



The Jury

AUGUST 2013
Volume 25, Issue 4

EXPERT

The Art and Science of Litigation Advocacy

A publication of the American Society of Trial Consultants



Classics: Everything Old Is New Again

Rita R. Handrich

Strategies for More Effective Voir Dire

Ronald J. Matlon

Getting Beyond “Can You Be Fair?”: Framing Your Cause Questions

Nicholas Scurich

Time to Rethink 3M?

Rachel Small,
Judith Platania,
and Brian Cutler

The “Why” and “How” of Focus Group Research

Douglas L. Keene
and Rita R. Handrich

Managing Hindsight Bias

Brian Patterson

Knowing When and How to Indoctrinate

Rita R. Handrich

FAVORITE THING

American Jury System: The Optimal Jury Trial Videos

W. Neil Gowensmith,
Daniel Murrie, and
Marcus T. Boccaccini

NOTE FROM THE EDITOR

Rita R. Handrich

Editor

Rita R. Handrich, PhD
rhandrich@keenetrial.com

Associate Editor

Jason Barnes
jbarnes@barnesandroberts.com

Assistant Editor

Brian Patterson
bpatterson@barnesandroberts.com

The Jury Expert logo was designed in
2008 by: Vince Plunkett of
[Persuasium Consulting](http://www.persuasium.com)

The Jury Expert [ISSN: 1943--2208] is
published bimonthly by the:

American Society of Trial Consultants

1941 Greenspring Drive
Timonium, MD 21093

Phone: (410) 560-2563
<http://www.astcweb.org/>

Additional ASTCF Resources:

[Deliberations Blog](#)
[The Red Well Blog Aggregator](#)

The publisher of The Jury Expert is not engaged in rendering legal, accounting, or other professional service. The accuracy of the content of articles included in The Jury Expert is the sole responsibility of the authors, not of the publication. The publisher makes no warranty regarding the accuracy, integrity, or continued validity of the facts, allegations or legal authorities contained in any public record documents provided herein.

NOTE FROM THE EDITOR

Law versus justice, dead ex-witnesses, and everything old is new again!

SUMMER IS ALWAYS HOT HERE in the Texas Hill Country but this summer has had added heat from media coverage of a number of very hot trials. The George Zimmerman trial for second degree murder resulted in acquittal, shocking and stunning the country. Unless you read [the jury charge](#) given to those six jurors and then you were likely neither shocked nor stunned. This verdict has been described as [the difference between law and justice](#) and [celebrities like Stevie Wonder](#) have taken a stand of their own on the “stand your ground” laws. [US News](#) says Stevie Wonder may have trouble performing in the US at all since between 16 and 30 states now have some version of the “stand your ground” law (when you include the castle doctrine in that count).

The [James “Whitey” Bulger](#) trial almost got lost in the media coverage of the Zimmerman trial but it’s been quite a colorful circus of [expletives and bile](#). It isn’t often you hear language in court of the sort we’ve heard here. (It’s like the [Sopranos](#) in real life.) When a possible witness in the Bulger trial (Stephen “Stippo” Rakes) was [found dead by the side of the road](#), drama ensued despite the body having no signs of trauma and police believing initially the death was a suicide.

For court-watchers and workers, it’s been an exciting, dramatic and often frustrating summer thus far. *The Jury Expert* experienced traffic spikes on some of our prior pieces related to the issues and themes in the Zimmerman trial and verdict. So we decided to do an entire issue of ‘classic’ pieces that were not previously available in full-text online. One of the tremendous benefits of publishing online is that our articles can be accessed as they become relevant over and over again. While that was always the point of print publications—unless I was at the library doing formal research—I never went back to old issues of print publications. They just took up space on my shelf. Not so with online publishing.

In other news, The Jury Expert is moving back to being published by the [American Society of Trial Consultants](#). We want to thank the [American Society of Trial Consultants Foundation](#) for publishing us for the past year! We are also moving from six issues a year to a quarterly publication. We will publish in August, November, February, and May. It’s a move to reduce the strain on our staff (and our authors!) of publishing every other month around our already busy trial consulting schedules and to reduce costs associated with the publication. Our quality will remain the same. We will work to produce timely as well as classic pieces that live on and take on new life as the news revolves.

Expect our next issue around the first of November. Until then, stay cool and hydrated. Let me know if there are topics you’d like to see covered in *The Jury Expert’s* ever expanding pages.

[Rita R. Handrich, PhD](#)
Editor, [The Jury Expert](#)

IN THIS ISSUE...

- 4 Classics: Everything Old Is New Again**
by Rita R. Handrich
- 5 Strategies for More Effective Voir Dire**
by Ronald J. Matlon
- 10 Getting Beyond “Can You Be Fair?”: Framing Your Cause Questions**
by Ken Broda Bahm
- 13 Time to Rethink 3M?**
by Laura Rochelois
- 16 The “Why” and “How” of Focus Group Research**
by Douglas L. Keene
- 20 Managing Hindsight Bias**
by Merrie Jo Pitera
- 21 Knowing When and How to Indoctrinate**
by Alan Tuerkheimar
- 25 Favorite Thing: American Jury System- The Optimal Jury Trial Videos**
by ASTC Member Trial Consultants



August 2013

Volume 25, Issue 4
Copyright © The American Society of
Trial Consultants
All Rights Reserved



Illustration by Sully Ridout of [Barnes & Roberts](#).

Classics: Everything Old Is New Again

THE DIGITAL VERSION of *The Jury Expert* has been successful beyond our expectations. That was not always the case. When the print version of *The Jury Expert* was discontinued in 2007, we had fewer than 500 subscribers. The publication is very different now but what we've noticed is that an advantage of on-line publishing is that as various trials hit the news, some of our more mature articles are accessed repeatedly.

For example, as the Trayvon Martin/George Zimmerman trial heated up and then concluded in controversy, here are some of the articles that had traffic spikes:

- [Ethical Issues in Racial Profiling](#) by Annabelle Lever
- [Will It Hurt Me In Court? Weapons Issues and the Fears of the Legally Armed Citizen](#) by Glenn Meyer
- [The 'Hoodie Effect': George, Trayvon and How it Might Have Happened](#) by Doug Keene and Rita Handrich
- [Does Jury Size Still Matter?](#) by Jill Holmquist
- [Avoiding Jury Duty: Psychological and Legal Perspectives](#) by David M. Sams, J.D., LL.M. and Tess M.S. Neal, Ph.D. and Stanley L. Brodsky, Ph.D.

The first four have direct relevance to themes in the Zimmerman trial and the fifth may be an outcome of those themes! We love it when this happens. What it means is that our articles are “timeless” or “classic”. And for our authors, it means their hard work doesn't soar and then crash to the ground once they are off our front page. Instead, it is celebrated initially and then savored over and over again as it once again becomes relevant and sought out courtesy of the internet.

So we thought—why not go back in time a bit ourselves? We combed through the old print issues of *The Jury Expert* to find other classics that few, if any, of *The Jury Expert's* current readership have seen.

These are classics in every sense of the word. Timeless. Aging gracefully. Whatever positive descriptor you wish to apply. We thought we'd add them to our full-text online depository of wisdom so searchers can come across them in the future. They are republished here as they were originally presented. Classics from the masters in trial consulting. Only at *The Jury Expert*.

[Rita Handrich, Ph.D.](#) is Editor of [The Jury Expert](#) and the Research Director at Keene Trial Consulting.



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.

Originally published in September 2006

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.

References

- [1] Ellsworth, Phoebe C. (1984). Due Process vs. Crime Control: Death Qualification and Jury Attitudes. *Law and Human Behavior*, 8, 31–51.
- [2] Hans, Valerie P. & Jehle, Alayna (2003). Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection. *Chicago-Kent Law Review*, 78, 1179–1201.
- [3] Wu, C. & Shaffer, D.R. (1987). Susceptibility to Persuasive Appeals as a Function of Source Credibility and Prior Experience with the Attitude Object. *Journal of Personality and Social Psychology*, 52, 677–688.
- [4] Bono, Randall A. (2000). A Former Judge’s Perspective on Voir Dire. www.illinoisbar.org.
- [5] Saks, Michael J. (1997). What Do Jury Experiments Tell Us about How Juries (Should) Make Decisions. *Southern California Interdisciplinary Law Journal*, 6, 1–53.
- [6] Chaikin, A.L., Derlega, V.J., & Miller, S.J. (1976). Effects of Room Environment on Self-Disclosure in a Counseling Analogue. *Journal of Counseling Psychology*, 23, 479–481.
- [7] Diamond, Shari Seidman (1997). Realistic Responses to the Limitations of Batson v. Kentucky. *Cornell Journal of Law and Public Policy*, 7, 77–95.
- [8] Fargo, Marjorie S., Affidavit in Support of Motions for Specialized Jury Selection Procedures, United States District Court for the Eastern District of North Carolina New Bern Division (1989).
- [9] Starr, V. Hale and McCormick, Mark (1985). *Jury Selection* (Little, Brown).
- [10] Mize, Gregory E. (1999). On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room. *Court Review*, Spring, 10–15.
- [11] Suggs, David & Sales, Bruce D. (1981). Juror Self-Disclosure in the Voir Dire: A Social Science Analysis. *Indiana Law Journal*, 56, 367–388.
- [12] Nisbett, Richard E. & Wilson, Timothy DeCamp (1977). Telling More Than We Can Know: Verbal Reports on Mental Processes. *Psychological Review*, 84, 231–259.
- [13] Pearson, Robert W. (1992). Personal Recall and the Limits of Retrospective Questions in Surveys. In Tanur, Judith M., ed., *Questions About Questions: Inquiries in the Cognitive Bases of Surveys* (Russell Sage Foundation).
- [14] Jones, Susan E. (1987). Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor. *Law and Human Behavior*, 11, 131–146.

- [15] Fargo (1989).
- [16] Williams J. Allen (1968). Interviewer Role Performance: A Further Note on Bias in the Information Interview. *Public Opinion Quarterly*, 32, 287–294.
- [17] Padawer-Singer, Alice M., Affidavit in re Antitrust Actions, No. 4–71 Civ. 435 (C.D. Minn.).
- [18] Motion to Permit Counsel to Question Jurors During Voir Dire and Memorandum to Support, United States of America v. Deric Frank, United States District Court for the Southern District of New York, No. 97-CR-269(DLC).
- [19] Bonora, Beth & Krauss, Elissa (1979). *Jurywork: Systematic Techniques*(National Jury Project).
- [20] Broeder, Dale W. (1965). Voir Dire Examinations: An Empirical Study. *Southern California Law Review*, 38, 503–528.
- [21] Bush, Neal (1976). The Case for Expansive Voir Dire. *Law and Psychology Review* 2, 9–26.
- [22] Seltzer, Richard, Venutti, M., & Lopes, G. (1991). Juror Honesty During the Voir Dire. *Journal of Criminal Justice*, 19, 451–462.
- [23] Hans & Jehle (1986).
- [24] Matlon, Ronald J. & Facciola, Peter C. (1986). Voir Dire by Judges and Attorneys: A Study of the Role Expectations of Potential Jurors. Paper presented at the Speech Communication Association Convention (Chicago).
- [25] Heaney, Lois (2003). Jury Selection in the Era of Tort Reform. National Jury Project unpublished paper.
- [26] American Bar Association American Jury Project, *Principles for Juries and Jury Trials*.
- [27] Frederick, Jeffrey T. (1987). *The Psychology of the American Jury* (Michie).
- [28] Heaney (2003).
- [29] Hans & Jehle (2003).
- [30] American Bar Association American Jury Project (2004).
- [31] Council on Jury Use and Management, Maryland Administrative Office of the Courts (2000).



Getting Beyond “Can You Be Fair?” Framing Your Cause Questions

by Ken Broda-Bahm

THIS SCENARIO HAPPENS at some point in nearly every voir dire. First, a juror reveals a bias for or against one of the parties.

Juror: I just really don't trust big companies. What with all the media stories and all the scandals, well, I just think that they are in it for the money and they aren't honest.

Then the attorney that would be disadvantaged by that bias moves in to clarify and, in effect, to convince the juror that this bias really wouldn't apply to their client.

Attorney: But you understand that companies aren't all the same, don't you?

Juror: Well, sure.

Attorney: And if the judge instructed you in this case, to just focus on the facts and the testimony about this company, and not your view of companies in general, you would be able to

do that, wouldn't you?

Juror: I would try my best.

Yes, the juror has made a verbal commitment to try to set aside bias. But no, there is no reason to believe that the juror has in the process recovered from their bias. The most pernicious juror biases are worldviews: frameworks that jurors will use to understand facts, reconstruct stories, and interpret testimony and other evidence. Jurors do not come equipped with an on/off switch, and they cannot escape such a bias just by making a solemn promise. In all likelihood, the juror in the scenario above will still be all too ready to presume that the corporate party is dishonest and greedy, and to disbelieve that company's representatives.

Experienced trial attorneys know that, of course. And the attorney in this case may indeed use one strike on that juror. However, what has been lost is the opportunity to use the cause challenge for its true and intended purpose: to remove a juror who cannot reliably be fair in evaluating the facts of the case. While any questioning attorney is subject to a judge's reluctance

to allow cause challenges, and at the mercy of a juror's tendency to give the safe answer, attorneys too often compound these disadvantages by asking truly biased juror questions that lead them away from an admission of bias and not toward one.

The fundamental barrier that attorneys must confront is the very human tendency on the part of jurors to want to portray themselves in the best possible light. This "social desirability bias"^[1] serves as a standing encouragement for jurors to answer all questions with what they take to be the "right" or the "good" answer. The courtroom itself, with its many trappings of official power and formality, can heighten for jurors a preference for an answer that they believe will satisfy the judge and the attorneys over an answer that honestly conveys a bias.

To ferret out the worst forms of bias, attorneys need to prepare for cause questioning with an eye toward the tendency to give the "right" answer. The task of developing these questions, however, can be tricky. To avoid evoking the socially desirable response, attorneys should start by dispensing with several old standbys:

- Leading questions: *Wouldn't you agree that...?*
- Instruction based questions: *If the judge were to tell you that...?*
- Ultimate conclusions: *Can you be fair to my client?*

While those questions can be quite effective at rehabilitating a desirable juror, they are counterproductive if the goal is to discover and expose actual bias that could hurt your case. The average juror will tend to agree with you, to say they will follow the judge's instructions, and promise to be fair to everyone in the courtroom, while still maintaining a biased worldview.

To create the best possibility for a successful cause challenge, consider using a four-phased approach designed to increase the chances that a biased juror will honestly admit to their bias.

Phase One: Modeling

First, create a climate for effective cause questioning by modeling the types of undesirable juror attitudes for your particular case. Show that it is acceptable to hold such views by modeling through some of your own self-disclosure. A light-hearted approach might sound as follows:

Let me explain a bit about what this questioning is for. Like many of you, I'm sure, I am a basketball fan, and around here that means that I'm a big fan of the Miami Heat and Shaquille O'Neal. If there were a court case in which someone was suing that basketball team, or suing Shaq, I would be the wrong juror for that case. I would be the wrong juror because I would have a hard time setting aside my loyalty to the team and being fair to

the person who was suing the team. And there would be nothing wrong at all for me to admit that opinion—to be fair, I would really want to admit that opinion because maybe I should be a juror for a different case.

The important part of this modeling phase is that it be genuine and that it establishes a comfortable climate of rapport in which jurors understand that they are *fulfilling* the requirements of the system and not *failing* the test when they disclose bias.

Phase Two: Priming

When a juror has provided an indication of a possible bias, avoid the temptation to immediately jump to the ultimate legal question of whether that juror can set aside that experience or attitude and render a verdict solely on the evidence. Asking that question too soon will simply prompt the juror to provide what they believe to be the correct response: "Yes, I can set aside that bias." Before asking the ultimate question, set jurors up for a more thoughtful and accurate response by sensitizing them to their own attitudes. Do this by inviting the juror to wear the mantle of that belief: to speak about the sources and depth of their feelings on the issue.

- *How long have you felt that way?*
- *Was that experience an important one for you?*
- *What experiences helped you form that opinion?*
- *Is this a belief that you feel you have good reasons for?*
- *Why do you feel this way?*

Naturally, in group voir dire, you want to be wary of effectively handing that juror a microphone to broadcast their negative views to the remaining venire. If possible, it is always better to handle important cause issues through individual voir dire or at the bench. However, if you are faced with a choice between (a) allowing a biased juror to inject a small amount of poison into the venire by speaking candidly prior to being dismissed for cause during voir dire; or (b) allowing that same juror to inject a potentially fatal dose of poison into the actual jury, by allowing them to stay; then option (a) is clearly the better option. Jurors do listen carefully to their peers during jury selection, but the harms of a few negative comments at that stage pale in comparison to the harms of that juror's sustained influence during deliberations.

Phase Three: Building the Case

Before moving on to confirm that juror's bias, use additional priming questions to explore all other potential sources of bias for that juror. Fully building the case on all possible sources of bias, then asking jurors whether they could lay aside these attitudes, works better than asking that confirming question for each source of bias. If possible, before moving on to the

final phase, work to connect the sources of bias.

Ms. Jones, in your questionnaire you noted that you have some negative opinions about people who bring lawsuits against large companies. Your exact words were, “Too many plaintiffs are just after money.” You also noted that your husband’s company was sued two years ago and lost a large sum defending and settling that suit. You also answered that you would tend to trust the science conducted by a large company like Smithco more than you would trust science conducted on the plaintiff’s behalf. So, you have had a negative personal experience with lawsuits, you believe that too many plaintiffs are just after the money, and you would be less likely to trust the plaintiff’s evidence. Is that right?

Phase Four: Confirming

Once a juror has provided an indication of possible bias *and* has had an opportunity to “own” all of their potential biases a bit by speaking about them, conclude questioning for this juror by asking the legal question of whether these biases could be set aside in order to focus on the evidence. Still, at this phase avoid suggesting the socially desirable response by asking the question in a straightforward “Can you be fair?” fashion. Instead, consider some of the following options that may create a more comfortable space for jurors to say “yes.”

- *In what ways will this experience/attitude affect the way you view the plaintiff/defendant?*

[Ken Broda-Bahm, Ph.D.](#) is a litigation consultant based in Denver, Colorado with the firm Persuasion Strategies, a service of Holland & Hart LLP. He provides comprehensive services including trial messaging strategy, focus group and mock trial research, community attitude surveys, witness preparation, jury selection, mock bench trials and mock arbitrations. He has worked in a broad array of litigation types specializing in commercial, employment, construction and energy litigation. You can read more at www.persuasionstrategies.com.

References

[1] Fisher, R. J. (1993). Social desirability bias and the validity of indirect questioning. *Journal of Consumer Research*: 20, 303–315.

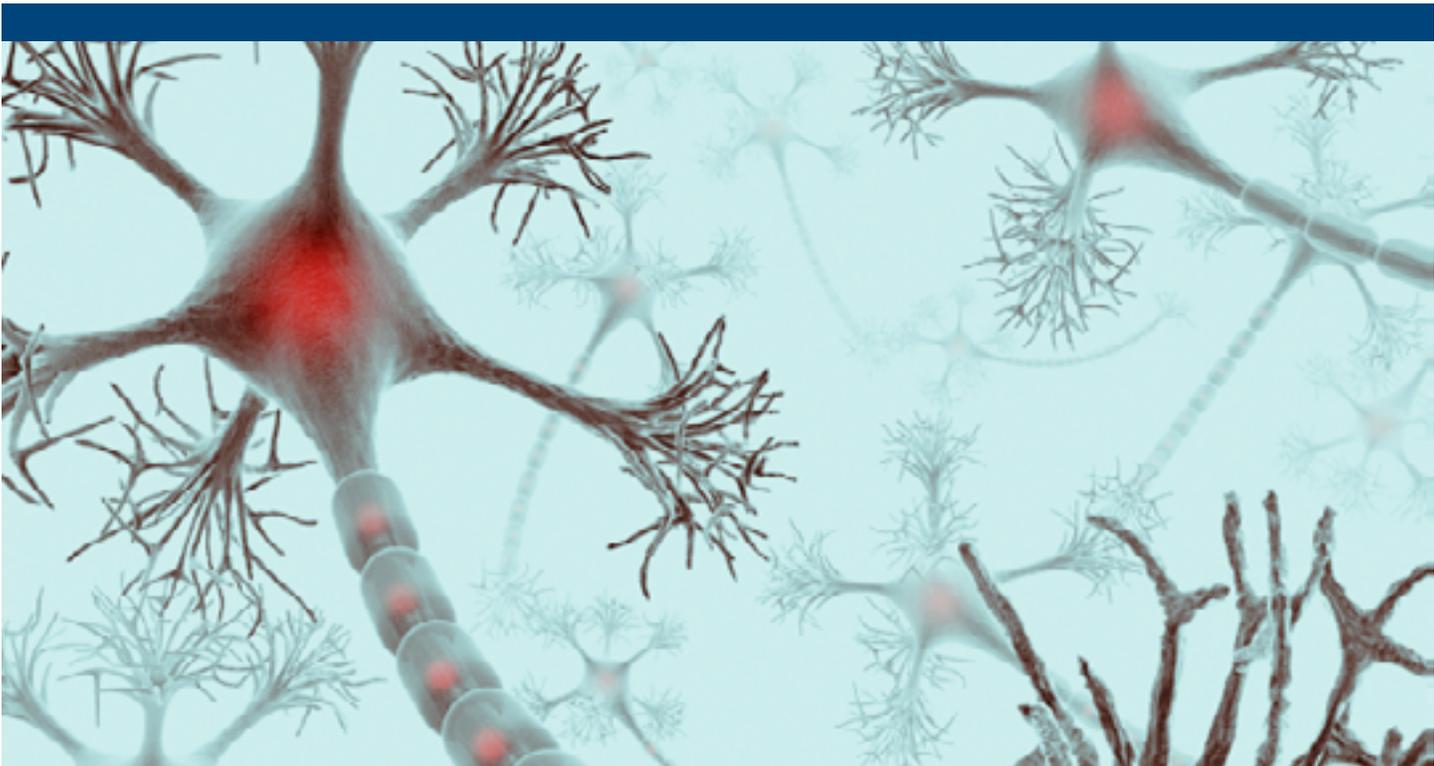
- *How likely do you think it is that you would change your opinion in the next 24 hours?*
- *Knowing that you wouldn’t automatically decide the case based on this experience of yours, is it safe to say that with you, I would start off a step or two behind my opposing counsel on this issue?*

Finally, end this section by providing the judge with the language she is looking for.

- *So based on everything you’ve said, how difficult would it be for you to just set aside what you know and what you believe and render a verdict solely on the evidence?*

Note that you are asking not whether the juror can set aside that bias (it is still too easy to say “yes”), but rather you are asking *how difficult* that would be, and in the process setting the stage for the juror to frankly talk about that difficulty. Naturally, your selection and phrasing of these questions will vary based on what you know of the judge’s preferences. But the common thread of the strategy is that you are undercutting the strong pull of social desirability in order to enable a truly biased juror to admit their bias. And that admission provides the best and most reliable answer to the basic question, “Can you be fair?” ☺

Originally published in March 2007



Time to Rethink 3M?

by Laura Rochelois

WHEN IT COMES TO PITCHING the use of trial graphics, there's not much out there that gets more play than the well-known 3M Study.^[1] The 1986 study sponsored by 3M and conducted at the University of Minnesota proclaimed in bold letters on the first page of the published paper that presentations using visual aids were "43 percent more persuasive" than those without. As if that wasn't good enough, participants in the study were more likely to describe presenters who used visual aids as "clear," "concise," "interesting," and as having appropriate "supporting data," among other accolades. It sounds great at first blush, and there's no doubt that the study, sponsored by the leading manufacturer of overhead transparencies, is still a favorite in sales presentations and brochures.

However, when you look closely at the paper, which was not published in a peer-reviewed journal, it feels a bit like one of those global warming reports we hear about where any unhappy effects likely to result from the scientific gobbledygook have been offset by a political operative's tacked-on title: "Evidence for Climate Change Inconclusive." In this case, the problem is the reverse: the data is not quite as conclusive as the bold-faced

proclamation in the introductory sentence. If only we knew what it means to be "43 percent more persuasive."

Fortunately, author Doug Vogel didn't stop with the 3M study. In 1996, he and colleague Joline Morrison set out to drill down on the findings described in that paper and published their results in *Information & Management*.^[2]

This second study never makes the "43 percent" conclusion. Its results are far more useful and specific, not to mention better substantiated, than those reported in the 3M Study.

This later study looks at a variety of factors relating to the use of visual aids and their effects on both "perceptions of the presenter" and "components of persuasion," the latter of which it defines as:

1. attention,
2. yielding,
3. comprehension, and

4. retention.

The use of visual aids alone appears to have no direct effect on the first two components, attention and yielding, but has a strong positive effect on comprehension and retention. Interestingly, the use of visuals *does* tend to produce a higher regard for the presenter on the part of subjects, which, in turn, correlates with improved attention and yielding. This, of course, begs the question of which presenter qualities (professionalism? conciseness?) most effectively dial up the attention and yielding levels of an audience. But the interesting thing is that good visuals contribute directly to two components of persuasion: comprehension and retention. Now that's useful.

Morrison and Vogel also slice and dice various optional features of visual aids in multiple ways, yielding some useful findings. For example, it may surprise you to know that color visuals are not only prettier than black-and-white; they actually contribute to greater comprehension and retention of the subject matter being conveyed. Similarly, while well-done animation significantly improves comprehension, redundant or marginally relevant art and animation are at best ineffective and at worst harmfully distracting to viewers.

Research on effective visual communication in the courtroom should ask a number of additional questions:

- What exactly is a good versus a bad visual aid?
- What are the effects of the fact-finder's demographics or cultural background on his or her visual perception and susceptibility to persuasion?
- How do various courtroom factors, social and environmental, affect visual persuasion?

My point is not that trial graphics that aren't based on peer-reviewed research aren't worth the bother. In fact, in our age of 24/7 multimedia edutainment, I'd consider visual aids indispensable in any setting where the goal is to make a persuasive presentation, if for no other reason than because people expect it. But we need to get past the limited beginnings of the 3M Study. If visual persuasion is to come of age as a science, it must be based not on old saws and advertising taglines, but on something we should know a thing or two about: evidence.

A look at the greater weight of the available evidence suggests

a few effective ways to incorporate visual persuasion into your next case:

First, respect the limitations of the brain. The eye receives 10,000,000 bits of information every second. The brain processes 40 of these bits (.0004 percent). We hear 100,000 bits of information every second and are able to process 30 (.03 percent).^[3] The central organizing principal in creating visuals is to eliminate everything that isn't necessary. Start at the macro level and remove all nonessential case themes, then all visuals that aren't critical, and finally all unnecessary elements in each visual. Find the core of your message and focus your creative energy there.

Second, leverage the power of multimedia. Once you have determined your core messages, use words and pictures together to improve meaningful learning.^[4]

That's the theory part. Here's the practical part: it turns out that, according to Mayer, putting words and images on the same screen causes (you guessed it) cognitive overload. A more effective strategy is to let the speaker do the telling and the screens do the showing. Of course, real-time narration also leaves room for on-the-fly improvements, a handy thing during the unpredictable, shifty beast we call trial.

Other researched-based ways to reduce cognitive load and improve meaningful learning include keeping like items together (for example, incorporating key information into the main field rather than placing it in a corner) and breaking information into digestible parts. Design decisions also contribute to meaningful learning, since effective color choice, layout, camera angle and motion, to name a few, can reinforce emphasis, hierarchy and focus of information, cutting cognitive load and reorienting it in the right direction.

So, must successful trial graphics designers earn advanced degrees in neurology, psychology and ophthalmology? I hope not. But neither can we afford to ploddingly recycle unsupported mythologies dating from the dawn of our profession. To become experts who can create real value for our clients, we have to know something they don't. And to do that, we have to do our homework. ©

Originally published in July 2007.

Laura Rochelois is a principal at By Design Legal, a full-service trial presentation firm serving a national client base from its offices in Portland, Oregon. She may be reached at lr@bydesignlegal.com. For more information on By Design Legal, see www.bydesignlegal.com.

References

- [1] Vogel, Douglas R. (1986). "Persuasion and the Role of Visual Presentation Support: The UM/3M Study." *Working Paper Series*. The other study that gets a lot of airtime and is also quite old and untested is the Wharton Study: Oppenheim, Lynn. (1981). "A Study of the Effects of the Use of Overhead Transparencies on Business Meetings."
- [2] Morrison, Joline. (1998). "The impacts of presentation visuals on persuasion." *Information & Management*, 33 125–135.
- [3] Norretranders, Tor. (1998). *The User Illusion: Cutting Consciousness Down to Size*. New York: Penguin.
- [4] Mayer, Richard. (2001). *Multimedia Learning*. Cambridge: Cambridge University Press.

The “Why” and “How” of Focus Group Research

by Douglas L. Keene

Why focus groups?

PROPERLY CONDUCTED FOCUS GROUPS are extremely useful in getting reactions to a wide array of aspects of the case. While it is not prudent to expect that the “verdict” of a small group research project will be repeated at trial, it is very likely that the same values, hot buttons, and sensibilities that engage the research group will resonate in the jury room.

- What do jurors want in the way of persuasive evidence? Brainstorm with them about the evidence that they used to come to their conclusions, and what additional evidence they would need to change their minds.
- What will a jury think of the witnesses? Show brief tape excerpts from depositions and solicit feedback.
- What sorts of demonstrative evidence will be helpful in getting this story across? Devise a focus group to examine what you have in mind and offer suggestions.
- What themes and language resonate most effectively with jurors who hear this set of facts? Lay out the story and get the group to describe their associations, impressions and reactions to the situation.

The premise

Focus group participants are ideally very savvy. You are not looking for opinions off the street. You are looking for people who will influence deliberations when the jury room door is closed. To engage them fully in the process, it is important to elevate their role from partisan to peacemaker. The moderator should tell them that they are there at the behest of *both sides* in a dispute that is headed for the courthouse. The litigants are blind to what real people think of the case, and it is [the moderator’s] hope that the collective wisdom of the focus group will offer both sides a basis for coming to a resolution of the dispute without the need for trial. Their impressions and conclusions will be extremely important in that process, and

will be provided to the lawyers to share with their clients in a lengthy report. It makes the participants key players in an important process.

It is far less productive to allow them to think that they are working in the interest of one side or the other. That stifles openness. And this premise must be maintained with complete fidelity from start to finish. Never tell them anything different, or they will feel betrayed. If you lied to them about that matter, they are free to lie to you about their confidentiality agreement. Plus, you have stolen their good feeling about trying to end the conflict.

Constructing your presentation

When preparing for a focus group or a mock trial, the goal needs to be to test the strength of the opposition, more than to see what the range of damages is or whether you will “win” at the end of a three-week trial. This is small group research, and it should not be considered predictive of a full jury trial. As all trial lawyers know, trials rarely go as anticipated. Rulings on evidence, performances by key witnesses, the composition of the jury, and myriad other factors all offer uncertainty about what will happen in court, and cannot be precisely replicated in pretrial research. What is far more reliable, though, are the values, sensibilities and evidentiary requirements of jurors in their efforts to understand what underlies the dispute. If you know what jurors are likely to find most compelling about the case, and the social and personal values that are likely to drive decision making, you are in a position to modify your trial strategy to maximize those effects.

The smartest strategy in conducting pretrial research is to construct a presentation that gives the opposition the benefit of the doubt on all unknowns:

- Assume all evidentiary rulings go against you.
- Offer a greater percentage of the evidence and case theories favored by the opposition.

- If you have evidence or testimony that is devastating to the opposition's case (the elusive "smoking gun") hold it back and see if the case survives its absence. You might introduce it after the deliberations start as additional data for consideration.
- If deposition video clips are shown, make sure that the segments used for opposition witnesses are as flattering as possible, and hold back on the best parts for your own witnesses.

The principle is that you want to challenge your case as vigorously as possible, in the way that a battleship is taken out to test seaworthiness before it is sent into battle. See what additional resources are required to meet your objectives at trial. Learn where the case springs leaks, and if it sinks completely, find out in time to bolster the weak areas.

Different groups for different objectives: concept focus groups, structured focus groups and mock trials

Concept focus groups resemble a brainstorming approach to developing themes for trial. This approach is akin to the discovery phase of trial preparation, and is most often used in that time frame of the case development. Concept focus group participants serve as community attitude consultants, responding to issues and facts of the case, telling us how to construct the story, and guiding us as to the most important avenues to explore in supplemental discovery or depositions. They tell us about biases that are going to show up at trial, and provide ideas for how to deal with them. When land mine issues are encountered, they let us know, and give invaluable help on areas for discovery that have been overlooked.

Structured focus groups involve a set presentation, usually of facts and arguments that are anticipated at the time of trial. Structured groups, like mock trials, are also helpful for the trial team in that to do them well requires thorough consideration of what the themes and strategies of the opposition will be. The length of the group sessions, as well as the size and number of groups to be run, are areas of flexibility. A thorough report of the groups examines the value and impact of each element of the presentation, as well as addressing specific questions and issues of concern about the cases.

Mock trials are a more formal and thorough approach to case testing than focus groups, but the goals are similar. Mock trials typically involve presentations of evidence and argument, witnesses (either through video tape or live using actors for the opposing witnesses as well as the actual witnesses from your side), formal use of demonstrative evidence, evaluation of the impact of opening statements, witnesses, evidence and closing argument. Feedback from the mock jurors usually takes the form of observing their deliberations and having them (individually and/or as a group) complete mock verdict forms. This can be supplemented with additional questionnaires

at points during the trial presentations, as well as additional written questions at the end of the event. Normally, mock trials do not have moderated deliberations. Mock trials offer a more formal structure, closer to the style of a mini trial or summary jury trial, but what they can lose in the process is the information gleaned from teasing out the meaningful elements of the presentations that comes from skilled moderation of the discussion. For cases that warrant a mock trial, the normal approach is to conduct preliminary focus groups about crucial aspects of the case.

The form of the presentation

In concept focus groups, the "presentation" is typically made by a very experienced trial consultant, sometimes with the assistance of one of the trial counsel to make sure the facts are immediately at hand when needed. Although it may look simple, it is actually the form of research that requires the most skill and experience. Many trial consultants do not conduct them at all. When it is done properly, however, the results can be remarkably productive.

The presentation is more like a brainstorming session with the jurors, telling them a bit about the story, and eliciting reactions from them about the facts, while also asking them what questions those facts prompt in them. The outline of facts and issues that are to be covered in the session is agreed upon with the trial team, and key documents and evidence are arranged ahead of time.

Over the course of the presentation, the scope is covered, although an energetic group often results in the order shifting somewhat. An experienced consultant will be able to get jurors to explain why their questions are meaningful to them, what they will do with answers in one direction or the other, the part the answers will play in their assessment of the case. The consultant can gauge which of those questions should be answered directly and which are better left unanswered at that point in the process. Skilled consultants are especially good at eliciting high levels of comment from jurors, and keeping the more talkative jurors from dominating the discussion too much.

In structured focus groups, the presentation options are very different. The first question is with regard to roles. The trial consultant in this case serves as a group host and moderator. He or she establishes with the group confidentiality issues and the value of their input, and sets the tone and agenda for the presentation.

When you conduct the focus group with an "adversarial" approach, more like what you would think of as being a mock trial, there are ways to structure it to get more useful results:

- First, have the trial consultant read a preliminary statement of facts not in dispute, and perhaps a brief statement of the positions of the parties. That takes the parts of the story

that are easy for the jurors to agree with out of the plaintiff's hands, and provides more balance to the presentation, both in terms of time and content. It also streamlines things.

- Second, have the attorney who knows the case best play the role of opposition counsel. They will know where the hot buttons are.
- Third, if you are going to show any demonstrative evidence, such as PowerPoint™ slides or graphics, make sure that there is balance in the plaintiff and defense presentations. If one side has a slick PowerPoint™ presentation and the other side is using a flip chart, the different presentation types can skew the results.
- Fourth, if there are going to be video clips from depositions, be cautious about whose voice is going to be heard on the tape, and whether the examining counsel sounds too interrogative. If the defense counsel is heard badgering his own client, the whole program can be seen as suspect by the jurors. The purpose of the clips is for jurors to get a feel for the likeability, credibility and personality of witnesses. That can take five to seven minutes. Select the clips to show the witness talking, and try to avoid long predicate speeches by counsel. If you want to have the jurors see the witness go through specific fact testimony, it generally takes more time, and time is often in short supply.

For structured focus groups, the presentations are done by trial counsel. One challenge that arises frequently, especially in small firms, is that only one attorney really knows the case. She is able to stand up and explain both sides of the case fluently. Unfortunately, in a focus group, there is no one that can play the part of the opposition with that level of fluency, unless a good deal of time is spent bringing them up to speed. Even then, the second counsel is often relying on notes, while the first counsel is relying on months or years of learning the facts. Jurors notice the difference, and they favor the more prepared counsel.

So what do you do? We suggest a creative modification for solo practitioners or those who do not have a second chair that is totally at ease with the case facts: the “mediator” approach. The mediator approach involves having the one attorney who knows the case thoroughly doing the presentation, but doing it as a third party neutral. They explain to the focus group that they have been asked by the parties to attempt to get feedback from real jurors about the merits of the case, in the hopes of coming to a resolution without the need for trial. The mediator offers an overview of facts not in dispute, and then offers the disputed positions of the parties.

What is very difficult for many trial lawyers is to take off the advocacy role and be neutral when that is called for, and be balanced in the characterizations of the case for both sides. If any imbalance in passion or argument is discerned by the jurors, it needs to be mildly in favor of the opposition. If there

are favorable facts or documents that are so damning of the opposition that they overwhelm the salience of other facts, hold them back until the end of the group, after the deliberations have largely taken place, so you can see how the case will fare in the event that the hot document is excluded. At the same time, if the explosive information favors the opposition, include it in your presentation unless its admissibility is highly questionable. The goal is not to “win” the focus group. The goal is to test the weaknesses of your case and discover strategies for dealing with them, and then assess the strengths.

Deliberate or moderate?

When the presentation in a structured focus group is complete, you want to get the highest quality feedback from the jurors that you possibly can. It is the payoff for doing the exercise. So, how do you get it?

Deliberations in focus groups or mock trials can bring you to a consensus, or a near consensus, and give you an idea of how a deliberation might unfold. You provide a mock jury charge (with key questions and simplified instructions), and a presiding juror attempts to get people to discuss their views and their reasoning.

The drawbacks to this approach, in our view, are several. First, the jury, just like at trial, can be dominated by one or two people that drive quick decisions and suppress meaningful discussion. Second, the discussion is the most useful part of the process. That is where you learn why they feel as they do, what they might require in testimony or evidence to persuade them differently, and what parts of the case they liked and disliked the most. Their final decision is rarely based on the full scope of trial testimony, so the value of watching them deliberate is somewhat questionable.

Moderator-led discussions take a different path. The same juror questions are submitted, and completed by jurors individually. The discussion is guided to make sure that everyone is heard from, that no one dominates the discussion unreasonably, and that all of the key issues are covered as needed. If there is a gross misunderstanding of some part of the attorney presentations (which indicates the need to do things differently at trial to avoid repeating the confusion), the moderator is able to clarify the error before it derails the whole process. The moderator is able to remind the jury of some piece of evidence or theme that one side or the other thinks is key, and ask them whether they thought it was significant or not, and why. And finally, the moderator can provide additional facts about the case that the jurors have not yet been told. While all of this can be done in a deliberation-style group, it takes much more time, and time is what you have the least of.

Logistics

Careful adherence to some key planning issues can make the case more effective. One rule of thumb is that while the most

expensive focus groups are not necessarily more useful than a mid range group, the cheapest ones are definitely less useful. When you factor in how much time you are going to spend on the case to do research, consider the hours of your time, your staff time, and the benefit you hope to attain. Make sure that your decision making is consistent with your goals.

- *Recruiting.* You want participants who resemble the jurors in the venue on a bad luck day for your case. When you look at the group, or see profiles of their attitudes and life circumstances, they need to be realistic. You do not find them in employment agencies (those jurors are generally much more liberal, have negative attitudes toward corporations, and are plaintiff-oriented). You do not find them by putting an ad in the classified section of the newspaper (for many of the same reasons). You do not want participants who have been in mock trials or litigation focus groups before, because you don't know what they were told, what their experience was like, and whether they have some appreciation that the premise may not be true. And most of all, real jurors are not professional jurors. There are some people in major cities who make a significant amount of money going from focus group to mock trial and back again.

Plaintiffs want focus group jurors who are mildly more conservative than the venue, and who will offer some resistance to their views. We skew the recruit very slightly in favor of people with a bit more education, because we want to know what the decision makers in the jury are going to think of the case. Remember, this is primarily a test of the problems in your case, not a pre-race victory lap. We use professional recruiters, and provide them with a detailed "screener" which forces them to find people of proper socio-economic, ethnic, employment and demographic diversity. It costs more, but it gives you a much greater likelihood of getting the kind of cross-section you need.

- *Paying participants.* Pay the jurors well. You will have jurors in the venue who have household incomes of over \$100,000 per year. If you want to know what these people (who tend to have more influence in deliberations) think of the case, they don't read classified ads for part-time temporary work, and they won't come in for \$25 and a hot lunch. For a four to five hour group, we typically pay jurors \$120-\$200, depending on the venue. Full day groups are between \$150-\$300 for eight to nine hours. Metropolitan areas in the northeast and west tend to demand higher participant fees.

- *Time.* There is never enough. If you are planning a five-hour group, you need to plan presentations that last no longer than two to two and a quarter hours, including all introductory remarks, evidence and argument. A four-hour group cuts presentation time back to less than 90 minutes. If you run longer than that, it ends up both overwhelming the jurors, and cutting badly into the payoff time (getting feedback). For a full day group, the total time for presentation can run as long as three and a half hours.
- *Report.* Most consultants distill the results of the group into a report. Do you want one? What you see in front of you as the group discusses the case is far too fleeting. You will miss a great deal, even if you are taking copious notes. You might take the video tape home, and a pile of questionnaires, but you are very busy and will not be able to spend the amount of time looking at it that you always intended. Plus, the questionnaires simply are too overwhelming to make productive sense out of without a system for analyzing them.

Most consultants write reports that do that work for you. It can be time consuming (thus, potentially expensive), but it covers key information that can turn a good exercise into an invaluable tool. Some consultants write brief summaries, while others don't include much direct analysis of juror comments and just provide impressions of key themes and issues. Others write comprehensive reports that lay out key features of bias, evidence, juror comments, the reasoning behind their ultimate conclusions, where the jurors got most confused or distracted, evidence they found most persuasive, and trial themes and strategies. Ask the consultant if you can see a redacted copy of an old report to get a feel for what kind of analysis you might expect.

Focus groups are not indulgences. They are increasingly becoming standard preparation for trial practice in significant cases. If you want a basis for recommending a settlement strategy to a client, a focus group (while not predictive of trial outcome) can be a good place to start. If you need to know whether a land mine in the case can be dealt with effectively, or how to maximize the impact of evidence, argument and story sequencing, this is your best way of knowing how confident you can be going to trial. ●

Originally published in June 2007

[Douglas L. Keene, Ph.D.](#) is a psychologist, founder of Keene Trial Consulting, Past-President of the American Society of Trial Consultants, and teaches Advanced Civil Trial Advocacy at the University of Texas School of Law. He assists law firms with trial strategy (including focus groups and mock trials) on major civil litigation and white-collar criminal defense. He assists with voir dire strategy, jury selection, witness preparation, and related services. His national practice is based in Austin, Texas and you can visit his website [here](#).

Managing Hindsight Bias

by Merrie Jo Pitera

The Problem

HUMAN BEINGS, especially jurors, like to believe they can prevent bad things from happening if they *do the right thing*. As a result, when something bad occurs, jurors find it comforting to assume, with the benefit of hindsight, that someone *did the wrong thing* and that they (the jurors) *would have known* better. This assumption is known in psychology as *hindsight bias*.

Because jurors are almost always introduced to a bad – often tragic – outcome *before* they hear the related evidence, their hindsight bias leads them, before they have heard the evidence, to ask subconsciously, *who did the wrong thing and why*, rather than *will the evidence support negligence*? Once jurors assimilate the tragic outcome into their knowledge base, it becomes difficult, but not impossible, for them to entertain non-negligence alternatives that may have caused the same outcome.

The Research

Hindsight bias is far too pervasive and persistent to be completely avoided, and previous studies have shown that mock jury instructions or single warnings acknowledging the hindsight tendency are not an effective deterrent against this bias. As a result, a series of mock trials were utilized to determine what strategies and themes would prove effective in reducing hindsight bias among mock jurors.

Results

The number of mock jurors who found negligence significantly decreased when defense attorneys inoculated against hindsight bias by systematically constructing a case story which included:

- a plausible alternative to the event's outcome;
- presentation of unforeseeable information that became available after the fact;
- multiple appeals to jurors to focus on the pre-outcome time period when making their decisions; and
- explicit cautions against Monday-morning quarterbacking.

Lessons Learned

The bias-reducing effects of cautionary closings suggest that, because hindsight bias is so pervasive and damaging, systematic thematic hindsight inoculation should be developed by the defense for every stage of the trial, including voir dire, opening statements, closing arguments, and testimony that conspicuously references after-the-fact information, alternative outcomes and the fallacy of Monday-morning quarterbacking. 

Originally published in May 2006.

Dr. Merrie Jo Pitera is CEO of Litigation Insights, a woman-owned jury research, graphics and presentation technology company. Dr. Pitera can be reached at 913-339-9885 or mjpitera@litigationinsights.com. Please visit www.litigationinsights.com to view our services and download Dr. Pitera's CV and v-card.

Knowing When and How to Indoctrinate

by Alan Tuerkheimer

IT'S TIME FOR VOIR DIRE, but is anybody listening? Are jurors listening to attorneys? Are attorneys listening to jurors? More often than not the answer is no. Regardless of case type or jurisdiction, jurors are checking out. Their attention spans are flat-lining during a crucial phase of trial – voir dire.

At a critical time when jurors need to be particularly focused and engaged, they are losing focus and disengaging. Why is this happening? The reasons are varied and the problem is serious.

Sometimes, jurors are put off by an attorney's combative style or demeanor. Other times jurors are confused by awkwardly worded questions they do not understand, or by attorneys who seem more concerned with their next question than with listening to jurors as they respond to the question at hand.

Ironically, it is during voir dire that attorneys have their best chance to bond with the panel. Even if the jury selection is effective, it is during these early stages of voir dire that first impressions are being formed by jurors, and there will never be another opportunity to do just that.

Compounding the problem is that most attorneys say voir dire is their least favorite part of the trial process. Courtroom lawyers thrive on the adversarial nature of trials and have learned how to be effective advocates. However, achieving success during jury selection requires a somewhat different approach. Attorneys need to play by a completely different set of rules if they are going to conduct a successful voir dire. Combative, aggressive or argumentative questions will not help attorneys connect with the potential jury.

Get the Jurors Comfortable

Listening and getting jurors to feel comfortable enough to freely and openly express themselves is the key to success in jury selection. Jurors do not want to feel as if they are being prompted to say merely what the attorney wants to hear. The only answer counsel truly wants to hear during voir dire

is an honest one. While indoctrination is an important part of effective jury selection, juror responses during voir dire reveal more about who will determine your client's fate. Not surprisingly, the most useful information is gathered when jurors are the ones doing the talking, and speaking in their own words.

Of course attorneys want jurors to view the case in ways that are favorable to their client and will attempt to indoctrinate the panel to some degree. The trick is to know when to do it and how to do it effectively.

Generally, the use of indoctrinating questions should be modest and occupy no more than 25 percent of an attorney's total time and questions. Conversely, since 75 percent of voir dire questioning will consist of more open-ended, information gathering questions, it is imperative to pick and choose the most crucial topic areas for indoctrination. The attorney needs to prioritize which questions will be best suited for the indoctrinating approach since there should always be a finite amount of such "questioning" in voir dire.

Jurors should be reminded early on there are no right, wrong or unimportant answers, and then the open-ended phase of voir dire should commence. If indoctrinating questions are asked at the front end of voir dire, this will stifle candid responses important to subsequent open-ended questions. It is these open-ended conversations where the most information about the panel is learned, in what is often a limited amount of time. Three words should guide attorneys at the beginning of voir dire – let them talk.

It is also important to keep in mind that jurors are typically smarter than attorneys give them credit for. Jurors often realize as soon as an attorney asks an indoctrinating question that they are being forced and frequently manipulated into seeing things a particular way. This reality may cause a backlash.

Jurors want to see the attorney listening to them talk and being interested in what they have to say. They do not want to be

lectured to or forced to listen to something, especially from someone they have yet to connect with. At the right time, toward the end of voir dire, once rapport has been established with plenty of open-ended questions, some indoctrinating questions can be asked without risk of alienating the vast majority of the panel.

Attorneys sometimes have difficulties connecting with jurors because jurors may have firmly-held, preconceived opinions on topics such as tort reform, corporate mendacity, frivolous lawsuits, and the government's role in regulating corporations, among other interrelated "hot topic" litigation issues. These general beliefs help shape how jurors will view the evidence in the case, so counsel needs to choose which topics should be asked in open-ended fashion and which ones would be more effective in the indoctrination format later on in the process.

Either way, voir dire is the opportunity to get answers to questions that will help determine whom you do not want sitting on your jury, and it also enables you to start framing the case in a jury-friendly way that is most beneficial to your side.

Set the Tone First

What is the best way to identify and then strike someone who believes all plaintiff lawyers are "money hungry" and will not give your client a fair shake and keep an open mind? How do we identify someone who believes corporations are the root of all evil, and despite pledges to follow the judge's instructions, will expect your corporate client to prove it did nothing wrong? How do plaintiff attorneys differentiate, in the eyes of the jury, between the substance underlying their client's claims and those "other" frivolous lawsuits? How can corporate counsel distinguish between its C.E.O. and those seen on the nightly news being dragged away in handcuffs?

As previously noted, open-ended questions are the best way to get jurors to express themselves candidly and empower them to talk earnestly about their experiences and world views. This is a universal perspective on jury selection, regardless of whether you are working for the plaintiff or the defense. Therefore, all lawyers should always begin with the "easy" open-ended questions first. There are no right, wrong or unimportant answers to these simpler questions, and this approach will often yield valuable information. Additionally, it gets the jury to open up for subsequent, more penetrating questions. These are by no means throwaway questions, but ones that set the tone for the remainder of voir dire.

Say that an attorney begins the voir dire process by immediately pressing jurors on how they feel about a paraplegic's chances of living a happy life as a result of a horrific accident caused by an unstable load on a truck. If the attorney is not careful and sensitive, jurors will (rightfully) check out of the process, harbor some resentment toward the attorney, and likely not communicate their true beliefs on the subject and probably other subjects delved into down the road. Warm-up questions

for a case like this one might include questions such as:

- *"Does anyone know someone who is a paraplegic?"*
- *"How do you know that person?"*
- *"What kind of life does this person live?"*
- *"How long has s/he been a paraplegic?"*

Attorneys must not forget that the jurors are real people they are conversing with, so genuine expressions of sympathy, or reactions such as "I am sorry to hear that," will keep jurors listening. If a juror talks about a car accident and the lawyer doesn't follow up by asking whether anyone was hurt as a result of the accident, it will reinforce for jurors that attorneys are self-absorbed and only interested in winning their case. In addition, long lectures about the importance of jury duty and constitutional rights as an American are not recommended. Plaintiff and defense perspectives differ from this point forward, as each side is looking at things through a different lens and playing a different set of cards altogether. However, the proportion and timing of open-ended versus indoctrinating questions is universal.

Defense counsel often has to counteract the plaintiff's painted picture of their client as a distant, unconcerned, profit-driven corporation that will cut corners to save a buck. Receiving answers to the following open-ended question will go a long way toward ascertaining crucial information:

- *"Compared to an individual who has filed a lawsuit, what kind of standard should the defendant corporation be held to?"*

Or, if your client has received some bad publicity, important information and credibility can be attained by asking the following:

- *"Decisions should be based on the information presented to you here at trial. Therefore, how would you react if, during deliberations, someone makes an argument either for or against my client based on pre-trial media and television?"*
- *"How reliable is information you get from television news?"*

Jurors will provide crucial information to these questions and will become more comfortable and willing to further engage in conversation. As a result, they will candidly answer more probing questions that follow.

In voir dire, the plaintiff has an opportunity to begin to illustrate the contrast between the behavior of their client with that of the defendant corporation. In many cases where the defense does not admit liability, jurors will put themselves in the plaintiff's shoes and wonder if what happened to the plaintiff could have happened to them or someone close to them. The defense will focus on the plaintiff and build a psychological barrier

around the plaintiff so jurors do not “connect” and come away thinking this could have been them. Plaintiffs, on the other hand, want jurors to be thinking about how this could have been them. Voir dire should be structured with this in mind. Defense counsel, for example, should ask jurors about their thoughts on how far a corporation needs to go in ensuring its product is used in the proper manner, hoping to lead jurors to the conclusion they would not have done what the plaintiff did or did not do.

Timing is Key

Plaintiff lawyers will find dimensions that enable them to characterize the plaintiff as “any of us.” If these are the “key” questions that require indoctrination, counsel better be sure the timing is right to ask these questions. If counsel wants feedback on these issues but does not feel the jury is ready for these questions, it is wise to take the more open-ended approach.

- *“What is a corporation’s responsibility to the public at large?”*
- *“What can citizens of this county expect when they walk along XX path near YY river?”*

In many cases, questions should be asked that get at a sense of jurors’ global views on personal responsibility.

- *“Juror 21, have you ever been in a car with someone who was so careless and so reckless that you thought at the time this person shouldn’t be driving?”*

Of course the last thing counsel wants to do is appear to be blaming the victim, so proper wording is key to finding the right balance between planting a seed that will germinate into doubt about the plaintiff’s claims on the one hand, and flat out blaming him for the accident on the other. Plaintiff lawyers should ask about whether, as a consumer, when a company manufactures something, a certain “margin of misuse” should be factored in. Take the following indoctrinating question as an example:

- *“Juror 23, do you believe that a product should be dangerous if it is properly used for its intended purpose? Why/why not?”*

The obvious answer is no but there will be major differences in how jurors respond to this question depending on when it is asked in the voir dire process. If other, more pressing indoctrinating questions are more of a priority, this information can be gleaned early on simply by asking it in a more open-ended way.

Discussing Damages

It is important to be up front with jurors about damages. Plaintiff and defense perspectives differ here as well. The

defense will want to receive commitments from jurors that arguing about lesser damages is not any kind of admission on liability or mean-spiritedness. Jurors should be told the client is not negligent, nor did it cause damage to the plaintiff, but in the event the damage phase is reached, the plaintiff’s amount is unreasonable and here is why.

Plaintiff lawyers need to be looking out for something else. Jurors are typically more comfortable discussing a total damage amount than determining how much each facet of damages is worth. It becomes important to explain to jurors how this tendency is understandable but that fairness requires them to consider each question discretely. Even if this commitment is ignored during deliberations, the strongest pro-plaintiff supporters will use it to increase damages.

Overall, because the discussion of damages is something counsel often wants to “control,” the indoctrinating approach seems best and most comfortable, but in the end this is not true. Determining juror bias is critical during voir dire and the indoctrinating approach does not let jurors with the greatest amount of bias against your case reveal such a bias if you are the one doing the talking. A good open-ended question during this phase is:

- *“How do you feel about pain and suffering?”*

Once jurors answer this question and provide insights into their biases, indoctrinating questions may follow that teach the jurors about pain and suffering. A supplemental jury questionnaire is ideal under this circumstance, but again, attorneys need to fight the urge to indoctrinate in a supplemental jury questionnaire – it never works and can even ruin a certain area of inquiry for oral voir dire.

Open-ended questions in a jury questionnaire are ideal for eliciting candid responses that are windows into juror bias. If lawyers must indoctrinate during oral voir dire, the open-ended information from a questionnaire will pave the way for the indoctrinating questions to be asked orally.

No matter what attorneys are told, they will always want to do some degree of advocating. The challenge is to accept this and then determine how and where this advocating should take place, and when it needs to take a back seat to the less confrontational approach of asking jurors open-ended questions. The key is to ask indoctrinating questions at the right time, and to follow proper sequencing during the voir dire process. If the proper balance is struck and attorneys shed the mold they’re so accustomed to, the jury will find it easier to tune in, connect, open up and talk honestly, and as a result offer the most useful information needed to make intelligent decisions during jury selection. ☺

Originally published in January 2006.

[Alan Tuerkheimer, M.A., J.D.](#) brings his background in psychology and the law to his role as litigation consultant through [Zagnoli McEvoy Foley](#). He has extensive experience conducting jury research including focus groups, mock trials, and venue attitude surveys and has worked with trial teams across the country on voir dire and jury selection, trial observation, shadow juries and post-trial interviews. He earned his J.D. from the University of Wisconsin Law School and completed his graduate and undergraduate work in Psychology from Connecticut College and University of Wisconsin, respectively. He is a member of the State Bar of Wisconsin, the American Society of Trial Consultants (ASTC), Defense Research Institute (DRI), and the American Association of Public Opinion Research (AAPOR).

Videos from the ABA's 2012 National Symposium of the American Jury System: The Optimal Jury Trial are now available for viewing on line.

http://www.americanbar.org/groups/justice_center/american_jury.html

The symposium included panels on jury size and jury selection, jurors asking questions, giving preliminary jury instructions on the law, allowing attorneys to make interim statements to the jury, and other procedures designed to improve juror comprehension and assist jurors with decision making.

The edited videos are broken out by topic and feature pre-recorded examples of each procedure being used in a sample case, followed by a panel of judges and other well known experts on the jury system discussing the issues related to using these procedures. The “show and tell” approach takes the viewer over the first hurdle of not being able to imagine “what that would look/feel/sound like” to change what goes on in the courtroom.

There is also a short video of Steven Landsman interviewing some of the judges who participated in the 7th Circuit study on jury innovations, with a good summary of the results of how jurors, attorneys and judges evaluated each new procedure.

These videos are a great resource for attorneys and judges who want to investigate any of these topics, or for those who need “hands on” examples to encourage other judges and attorneys to implement new procedures. ©

Submitted by Susie Macpherson of [NJP Litigation Consulting](#)