information) directly influences our attitudes (predispositions to act in a positive or negative way toward an attitude object). Sometimes, these attitudes produce biases (prejudice so strong that it actually causes one to act in a positive or negative way). These attitudes and biases deep within each and every one of us are extremely unyielding to even a very persuasive plea.^[3] It is almost impossible to think

that anyone can disregard their experiences in life in any setting that taps into those experiences, including jury duty. “Indeed, research indicates that jurors’ prior experiences and attitudes are more likely to influence their verdict than the arguments presented to them at trial.”^[4]

This means juror experiences and attitudes must be thoroughly probed in voir dire to identify jurors with unfortunate bias. Unfortunately, in many states and in federal court, voir dire is often so limited that attorneys are placed in the position of relying far too much on demographic stereotyping when exercising their peremptory challenges. Trial lawyers use this method because these characteristics are the primary information they receive about each juror. Important strikes are often based on demographic myth and lore.

Lifetime experiences and attitudes tend to be much more powerful predictors of verdict choices than demographic characteristics.^[5] In order to get at juror bias in the best possible way, attorneys must uncover the lifetime experiences and attitudes of all potential jurors.

Jurors' Limited Disclosure of Attitudes and Biases

Potential juror bias is not easily detected in jury selection for several reasons. Many jurors feel uncomfortable in court, which may inhibit their willingness to disclose their true feelings or opinions. Why are jurors inhibited?

1. The court setting is very formal, both structurally and behaviorally, causing jurors to feel intimidated and restricted in what they do and say.^[6]
2. Jurors are hesitant to share personal information and beliefs in front of strangers.^[7]
3. When in an unfamiliar environment, people look to others as a guide for their behavior, causing many jurors to follow the crowd rather than express their own true feelings.^[8]
4. Some potential jurors say what is expected of them because of the fear of rejection for jury duty.^[9]
5. Jurors remain quiet because they think that speaking up in court is like public speaking—something many people fear.^[10]

There are two important additional reasons jurors do not fully self-disclose in court. First, potential jurors do not recognize or want to admit they are biased. Second, they are being questioned by and are trying to please a judge. These reasons, combined with those above, provide us with discouraging, counterproductive results in voir dire.

Even when jurors are willing to reveal all that is on their minds, they may be unaware of or unwilling to admit their own biases.^[11] They do not plan to deceive anyone in jury selection; they simply underestimate their own attitudes and biases. Research shows that many people are not conscious of some of the significant factors that shape their behavior.^{[12][13]} Or, they think what they know and believe is objective fact, not bias. I've heard Arizona jurors refer to Native Americans as "lazy" and "alcoholic" in voir dire. Yet, when asked if they might be prejudiced in some way against Native Americans they frequently say: "Well, these are just facts; not my personal opinion." These jurors did not view their knowledge as prejudice.

Judge-conducted questioning exacerbates jurors' lack of self-disclosure in voir dire. Irrespective of judges' capability, it is their role or status that can greatly influence self-disclosure. A review of the research in this area shows that a questioner's status or role affects whether an individual will reveal information about himself or herself. Indeed, interviewers with very high status (like judges) produce limited self-disclosure.^[14] Judges are physically separated from everyone else in the courtroom: they wear robes, and attorneys and court personnel address the judge as "Your Honor."

Judge status fosters an increased sense of authority and

detachment from jurors.^[15] Questioning from the bench minimizes juror candor, and in voir dire, jurors will actually alter their expressed attitudes when questioned by judges.^[16] When the court asks all the questions, a prospective juror is often influenced by social norms, providing "socially acceptable" answers he or she believes the judge wants to hear.^[17] Survey data shows jurors look upon judges as important authority figures and are reluctant to displease them.^[18] In fear of the court's disapproval, some jurors will offer acceptable responses without even considering their own honest responses.^[19] "The message communicated by the judge is that impartiality or lack of bias is the desirable state of mind for a juror.... The end result is that jurors give the judge the answers they believe the judge wants to hear."^[20]

Seminal research on this matter included post-trial interviews of 225 actual jurors and revealed a significant discrepancy between information jurors shared in voir dire compared to what they shared with interviewers following the trial. Many jurors withheld information during the group voir dire in an effort to appear "qualified" to perform their civic duty as jurors.^[21] Additional studies also demonstrate jurors' unwillingness to disclose information that may threaten their fitness to serve as jurors.^[22]

Judicial Practices Often Make Matters Worse

In addition to all of the elements preventing juror self-disclosure noted above, there are two additional factors connected to a judge-conducted voir dire that intensify the problem of uncovering juror bias. The first factor is the establishment of a limited, rather than an expanded, voir dire. The second factor involves judicial attempts to rehabilitate jurors using ineffective question forms.

The traditional limited voir dire includes a minimal number of trial-specific questions, many of which are close-ended, prompting either a show of hands or a yes/no response. A judge conducts much of the questioning addressing the group rather than individuals, and conducts limited follow-up with those jurors not recognized by affirmative responses.

Expanded voir dire contains a larger number of questions, a broader range of questions, a combination of close-ended and open-ended questions, individual (perhaps sequestered) follow-up questions asked by the attorneys and/or the judge, and, quite often, a pretrial juror questionnaire.

There is overwhelming evidence that a limited voir dire is "not effective in identifying and vetting jurors with relevant experiences and attitudes."^[23] There is little opportunity to obtain full disclosure of relevant information.^[24] Results of a study in the District of Columbia Superior Court demonstrate jurors disclose less in limited voir dire than in expanded voir dire. When experimenters followed up with jurors in expanded voir dire, they learned a great deal of information. Some of jurors' responses included:

“I was frightened to raise my hand, but I do take blood pressure medication.”

“I was on a hung jury before, and it dealt with a gun offense. I’m not sure I can be fair in this gun possession case.”

“My grandson was killed with a gun.”

“I’m the defendant’s fiancée— is that okay?”

Expansive voir dire is “an indispensable way of ferreting out otherwise unknown juror qualities.”^[25] Some judges use forms of questioning that exacerbate the problem of juror non-disclosure. Too many judges ask leading questions of the jurors. One of the most common question types goes something like this: “In spite of the fact that the defendant was admittedly intoxicated when the incident took place, would you make every effort to be fair and impartial to him?” This leading question is weak because it does not allow any description of the juror’s experiences, impressions and opinions. It yields little information because no one likes to think he or she would intentionally be unfair to someone just because that person was intoxicated.^[26]

When a judge poses this kind of question to rehabilitate a juror, the “correct” answer is obvious. The juror wants to please the judge by saying: “Yes, I will be fair.” Leading questions are of minimal value in weeding out jury bias and, by their nature, elicit only the prospective jurors’ own perceptions of their biases which are generally not accurate information. Fortunately, there are ways to combat these problems.

Recommendations for Improving Voir Dire

A substantial body of relevant jury research supports two recommendations for improving your ability to uncover juror bias. First is the use of expanded voir dire and second is the use of supplemental juror questionnaires.

Expanded voir dire, defined above, should be implemented in all trials. There should be more questions asked over a broader scope of subject matter in order to better reveal juror bias. Both judges and attorneys should ask follow up questions to create an environment that makes it easier to identify juror prejudice.

A more effective blend of close-ended and open-ended questions will help ensure as much juror candor as possible. Close-ended, yes/no questions can precede open-ended questions. Close-ended questions can identify juror experiences. For example, “Have you, or has anyone close to you, ever been on kidney dialysis?” Note that this is a lifetime experience question. For those who respond affirmatively, the open-ended request to ask of them is: “Please tell us about that experience.”

Or, in another kind of case, one might ask: “How do you feel about the dissemination of sexually explicit videos to adults?” Even if the answer is: “I have no strong feelings,” an appropriate

probe would be: “Well, then, what are your feelings even though they are not strong?”

Open-ended questions such as those above allow prospective jurors to do most of the talking, giving the court and counsel a good opportunity to learn what they need to know. “Open-ended questions require jurors to think about the issues involved in the question and to describe in their own words their thoughts on the topic.”^[27] Listening to the jurors reply to the open-ended request is the best way to detect juror bias in oral voir dire. As jurors are allowed to talk, their attitudes will be on display. Additional follow-up open-ended questions beginning with “how,” “why,” and “what” can go far in helping judges and attorneys identify bias (e.g., “Why did you find the services received by your mother’s home health care provider to be insufficient?”). A good series of questions follows the experience-attitude-bias continuum identified at the beginning of this article.

Consider this list as a series of well-constructed close-ended (experience) and open-ended (attitude/bias) questions:

- Have you or has anyone close to you ever been seriously injured or killed in a vehicle accident?
- If yes, please describe the circumstances. (Follow-up probes may be necessary.)
- Was a complaint, lawsuit, or claim of some sort made about this?
- If yes, please explain. (Follow-up probes may be necessary.)
- How was the complaint or claim resolved?
- How did you feel about this resolution?
- Is there any reason why any of you who remained silent during this last set of questions chose to do so? (Follow-up probes may be necessary.)

Second, *supplemental juror questionnaires* should be used whenever possible and appropriate because they allow prospective jurors to answer voir dire questions in writing. “Well-formulated juror questionnaires can provide counsel with a substantial amount of information about prospective jurors ... especially in jurisdictions where the scope of attorney-conducted voir dire is limited or judge-conducted questioning is the mainstay.”^[28] Supplemental juror questionnaires provide counsel many advantages:

1. Lawyers can get an overview of possible bias from the entire venire, not just the people seated in the box.
2. Because answers are provided in writing rather than orally, there is more candor and more assurance of identifying bias with questionnaires than having voir dire be entirely

an open court oral experience.

3. Questionnaires actually save court time inasmuch as judges and lawyers need not be present when this information is gathered. They need only be present for follow-up oral questions based on the questionnaire answers.
4. Jurors appreciate the privacy of this activity.
5. Questionnaires “can quickly pinpoint for the court and attorneys the specific areas that require individual follow-up questioning.”^[29]

Effective supplemental juror questionnaires require careful thought and preparation. However, they have recently received some ringing endorsements. The American Bar Association has asked that courts consider using a specialized questionnaire addressing particular issues and permitting the parties to submit proposed questionnaires.^[30] In Maryland, the Council on Jury Use and Management concluded: “Advance written questionnaires for jury panels should be utilized. Questionnaires can provide information in a more efficient form and with less

invasion of juror privacy.... Advance written questionnaires can be especially useful in protracted or complex cases where jury selection will require prospective jurors to answer many questions. They may also be useful in more routine cases where jurors are asked certain standard questions.”^[31]

While expanded voir dire and supplemental juror questionnaires do not solve all the problems inherent in voir dire in many states, they can go a long way toward doing a better job of uncovering juror bias. Since the goal of voir dire is to help both judge and counsel identify bias that can taint jury deliberations, consider these two recommendations the next time you have the opportunity to learn about your potential jury pool. ●

This article was derived from an affidavit Dr. Matlon prepared for the Maryland Defense Counsel, Inc. where he was asked to render an opinion concerning jury selection procedures in Maryland.

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Ronald J. Matlon, Ph.D., is the Executive Director of the ASTC and Senior Trial Consultant with Matlon & Associates in Phoenix, MD. He may be reached at (410) 472-0736 or by e-mail at matlon1005@earthlink.net.

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