



The Jury  
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## THE UBIQUITOUS PRACTICE OF “PREHABILITATION” LEADS PROSPECTIVE JURORS TO CONCEAL THEIR BIASES

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**D**on't miss the consultant responses below: Charli Morris; *Diane Wiley*.



The sole legal purpose of voir dire is to expose bias in prospective jurors so as to seat a fair, impartial jury (Law.com). However, many practices and psychological pressures conspire together to reduce the likelihood of achieving this purpose. For example, attorneys not only attempt to sway prospective jurors to their side during voir dire, but both judges and attorneys attempt to rehabilitate any biases they detect (although of course attorneys really just want to excuse those who are biased in the “wrong” direction). Unfortunately, there is evidence that most rehabilitation attempts are ineffective. For example, according to Macpherson (2014), by instructing jurors that they must set aside any knowledge, experiences, attitudes, or beliefs that might bias them, the court “asks jurors to do the impossible.” Humans are

not robots. We are notoriously bad at preventing our biases from influencing us. Furthermore, we strongly but erroneously believe that we *can* control our biases (Nisbett & Ross, 1980), thus we are likely to tell judges and attorneys that we can be fair and open-minded even if we cannot.

Community pressure exacerbates the problem. Yet judges rarely give this consideration sufficient weight. When they insist that impartial jurors can be identified in a community in which pretrial publicity and/or shared beliefs and attitudes are major factors, they are probably engaging in wishful thinking. In testifying as an expert witness concerning the results of change of venue surveys I have conducted, I have seen judges respond something like this even when 70% or more of the survey respondents have admitted a guilty bias: "Since some respondents didn't say he's guilty, all we have to do is put *those* people on the jury." I feel as though all I have to do is listen closely and I will hear echoes of the judge's thoughts, "And if you don't believe me, just ask them."

Both common sense and decades of scholarly research demonstrate that such claims are probably based largely on naïve pipe dreams, because, among other problems:

1. Most people are unaware of how much their attitudes affect their behavior in general (Nisbett & Ross, 1980), due perhaps to the introspection bias and the bias blind spot (Shniderman, 2013), let alone how strong the biasing effect of pretrial publicity on their opinions about a court case can be (Moran & Cutler, 1991). Even mock jurors who *promise* to be impartial and to disregard pretrial publicity show bias in their decisions (Dexter, Cutler, & Moran, 1992).
2. People are disturbingly unsuccessful at setting aside bias (assuming they are aware of their bias in the first place). Unconscious processes such as confirmatory information searching (Swann & Read, 1981), belief perseverance (Ross, Lepper, & Hubbard, 1975), conformity to others' attitudes (Asch, 1955), cognitive load (Gilbert & Hixon, 1991), the backfire effect (Cox & Tanford, 1989; Sue, Smith, & Pedroza, 1975), cognitive dissonance (Festinger, 1957), and plain old poor recall may all contribute to this lack of self-understanding.
3. If #1 and #2 aren't hurdles in a particular instance, that is, if the prospective juror is aware of her own biases and knows how hard they are to set aside, unless she confesses to her biases, it will be difficult if not impossible to detect them. Humans don't generally want to admit that they are imperfect (as in, unable to be completely fair and impartial), and humans, even attorneys, judges, and legal consultants, are terrible lie detectors (as in, unable to tell whether those who claim impartiality are dissembling, fooling themselves, or both; Miller & Stiff, 1993; Vrij, 2000; Kressel & Kressel, 2004).
4. On top of all that, in highly publicized cases, sensationalistic stories increase community pressure on jurors (Robertson & Tumminello, 1996). Lawyer and former Massachusetts governor Foster Furcolo wrote, in *The Thirteenth Juror* (1968), "It is impossible for any criminal defendant to escape the influence of the 'thirteenth juror,' the climate of public opinion, especially if he is charged with an especially notorious crime, for no juror can ever entirely escape community pressure." And in *Stack and Sway*, Neil and Dorit Kressel (Kressel & Kressel, 2004) quote the appellate panel in the Amadou Diallo case: "This is not a simple matter of asking the jurors if they could put aside any opinions that [they] may have formed. Instead, it would also be necessary to ascertain whether they could face their friends and neighbors in the event of an acquittal," p. 194.
5. Once prospective jurors report for voir dire, new pressures emerge. In *The Persuasive Edge*, Richard Crawford and Charli Morris (2006) describe the juror's courtroom phenomenology. They say the juror faces "a judge perched high on a bench...; an armed deputy standing guard over the proceedings; a court reporter taking down every spoken word; a room full of lawyers dressed in suits; and all eyes focused on the jury box." p. 43. How could

such a setting not push a prospective juror toward the ‘right’ answers, toward trying to appear intelligent and responsible...?”

To measure the effects of voir dire pressures, I have performed several naturalistic and laboratory studies. For example, one study was based on a 2010 change of venue survey I conducted for the defense in a highly publicized case in Kentucky—the “pontoon boat” murder trial of Dr. Stephen Hall. . The judge denied the COV motion, which allowed us (Hamilton, Augustus, and Melloan, 2011) to compare admissions of anti-defendant bias in our 400 COV survey respondents to those of the 44 individual voir dire interviewees.

Before I describe the study, it is important to note that early in my consulting work I began to suspect that even anonymous COV surveys under-predict guilty bias. But why? Shouldn’t they have low social/legal desirability pressure? They occur weeks or months before jury selection, respondents presumably don’t feel the surveys are terribly important, and they do not take place in a courtroom setting. My suspicions were based on the fact that in the surveys I had conducted so far, many respondents who said they thought the defendant was innocent or had no opinion nevertheless predicted that the defendant would be convicted and that the local community wanted him or her to be convicted. I suspected this meant that, in their heart of hearts, these respondents leaned toward guilty. It is simply more comfortable to project a guilty bias onto others than to admit it of oneself.

Moreover, the most frequent explanation respondents gave for leaning toward innocent was, “Because a person is innocent until proven guilty.” That response likely reflects a (professed) *willingness* to consider the evidence before coming to a definite decision rather than an affirmative belief in the defendant’s innocence. Americans know how central the presumption of innocence principal is to the American justice system, and are loath to admit that they personally doubt that a defendant is innocent. In sum, there is probably considerable legal/social desirability pressure even in anonymous COV phone surveys.

The hypothesis for our 2011 study connected to these issues. However strong the social/legal desirability pressure might be in a survey, we predicted that the pressure in voir dire would be measurably greater. Confirming the hypothesis, more than two-and-a-half times the proportion of COV survey respondents (57%)<sup>[1]</sup> as venirepersons (22%) admitted that they believed Hall was guilty. The samples were equivalent in their familiarity with the case—91% of both groups had read or heard about the infamous pontoon boat case. Therefore, our results suggested that something about the voir dire process caused prospective jurors to conceal their guilty bias at a much greater rate than the survey respondents had.

We believed that although the seriousness of the courtroom setting and the importance of jury duty undoubtedly contributed to the increase, the problem lay predominantly in the way the judge and attorneys phrased their questions and statements. They engaged in a practice we dubbed premature rehabilitation, or *prehabilitation*. Before each prospective juror even had an opportunity to admit to bias, the judge and attorneys began trying to remedy *potential* bias, signaling the legally and socially desirable, “correct,” responses to questions about a juror’s responsibility to be impartial, fair, and open-minded and to set aside biases.

For example, the judge introduced every interview with statements such as (emphasis ours): “This is the portion of the trial that talks about pretrial publicity... about what you heard and its effect on your **ability to keep from forming a preconceived notion**, and your **ability to look at the other side of the story**” and, “Keep in mind that it is **your duty** to presume that the defendant is innocent unless his guilt is proven beyond reasonable doubt.” The attorneys also phrased many questions prehabilitatively: “Are you **capable of remaining objective** in this case?”

It is hard to imagine that under these circumstances anyone, unless they were actively trying to get out of jury duty, would admit that they might have difficulty keeping an open mind or might struggle to fulfill their duty as a juror. To

express such doubts is to say, essentially, “No, I can’t follow the law. I don’t believe in the American justice system. I’m not willing to set aside my prejudices. I’m a bad citizen. In fact, I’m a rotten person.”

The Hall analyses and experimental research we will discuss later provide evidence that prospective jurors conceal their biases in voir dire, and furthermore, that prehabilitation contributes to the problem. The next logical question was: Is prehabilitation a common practice or was it peculiar to the Hall case? The current study is a first effort to answer this question.

We performed a content analysis of 604 voir dire interviews from 11 high profile cases in California, Colorado, Illinois, Indiana, Kentucky (2 cases), Missouri, Mississippi, Texas (2 cases), and Saskatchewan, Canada. Based on content analysis in the Hall case, we predicted that most or all judges would engage in prehabilitation in their introductions to voir dire and/or questioning of prospective jurors. In addition, based on the Hall content analysis and on the fact that it is in the prosecution’s and plaintiff’s attorney’s interest for anti-defendant prospective jurors to hide their biases, we predicted that prosecutors and plaintiff’s attorneys would engage in prehabilitation. And finally, although it is in the defense’s interest to engage in rehabilitation but not prehabilitation, the defense attorney in the Hall case did ask prehabilitative questions, therefore we assessed defense attorney prehabilitation as well.

## METHOD

We obtained transcripts or video recordings of voir dire for 11 cases—10 U.S. trials and one Canada trial. All but one were criminal cases. We assessed the frequencies of three kinds of statements and questions uttered by the judges and attorneys:

The first type we called **Bias Discovery**, which involved probing for bias without signaling socially desirable answers, and doing so before any rehabilitation attempts had been made. For example, an attorney might ask, “Do you have any feelings one way or the other about the likelihood that X committed this crime?”

**Rehabilitation**, or attempting to remedy bias a prospective juror has confessed to. “You’ve said that certain information you heard on the TV news may make it difficult for you to be completely fair. Do you think you would be able to overcome those feelings if you were seated on the jury?”

**Prehabilitation**, or attempting to remedying potential bias, thus signaling socially desirable responses to subsequent bias questions. “You seem like a reasonable person. Do you think you’ll be able to keep an open mind and base your opinion solely on evidence that’s presented in court?”

For individual voir dire, we classified an utterance as prehabilitative rather than rehabilitative only if someone had exerted social desirability pressure on the particular juror in question. For general voir dire, we counted an utterance as prehabilitation if the judge or one of the attorneys had exerted pressure in questioning the group.

## RESULTS

All 11 judges (100%) gave prehabilitative introductions to prospective jurors. Every judge prehabilitated all venire persons in at least one way (100%). The most frequent forms of prehabilitation by judges involved discussion of the ability to remain fair and impartial (7/11 cases; 64%) or the ability to put aside pretrial information (4/11 cases; 36%).

In 8 of the 11 cases (73%), prosecutors used prehabilitative wording in their statements, questions, or both. In 6 of 11 cases (55%), defense attorneys directed prehabilitative questions/statements to prospective jurors. Attorneys emphasized themes similar to those that judges focused on, but other themes appeared as well. For example, many asked questions along the lines of, “Will you be able to follow the law?” or “Can you put aside your preconceived biases?”

## DISCUSSION

Previous studies by my student colleagues and me (Hamilton, 2010; Hamilton, et al., 2011; Hamilton, et al., 2013; Robbins et al., 2012) have demonstrated that prehabilitation in voir dire leads prospective jurors at best to temporarily suppress bias and at worst to falsely claim that they are devoid of bias. The present study shows that prehabilitation may well be universal in U.S. courtrooms (and that it at least occurs in Canada). We found that the voir dire process commonly places social/legal desirability pressure on prospective jurors through judges' introductions and questions and through attorney questioning. With insufficient regard for accuracy, attorneys and judges exert pressure on prospective jurors to declare, even before they have revealed any bias, that they can be impartial, set aside pre-trial information, and follow the law by presuming innocence. Given how clearly and repeatedly judges and attorneys communicate their expectations, it is not surprising that prospective jurors rarely admit to bias.

All of that leaves us with this very important question—what can we do about it?

Trial consultants, legal scholars, and lawyers have all discussed general techniques for eliciting honest answers from prospective jurors. For example, a relaxed demeanor and a friendly approach may help. As Angela Dodge said in *Winning at Jury Selection*, a good voir dire performance may require “putting on the Mister Rogers sweater” p. 58 (although that can be taken too far).

In addition, trial consultants, attorneys, and researchers have discussed how to compose truth-eliciting voir dire questions. For example, instead of asking yes or no questions that force prospective jurors to respond in the absolute, Crawford and Morris (2006) suggest some answers on 1-10 scales, which allows for a weaker commitment. One can then probe for the true strength of people's feelings. And Trisha Renaud quotes Robertson, Yokum, and Palmer (cited in Renaud, 2012), who suggest that attorneys ask prospective jurors to “...imagine not having read that damaging newspaper article or not having had that bad experience with the police... Or ask the juror if he or she believes that someone else who holds a similar opinion or has had a similar experience might have difficulty being impartial.”

Below are my own suggestions for how attorneys and judges can encourage veracity. I base my recommendations on questions I have developed for use in my COV surveys, on experiments in which I have compared bad techniques to (what I hoped were) better techniques developed for the experiments, and finally, and this is only a bit tongue in cheek, on whatever I see as the opposite of the bad techniques I have observed in the courtroom.

### QUESTION TECHNIQUES FOR ATTORNEYS (AND/OR JUDGES):

- The first few times I conducted a COV survey, I asked the innocent/guilty question only in this standard way: “In your opinion, is X guilty or innocent (counterbalanced order) of the murder of Y?” But then, because of my suspicion that many people were simply unwilling to admit a guilty bias, I added a second guilt/innocence question in subsequent surveys, one designed to simulate the “water cooler” approach, or more exactly, the “if-you-were-standing-around-the-water-cooler-with-a-bunch-of-coworkers-would-you-opine-that-the-defendant-is-innocent-or-guilty?” approach. For the telephone surveys I worded the question a little more scientifically as well as more simply: “If you had to say right now that you lean one way or the other about X's guilt or innocence, which way would you lean?” Invariably, whatever percentage of people had answered the standard guilt/innocence question with probably or definitely guilty, an additional 10%-15% said they *leaned toward* guilty. In voir dire, an attorney could use the survey's “lean” question, or even the more literal water-cooler version question.
- I also use explicit or implied rating scales to ask the guilty bias questions (and several others) in my COV surveys. For example, answers on the guilty bias questions are on an implied 1-4 scale, from definitely innocent to definitely guilty.

- I ask projective questions about community opinions and community pressure in my telephone surveys on 6-point Likert scales (disagree strongly through agree strongly). Such questions are designed to allow respondents to project onto others answers they themselves might perceive to be legally/socially undesirable. Once they have answered such questions in the affirmative, they may feel more comfortable stating their own opinions, even strongly. Variations of my COV survey projective questions can certainly be used in voir dire:
  - The Z County community wants X to be found guilty.
  - If you served on the jury, most people would expect you to find X guilty of this crime.
  - X will be convicted of murdering Y.

Two other possible projective style questions: “In talking to friends and family about the case, have you gotten the feeling that they have formed some opinions about the case?” and “Has some of the news coverage you mentioned reading given you cause to be skeptical about the defendant’s claims of innocence?” The latter question puts the onus on the media rather than on the prospective juror—it’s not “have you developed biases against the defendant based on the news coverage?”, which implies that it’s the prospective juror’s fault. It’s not even “has the coverage led you to be skeptical?”, which puts the person in a passive, I’ve-been-manipulated light.

In addition, experiments by Hamilton, et al. (2013) and Robbins et al. (2012) showed that non-prehabilitative questions directed toward the respondents’ own feelings promote honest answers more than do questions with typically prehabilitative phrases such as, “Since it’s your duty to remain objective...” or “Given the importance of an impartial jury...” We exposed participants to media coverage about cases then asked them the questions with or without the prehabilitative phrases. They answered on 6-point scales from very easy to very difficult or from definitely will to definitely will not. Below are the non-prehabilitative versions of the questions. Again, such questions could be used in voir dire.

- If you were to serve on the jury in X’s trial could you assume he is innocent until proven guilty beyond a reasonable doubt?
- In your honest opinion, how easy or difficult would it be for you to put aside any preconceived notions about this case?

#### **JUDGES’ INTRODUCTIONS TO THE VOIR DIRE PROCESS:**

My 2013 experiment was a mock voir dire study with professional actors playing the roles of judge and attorneys. (One actor happened to also be an attorney, which helped with verisimilitude.) Participants were significantly more likely to admit to anti-defendant bias when the judge used our non-prehabilitative introduction:

“We’re here to get a feel for what kind of information is out there in the media about this case. We’re also interested in hearing how you, personally, feel about the case as well as what you think community perceptions are. There are no right or wrong answers and we want you to feel as comfortable as possible sharing your honest thoughts and opinions. Please remember that you are sworn to tell the truth about those feelings and opinions.”

Note that the only admonitions or explanations the judge gave had to do with honesty. He said nothing about a juror’s duty to be impartial and objective, presume innocence, put aside pretrial information, and so forth.

In a paper-and-pencil study (Robbins et al., 2013) we contrasted typical prehabilitative judge instructions with instructions that employed a variation on the water-cooler approach. The water-cooler approach resulted in significantly more admission of bias. In this experiment, the water-cooler instructions were:

“Imagine the following scenario. A few months from now, you are standing around with some friends and acquaintances in [the dining hall], in your dorm, or somewhere else on campus. Someone brings up the Trayvon Martin case and everyone starts talking about what they’ve read and heard, giving their opinions about what really happened. Assume that over the months since Trayvon was killed, you have seen the information you just read [a transcript of an ABC news story] and you have also read several newspaper articles about the case and seen quite a few TV news stories about it. One of your friends says, ‘I have a survey I’d love for you to fill out for me. In my Sociology class we’re trying to figure out what Centre students think about the case. Would you mind answering these questions for me?’”

With some adjustments, such a scenario might be useful for judges who want to introduce *voir dire* in a way that will encourage candidness.

The questions and judge instructions I have discussed above could very well help attorneys and judges to elicit honest responses from prospective jurors. However, if you think that eliminating prehabilitation is an uphill battle, you are correct.

Although individual attorneys can improve their own questioning so as to avoid prehabilitation, they have little control over what judges and opposing attorneys do. Also, avoiding prehabilitation oneself, once anyone in the courtroom has begun the prehabilitation process (or has even begun the *rehabilitation* process if it is group *voir dire*) may be useless. The bell has been rung. Does this mean that one should just prehabilitate along with everyone else, just to make sure they get their licks in? Not necessarily.

Urging prospective jurors not to fall for opposing counsel’s manipulation-through-prehabilitation might be effective. “While Mr. Zelbenhausermansmith has lectured you to death on the importance of being objective, probably to the point where you fear admitting any negative feelings you might have about the defendant, let me assure you that the goal of the court is to understand your true feelings, not bully you into...”

Or one might be able to solve the prehabilitation problem right *before voir dire* if the judge is highly motivated to seat an unbiased jury. An attorney knowledgeable about prehabilitation issues might be able to convince the judge to avoid prehabilitation in his or her introductory remarks and to disallow prehabilitative questions.

Finally, maybe we consultants can contribute to more widespread change. We need to get the word out broadly when we assist in jury selection, offer CLE workshops, or write for legal audiences. (Literally get the word out—prehabilitation.)

In closing, a hopeful fact. Not all judges believe that rehabilitation of biases (let alone prehabilitation of biases) is effective. MacPherson (2014) discussed a court decision in which the majority opinion contained the following statements about jurors’ ability to set setting aside biasing information:

“Any lawyer who has spent time in our courtrooms ... 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 ... it is not appropriate for the trial court to attempt to ‘rehabilitate’ a juror into rejection of those expressions.”

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*related consultation. You may find more information about Dr. Hamilton at her college webpage, and soon at her consulting webpage.*

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[1] Given the 91% familiarity rate in the community, the press's sensationalized stories about Isabel Hall's death and the anti-defendant bias of the news and television coverage, 57% seemed low—it is this kind of result that makes me believe that COV surveys under-predict guilty-bias.

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#### IF IMPARTIAL IS IMPOSSIBLE: HOW DID WE GET HERE AND WHAT ARE WE TO DO?

When I met Mykol Hamilton at the ASTC Conference in June of this year, I told her this is just the kind of research I like to see. We want social science experts working on empirical studies to give us the ammunition we need to convince judges and lawyers that what they are doing in the courtroom may be counterproductive. The irony of prehabilitation is that the repetitive use of questions such as, “Do you think you can be fair and impartial?” or its cross-examination cousin, “You could be fair and impartial, couldn't you?” serves only to create a jury selection process that is itself neither fair nor impartial.

As I prepared to comment on the article, I decided to look more closely at the history of the language of “fair and impartial” to see if I could find out why we began using that phrase in the first place (and then abusing it). In a 1988 journal article “In Search of the Impartial Jury”, law professor and author James J. Gobert provides some context for this discussion.[1]

#### A QUICK HISTORY

The sixth amendment of the U.S. Constitution provides an accused “the right to an impartial jury” in federal courts, which was then extended to state courts, and then incorporated into the due process clause of the fourteenth amendment. Gobert points out in his first footnote that, “The seventh amendment provides for a jury trial in many civil cases. Unlike the sixth amendment, no guarantee of impartiality is explicitly mentioned in the seventh amendment.”[2]

The Gobert article traces a fascinating narrative of how we arrived at a system which favors “impartiality” in the first place. Jurors in the earliest trials were in fact witnesses, with direct knowledge of the facts. “Not until a relatively late stage in the evolution of the jury did presentation of evidence to persons unacquainted with the facts replace decision making by persons who knew the facts.” Then the “ideal juror” became “the one who had no knowledge of the facts and no interest, financial or otherwise, in the outcome of the case”.

Since the early days of trial by jury in England, impartial has also been taken to mean indifference, neutrality, detachment, openness. And indeed there is an argument that we can create an “impartial” jury made up of “partial” jurors by

virtue of the fact that one juror's partiality toward one side may cancel out the partiality of another juror toward the opposition.

Importantly, despite the thorough treatment of the history of jurisprudence on the question of impartiality, the word "fair" is hardly used and it is not yet clear how the pairing was first made or why it has persisted. It may be simply because the Articles of our Constitution do not use the word.

#### THE PRACTICAL REALITY

Despite changes and variations in the meaning (or interpretation) of the words, we know there are at least four possible conclusions we could draw if indeed "fair and impartial" are the two most important criteria by which potential jurors are evaluated for their fitness to serve:

1) A juror could be fair while she is also impartial

*I am the perfect juror.*

2) A juror could be fair even if he is partial

*I can manage my bias just fine, thank you very much.*

3) A juror may be unfair because she is also partial

*It's true, I probably should not sit on this case.*

4) A juror may be unfair while he is also impartial

*It's not your client or your evidence I don't like, it's the way you presented your case.*

Some lawyers and judges know enough of the effect of asking about "fair and impartial" that they change the language only slightly after the judge has introduced it. They say impartial means "unbiased" or "without prejudice," thinking these are less buzz-worthy words (they are not). Others are more colloquial in their approach, as in, "Do you think you might have just one thumb on the scale to tip it in one direction or the other?" or "Does this mean my client starts just slightly behind that line at the starting blocks?" But substitute "bias" or "prejudice" in the four possible conclusions above and you will still find truth in all of them.

#### WHAT IF WE COULD SPLIT THE PHRASE AND TALK ABOUT THE WORDS SEPARATELY, OR MAYBE NOT AT ALL?

It seems to me that "fair" is the part we could all agree on and this is where I think most judges get it mostly right in their initial comments to the jury. The parties deserve a fair trial. They deserve fairness from the Court, from counsel, and from the jury. Fundamentally this might mean that the rules will be applied and followed; that the playing field – once inside the courtroom at least – starts out level; or that to the extent we think we can eliminate arbitrariness or randomness in a trial, we attempt to do so.

But that leaves us with the impossibility of impartial. Even if they could, we can't really expect people to set aside their bias when they will often be instructed in the end that they may use their common sense and life experience to determine what is reasonable or ordinary on the questions of negligence and damages[3].

What if we just stopped using the word "impartial" altogether, or at least after the judge has made the initial introduction? Couldn't we just we make a collective motion *in limine* to exclude the word from our voir dire vocabulary?

## WHAT ELSE CAN WE DO?

*BETTER ACCESS TO JUDGES*

As a trial consultant I've spent twenty years in courtrooms but I still rarely get direct access to judges. Some of my most memorable experiences in trials have come when judges talk to me during recesses about who I am, what I do, and how I help. But those circumstances are too rare in part because I work throughout the country on a wide variety of case types, so I don't see the same judges every month or even every year. I'm not present for the motions practice of a case. It's also true that many of my clients don't want to broadcast my presence or role in their case at the time of trial, when my advice and assistance on these very issues for jury selection is the most valuable and may also be the most instructive for judges who recognize the problems we have when we do it the way it has always been done.

What I'm hoping is that attorneys who read *The Jury Expert* will see this as a call to arms. Invite jury experts to present at seminars for judges so we can share the research. Or consider sharing research articles like this one with judges that you serve and speak with in your honorary groups such as ABOTA or ACTL. Or after the trial is over, suggest to the judge that a trial consultant was instrumental in your effective, efficient voir dire and offer to set up an opportunity for us to meet.

*"STOP SCREWING IT UP FOR ALL OF US"*

This article highlights all-too-common errors often seen in the courtroom. Hamilton and her colleagues are exactly right: lawyers who hope to hide or bury the bias that they believe will work *for them* are doing it wrong. Trial consultants who help them do it this way are aiding and abetting. Not only does the technique contribute to the problem identified by the research, but sometimes lawyers are mistaken about whether a juror's similar life experience or attitude makes them favorable or unfavorable.

In every jury selection I attend, we talk in our huddle about the fact that jurors who seem to be most *like* our client can be our best friend or worst enemy. It takes a lot of really good open-ended questioning on a wide range of issues to figure out what the likelihood for either will be.[4] It can be dangerous to lock someone in with the "fair and impartial" qualification on any topic before she is fully vetted.

*HOW TO ESTABLISH SOLID CAUSE CHALLENGES THAT ARE REHABILITATION-RESISTANT*

I agree with all of the author's suggested strategies for changing the language of our approach to bias in the courtroom: the "water-cooler" approach, "projection" questions, explicit or implied rating scales, and open-ended questions free of "prehabilitative" words or phrases.

I typically include in the voir dire I prepared for clients a set of questions that are specifically labeled "Establishing Cause Challenges" so that an attorney can flip to the formula on any topic of her choosing during the jury selection process. These are the essential elements.[5]

## 1. ESTABLISH THE EXTENT OF JURORS' POTENTIAL FOR PARTIALITY

You do this with the "exhaustion technique" that you learned for deposing witnesses, to expand the juror's initial answer as far and wide as possible.

## 2. QUANTIFY IT

While I appreciate scaled response items that use words like "definitely" or "very" or "strongly" I find that many jurors are reluctant to adopt the language of a question if it makes them seem too extreme or closed-minded. Instead, I like

the good old 10-point scale. I find that when we argue the cause challenge to a judge, and the number seven or higher on the scale is attached to an attitude or belief that indicates bias against our client, judges typically agree. It is a plain-spoken and simple way to rate the intensity of sometimes complicated feelings or beliefs.

### 3. GET IT ALL DOWN

The technique for building a better cause challenge requires attorneys to be methodical and slow down, so that essential words spoken by a juror are recorded by the consultant assisting counsel. That way, when you approach the bench to make the motion for cause, you are reading back into the record exactly what the juror said rather than something that sounds like your interpretation of the bias.

### 4. ADD IT ALL UP

Once you have committed the juror's answers to your long list of questions designed to exhaust the reach and scope of a juror's inability to be fair, you want to deliver it in a narrative to the judge and on the record. If you don't win the motion and you have to use your precious few strikes to remove a juror, you may have a good record for an appeal.

### HERE'S HOW IT WORKS

The method described generally in four steps above yields powerful results for succeeding on a motion to dismiss for cause. In one North Carolina case, I recall us finding a prospective juror who reported work experience for the large, multi-national corporation on the other side of an employment dispute. By the time we had used the exhaustion techniques, quantified the bias and got it all down, we had the following to say about the juror on the record when we added it all up to make our challenge for cause:

"Your honor, Mr. Jones first told us that he was no longer employed by Acme. Then he told us he had worked his entire career at Acme, some 36 years, and Acme had been his "only full-time employer after college." When asked if he was still close to people who used to work or currently work for Acme, he revealed that his nephew, his sister-in-law, and his daughter all work (or have previously worked) for Acme. When you add up the number of years he and his family members have worked for Acme so far, he has a combined total of 87 years of family allegiance to Acme.

Furthermore, when asked to rate his satisfaction with work at Acme he rated it a 9.5 overall with similarly high favorable ratings (and none less than 7 on a scale of 1 to 10) for things like pay, benefits, employee relations, quality of products and quality of service.

He told us he'd been a "loyal" employee of Acme and that Acme had "recognized his loyalty" over the years with bonuses, pay increases, and opportunities for advancement.

And finally, your Honor, after attempting to assure us that he could be "fair and impartial," when asked if he would be able to talk openly to his loved ones who still work for the company if he served on a jury that ruled against Acme, he hesitated, and said, he "just didn't know." Ultimately, when asked if he was in our shoes – representing a person who was in a legal dispute with Acme – whether he would recommend to the client that he himself should remain on the panel, he grinned as others on the panel snickered, and said, "I guess probably not."

Had we wasted any time cross-examining him on his ability to be fair and impartial we might not have had such a compelling record to make or saved ourselves a peremptory strike.

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[1] Gobert, James J. (1998). In Search of the Impartial Jury.” Journal of Criminal Law and Criminology: Vol 79, Issue 2 Summer.

[2] Although, he points out, it is generally understood that the framers did not intend to distinguish civil cases in a way that would exclude the requirement of impartiality.

[3] In civil cases.

[4] Of course this is most likely to occur in State courts where attorney-conducted voir dire is not strictly limited. It would be easy to believe that rehabilitation occurs more frequently in Federal courts where attorneys are not allowed to conduct voir dire and its effects are more pronounced.

[5] A sample outline of questions you can use in any case is available upon written request to Charli Morris.

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This article is long overdue and I love the new word. Kudos to Mykol C. Hamilton, Emily Lindon, Madeline Pitt, and Emily K. Robbins. “Prehabilitation” and “Rehabilitation” are two of the worst problems we face in jury selection. It’s right up there with “Raise your hand if you’re biased and prejudiced.”

My “favorite” juror example of the problem of rehabilitation is from a woman in Massachusetts in a very high profile case where Vietnam War anti-war activist Susan Saxe was charged with felony murder by virtue of having participated in a bank robbery where a police officer was killed. The judge agreed to let the attorneys ask a couple questions. The juror, who said she had read all about the case had assured the judge that she “could be fair”. With lawyer questioning, she eventually said that “we all know the girl was there, the question is whether she’s guilty.” Of course, legally, if she was there, she was guilty. If the questioning had stopped when the juror said she could be fair, this juror could have ended up sitting. But this is like so many situations, as the authors point out, where the jurors don’t really know what it is that constitutes an opinion or a prejudice and where they assume that their opinions and prejudgments are just “normal” and shared by everyone.

We at NJP have also experienced the situation where we have a good sense of the amount of bias in a jurisdiction because of a venue evaluation survey, but attorney voir dire is limited and the number of jurors admitting to bias is much smaller than we would expect.

Many of the suggestions that the authors make to educate judges about the problems with prehabilitation and rehabilitation are good, but it will be a long while before most judges are willing to change their approach. Sadly, as the authors state, some judges and prosecutors in particular are happy with things the way they are. Many judges believe that jurors can, in fact, put aside their prejudices and prosecutors are more than happy to have jurors who already are predisposed against the defendant. That said, most criminal defense attorneys would be happy to have someone prejudiced “for” their clients, but that’s almost never even a possibility (unless you believe jurors who really believe in the presumption of innocence are biased). And the same is obviously true in civil cases. Lawyers want to have jurors who are predisposed to their side. Judges are the ones who should not be promoting this culture of rehabilitation, but they do for a variety of reasons. And in order to get rid of both prehabilitation and rehabilitation, we will have to

change the culture far more than is likely possible in the near future. But of course, that doesn't mean we shouldn't keep trying.

Another issue we should talk to our attorneys about is when they should try to rehabilitate jurors themselves. I often cringe in court when "my" attorney is heavy handedly trying to rehabilitate a juror and arguing to the judge that someone should be kept who is obviously prejudiced against the other side. The jurors see this and I think these battles where a juror is being heavily cross examined encourages other jurors to not want to say anything "wrong". It also turns the process into a game, wastes time and encourages the judge to not use his or her common sense, but wait to see if the attorney is clever enough to get the juror to say the magic words. There are times where it's best to just say, we agree your honor, and move on. Or, at a minimum, ask to do the questioning at the bench so the other jurors don't think the attorney is a hypocrite or even abusive.

I've suggested for years that attorneys file motions in relation to jury selection asking for Supplemental Juror Questionnaires and other good voir dire practice procedures in their cases in order to get the judges used to it and because you never know when a judge will surprise you and grant your motion. If these motions outline some of the problems of prejudice or sensitive issues that the attorneys expect might arise, it may help the judge to begin to think of those issues as problems to deal with during voir dire. It's important to remember that the judges don't know your case as you do and are usually not thinking about any but the most obvious areas of prejudice. Including data can also help the judge to take an issue seriously. For example, it's not hard to find studies showing what percentage of people have either themselves or had family members who have been abused as evidence for the need for an SJQ or at least questioning out of the hearing of the others.

Trial consultants should suggest to the attorneys that when they have a higher profile case or a case with particularly sensitive issues that they incorporate some of the data mentioned in this article and material from case cites – especially the quote from Judge Bennett – into their motions for jury selection procedures. The legal field seems to be one of the last fields to recognize developments in brain and psychological studies. It's up to us to educate our attorneys so they can educate the judges. I am reminded about how it took decades for Supplemental Juror Questionnaires to catch on, although the "science" behind them – that jurors are more likely to reveal personal experiences and attitudes on paper than in open court was pretty clear.

We should also be telling our lawyers and the judges that they shouldn't tell the jurors that they are not asking questions to "pry into their personal affairs". This is another example of conditioning the jurors to be afraid of what is going to happen in voir dire and withhold their true feelings.

We will still be dealing with prehabilitation and rehabilitation in the years to come and the best way to counter it in court is with good questioning.

One of my pet peeves is when attorneys reinforce the idea that the jurors CAN put their prejudices behind them and unwittingly begin to rehabilitate the jurors who have said they have biases and prejudices against the attorney's client. There's a lot of training to be done.

I know that we all know that we need to be careful with the words that we use. While I agree with the tone of many of the authors' suggested questions, their word choice could be better.

I particularly like the question the authors suggest to be used after a juror has talked about having feelings about a case or parties. Asking "how easy or difficult" makes the juror think and doesn't allow them to just say yes or no. Unfortunately, we need to stress this kind of construction because most attorneys are locked into yes/no formulations:

- In your honest opinion, how easy or difficult would it be for you to put aside any preconceived notions about this case?

But it's better to not use "preconceived notions" unless the juror has used that phrase. It has negative connotations as most people don't want to admit that they have preconceived notions.

However, I have a problem with the following question from the authors – one which we hear repeatedly in voir dire:

- If you were to serve on the jury in X's trial could you assume he is innocent until proven guilty beyond a reasonable doubt?

A closed ended question in this instance is more likely to get you a yes answer. What most jurors – and many attorneys apparently – don't realize is that a defendant is entitled to be presumed innocent UNLESS and until proven guilty beyond a reasonable doubt. Instead ask:

"Given your feelings/experiences, HOW HARD will it be for you presume that Mr. X is innocent UNLESS the prosecutor can prove he is guilty beyond a reasonable doubt".

I hope the authors were being tongue-in-cheek when they suggest that an attorney say:

"While Mr. Zelbenhausermansmith has lectured you to death on the importance of being objective, probably to the point where you fear admitting any negative feelings you might have about the defendant, let me assure you that the goal of the court is to understand your true feelings, not bully you into..."

It does not make sense to trash the opposing lawyer, in fact, you should reframe and include him or her in your statements that everyone here – the judge, the other lawyer and I – all want them to tell us how they really feel.

"We need jurors who are objective, as Mr. Zelbenhausermansmith has said. And part of being objective is to tell us if you have any negative feelings about the defendant or anyone else involved in this case. You're the only one who can tell us what your feelings are and if you can't be objective or impartial, or have any questions about whether you can be objective or impartial, we can talk about that."

The only way I have found to counter the "put aside" your feelings question is to ask, "HOW are you going to put aside your feelings?" It's a good question and some thoughtful jurors will realize that they can't.

The most helpful thing to do to counter rehabilitation is to get the juror to explore the feelings that they have, where those feelings come from, how long they have felt a particular way, is there a time when they didn't feel that way, why did they change their mind, when they think about it what else comes to mind:

What have you read? What have you seen on TV? Heard on the radio? Have you read about it on the internet? About how many articles and TV news reports have you seen?

Have you talked to other people about the case? Have you heard anyone else talking about the case? What have they said? What have you said?

What do you know about the case?

What do you know about the victim/alleged victim?

What do you know about Mr. Defendant?

What have you thought about this case?

Have you ever thought to yourself, “I think this guy is guilty”? Why?

IF YES, Has there been anything that has made you feel differently about the case? What was that?

How do you think you’ll be able to put those negative thoughts that you’ve had out of your mind and be objective and impartial?

IF NO: You’ve read and seen and heard a lot about the case. It’s all been pretty negative towards the defendant, don’t you think? Do you think it’s all true?

You’ve seen and read a lot of negative things about the defendant – have you seen anything good about him or heard anything about what his side of the story is?

HOW do you think that might affect you? HOW are you going to put all those negative images out of your head?

The key to getting the jurors to open up and be impervious to rehabilitation is to get them to explore what they know and how they feel about it. Questions like, “HOW do you think your feelings might affect you if you were a juror?” and “HOW do you think you’ll be able to put that out of your mind?” force them to really think about how hard it might be to actually presume the defendant is guilty or not come into a civil case leaning towards one side or the other.

Finally, if the attorney is conducting voir dire in a group, one good technique is to say to a juror who has expressed negative opinions, “It sounds like you’re trying to figure out how your feelings might affect your ability to be objective in this case. I’m going to ask some other people questions and you can think about how this has affected you and how you’ll be able to put those feelings aside – then I’ll come back and talk to you about whether you think you can be objective.” Then the attorney talks to other jurors and comes back to the juror and asks, “What have you been thinking about? HOW do you think your negative feelings about the defendant might affect your ability to presume that he’s innocent?”

In criminal cases, keeping the focus on being “objective” and on their ability to presume that the defendant is innocent can be most useful in getting jurors to understand the impact of their feelings.

“What kind of problems do you think that that experience might cause you in presuming that the defendant is innocent?”

In civil cases, it’s the same principle:

“What kind of problems do you think that that experience might cause you in coming into this case not leaning towards the person bringing the lawsuit/the defendant?”

In my experience, we always have more jurors we’d like get rid of than we have cause challenges or peremptories. In criminal cases, evaluating jurors commitment to basic principles can give us the information to decide who are the best of the worst.

“We all know that a defendant is supposed to be presumed innocent UNLESS the prosecution can prove that he is guilty. HOW important is it to you that someone be presumed innocent? Why do you feel that way?”

“We also all know that a defendant cannot be found guilty unless the prosecution can prove she is guilty beyond

a reasonable doubt. HOW important is it to you that the defendant be found not guilty UNLESS the prosecution can prove she is guilty beyond a reasonable doubt? Why do you feel that way?"

Good article, lots of food for thought and good suggestions. Thanks to the authors for raising this and coining a new word!