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VOIR DIRE: NEW RESEARCH CHALLENGES OLD ASSUMPTIONS

Research Shows That 1) Judge-Directed Voir Dire Can be Less Revealing of Juror Prejudice Than Lawyer Questioning and 2) Attitudes Toward Hot-Button Issues Like Tort Reform are Better Predictors of Juror Bias Than Race, Class, and Other Demographic Factors

Voir dire, the literal translation of which is "to see and speak the truth," is generally considered one of the most critical aspects of a trial.[1] During this pre-trial interview, prospective jurors are asked to provide information about their background, attitudes and beliefs.

In theory, these self-disclosures reveal any bias or prejudice that would prevent the juror from acting in a fair and impartial manner. The problem with voir dire as currently practiced, however, is that courts rarely understand the psychological underpinnings of self-disclosure interviews and why attorney participation is so critical to effective voir dire.

Current social science research shows that levels of juror self-disclosure vary widely depending on the identity of the questioner, the style of questioning, and the manner in which the questioning is conducted.[2] Corollary research shows that demographic profiles and other traditional assumptions about race, class, and socioeconomic status are not necessarily reliable indicators of verdict predisposition. Rather, juror attitudes about the legal system, ***475** tort reform, corporate misconduct, and other hot button issues are much more reliable measures of verdict pre-disposition.

By learning basic psychological precepts of self-disclosure interviews and examining recent shifts in public opinion about the legal system, attorneys can better prepare themselves for the task of jury selection.

History and trends

The right to a fair and impartial jury is a cornerstone of American jurisprudence.[3] The Sixth and Fourteenth Amendments provide for trial by jury, including the right to an impartial jury.[4] Although questioning of prospective jurors is constitutionally required, exactly how it is done is controlled by applicable statutes and rules.[5]

In Illinois, Supreme Court Rule 234 provides that the trial court "shall" allow each counsel to supplement the trial court's voir dire with direct inquiry of the venire.[6] Though this mandate applies to both civil and criminal cases,[7] the extent to which the attorneys are allowed to directly question prospective jurors varies widely.

One of the most frequently cited reasons for limiting attorney voir dire is belief that it unduly prolongs the trial process. A survey of 124 federal judges conducted by the Federal Judicial Center, however, reported no significant increase in jury

selection times between those judges who allowed attorney conducted voir dire and those that did not.[8]

In an effort to promote a more uniform and effective system of jury selection and service, the ABA's American Jury Project has produced a set of modern jury principles.[9] Though a complete analysis of these principles is beyond the scope of this article, they include provisions for jury selection questionnaires, substantive pre-trial instructions to the jury, trial time limits, questions by the jury during trial, substantial questioning of prospective jurors by counsel, and interim statements to the jury by the attorneys. The authors of these principles used social science research to help develop a framework for refining and improving jury trial practice.

The federal district courts in the seventh circuit have implemented a program putting many of the ABA's model principles into practical application. For those interested in the program, the Seventh Circuit Bar Association's Web site is an excellent informational resource.[10] The ABA and seventh circuit's model program demonstrates an increasing willingness in the legal community to use social science research to help improve and refine the American jury trial system.

Judge versus attorney conducted voir dire

In one of the largest empirical studies of voir dire, funded by the U.S. Department of Justice, researchers sought to determine whether the level of juror self-disclosure was affected by the identity of the questioner or the method of questioning. The researchers sought to verify or refute past social science research about self-disclosure interviews.[11] A long series of studies conducted in the employment field have identified what researchers described as "reciprocity effect."[12]

At its most basic, reciprocity effect holds that the level of self-disclosure an individual will make depends on whether he or she first receives self-disclosure from the interviewer.[13] In the employment context, researchers have found that individuals "reciprocate" with self-disclosure when they receive moderate self-disclosure from their interviewer.[14] The degree of self-disclosure also varies based on the interviewer's perceived status within the employment organization; that is, employees were more willing to self-disclose to interviewers within their own hierarchical level rather than to more powerful superiors.[15]

To test whether prospective jurors "reciprocate" with self-disclosure consistent with past research, 166 jury-eligible residents were selected from a county voter registration list.[16] The participants were told that they would be participating in a mock trial and that the judge and the attorneys were authentic.

They were further told that the judge had been delayed and they were asked to complete an Attitudes Toward Legal Issues Questionnaire (ATLIQ) while they waited.[17] The ATLIQ posed 29 statements regarding various issues, including (a) treatment of minorities by the court system, (b) controversial sociological issues, e.g., marijuana use and abortion, (c) attitudes toward the courts, e.g., judges, attorneys, and (d) attitudes about deterrence.[18]

The venire was then asked to agree or disagree with the statements along a 10-point Likert-type scale.[19] The goal of the ATLIQ, which was also based on earlier social science studies, was to gauge the venire's relative conservatism or liberalism regarding the justice system.[20]

***476** The participants were then excused and the venire broken down in cross sections based on their ATLIQ scores. Then, multiple voir dires were conducted twice a week for two consecutive weeks in a moot courtroom, with a uniformed sheriff, clerk, attorneys and a judge.

In examining courtroom behavior, the researchers found that the prospective jurors viewed the judge as an authority figure and were much more guarded in their responses.[21] The jurors tended to provide less self-revealing information than their ATLIQ questionnaire suggested and were much more conservative with the responses during judge initiated questioning.

This correlation to past research lead to the observation that "it seems from the direction and magnitude of the change scores that during a judge-conducted voir dire jurors attempted to report not what they truly thought or felt about an issue, but instead what they believed the judge wanted to hear."[22] This skew continued to exist even when the judge adopted a less formal method of examination.[23]

In contrast, the jurors did not view the attorneys as possessing the same type of authority as the judge, which tended to result

in a greater degree of self-disclosure.[24] When the attorneys provided some self-disclosure, e.g., admission of nervousness or cursory biographical information, and further conducted the voir dire in a warm and "liking" manner, self-disclosure levels rose. As with the judge-conducted voir dire, however, self-disclosure dropped dramatically when the attorneys provided the jurors with no self-disclosure and adopted a cold and aloof manner.[25]

Other empirical studies have confirmed the validity of "reciprocity effect" as a method of increasing juror self-disclosure during voir dire.[26] These findings correlate with much of the antidotal reporting from trial advocacy institutions and well known attorneys, both plaintiff and defense. These findings strongly suggest that attorney-conducted voir dire, when conducted correctly, leads to an atmosphere where prospective jurors are more likely to provide meaningful self-disclosure and thus produce a more effective voir dire examination.

Attitudes, voir dire, and the legal system

The ability to effectively elicit information directly from prospective jurors, however, is only part of productive voir dire. The more pressing question becomes "what information should be asked of prospective jurors?" Because no two cases are identical, no set of stock questions can be considered sufficient.

However, recent research demonstrates that popular attitudes about the legal system, jury awards, corporate misconduct, and other hot button issues are crucial indicators of verdict inclination.[27] The ability to discuss such issues with prospective jurors is critical to obtaining a fair venire.

Empirical and anecdotal evidence strongly suggest that the millions of dollars spent each year on anti-lawsuit advertising has changed public perception of the legal profession and has strongly shifted attitudes in both criminal and civil cases.[28] It has become an accepted precept in the field of scientific jury selection (SJS) that attitudes about tort reform, concerns about insurance rates, and support for damage caps are better predictors of jury verdict inclination than are demographic variables.[29]

In a similar vein, corporate litigators have become increasingly concerned about jury prejudice following the collapse of Enron, WorldCom and the multiple corporate accounting scandals which followed.[30] The *National Law Journal*, reporting on its top 100 verdicts of 2002, attributed some of them to "juror rage" against corporate entities.[31] According to one national survey conducted by Decision Quest, a jury consulting firm, "more than 80% of those polled agreed that 'the events of Enron and WorldCom are just the tip of the iceberg.'"[32]

In order to test the validity of public opinion trends on verdict inclination, members of the Psychology Department at Florida International University undertook a multi-phase study of several hundred jury eligible persons chosen from a racially and economically diverse cross-section of the South Florida community. The participants were administered an Attitudes Toward Tort Reform (ATR) questionnaire where the venire was asked to answer on a modified Likert type scale ("agree," "strongly agree," "neutral," "disagree," "strongly disagree.").

The ATR covered attitudes towards attorney fees, limits on pain and suffering, as well as questions about criminal deterrence, e.g., "The courts are far too technical in protecting the so-called rights of defendants." The participants were then provided with various criminal and civil case scenarios, including an attorney charged with controlled substance conspiracy, a RICO case involving stolen goods, a neurologist charged with medical insurance fraud, and a "slip and fall" case where the plaintiff suffered from pre-accident depression and claimed that the fall caused mild organic brain damage.

The results of the study showed those jurors who showed a strong tendency towards what the researchers called "legal ***477** authoritarianism," i.e., the strongly held belief that "the system is too soft on criminals" or that jurors in civil cases "often give money awards that are too large," were much more inclined to rule for the government in criminal cases and the defense in civil cases than were those who were neutral or more civil-liberties conscious. Interestingly, those persons who tended towards "classical authoritarianism" in their personal views (e.g., stiff punishment is a good way to teach people right from wrong) but maintained a belief in the importance of the legal system and the necessity of protecting citizen rights did not skew as strongly pro-government/pro-defense.

Researchers concluded that those persons holding negative attitudes about the legal system are strongly inclined towards a particular result in both civil and criminal cases. Social psychologist Melvin Lerner has theorized that the concept of

undeserved suffering, or the existence of an unjust world, often challenges the core upon which certain personalities base so much of their sense of self.[33] To accept that the world is sometimes a random and unjust place calls into question the validity of the concepts of "self-reliance" and "self-motivation" upon which authoritarian personalities base their world view.[34]

Several studies have confirmed these basic precepts, using different testing models such as the "Hans and Lofquist Litigation Crisis Attitudes Scale"[35] and the "Just World Scale."[36] What can be taken from the research is that traditional methods of juror profiling, such as age, race, sex or wealth, do not accurately predict juror attitudes when compared to directing questioning. Attitudes about the legal system, lawsuits, and certain hot button social issues seem to provide a much more revealing method of assessing preconceived juror inclination.[37]

Conclusion

The essence of voir dire is to open a dialog with prospective jurors in a way that encourages meaningful self-disclosure. When the attorneys present prospective jurors with some self-disclosure, and conduct the voir dire examination in a way that appreciates how intimidating it is to make self-revelations in a crowded courtroom, a dialog becomes possible. The goal of this dialog is to encourage the prospective venire to reveal their true attitudes and beliefs, even if they are antithetical to lawyers, the legal system, or the type of suit at issue.

The simple truth is that attorneys must be willing to rethink their approach to voir dire and to appreciate the crucial role they have in selecting a fair venire. Jury selection is a human event. No set of stock questions, forms or a checklist can tell a trial lawyer what he or she needs to know.

Only by opening up to the prospective venire, and by accepting that answers received may be unsettling, can the trial lawyer progress to the point where voir dire is meaningful and revealing. It is far better to receive a "negative" answer during voir dire than to allow a predisposed juror to sit silently on the panel and dispatch your client on a verdict form. By studying social sciences and the lessons they have to teach, we can all become better trial lawyers and work towards the goal of true justice.

Footnotes

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1 Irving Goldstein and Fred Lane, 1 *Lane's Goldstein Trial Technique* § 9.45 (2d ed 1984).

2 Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 Law & Hum Behav 131-146 (June 1987).

3 Deidre Golash, JD, PhD, *Race, Fairness, and Jury Selection*, 10 Behav Sci & L, 155-177 (1992).

4 Id.

5 Valerie P. Hans and Alayana Jehle, *Avoid Bald Men And People With Green Socks? Other Ways To Improve The Voir Dire Process in Jury Selection*, 78 Chi Kent L Rev 1179, 1183. (See FN 16 in article for conpendium on practices in state and federal courts).

6 177 Ill 2d R 234.

[7] *Grossman v Gebarowski*, 315 Ill App 3d 213, 732 NE2d 1100 (1st D 2000); *People v Allen*, 313 Ill App 3d 842, 730 NE2d 1216 (2d D 2000).

[8] Hans and Jehle, *Avoid Bald Men And People With Green Socks*, 78 Chi Kent L Rev at 1185 (cited in note 5) (citing 1994 memorandum of survey of 124 federal judges conducted by Federal Judicial Center, to the Advisory Committee on Civil Rules and Advisory Committee on Criminal Rules, Oct 4, 1994).

[9] http://www.abanet.org/juryprojectstandards/The_ABA_Principles_for_ Juries_and_Jury_Trials.pdf.

[10] http:// www.7thcircuitbar.org/associations/1507/files/01ProjectManual.pdf.

[11] See Jones, *Judge-Versus Attorney-Conducted Voir Dire*, 11 Law & Hum Behav at 143 (cited in note 2).

[12] Id at 133.

[13] H. J. Erhlich and D. B. Graven, *Reciprocal self-disclosure in a dyad*, J of Exper Soc Psych 7: 389-400 (1971).

[14] L. D. Goodstein and V. M. Reinecker, *Factors affecting self-disclosure: A literature review*, in B. A. Maher (ed), *Progress in experimental personality research*, 49-77 (New York: Academic 1974).

[15] Id.

[16] See Jones, *Judge-Versus Attorney-Conducted Voir Dire*, 11 Law & Hum Behav at 143 (cited in note 2).

[17] Id at 136-137.

[18] Id at 136.

[19] See A. Campbell (ed), *International Encyclopedia of the Social Sciences, Biographical Supplement* (New York: The Free Press 1988). (A Likert scale (pronounced 'lick-ert') is a type of psychometric scale often used in questionnaires. Invented in 1932 by social scientist Renis Likert, a question is posed and the respondents are asked to indicate their degree of agreement, or disagreement on a categorical scale.).

[20] See Jones, *Judge-Versus Attorney-Conducted Voir Dire*, 11 Law & Hum Behav at 136 (cited in note 2).

[21] Id at 143.

[22] Id.

[23] Id at 134.

[24] Id.

[25] Id.

[26] Id at 143.

[27] Robert Trager, Sandra Moriariaty, and Tom Duncan, *Selling Influence: Using Advertising To Prejudice The Jury Pool*, 83 Neb L Rev 685 (2005); and Valerie Hans and Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 Notre Dame L Rev 1497 (Aug 2003).

[28] Gary Moran, Brian Cutler and Anthony De Lisa, *Attitude toward tort reform, scientific jury selection and juror bias; verdict inclination in criminal and civil trials*, 18 Law & Psych Rev 309-313 (1990).

[29] See Gary Moran, Brian Cutler, and Elizabeth Loftus, *Jury selection in major controlled substance trials: the need for extended voir dire*, 3 Forensic Rep 331, 346 (1990); Douglas J. Narby, Brian Cutler, and Gary Moran, *A meta-analysis of the association between authoritarianism and jurors' perceptions of defendant culpability*, 78 J Applied Psychol 34 (1993).

[30] Tamara Loomis, *Scandals Rock Juror Attitudes: Enron/WorldCom Ripple Seen Across the Board*, Natl L J, Oct 21, 2002, at A30.

[31] Gary Young, *Jury Room Rage*, Natl L J, Feb 10, 2003, at C17 ("If punitive damages are a measure of juror anger, there were a lot of angry jurors last year").

[32] See Loomis, *Scandals Rock Juror Attitudes* at A35 (cited in note 30).

[33] Melvin J. Lerner, *The Belief in a Just World: A Fundamental Delusion* (New York: Plenum Press 1980).

[34] Id.

[35] Valerie P. Hans and William S. Loftquist, *Perceptions of Civil Justice: The Litigation Crisis Attitudes of Civil Jurors*, 12 Behav Sci & L 149-160 (1994).

[36] Id.

[37] Moran, Cutler, and DeLisa, *Attitude Toward Tort Reform* (cited in note 28).

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