

The Psychology of Voir Dire

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How many times have you debriefed jurors after they rendered their verdict and been surprised by what they told you? In particular, how many times have you had to smile and maintain your composure as jurors tell you about something that played a major role forming the verdict and you thought that factor was practically irrelevant?

I had that kind of experience in the very first focus group I conducted as a trial consultant. This was a criminal case in which aggravated assault had been alleged. I set up the focus group the way I was trained. When the focus group members arrived, they were given two documents. One document was a summary of the case from the point of view of the prosecution. The other document was a summary of the case from the point of view the defense. I had been working in the field of criminal psychology since 1985. I was an expert in violent crime. So, I thought I had a pretty good idea how the focus group would deliberate. I even thought I had a pretty good idea about the verdict they would reach. Boy, was I wrong.

From the outset of deliberations, the discussion took an odd turn. In plain English, I was shocked by the deliberations. My mind was whirling as I silently asked focus group members: “Why are you focusing on that? That is not even relevant.” At other times I would silently say, “That is not what the evidence says. Why are we even going down that path?”

Here is the lesson I learned during that focus group and this lesson has been reaffirmed by every focus group I have conducted since that time: jurors don’t deliberate based on facts and argument; jurors deliberate based on their perception of the facts and arguments and it is the juror’s belief system that accounts for the varying way that jurors perceive facts and arguments.

In this paper a psychological approach to conducting voir dire will be presented. The psychological approach to voir dire is based upon psychological factors that are known to impact how a juror reaches a verdict. So, this paper begins with a discussion of the psychology of how a juror forms a verdict. Based upon the psychology of the verdict, a process is proposed for identifying jurors whose belief system would prevent them from a fair hearing of your case.

This paper is written from the perspective of a criminal defense attorney who is involved in a case of alleged child sexual abuse. The discussion and sample questions will be based upon this case.

How a Juror Reaches a Verdict

After my first focus group, I realized that I had information that could have let me anticipate, if not predict what I saw during that focus group session. This information was not some new cutting edge research. Rather, the information was more than a half century old and it was a foundation of current psychology treatment.

In order to understand how jurors reach a verdict, we will take a trip back in time, about sixty years ago, to New York circa 1950. There you will meet an iconoclastic psychologist named, Albert Ellis, who provides us with a cornerstone concept in the field of psychology that is still used to today. He offers us what is referred to as the ABCs of emotion (Ellis, 1957)

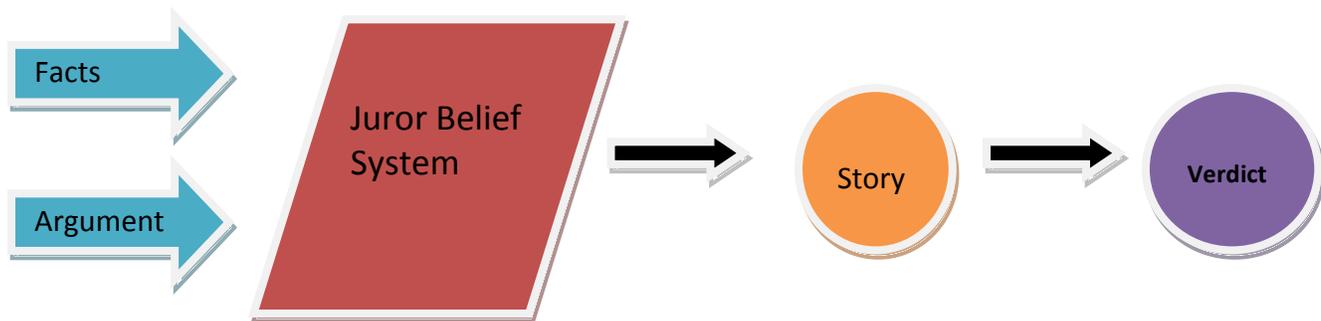


In the ABCs of emotion, A stands for “activating event”, or any event that might happen in the environment. B refers to the individual’s “belief system”. All events are filtered through a set of beliefs and based upon those beliefs, the individual will have a resulting or “consequent emotion.”

There is an important implication to the ABCs of emotion that might be readily obvious but it is fundamental to how a juror forms a verdict. The ABCs of emotion reveals that events don’t cause emotions; instead, our beliefs regarding the event cause the emotion. Let’s take a look at one recent event and it will be easy to show the power of the belief system.

Consider for a moment our last presidential election, in which Barack Obama was the victor. If events determined how an individual felt, then the election of Barack Obama should have made everyone feel the same way but it did not. In general, Democrats were happy with Mr. Obama’s election whereas Republicans were not. What caused the different reaction? Not the event, the event was the same for both Democrats and Republicans. The difference was the belief systems that filtered the event.

Let’s take what you just learned about the ABCs of emotion and apply it to the behavior of jurors. In the graphic below, it is easy to see the critical role the belief system plays in verdict formation.



The graphic above is the ABCs of emotions translated into a court setting. In this model, the activating events are the facts and arguments used when presenting the case. The juror belief system is the filter through which the facts and arguments must pass. The “Story” refers to the way that the juror uses her beliefs to organize the facts and evidence. The story that the juror tells herself about the case is the basis on which the juror reaches a verdict.

Using what you know about the ABCs of reaching a verdict, the task of voir dire might be stated as, “Voir dire is the process of identifying jurors with beliefs that prevent them from a fair hearing of your case.”

How to Conduct Voir Dire

In the psychological approach to conducting voir dire, voir dire is aimed at identifying jurors whose beliefs prevent them from an open and fair hearing of your case. David Ball (2003) has developed a method of conducting voir dire and with a little modification it can serve the purpose of identifying supportive and harmful beliefs held by jurors. The following is the recommended process for conducting voir dire, with goal of identifying juror belief systems.

1. Develop voir dire questions for key evidence and themes.
2. Develop voir dire questions to uncover juror beliefs.
3. Develop voir dire questions regarding juror life experiences.
4. Develop voir dire questions regarding juror demographics.

Step One: Develop Voir Dire Questions for Key Evidence and Themes

All attorneys and trial consultants have developed their own methods for organizing evidence. There is no right or wrong way to organize the evidence. If it works for you, it is the right way to do it.

Regardless of how the evidence is organized, if you are going to take the psychological approach to conducting voir dire, I would ask you to take one extra step after you have your evidence organized: group or categorize the evidence into themes. It is recommended that you have one primary theme and no more than three subthemes.

I have been involved in cases where the attorney took the approach of “throw it all against the wall and see what sticks.” On occasion, I have seen this work but I don’t think this approach is scientifically or psychologically sound. Research in the area of cognitive psychology has revealed that the average individual can keep three things in mind at one point in time. In other words, the average individual can keep three things in working memory.

If you want to use these scientific data to your advantage, you should organize your evidence so you have one primary theme for your case and no more than three subthemes. You might want to adopt the motto: If you present more than three themes, you have presented nothing at all. All that a juror can take into the deliberation room are three themes; a juror cannot take ten themes or arguments into the deliberation room.

Let’s consider a child sexual abuse case in which Mrs. Green accuses her ex-husband of sexually abusing their three year old daughter and the allegations arose during their bitter divorce. In this case, defense counsel’s primary theme will be: *The allegations were contrived by a vengeful ex-spouse.* The subthemes in the case could be as follows: (1) *Children in the three to five year age range are at risk for being induced to make a false outcry;* (2) *Mrs. Green has a history of using the children to hurt Mr.*

Green; and (3) *In the past, Mrs. Green has made false statements to the police and child protective services.*

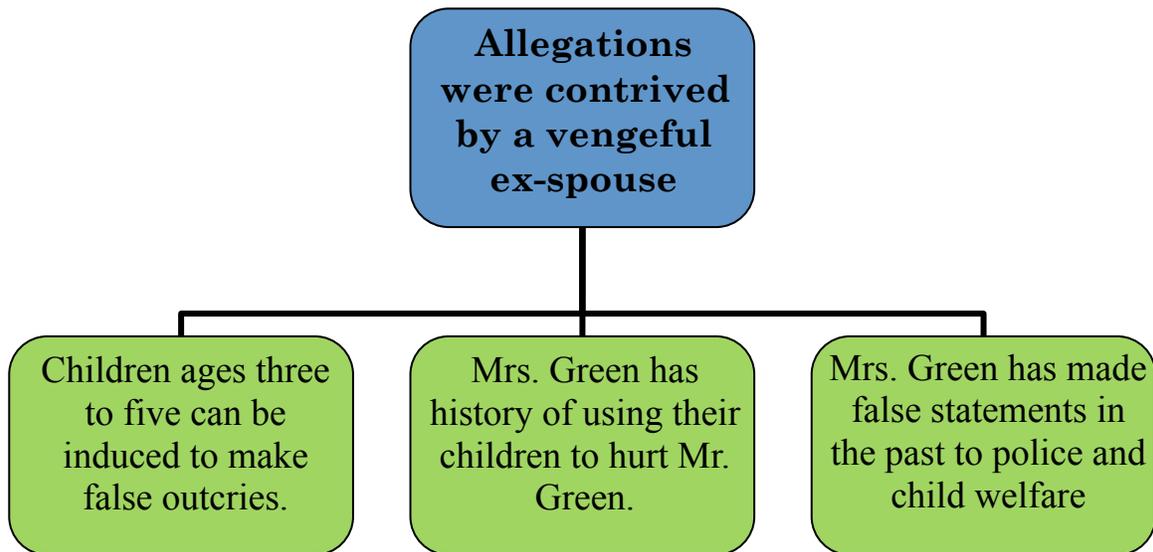
Once you have your primary theme and three subthemes, you are ready to formulate your first set of voir dire questions. The questions you create should be designed to reveal juror beliefs about your evidence and themes. For example, take the first subtheme, *“Children in the three to five year age range are at risk for being induced to make a false outcry.”* Your voir dire questions might look something like this:

Q: What weight would you give to scientific research that says a child in the three to five year old age range can be induced to make a false outcry of sexual abuse about 45% of the time?

Q: What weight would you give to scientific research that says a child is equally likely to believe something happened when it actually happened or when she is told by a parent it happened?

Of course, there are many more questions that might be formulated than the two listed above. The questions listed above serve as examples of the type of questions you could ask regarding one of the subthemes in the hypothetical case about child sexual abuse.

For each theme and for each piece of key evidence, you want to develop voir dire questions that will reveal relevant juror beliefs. Your questions should be designed to get jurors talking. Once they are talking, you will begin to see the beliefs they hold regarding the evidence and your themes.



A word of caution is offered. You might instinctively want to avoid voir dire questions regarding evidence that is harmful to your case. Don't do this. Don't avoid asking questions about the potentially harmful topics you know are going to come up. The reason for this is simple, you need identify jurors whose beliefs will be supportive of the damning evidence. Once you have identified the juror whose beliefs support harmful evidence, you can deselect that juror.

You have now completed the first step of the voir dire process. You have written voir dire questions regarding key evidence, your case theme and subthemes, and harmful evidence. Now, you are ready to go to the next step in the process.

Step Two: Develop Voir Dire Questions that Reveal Juror' Belief Systems

Belief system is defined as the totality of an individual's values, attitudes, and opinions. When it comes to the matter of rendering a verdict, nothing is more critical than the juror's belief system. The juror's belief system is the filter through which all evidence and argument must pass. The juror will not deal directly with the evidence and argument when formulating a verdict. The juror will deal with the story he tells himself about the case information and the juror's story is based more on belief than fact.

Your job during the second step of voir dire is to uncover information about each juror's belief system. Once you uncover the juror's belief system, you should determine if your client can get a fair hearing with that belief system in the deliberation room.

There are two ways to identify relevant juror beliefs. First, you can take a rational approach. In the rational approach, you use reason and logic to deduce juror opinions that are relevant to the case. Second you can take an empirical approach. In the empirical approach, you identify relevant juror beliefs by use of the existing scientific literature, or better still you use focus groups.

In order to demonstrate the rational approach to uncovering juror beliefs, let's return to the child sexual abuse case which was introduced when we discussed the first step. Using logic and intuition, what beliefs do you believe would be helpful or harmful to the defense in such a case? Consider the following:

- **Sexually Conservative** –In our culture, sex is supposed to be a private thing, so everybody will be a little shy about sexual matters but the sexually conservative person is extraordinarily shy and might punish the defendant with a guilty verdict for bringing sex out of the bedroom and into the courtroom.
- **Strong Parenting Instinct** – Individuals with a strong parenting instinct might be overprotective towards children and thus inclined to begin hearing evidence in a child sexual abuse case with a guilty verdict already in mind.
- **Law and Order** – Individuals who identify with law enforcement and the courts would from the beginning of the trial be favorable to the prosecution.

The list above is not exhaustive of juror beliefs but it shows you the thought process you must go through to identify relevant juror beliefs. Notice that the beliefs you most want to identify are beliefs that favor your opponent. In the case of the defense attorney preparing to defend Mr. Green, the goal is to identify pro-prosecution beliefs. The reason for this is simple. The only tool you have available to you during voir dire is deselection, so you need to spend the precious little time that you do have determining who you need to deselect.

The second approach to developing voir dire questions designed to uncover juror beliefs is the empirical approach. There has been extensive psychological research regarding the relationship of beliefs and juror verdict. It is beyond the scope of this paper to review the entire body of research regarding juror beliefs. To give you a flavor of the research, consider the following summary of the research regarding three beliefs that have a tremendous impact on verdicts in civil and criminal trials.

- **Authoritarianism** – Authoritarianism is defined as a desire for order, well defined rules, and reliance upon authority when making decisions. Authoritarians have a strong belief in the legitimacy of conventional authority. The research shows that authoritarian individuals tend to convict and give harsher punishment than people who are low on authoritarianism (Narby, Cutler & Moran, 1993). To really appreciate the power of authoritarianism, consider the results of a thirty year old study that showed that authoritarian individuals recall prosecution evidence more than defense evidence (Garcia & Griffitt, 1978). The following are examples of beliefs held by authoritarian individuals:
 - Obedience and respect for authority are the most important virtues children should learn.
 - An insult to honor should always be punished.
 - There is nothing lower than a person who does not feel great love, gratitude and respect for his parents.

- **Locus of Control** – Locus of control means location of control. In the locus of control research, there are two locations for control: internal and external. Individuals with external locus of control believe that their actions matter little and what happens in their life is largely the result of external factors, like fate, luck, or serendipity. Individuals with internal locus of control believe that their personal qualities, such as intelligence, perseverance, and so on, determine what happens in their life.

You might think something as abstract as locus of control would have no bearing on a verdict but it does. The research shows that persons with a strong internal locus of control are more likely to convict because they view themselves as well as others as accountable for their own actions (Phares & Wilson, 1972). One research study having to do with a drunk driving showed that individuals with strong internal locus of control recommend more harsh punishment than individuals with external locus of control (Sosis, 1974). The following are some examples of beliefs held by internal locus of control:

- People's misfortunes are the result of mistakes they make.
 - Capable people who fail to become leaders have not taken advantage of their opportunities.
 - When I make plans I am almost always certain I can make them work.
-
- **Belief in a Just World** – If you believe that people get what they deserve in life, you have a belief in a just world, i.e., good things happen to good people and bad things happen to bad people. The research regarding Belief in a Just World (BJW) is mixed. Some research has shown persons with a strong BJW are more likely to convict but these same individuals might be inclined to blame a rape victim or be less punitive towards a higher status defendant (Lieberman & Sales, 2007). The following are some beliefs held by individuals with strong just world beliefs:
 - I feel the world treats me fairly.
 - I believe that I get what I deserve.
 - I feel that I earn the rewards and punishments I get.

As you can see from the brief overview of the research, there is a wealth of scientific data to guide the formulation of questions designed to uncover a juror's belief system. If you would like to know more about this research, you can get started by Googling "jury selection". Another good option would be to go to Google Books and then Google "jury selection."

A word of caution is warranted regarding the research regarding juror beliefs. This research is general research and the extent to which it applies to your case is unknown. There is a way to determine the extent to which these beliefs apply to your specific case. You could conduct a focus group and test the extent to which these beliefs are related to a verdict in your case.

Focus groups are superior to merely reviewing the scientific research for a variety of reasons: some of the research is old and might be outdated, some research is conducted with college students who are not jury eligible, the research was not conducted in your venue, and the research was not conducted using the unique facts associated with your case. All of these shortcomings can be easily overcome by conducting focus groups. If you don't know how to conduct focus groups, you could contact a trial consultant. A national listing of trial consultants is available at <http://www.astcweb.org>.

Step Three: Develop Voir Dire Questions about Life Experiences

Juror decision-making is shaped by beliefs and beliefs are shaped by life experiences. So, life experience can be fruitful area of questioning during voir dire, if it is done correctly.

If you want to use questions about life experiences as a means to uncover juror beliefs, the first thing you must do is identify those life experiences that you think would create relevant juror beliefs. For example, in the sexual abuse case regarding Mr. Green, some relevant life experiences might include the following:

- **Sexual abuse history** – "Have you ever been sexually abused, sexually assaulted or raped?" "Has someone close to you ever been sexually abused, sexually assaulted or raped?"
- **Divorce** – "If you have gone through a divorce, was it a bitter divorce?" "Do you have family or friends who were harmed during a bitter divorce?"
- **Child rearing** – "If you have raised children, have you ever seen them get confused about facts or things that happened to them?" "If you have raised children, have you ever seen them make up things to please one or both of the parents?"

Taking a look at the first two life experiences (sexual abuse and divorce), you probably recognize how difficult it would be for prospective jurors to talk about those things in public. Yet, those life experiences are critically important in a sexual abuse case. If you know that you will be asking jurors about such sensitive matters as sexual abuse and divorce you might try to avoid a public discussion of these matters by use of supplemental jury questionnaire. If for some reason you cannot use supplemental questionnaires, then you should attempt to conduct individual voir dire on the sensitive topics.

Whether you are assessing life experiences by means of questionnaire, individual voir dire, or public voir dire, your goal is the same. You want to find out if a juror had the relevant life experience. However, it is not enough to know if the juror had that life experience. You must uncover the juror's beliefs about that life experience.

A life experience itself does not determine a verdict bias. Rather, the juror's beliefs about the life experience determine what if any bias will exist. You must first ask who has had the life experience and then you must follow-up with open-ended questions that reveal the juror's beliefs about the life experience.

Step Four: Develop Voir Dire Questions regarding Demographics

Let me apologize in advance to those traumatized by the LSAT or the GRE similes but I must say: Demographics are to voir dire as the Sirens are to Odysseus. The Sirens I am referring to are the Sirens in the Greek myth, *The Odyssey*. These are the captivating Sirens who used their beautiful voices to lure Odysseus' ship to the rocks. Odysseus did not wreck his ship upon the rocks and you don't have to wreck your voir dire by over-reliance on demographics.

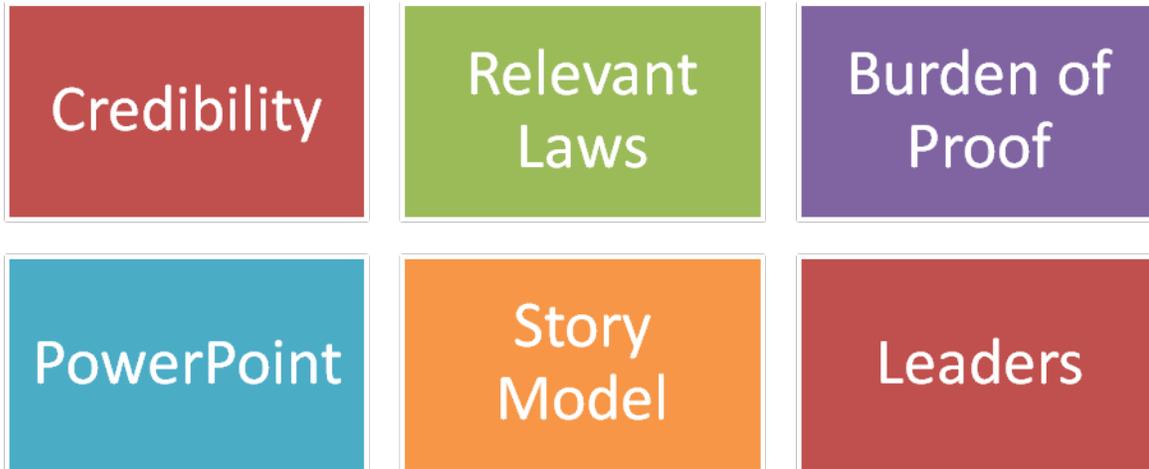
If you want to use demographics effectively, use demographics to probe prospective jurors about beliefs. For example, in the alleged child sexual abuse case, as Mr. Green's defense attorney, you might be interested in knowing who among the prospective jurors has ever worked at a child welfare agency. But it is not enough to know that an individual worked at such an agency. Did that individual have experiences that would lead him or her to mistrust reports of child sexual abuse? Did that individual have experiences that might cause him or her to mistrust official reports of child sexual abuse?

With regard to Mr. Green's criminal case, juror occupation is just one of several demographics that might be relevant demographic areas worth investigation.

- **Occupation** – “Have you worked in a child welfare agency?” “Have you worked in a women's shelter or family shelter?” “Have you ever worked as an investigator for any governmental agency?”
- **Parent status** – “Do you have children?” “Do your children live with you?”
- **Social groups** – “Do you belong to a neighborhood watch group?” “Do you do volunteer work for any law enforcement agency or quasi-law enforcement agency?”
- **Bumper Stickers** – “Do you have or have you ever had bumper stickers on your vehicle? If so, what did the bumper sticker say?”

The Context of the Psychological Approach to Voir Dire

The purpose of this paper was to discuss a psychological method for conducting voir dire. In closing, I would like to put this psychological method in context of an overall approach to voir dire. Juror beliefs are just one of many factors to consider when preparing for voir dire.



1. **Credibility** – If jurors don't trust the attorney, they will not listen to the attorney. It is critical to establish credibility as early as possible in the trial.
2. **Relevant laws** – You need to ask questions of jurors about the laws they must consider when deliberating. Jurors often have misconceptions or unusual beliefs about the law.
3. **Burden of proof** – Civil and criminal trials have different burdens of proof but the attorney's task is the same regardless of the type of trial. The attorney should ask questions to identify juror biases regarding burden of proof.
4. **PowerPoint** – There are methods of constructing and presenting PowerPoint presentations that are very powerful. Done correctly, PowerPoint can be used in voir dire, the opening, the case in chief and during closing to convey a compelling story about your case.
5. **Story Model** – Jurors do not base their verdict on facts and argument directly. Rather they base their verdict on the story they tell themselves about the facts and argument. Since you know jurors are going to tell themselves a story, provide them with your story about the case.
6. **Leaders** – It is really important to identify individuals who will become the leaders in the deliberation room. One strong leader can sway an entire jury panel.

Conclusion

Voir dire is the only part of a trial when it is possible for an attorney to dialogue with jurors but getting jurors to talk to you is only part of the task. Jurors need to talk about their beliefs, including their values, opinions and attitudes because these are the filters through which all evidence and

argument must pass. The goal of voir dire is to identify jurors whose belief system would prevent them from a fair hearing of your case. By carefully considering the information regarding juror beliefs, the attorney can do a better job of deselecting biased jurors.

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Editor's Note

You know how 'they' say as you get older, time seems to fly by faster? 2010 has absolutely flown by for me. This is our last issue for 2010 and we wanted to offer a full plate (so to speak) as you go into the holidays. To that end, we have articles on self-presentation in the courtroom; thoughts on what we can learn (if anything) from negative political attack ads; a review of the research on police deception in interrogation and how that influences jurors as they consider confessions; using hyperlinked briefs to power up both your argument and your persuasiveness; a look at the role and impact of juror IQ; a psychological approach to *voir dire*; and a review of the research on the role of the juror foreperson. As you peruse these (with holiday fudge and hot cider) all of us at the American Society of Trial Consultants wish you and yours the best of holiday times and success, health and happiness in the New Year.

In 2011, we hope to continue to bring you thought-provoking pieces that make you think as well as improve your litigation advocacy skills. We are in a time in this country where we have to continually assess and re-assess whether strategies in persuasion are still effective or if we have to re-group and re-vamp and re-approach the venire. As you practice and run up against new concerns, perspectives and attitudes-it helps us a lot to hear from you about topics you'd like to learn more about in *The Jury Expert*. Send me an email and tell me what topics you want to have in our 2011 issues. We'll see what we can do to make that happen. Think of it as our gift to you. Happy Holidays.

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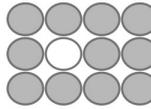
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