



The Jury

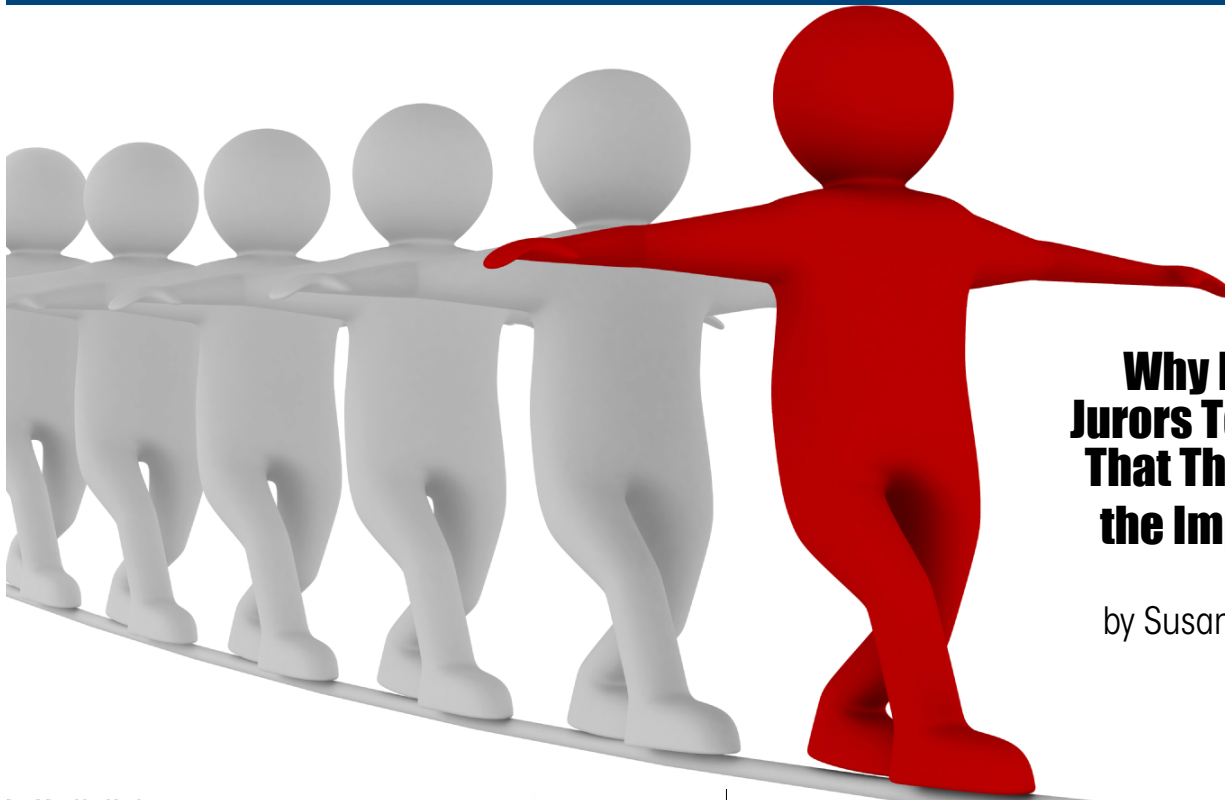
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## Why Do We Ask Jurors To Promise That They Will Do the Impossible?

by Susan Macpherson

**W**HETHER YOU HAVE DONE a handful of jury selections or a hundred, you have most likely heard many jurors asked this question as a follow up to revealing some experience or opinion related to the issues in dispute: “Would you be able to set aside that experience/attitude/belief and decide this case only on the evidence you hear in this courtroom?” Some attorneys use this question to fend off a potential cause challenge. Judges often use it to determine whether the challenge should be granted. Since the answer is used to make critical decisions, we should be sure this is the right question to ask. The short answer is that it is not. Why? The “set aside” concept is based on fundamentally flawed and outdated assumptions about how the brain processes information and how jurors make decisions.

Jurors often promise to try their best to set aside prior experiences, attitudes or beliefs. But the desire to do what jurors believe is expected of them does not create the ability to do it. These factors can be reliably “set aside” only when the juror has no need to do so because the juror doesn’t view them as relevant to the case. If the juror perceives a prior experience, attitude, or belief as relevant, research demonstrates it will have

some influence on the juror’s decision making by being part of the schema used to evaluate the evidence. Note that the *juror’s perception* of relevance is the only test that matters here. While attorneys and judges can help jurors make that assessment by clarifying what is or is not involved in the case, their own definitions of relevance are usually not shared by the jurors.

Decades of social science research debunk the assumptions underlying the “set aside” question.<sup>[i]</sup> More recent neuroscience research dramatically illustrates how outside stimuli trigger immediate reactions in the brain and offer further proof that a request to “set aside” a relevant experience, attitude or belief is asking jurors to do the impossible.<sup>[ii]</sup> Jurors simply cannot flip a switch and shut off the influence of their own life experiences or well-established attitudes and beliefs.

A recent Florida Supreme Court decision on this issue (*Matarranz v. Florida*)<sup>[iii]</sup> illustrates how we often make it hard for jurors to express any doubts about whether they can do the impossible. Many cause challenges end with a question like this: “You said you would try. What we need to know is whether you are really comfortable with that – are you sure you

can set that aside?” The Florida Supreme Court made it clear that getting an affirmative answer to that type of question to protect the record does not protect the rights of the litigants, and ordered a new trial:

“Any lawyer who has spent time in our courtrooms, whether civil or criminal, has experienced the frustration of prospective jurors expressing extreme bias against his or her client and then recanting upon expert questioning by his opposition, which generates such embarrassment as to produce a socially and politically correct recantation. When a juror expresses his or her unease and reservations based upon actual life experiences, as opposed to stating such attitudes in response to vague or academic questioning, it is not appropriate for the trial court to attempt to “rehabilitate” a juror into rejection of those expressions – ...”

When I first discussed this issue at an Inns of Court meeting many years ago, a federal judge approached me after the meeting. He was troubled by the idea that he had been asking jurors to do the impossible, and equally troubled by the implications of accepting a deeper understanding of juror bias. How would they ever get a jury seated if he couldn't just ask whether they could promise to be impartial? I proposed he consider thinking about jury selection as an “informed consent” process in which the task of the judge and counsel is to help jurors with three basic tasks:

1. identify prior experiences, attitudes, and beliefs that may touch on the issues to be decided;
2. examine the ways in which the identified factors could have an influence; and
3. address the consequences of uncertainty.

Most attorneys do provide some help with the first task by using jury selection to highlight specific issues or factors that may make it difficult for jurors to start out with an open mind. Some judges expedite this task by permitting the use of a supplemental jury questionnaire. The process more often falls short on the second task when jurors are not encouraged to consider how an experience, attitude or belief related to the issues in the case could influence their view of the evidence. All too often, they are actively discouraged from doing so by asking the “set aside” question, or it's cousin: “Is that going to cause you any problem in being fair and impartial?”

Jurors with no experience evaluating testimony and applying the law to the facts have no frame of reference for the tasks that lie ahead. They often need to “think out loud” about how specific factors in their backgrounds could influence their views. This is particularly true in civil cases where generic labels that are used to describe the case in jury selection (“this is an employment case” or “this is an antitrust case” or “this is a patent case”) don't help jurors anticipate what the case is about.

Giving them some specifics about the types of evidence they will have to consider and defining some of the issues they will have to decide helps jurors to think through whether their own experiences, attitudes or beliefs may be relevant to their task.

For example, saying “This is a case about property rights, “ doesn't tell a juror who previously worked on projecting retail sales for a “big box” retailer whether that experience would have any potential influence on her opinion in an eminent domain case. On the other hand, if that juror is given the additional information that one of the key disputes will be whether the potential use of the property as a retail site has changed as a result of changing the access from the main road, that juror will be in a much better position to make an informed assessment of how her prior work experience could influence her decisions

Another example comes from a patent case where jurors were given the following description: “this is a case involving allegations of patent infringement and invalidity in the medical device industry.” Adding the information that “the patent claims a process that reduces the number of nonconforming components” allowed a juror who documents quality assurance at a food processing plant to consider the ways in which his own experience and opinions about the manufacturing process could influence the way he viewed the issues in that case)

When a case specific jury questionnaire has not been used, jurors may also need a little time to accurately and fully recall their prior experiences. This is why it is always a good idea to end jury selection by asking, “Have any of you thought of something you'd like to add to an earlier answer or change an earlier answer because more information has come to mind?” When jurors have revealed an upsetting or painful experience, they often initially downplay or underestimate its potential influence. This is especially true if the juror has not previously or recently discussed the experience with anyone or had managed to suppress it until the subject came up in voir dire. . It may take a little while to recall important details or to recognize the strength of emotions that are triggered by activating the memory. The best strategy in this situation may be to tell the juror to take a few minutes to think about the potential influence of a prior experience, or to consider the opinions shaped by that experience, while the other jurors are being questioned.

The third task recognizes that, even after thinking it through, many jurors will remain uncertain about whether an identified experience, attitude, or belief will influence their perceptions and decisions. The consequences of remaining on the panel in the face of that uncertainty are often not addressed because, for the most part, jury selection is an “opt in” system: say you can be fair and you generally stay on the panel; say you are not sure and you generally get excused.

That the traditional approach to further questioning of a juror who has expressed potential bias or prejudgment is called “rehabilitation” speaks volumes about what is wrong with it.

The goal should not be helping uncertain jurors figure out how to give the “right” answer, but rather helping those jurors understand that the consequence of uncertainty, in most instances, should be serving on a different type of case. Jurors may also need some help in understanding that they need to be fully prepared to “opt in” because they often assume that they will be struck by one side or the other after revealing a potential bias or prejudgment. Only the judges, attorneys, and jury consultants know that it doesn’t necessarily work out that way.

An attorney or a judge who doesn’t want to risk losing an otherwise qualified juror often skips third step of addressing the consequences when the jurors has expressed some uncertainty. But consider what happens when the uncertain juror has been encouraged to recognize – rather than ignore – the potential difficulty he or she faces in struggling to keep an open mind

and ultimately “opts in.” That juror is more likely to start the case with a heightened awareness of the challenge he or she faces in making impartial judgments. Research indicates that being made aware of the negative effects of a bias can reduce its influence when the decision maker is highly motivated to achieve that goal.<sup>[iv]</sup> Equally important is the fact that his or her fellow jurors who have been listening to the voir dire are now well prepared to be on the lookout for any indications that the uncertain juror’s prior experiences, attitudes, or beliefs are inappropriately influencing his or her decisions.

We ask a great deal of the jurors in every case. We should stop adding to that burden by asking them to take on an impossible task. Let’s take the concepts of “set aside” and “rehabilitation” off the shelf of tools approved for jury selection and use instead the types of questions that will help jurors, as well as attorneys and judges, make these critically important assessments. 19

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#### References

- [i] For an excellent review of the literature, see “Models of Juror and Jury Decision Making,” in *Jury Decision Making: The State of the Science*, by Dennis J. Devine, New York University Press, 2012.
- [ii] For an example, see *Thinking Fast and Slow*, Daniel Kahneman, 2011.
- [iii] No. SC11–1617, –So.3d.–, 2013 WL 5355117 (Fla. Sept. 26, 2013). This decision incorporates the relevant voir dire transcript and is available on the Florida Supreme Court website at [www.floridasupremecourt.org/decisions/2013/sc11-1617.pdf](http://www.floridasupremecourt.org/decisions/2013/sc11-1617.pdf).
- [iv] “First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making,” *Court Review*, Volume 49, Pg. 190, by Jennifer K. Elek and Paula Hannaford-Agor. This article reviews the research and remedies for reducing bias, noting that certain authoritarian approaches can have a harmful backlash effect.