

Identifying Leaders

By **Barbara Rich Bushell**

You, with juror profile and rating sheet in hand are about to pick a jury. Before exercising your first strike, identify the leaders.

Jurors have sized up their peers by the time they are directed to choose a foreperson. They have already taken into account his race, gender, dress, and appearance. They have even assessed his socio-economic class by listening to him describe his residence, town or neighborhood, occupation, education, military background, marital status, and even his children's accomplishments. Trial consultants observing mock trials marvel at the speed in which the foreperson is chosen. Most often the process takes a few minutes. Jurors make this decision without knowing anything about the foreperson's ability to lead a group.

How do jurors come to this quick decision? Forepersons reflect our society's definition of power and success. They tend to be higher status white males and are often college educated. Many have had prior jury experience. Their behavior and accoutrements (an attache or soft computer case, a collared shirt, or sports jacket) alert fellow jurors that they are high status people. During mock trials, they usually walk into the jury room, take a place at the head or middle of the table, and tend to be the first to inform the group of the need to vote for a foreperson.

Choosing a foreperson is one of the most important decisions the jury will make. This decision affects how the verdict will be decided and the verdict itself. Forepersons bring their personality, ways of dealing with a group, and abilities to the process. Some may be authoritarian and controlling, allowing only a few jurors to express opinions. Others may be open to each juror's ideas or may have experience in facilitating groups. Still others may be so disorganized that a fellow juror will step in to guide, assist or even take control of the proceedings. This is often seen when the Court has assigned the role of foreperson.



Forepersons are powerful. Clever forepersons can call for opinion polls at key moments and create majorities by calling for a vote when the majority of jurors share their verdict preference. Studies show that forepersons participate more than any other jurors in the deliberation process. (Strodtbeck & Lipinski, 1985) The foreperson determines the form that deliberations take, and that in turn, influences the verdict. Deliberations are verdict-driven, evidence-driven, or a combination of both. Verdict-driven deliberations occur when an immediate verdict vote is taken and discussion following it focuses on verdict options. Rarely does consensus in a verdict-driven jury reverse.

Evidence-driven juries do not vote until an extensive evaluation of the evidence is completed. Studies show that the form of deliberations is associated with final verdict. Kameda (1991) found that verdict driven juries were more likely to find the defendant liable in cases where two legal criteria were needed for a verdict of liability, but less likely when one criterion was needed. The opposite effect occurred with evidence-driven juries. Evidence-driven juries were less likely to return a verdict of liability when two criteria were needed, but more likely when one criterion was needed.

Forepersons also affect the size of damage awards. Boster (1991) and Diamond and Caspers (1992) showed that forepersons' pre-deliberation damage awards are strongly related to final jury awards. Forepersons can also dampen damage awards. (Bevan, Loiseaux, Mayfield & Wright, 1958 and Eakin, 1975).

Voir dire questions pertaining to occupation and leisure activities help identify potential forepersons. Look for managers, committee chairs, foremen, shop stewards, union officials, project leaders, civic and church leaders, and team leaders (bowling, tennis, golf leagues, etc.). Always ask what the panelist does, not just what his job title is, and ask how many people he/she manages.

The Instrumental Leader

While good forepersons move the deliberation process forward, instrumental leaders decipher information for fellow jurors. Instrumental leaders serve as information gatherers, fact interpreters, problem solvers, and even experts. Many jurors rely on their interpretation of the evidence. These leaders shape the jury story by interpreting and weighing evidence. It is important to remember that instrumental leaders' interpretations are products of their own perception, education, experience, intelligence, and level of understanding. At times, information gatherers provide inaccurate information or spout factoids. Naive jurors often accept this information as fact.

Jurors will often accept the instrumental leader's view if he/she expresses commonly held values and conveys his/her take or interpretation in an understandable logical way. At times, extremely bright or highly educated instrumental jurors are incapable of drawing fellow jurors into their camp because they are incapable of communicating in their language or idiom.

Analyze the facts and issues in your case and identify those jurors who have case-related training, education, or experience. Don't be quick to strike all jurors who know something about case facts and issues. Keep the jurors who will want to and be capable of expressing your views. Patent defense attorneys need defense jurors who have pertinent case experience or education to decipher and point out important differences between a patent and an alleged infringing product. Think outside of the box when looking for jurors who have pertinent knowledge or experience. I have seen a manicurist schooled in gels decipher a patent dealing with dental products and a genuine Hell's Angel explain a mechanical patent to fellow jurors.

Be cautious. Consider the socio-economic class from which certain juror pools are drawn. I have seen jurors rely on nurses' interpretations of complex medical facts. Make sure that the nurse espouses your litigant's stance. Be cautious of self-perceived experts. A juror with prior jury experience often becomes an expert in interpreting the law or jury instructions.

Other types of instrumental leaders are those jurors who take notes, count votes during polling, and at times, gently direct ineffectual leaders by suggesting that it's time to poll or that certain jurors have not been heard. Females usually fill these roles. At times, when the chosen foreperson is ineffectual, these leaders will usurp the foreperson's role by talking over the foreperson's directions and stating their own.

The Emotional Leader

There is a type of juror who listens to and even consoles other jurors when the case is moving into the third or fourth week and jurors have become bored or overwhelmed with ever increasing facts and issues. The emotional leader often acknowledges his/her peers' contributions by nodding his/her head or smiling. This type of leader acts as a negotiator or offers



compromises. He/she sometimes affects damage awards by suggesting the jury average each juror's damage award. This is often done without taking into account specific damage award models.

Attorneys want this type of leader if they need a lot of time to present their case, but should be cautious if there is a question of high damage awards. Scrutinize the panelists and take note of the roles they play at home and at work. Is that panelist a special education teacher, social worker, psychologist, or coach? Watch potential jurors in the court room. See how they interact with their potential peers.

Summary

Jury selection is a misnomer. None of us are fortunate enough to select a jury. We must use our few strikes wisely. A juror profile is useful only when it is combined with a leadership rating. If you are representing the defense, identify plaintiff panelists who are potential leaders and visa- versa. Potential forepersons are generally better- educated males occupying higher status jobs. Note their dress, speech, and accoutrements. Note if they have previous jury service. Take note of what a panelist does and what role he/she assumes during leisure time. People assume similar roles in all walks of life. Find out if the panelist is a leader of his/her organization or if he assumes an instrumental role.



Identify instrumental leaders. Read or listen to a panelist describe his/her job. Listen to how panelists answer *voir dire* questions. Are they articulate? Will they be able to paraphrase your arguments and themes to their fellow jurors?

An accountant during damage discussions will often assume the role of damages expert and a lab assistant in a patent case may assume the position of technical expert. Nurses and nurse assistants often take on the role of medical experts in medical malpractice cases. A juror with previous jury experience may assume the role of an interpreter of jury instructions. These people can help your case only if their profile matches your profile of a good juror (e.g., defense, plaintiff, prosecution juror). Strike these people first if their profile matches the opposing side's good juror's profile.

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On civility, racial slurs, graphic pictures & anthropomorphism

Recent days have been filled with news about (very public) rude and/or disrespectful behavior from athletes, celebrities, and politicians. Pundits and pollsters are telling us what it means about our society and about the deepening political divisions in our country. Media outlets are covering the frenzy intently and 'civility' is being talked about as a behavior sorely lacking in our society today. It does make us stop and think about how each of us is responsible for our own behavior and for treating each other with respect.

Our goal with *The Jury Expert* is not only to help you increase your trial skills but also to offer information that helps you pause and ponder from time to time. This issue features diverse and provocative pieces that we hope will make you stop and think about hate crimes, racial slurs, graphic injury photographs, and assault weapons as self-defense tools.

In addition, we have terrific pieces on the contribution of the mediator to the negotiation process; how to identify leaders in the jury pool; the benefits of humanizing complex evidence through anthropomorphism in technical presentations; considering the need for alternative cause strategies in product liability litigation; and a primer of sorts, disguised as our September 2009 Favorite Thing.

Read us cover to cover (or web page to web page)! Tell your friends and colleagues about us. Help *The Jury Expert* travel to offices in venues where we've never been before. And, as always, if you have topics you'd like addressed in upcoming issues, let me know.

--- *Rita R. Handrich, Ph.D.*



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