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The Voir Dire Handbook

JANUARY 2015

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"*Voir dire*" refers to the process by which prospective jurors are questioned to uncover biases which may automatically require their rejection from jury service in a given trial (through strikes for "cause") or allow attorneys to deselect them from a jury (through "peremptory" challenges). The goal of *voir dire* is to eliminate jurors who pose the most risk to a client, whether in liability or damages. Those who are left constitute the jury. Given how limited a client's control is over who shows up in the pool and, in some venues, the questions that can be asked, the ability to smart bomb, i.e., hone in on the worst jurors and get rid of them, is vitally important. A case can be won or lost right then.

Proper *voir dire* is not something that one plans for the day before or even the morning of trial. In cases where what is at stake warrants it, months can be spent developing the best plan for jury selection through a mock trial process to learn the traits that mark adverse jurors and then ways to strategically incorporate that knowledge into the voir dire process.

Some believe there is little or no *voir dire* in most federal courts. That simply isn't true. You just have to be clever about how you conduct it, because very often a judge will do the questioning and accept a short list of suggested questions. Keeping the list short and acceptable to a judge are key, but require skill. Even better, knowing the top 2-3 questions that make a difference based on a data-driven jury profile can make all the difference.

Any attorney will find a way to exclude unfavorable jurors by using meaningful expertise and tools, rather than just best guesses and anecdotal hunches (though instinct has its place). For some, well-prepared jury questionnaires, questioning they conduct live or through written questions that a judge administers, and even observing prospective jurors' behavior without asking anything can all stack up in one's favor if they know reliable information with which to judge.

The articles contained in this book share lessons my colleagues and I have learned from being engaged in thousands of trial and jury consulting engagements over careers that span many decades. We cannot tell you how many times we have observed attorneys making obvious mistakes in voir dire -- all avoidable, such as revealing their fans rather than their enemies, or talking more than listening, or asking one too many questions of good jurors. Don't be one of them.

Sincerely,

Laurie R. Kuslansky, Ph.D.
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Table of Contents

7 Tips to Take "Dire" out of Voir Dire

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting

Jury selection certainly can have dire consequences. A case can be won or lost in *voir dire*. All you need is one or two strident enemy jurors to pull you down. The truth, typically, is that extremists are removed through cause or peremptory challenges. Who remains tends to be mildly favorable or unfavorable, saddled next to ones who hardly care. The key in *voir dire* is to identify extremists and understand what it will take to satisfy those who are left.

How can you do that?

1. Invite doubters to admit their doubt of your client,for example:

- Can you guarantee that, if the plaintiff doesn't prove its case based on the evidence, you will find for my client? (Or, for plaintiff: Can you guarantee that, if the plaintiff does prove its case based on the evidence, you would find for my client?)
- Is there any reason you'd give the benefit of the doubt to the other side? Explain.
- Please explain if there's any reason you couldn't give my client the benefit of the doubt.
- There are many reasons why people don't look at both sides in a lawsuit the same way.
- Does anything stand out to you about my client that puts them at a disadvantage? Explain.
- Many people have had experiences that come to mind when they are on a jury. What have you experienced that comes to mind in this case?
- Lots of people have strong opinions. Can you think of anything about this case that strikes a chord? Explain.
- Do you have any training, education or experience that makes you feel you'd be especially good at understanding the facts of this case? Describe that. If not, would you feel uncomfortable with this type of information for any reason?
- Please raise your hand if, for any reason, both sides of this lawsuit aren't completely equal in your mind. Explain.

2. For jurors you don't like, but can't strike (either rejected on a cause challenge or you've run out of peremptory strikes), **distinguish how this case/your client differs from their bias against you**. For example:

- I understand that you have a certain distrust for doctors based on your own experience. Does it make a difference for you that the doctor involved in this case is not actually a defendant? Why/not?

- You mentioned a bad experience with a tax advisor. Is it fair to assume that the issue was not because you gave incorrect or false information to your advisor? Do you understand that in this case, the issue is whether or not the corporation which is suing its auditor provided honest information to the auditor and how that is different than what happened to you?

3. Don't waste their time.

- Ask the fewest, but most pertinent questions. They will appreciate you respecting their time.

- Don't try to be too "cute;" jurors think certain questions are silly and don't understand how they relate to the case ("Do you have any bumper stickers?" "Do you read People magazine?"). Only ask such questions if you have a strong reason to do so. Curiosity is insufficient.

- Create a plan to be as efficient as possible during *voir dire*:

    - Check with the clerk what the judge's procedures will be

    - Streamline the number of questions you propose to the judge if he or she asks the questions

    - Be organized in how you and your team will solicit information and keep track of it during the jury selection. Fancy charts may not be what you need to keep notes/track and substitutions wreak havoc on the lovely seating plan once it changes.

    - Determine in advance who will do what (e.g., track cause information, watch for *Batson*issues, record the details of each juror, who will argue cause, who will have final say in peremptory strikes, how that decision will be made, etc.)

4. Don't overload on cooks in the kitchen

- It is common for members of a trial team with little to no experience at jury selection to pipe in their opinions strongly during decision-making about the jury when the stakes are high, information is too scarce or too abundant, and time is very limited. The "democratic" approach – in which everyone has a say -- is misguided and distracting at best, and can lead to very poor choices at worst.

    - Naïve/inexperienced folks tend to over-emphasize one comment, disregard potential for leadership (or the lack thereof), or overlook serious red flags. Using a data-driven jury profile with an experienced jury consultant, teaming

up with lead counsel, and factoring in the client's opinion, is a safer and better way to go, typically.

- If there are other, experienced people on the team, plan to get their opinions and insights, but don't engage in a debate with multiple people. As they say, "a camel is a horse designed by a committee." If you need a race horse, don't decide by committee. Determine the hierarchy in advance.
- To accomplish this approach successfully without stepping on toes, wasting time at crunch time, or hurting feelings – plan and discuss who will participate and how – before you get there so there's no confusion or wasted time.

5. You can't always get what you want, but ...

- If you are the defense and want sophisticated, educated individuals on the jury, but there aren't any, what else might work that is realistic? For example, can you bring the information down to a level that people with a high-school education can grasp? Can you use points of reference that resonate for lower income people?
- If you can't change the venue and the jury pool, what *can* you change for a better fit between your case story and the likely jury?
    - Are your themes understandable and likable to people from the local jury pool?
    - Have you researched what topics may be hot buttons to avoid or exploit?
    - Have you checked the local newspaper to ask pertinent questions on what prospective jurors have read and what opinions they've formed, if any?

6. Respect privacy

- Understandably, there are often delicate subjects you must inquire about in *voir dire*, but the answers will only be as candid as the environment is not threatening and protects their privacy.
    - Be sure to check in advance with the Court how they will approach issues that merit privacy and how the judge or clerk will orchestrate such inquiry.
    - Get the judge's assurance, if possible, that they will advise prospective jurors that their privacy will be protected.
    - Be as broad-minded as possible in considering what prospective jurors might consider uncomfortable or embarrassing to reveal in open court (e.g., being demoted/fired, going bankrupt, getting divorced, etc.), in addition to more obvious issues (such a personal health, victimization experiences, etc.).

7. Claim Territory to Command Respect

- Really experienced trial lawyers know how to take over the courtroom and establish themselves, not only as the authority, but as someone who knows what's going on, can be trusted, and someone looking out for the jurors. They seem to naturally and inadvertently become the guide, advising jurors what is happening and being the spokesperson during the voir-dire process – to the extent a judge may not participate or be present during jury selection – and immediately bond with prospective jurors and have more power. Say that person has more experience in that venue, so you let them do it, or the jury sees you deferring to them. Not good.
- Instead, learn the local rules and customs in the venue and with that judge – BEFORE—you are in front of prospective jurors.
- If an opportunity arises to explain what is going on, make sure to participate and provide the information/assurance as needed (e.g., "We're waiting for the Marshall to bring a few more people who may be jurors, then we will explain more about why we are here.") If you let your opponent do it, you are handing over the upper hand needlessly.
- In doing so, don't over-do it, i.e., you're not the judge and you're not the boss of everything, but if you can act as the jurors' ambassador, that is a feather in your cap.

By avoiding predictable pitfalls, you can establish an important rapport with prospective jurors and unearth dangers. *Voir dire* is important, but it shouldn't be dire.

5 Questions to Ask in Voir Dire . . . Always

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

The meaning of the term "*voir dire*" translated literally, means "See say," but figuratively means “to speak the truth." In common practice, "*voir dire*" describes the process of questioning potential jurors, by judge or litigator, in advance of a jury trial to uncover conflicts, biases or other reasons to dismiss the potential juror.

The stated goal of *voir dire*is to impanel an impartial jury. However, in the majority of courts that allow *voir dire* questions by counsel, the goal of each side of the case is to get the best jury for their client possible through a process of revealing and eliminating those who are most adverse. Through a combination of dismissals for cause and peremptory challenges, potential jurors are removed from the pool of jurors. As an example of the traditional process, see this description of the *voir dire* process written for those called for jury duty in the Southern District of New York.

In cases where the sides agree and the judge permits, jury selection often begins with a series of written questions agreed to by all parties. Ideally, mock jury pre-trial research is conducted to identify the most important and revealing questions to include based on the types of jurors who tend to look most unfavorably on the client's case. In court, once prospective jurors’ information and responses are received, there is often very limited time in which to conduct additional fact-finding research and evaluate the responses.

Many litigators mistakenly believe that *voir dire* is conducted only by judges in federal court. This is simply not true. I have conducted mock trials focused on *voir dire* and *voir dire* consulting in a majority of states in the U.S. On many occasions, this was done in preparation for a federal trial. This recent ABA article does a good job of describing the state

of *voir dire* in the federal courts. Even in those courts where the judge or the clerk conducts the *voir dire*, many accept proposed questions from counsel. The key is to know which, few questions are most productive.

Since the *voir dire* process can help determine the outcome of a case, it is essential to use it to your advantage. With the foregoing in mind, here are five questions I would always suggest asking in *voir dire*, whether in state court, in federal court, on a jury questionnaire, or among the questions presented to your judge to ask.

1. **If you were my client, would you be completely comfortable having you as a juror on this case?**

2. **Can you think of anything in your own life that reminds you of this case? What and how?**

3. **Is there anything that you have seen or heard that would make it hard for you to guarantee to judge my client the same as the other side?**

4. **Is there anything you'd prefer to discuss in private?**

5. **Is there anything we haven't asked you that you think we should know?**

Each of these questions is designed in one way or another to uncover biases that might hurt your client. Each is designed to provoke deeper thinking and candid responses, rather than meaningless knee-jerk ones which are politically correct, but not helpful in decision making during jury selection. Each is open ended and designed to avoid a simple yes or no answer.

5 Voir Dire Questions to Avoid

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting

1. Can you be fair and impartial?

2. Can you put your feelings aside?

3. Can you ignore your own opinion and follow the law if they conflict?

4. Despite your personal experience, can you only rely on the evidence to decide?

5. Do you have any concerns about understanding the information presented?

Most, if not all, of these questions show up in *voir dire* throughout the land, but yield largely meaningless information, yet they persist. The likely, politically-correct responses to these inquiries obscure the truth because people see themselves as being fair – by their own definition – which is not impartial, and as rational, which warrants no comment. They are either motivated to shield their agenda (think stealth juror) or are unaware of it.

If someone is anti-corporate or anti-establishment and you are the Goliath in the lawsuit, hitting you hard is fair . . . to that juror. One can only use their own mindset, feelings and experiences as a backdrop for deciding – lest they have an out-of-mind experience. They cannot rely on anything else, normally. If they do, in fact, possess case-related expertise, one side is likely to strike them, either for cause or using a peremptory strike.

How you ask a question determines the quality of the response. Instead of these boilerplate versions which are a waste of time, and are mere closed-ended versions (yes/no questions), consider questions that are likely more meaningful and tend to elicit more meaningful information, both in their form and content:

1. Can you think of any reason you might not treat both sides of this case 100% equally? If so, please explain.

2. Everyone has feelings and it is natural for them to influence our decisions. How might your feelings in this case come to mind when listening to the evidence and deciding?

3. How hard would it be for you to ignore your own opinion in this case? Any reason you might have reservations about ignoring it and only following the law if you disagree with the law?

4. It is impossible to forget our own personal experiences when we approach new situations. In this case, based on what you've heard so far, please explain any of your own experiences that may relate to it in any way.

5. Do you have any training or experience that relates to the subjects that are involved in this case? If not, is there any reason you might not be 100% confident that you will understand it completely? Explain.

Instead of participating in a charade in which people pretend to provide assurance about their fairness and counsel takes shallow assurance in it, use the precious, limited access to prospective jurors' true attitudes by carefully scripting questions that will allow you to make real use of their answers. It is a rare person who admits to deciding emotionally, ignoring evidence and the law, and believes he or she is not a fair and impartial judge. The exercise, therefore, is one of weeding through responses to glean those who really mean it and the majority, who don't.

Trial Consultants: Unfair Advantage?

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting, A2L Consulting

Can justice be bought in the American system?

The answer in a word is “Yes” and “No.”

The question, however, is not whether Hollywood-style plots to tamper with, threaten, or bribe judges or jurors succeed, or even whether “designer” lawyers supported by maverick trial consultants and paid experts “unnaturally” influence the otherwise noble process of the American legal system.

The real question is whether the money spent on reinforcing one side of an issue or the other leads to a bad (that is to say, wrong) outcome. Justice is in the eyes of the beholder. Though a lofty ideal, there is no universal agreement of what justice is. If such agreement existed, there would be no need for a process to determine the just result, because it would already be known before any trial took place. Everyone does not agree on what justice is in a particular instance, because different people are driven toward different outcomes, each seeing their desired outcome as serving justice. That is natural. For example, in the insurance industry, policyholders may believe justice is having their claims found legitimate and covered, while insurers may believe justice is having claims scrutinized for reasons not to pay or for retrieving payment by reserving their rights when they do pay. The system is driven by self-interest and the assumption that each side will do all it can to prevail.

While one often hears rhetoric about seeking justice and being fair and impartial, these mean different things depending on whom you ask. I recall asking a lawyer whether he sought justice. His response still rings true as he explained, “You only want justice when you are not involved. When you are involved, you don’t want justice; you want to win.”

In trying to win, advocates use the best tools and weapons available to obtain the desired goal. Everyone involved attempts to accomplish persuasion toward their way of seeing things, to the most favorable audience possible. The efforts expended are on using the strengths of the case as perceived by the trial team, presenting what is helpful, and doing damage control as well as possible.

Trying to win also includes trying to avoid unfavorable-seeming jurors and arguments, and resisting unfavorable decisions by the judge. This is natural. Wanting to win is natural. The desire to win (or not to lose) money or liberty is also natural. To reject this is to believe that there is a predetermined party in the right that should prevail no matter what. As if for each case there is a “telos,” or ultimate end, that could be discovered if only the seeker were perfect in his or her method. This, however, flies in the face of the fundamental premises of the American system: Everyone deserves their day in court, everyone is entitled to proper legal representation, and everyone is innocent until proven guilty. In short, everyone has the right to win.

Theory does not equal reality. What the law requires often differs from what actual people in the position of making decisions require, for their requirements are based on their desires and experiences, not the law.

Several examples demonstrate this gap. The law typically claims that the party suing has the burden of proving its case, while the accused need not prove anything. Yet most decision-makers want to hear the truth from the horse's mouth (i.e., the accused). The law may offer the party being sued or prosecuted the option of a judge or jury of peers. However, no one has 6-12 true peers (especially when there is disagreement on what constitutes a "peer" and where individualism is at a premium).

A commonly heard suggestion is to help restore the so-called *natural* process by having advocates accept the luck of the draw in selecting a jury to assure its randomness. The suggestion is to take away advocates' ability to exercise "peremptory strikes" (i.e., the ability to reject a fixed number of potential jurors without stating any reason). Many believe that a jury should be "neutral" (i.e., comprised of people who are disinterested, impartial, nonpartisan, open-minded, and unbiased). However, neutral is not natural. These requirements defy the basic human condition. Prospective jurors are ordinary people, not empty vessels void of experiences, knowledge, prejudices, and attitudes. In other words, jurors have natural preconceptions which prevent them from being truly neutral.

Some see specialized trial consultants, or "jury pickers" as some commonly refer to them, as an unnatural intrusion into a legal system which would otherwise be natural (that is, random). However, there is a major flaw in the belief that absent the advocates and their advisors, juries would be random. Before advocates or consultants even become part of the mix, the randomness of a jury is limited by who is available in the pool of prospective jurors.

To be random, there would need to be a blind call with an even chance to any of them. This is simply not the case. From the outset, it is not random because jury eligibility is limited "naturally" by a number of things. Some of the limitations include age, distance from the court, language fluency, citizenship, registration with the motor vehicle bureau or voter registration, and the lack of certain physical and psychological impairments. A truly random system would include anyone, but it does not.

An additional criticism is that advocates try to stack juries with people who are not neutral, but rather who favor the advocates' side. Jury selection gives advocates some say in who is dismissed, but not over who stays; they are left on the jury by default, often through seating arrangements and substitutions which may be entirely unpredictable. Hence, there is a natural limitation to what anyone can do to influence the randomness of jury composition, even if they so desire.

The effect of trial consultants, for instance, is to help advocates do what they already do, only better. What do social scientists do to accomplish this and who benefits?

In brief, they bridge the gap between the kinds of expertise required to satisfy the law vs. the audience (the jury). Lawyers' expertise is the result of a very specific education in the law, personal status in the world, and experience with specific case facts and players. As a rule, lawyers are better educated, more motivated, more interested, and have lived with the facts longer than jurors ever will. Lawyers do not get their training by interacting with common people, nor do common people usually come from their world. Lawyers are immersed in the

minutiae of their cases because that is what the law requires. Jurors, on the other hand, are not subject to such requirements. This is why and how big plaintiff lawyers beat up on big defense lawyers.

Social scientists and trial consultants, on the other hand, are trained observers and interpreters of what jurors as people want and need to know to resolve the conflicts in dispute as they, the jurors, see them, not necessarily as the lawyers or adversaries do. Skilled trial consultants offer vital information to parties in litigation through sound methodological techniques of research design, data collection, analysis, and seasoned consulting, which take years of proper education and training. Empirical research is more reliable and far more objective than plain old intuition. When done properly, jury research also identifies the kinds of arguments jurors accept or reject and what can be done about them. Further research may be required to test reshaped arguments and determine likely damages awards. Jury profiling to identify the most hazardous juror features for your case optimizes the use of peremptory strikes, when allowed. When the key themes of a case are identified through research, they can be reinforced in the minds of the jury. This is accomplished in various ways, including recommendations for the presentation approach of the lawyers, proper preparation of witnesses to carry the themes throughout the trial (as if in a relay race), and through strategic litigation graphics and demonstrative exhibits.

The tools that trial consultants add to the repertoire of a skilled trial lawyer can strengthen one side of the case to the detriment of the other. Is this bad or simply implementing the system to its utmost?

There are many other examples of psychological components which determine decision-making and thus the relative strengths and weaknesses of a case presentation strategy. The concepts of impression formation, credibility, perception, comprehension, and memory are not in the curriculum of law, yet clearly affect the lawyer's audience and need to be understood, assessed, and applied where relevant to a trial strategy. Knowing that these psychological factors necessarily affect the outcome of a trial, especially a jury trial, does subvert or enhance the trial process by using trial consultants trained in psychology.

As Shakespeare might have said, "All the litigation world is a stage." However, most lawyers are too bogged down with the factual agenda of the case to satisfy jurors' needs for a well-told story with sufficient drama to sustain their attention enough to watch the stage. Trial consultants play a significant role by identifying what the best story is (given the facts and the players) and ways to deliver it with clarity and interest. It could be argued this improves the jury trial system by making it jury-friendly. By not understanding what claims mean in the eyes of the jurors, clients set themselves up to be victims of the archetypal insurance defense attorney who may tell the client "You have a great case," only to phone back the day it goes to trial to announce, "We're settling" from the courtroom steps. A client has a right to know what his or her case is really about, how well the attorney has prepared the case, and the strengths and weaknesses related to it. These are some of the reasons why jury research is a useful tool for litigants, especially unpopular ones or those facing daunting case facts.

Since there are no reliable actuarial data of jury verdicts and awards, jury research is the best source of risk assessment. Such research is based on fair representation of the case and of the kinds of people who sit on real juries. Several well-publicized cases exemplify

how trial consulting made a significant difference by seeking to understand and satisfy jurors' needs, and to resolve their dilemmas in reaching a verdict. The Menendez brothers, for instance, alleged that they killed their parents because they feared being killed themselves after experiencing years of abuse as children. The first time the cases were tried, defense counsel were highly effective at showing the father as an unlikable, arrogant, difficult, powerful, and abusive man whom the brothers feared. Each brother's trial resulted in a hung jury (i.e., no unanimous verdict was reached) because jurors would not abandon their opposing positions. Some held fast to their sympathy for the abused young men on one hand, while others vehemently rejected the defense as an "abuse excuse" on the other. The role of trial consultants was key in bringing the retrial (for which the defendants were tried together) to a different end. The strategy was to help jurors organize the evidence differently to show that the defendants' actions were not justified. The first prosecution goal was accomplished by putting the focus on the history of the mother's relationship with her sons, as she had a significantly less salient role in their alleged prior abuse than the father and was hardly a current threat to two grown young men. By focusing on that, it would be difficult to see her murder as justified. If jurors were persuaded that the brothers committed unjustified murder against her, it would be easier to carry this judgment over to the father's murder as well.

An example in which trial consultants played a key role where money was at stake rather than liberty is a patent dispute between a small, unknown company and a Japanese-owned industry giant. The case revolved around patented video game technology and whether the industry giant infringed it. Jury research revealed several key problems for the plaintiff: 1) individuals attracted to technology and video games were impressed with the defendant's audio and visual wizardry, but were disinterested in how it came about; 2) the technology represented in the plaintiff's patent was abstract and complex, while the defendants' allegedly infringing products were concrete and simple; and 3) jurors with anti-Japanese bias who might have been considered unfavorable to the defendant did not apply this bias against the defense when coming to a verdict, so it was of no help to the plaintiff. To overcome these obstacles for the plaintiff, a trial strategy was forged based on research with mock jurors, which proved effective. A theme describing the plaintiff's breakthrough technology as the "seed to the tree" on which all other such games were produced and enhanced with bells and whistles was salient to most mock jurors. It was quite persuasive and overcame important weaknesses (e.g., that the company never produced anything based on its patented idea and that the company was bankrupt, while the defendant was a great success worldwide). The plaintiff's affirmative position of ownership was further enhanced by having the actual inventors dramatically "tell their story" of how the seed was developed and how the branches of the tree related back to the seed. They effectively portrayed the personal aspect of owning – and being robbed of – something which turned out to be very valuable (a story many people can appreciate). Finally, the research identified traits of unfavorable jurors, and during jury selection this information was used to eliminate those most unlikely to favor the plaintiff. In the end, the jury found the patent valid and infringed and awarded hundreds of millions of dollars to the plaintiff (although the appeal process ultimately rejected the amount awarded).

A third example involved the manufacturer of sophisticated telephone equipment used by a relatively new mail-order company. The mail-order company claimed it was losing business because the manufacturer's equipment was defective and could not process a large volume of calls. The plaintiffs' expert had prepared a damage model which supported an award in

the tens of millions of dollars. The plaintiffs, a group of likable entrepreneurs, had filed the case in their hometown. The manufacturer planned a case story which, first and foremost, defended the performance of its equipment and challenged the plaintiffs' damage model. Because the technology involved was quite sophisticated, a lot of emphasis was to be placed on explaining this technology to the jury. But the manufacturer's case story also attacked the credibility of the entrepreneurs, accusing them of mismanaging the business. A trial consultant was retained to evaluate and refine the manufacturer's story. Research strongly indicated that real persuasion in this case would be achieved at a different level. A different tactic was chosen. A story was recommended which took advantage of the plaintiffs' desire to paint themselves as an American success story. The new story celebrated the entrepreneurs' success and congratulated them for generating such a large volume of business. Completely different in tone and substance from the original story, the new story placed very little emphasis on the equipment and its function, and a great deal of emphasis on how the plaintiffs had become an overnight success. Embedded in the story was a key theme: "They got too big, too fast." It was a simple, easy-to-understand concept, and ultimately became the filter jurors used to decide the case. Testing showed this theme to be very effective, especially in the context of the positive story now being told. The entrepreneurs were portrayed as people who were not bad managers so much as they were simply unprepared for their sudden success. The story was no longer technical or negative; it allowed the jury to like and admire the plaintiffs, yet still find against them. When the case went to trial, the jury found for the manufacturer. Summing up the jury's opinion of the entrepreneurs in his post-trial interview, the foreman said, "These were good guys who had good ideas; they simply got too big, too fast." The jurors had embraced the story and made it their own.

These examples demonstrate that trial consultants, using social science research methods and principles, are able to reverse jurors' orientation by strategically redirecting their attention and satisfying their need to find for one party or another. These scenarios exemplify how skilled professionals impact the system, a circumstance which is seen as a strength or a weakness of the system, depending on whom you ask.

What are the weaknesses of this system? It is often driven by economics and politics. That is, it is more likely that the party more economically or politically attracted to the service providers will benefit most from their services. A modest individual is unlikely to be able to afford the services of a host of experts, including a premier trial consulting firm, or to attract them with a promise of good marketing or politically correct pro bono recognition. A balancing factor may be the natural advantages of an individual's case in David vs. Goliath lawsuits, since the David character is often more popular and engenders more sympathy from jurors than a big, rich corporation or insurance company.

How can these "defects" be remedied? If one defines the defects of the American legal system as the ability to hire superior representation and skill at attempts to sway decision-makers to agree with you, then the "defects" of the system are the backbone of the litigation industry. However, the ability to prepare well for litigation is the result of skill, not finances. A streamlined, hard-hitting presentation which is thematic and clear is far more compelling to a jury than an elaborate dog-and-pony show which is unfocused and lacking in proper substance. Without knowing the themes of a case and how each witness and exhibit can support them, an expensive presentation is reduced to bells and whistles and will not carry the day.

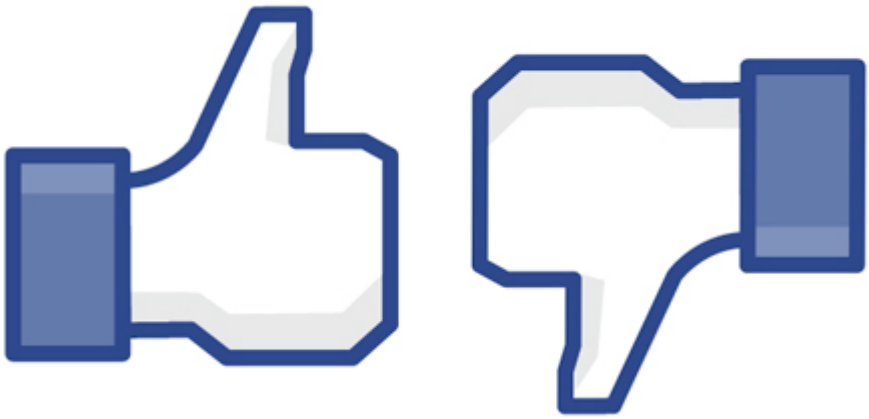
To the extent that finances determine who gets what in legal preparation, there are several solutions for those who cannot afford it. Attorneys can learn to improve their trial presentation skills. Knowledge learned for one case in which a trial consultant is retained can be transferred to other cases where one is not used. One may find they are dealing with several parties who can help defray costs by participating in a joint jury research effort. One may also find that he or she has related cases that can be handled together, with benefits to all.

When one does a cost/benefit analysis of what a litigant stands to win or lose in comparison to an investment in pretrial jury research, the benefits often outweigh the costs, because proper research and consulting turn a high-stakes gamble into an educated risk. Going to trial blindly without knowing and properly preparing for the risks would be as unwise as issuing insurance unconditionally, without performing due diligence to assess the potential risk, and without taking proper precautions before assuming it. Gaining an edge from empirically pre-testing your case may be state-of-the-art, but it is pushing the system in a natural direction. It takes into account the factors that affect the reality of the system.

These statements may sound brash and self-serving – representative of a “cowboy justice” system. However, they intend to show that justice is not blind, just myopic. It often requires proper enhancements to be seen in the eyes of the beholders: the jurors. *It is not what we show them that rules, but what they see.* Trial consultants assist in diagnosing jurors’ vision. By seeing the panorama of one side’s definition of justice, the jurors can see it, too.

Like It or Not: Likeability Counts for Credibility in the Courtroom

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting



In the courtroom or anywhere else, for that matter, it's hard to believe someone you don't like … because you don't want to. Credibility depends on likeability and likeability is one of the easiest variables to overlook, at your own peril, whether we are talking about the likeability of a litigator, a client or a witness. When assessing the likeability of someone on your side's team, it is difficult to be objective because it's your job to like them (say, if you are lead counsel, or lead counsel is your boss, plus the client, the client's employees and your expert witnesses). You already have plenty of motivation to do so – whether a paycheck, a promotion, a relationship, or other rewards. A jury does not. Jurors will not only have no rose-colored glasses on; they may have shades on altogether.

According to the "friendship/liking rule,"[1] people are more favorable to people they know and like and are more willing to comply with their requests. This principle can be used for good or evil. For example, it is evident in one of the most successful business models to evolve: the Tupperware home party. Tupperware found that sales pitches are received more positively from friends and neighbors than from strangers, since we believe people we like more than ones we dislike. It is also evident in affinity fraud, whereby people trust their money to people they know and like, which is exploited by many a con artist engaging in Ponzi schemes. As the U.S. SEC states (emphasis added):[2]

- "These scams exploit the trust and friendship that exist in groups of people who have something in common."
- "Affinity frauds can target any group of people who take pride in their shared characteristics, whether they are religious, ethnic, or professional."

Notice that the common thread here is having common ground. Having and using the common ground between participants in conversation is one of the most important routes to effectively communicating. The converse is also true. Among the most important building blocks toward reaching the skill of successful communication during development are the abilities to take another's perspective, include it in forming one's messages, making sure to use the common ground, and making one's utterances contingent on the other's input

(rather than having a collective monologue, whereby each one says something that does *not* relate back to what the other just said). Many of us can recall bad dates or failed relationships in which this has happened and how frustrating and unsatisfying such communication can be. This behavior is more common (and age appropriate) for 3-year olds. For example, one may say "I like ice cream," to which the other responds, "Look, a puppy!"

Using common ground to increase likability and trust is a variation on xenophobia, i.e., we are more likely to like and trust people more like ourselves than people who are different, like it or not. Similarity (about opinions, personality traits, dress, background or lifestyle) has been shown to increase likability, so it is worthwhile for trial counsel and key witnesses to *match styles* with the local flavor of the jury, or, as Marisa Tomei said in My Cousin Vinny, "You blend" with your decision maker(s).[3] Another way to increase similarity between your litigation team and the jury is to mirror body language by subtly matching the judge's or jurors' postures and gestures to make them feel more at ease and positive about you because you seem more like them. In contrast, during cross examination, or when facing hostility in the courtroom, it may be more powerful not to match the style of the adversary.

Your job as a persuasive litigator is to understand the factors that can be used properly and ethically to be more likable, and thus more persuasive. As your case is more complicated, jurors are more likely to seek shortcuts and give more weight to easier factors to understand, such as whom they like or not. The less personally involved jurors are with evidence, such as information that is too dry or difficult, the more they tend to rely on peripheral cues rather than on an argument's actual strength.[4] Being liked is an important ingredient in the cocktail of peripheral cues jurors use to decide whom to believe. Knowing that likeability is so critical to credibility in litigation, what can you do about it?

What Increases "Liking" in the Courtroom?

Attorneys and witnesses who – by design – cannot share an existing friendship with jurors -- can still benefit from applying the liking/friendship rule by understanding a number of relevant factors outlined below.[5]

Factors of liking and friendship include:

- **Physical attractiveness**
- **Pretty positive**: Positive reactions to good physical appearance generalize to talent, kindness, honesty, and intelligence.[6] Thus, attractive attorneys, witnesses and clients at counsel table are generally more likely to be persuasive at changing attitudes and getting what they request.[7]
- **The truth isn't pretty**: In fact, more physically attractive defendants have yielded less certainty of guilt from jurors and received recommendations for less severe punishments than less physically attractive defendants.[8]
- **Compliments** can create return liking and willing compliance. For example, the actor McClean Stevenson once said: "My wife tricked me into marrying her – she said she liked me."

- **Flattery**, if not overtly manipulative, creates liking[9] and is just as effective at creating liking when true as when not true, and even when the recipient realizes that the flatterer stands to gain from being liked.[10]

- **Cooperation**: People working together toward a goal, such as pulling together against a common enemy, feel more positive toward one another[11] Car salesmen and others often engage the principle of good cop/bad cop by setting up their manager or "Corporate" or someone more senior as the villain so the salesman and customer can do battle to win him/her over, creating a common alliance toward a mutual goal. To the extent possible, create mutual goals toward which you can help the jury work with you, whether a mystery you will help them solve, a more efficient way to get through certain procedures, clear tutorial graphics to become educated about facts, or another end you can help them reach.

- **Scarcity** improves positive attitudes because if less is available, what is available seems better. Limited access to information makes us want it more and makes it more influential.[12] Hence, explaining "little-known facts of interest," or information only the courtroom is privy to which are relevant to the case, and making jurors aware of this fact when possible, makes them feel special. Scarcity has increased how things are valued throughout history. Collectors know it; precious mistakes such as a misstamped coin are valuable because of it. It's a shortcut to something's value, it can cause the loss of freedoms, and people hate to lose freedoms they already have (because it diminishes personal control), also called "psychological reactance theory."[13] The more threatened we are about losing something, the more we want to keep it and value it (you don't know what you've got till it's almost gone).

- **Reciprocity**: Offering someone something first makes them more likely to want to give you something back, known as the "reciprocity reflex."[14] Phrasing what you promise the jury in voir dire in such terms (I promise to do "x" for you, and rely on you to do "y"), then keeping your word, is one way to act on this principle.

- **Smooth Talking**: People highly responsive in conversation (those who responded faster and more, used more diverse words, and were more effusive when responding) were also perceived to be likeable, intelligent, and interesting, and were valued as a possible friend.[15] This implies that both attorneys responding to the Judge's questions and witnesses responding to attorneys' questions should beware of overly laboring the timing of their responses and should be conversational when responding – without overdoing it.

- **Other factors** which have added to likeability are self-disclosure, listening, cordiality, showing interest, and of course, appropriate smiling. A variety of research has yielded other highly valuable findings about the relationship of social validation (fitting in with what others are doing as a model for what to do), consistency (between prior and current actions) and authority (whereby credentials merit trust), among others, to increase persuasion.[16]

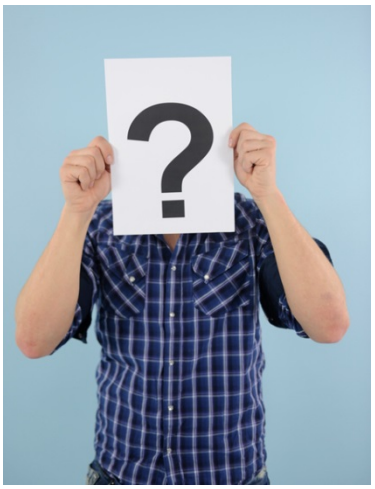
Jekyll vs. Hyde

Likeability and trust also come from consistency. Knowing that what you see is what you get, over time, helps. It is no wonder, therefore, that witnesses who drastically change their demeanor from friendly and cooperative on direct examination, and then morph into someone who refuses to answer questions, becomes antagonistic and uncooperative on cross – is not likable nor trusted. The truth should look and feel the same, no matter who's asking the questions.

In the end, sincerity bonds people together. Allowing them to see in you and your clients and witnesses the same truths and human traits that they recognize in themselves makes you genuine, likeable, and believable, like it or not.

Jury Selection and Voir Dire: Don't Ask, Don't Know

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant



John Colville once said of Winston Churchill, "He fertilizes a phrase or a line of poetry for weeks and then gives birth to it in a speech."

The same holds true for great voir dire questions asked during jury selection. How a question is asked dictates how it is answered: Skillful voir dire questions result from keen awareness of potential nuances, precise wording, intentional phrasing, and delivery.

Notice what certain variations elicit:

"Someone who files a formal discrimination complaint probably has a valid case" (48% agree nationally). Many of the same people, however, agreed that "People often claim discrimination when they don't get what they want" (52%) and that "Poor performers are much more likely to complain of discrimination than good performers" (55%).

Similarly, when asked "Do you believe there are too many lawsuits nowadays?" 79% of people nationally say "**Yes**."

(**Follow-up question**: If someone is badly hurt by a product, do you think it's frivolous of them to sue the company that made it? Most common answer: "**No**.")

Are you an environmentalist? Most common answer: "**Yes**."

(**Follow-up question**: Are you a member of or do you contribute money to any environmental organizations? Most common answer: "**No**.")

Do you believe in racial profiling? Most common answer: "**No**."

(**Follow-up question**: Should people from Muslim countries get extra scrutiny? Most common answer: "**Yes**.")

The answers to those follow-up questions reveal different mindsets than the often-misleading answers to the primary questions, which can lead to mistaken judgments. Good follow-up questions yield important information, but are often unasked. Don't be satisfied (or worried) too soon by the first answer you get.

Research by Judge Gregory E. Mize (retired D.C. Superior Court trial judge and co-chair of the D.C. Jury Project) revealed that while 28% of prospective jurors in both civil and criminal cases failed to respond affirmatively to questions in open court, 10% of those "silent ones" in

civil cases and 17.5% in criminal cases later revealed biases that yielded a cause strike in follow-up individual interviews.

Posed in the proper environment, follow-up questions are indispensable tools to provide a basis for cause strikes. The more cause strikes you achieve, the better use you can make of peremptory challenges to avoid undesirable jurors. Without such measures, biased jurors end up on the jury.

Skilled investigators know that closed-ended questioning (e.g., “When did you leave the bar?”) yields 85% less information than “free-format” interviews using open-ended questions (e.g., “Tell me what you did that night?”), which allow the respondent to recall and report more through free association. If given the time and space to do so without interruption, people reveal important information.

The tendency is to jump on a worrisome or interesting answer. However, better listening may provide more clues to people’s character, motives, biases, and experiences. Reserve questions to learn specific information.

Here are some tips:

- **Establish rapport**, especially with unfavorable jurors.
- **Make it easy for them to reveal why they are not good jurors** for your client. It is a win-win situation: You will have a clearer basis to strike them or, if they end up on the jury, you will benefit from sharing a positive exchange with them.
- **Make jurors feel that it’s safe to talk**. Beware of putting jurors on the spot or not protecting their privacy in open court, which makes them feel self-protective.
- **Leave them room to talk**. “Take a beat,” a phrase borrowed from the stage, means to leave a moment’s silence after the other person answers in case they have something to add. The best information often comes out as an afterthought once a juror ponders a bit.
- **Don’t move on too quickly**. Following a strict list of questions removes the spontaneity of “conversation” with potential jurors, suppresses their potential disclosures, and creates a deposition-like atmosphere that sends the message: “Just tell me what I asked and nothing more.” This is counterproductive.
- **Reserve scripted questions** to learn critical, specific information.

Whether due to a hidden agenda to remain on the jury or out of discomfort in revealing it, some jurors attempt to conceal bias. Stealth enemies are critical to ferret out.

- **Invite and cajole the jurors**. Make it acceptable for them to expose their bias.
- To hone your skills at getting at the truth, **read** about investigative techniques to detecting lies and deceit.

It takes two people to learn the truth: one to tell it and one to listen and make it safe for them to tell it. Inquiring lawyers must make prospective jurors feel safe to reveal the truth.

Is Hiring a Jury Consultant Really Worth It?

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

If you are a trial lawyer, would you prefer to know which jurors are going to reject your case after the trial or before?

Why retain a jury consultant before you are ready to pick a jury? Because you have no control over who shows up and only a limited number of strikes during the jury selection process. Besides, certain types of jurors are never going to vote your way, no matter what you do. When they reject you, they will do so vehemently (and, if possible, punitively), and they may even take other jurors along for the ride. The only good jury is one that agrees with you, but to know which jurors are on your side requires waiting until the trial is over. Or does it?

You can reliably discover what types of jurors accept or reject your case (through jury profiling) and why they do so (through trying your case to mock jurors) ***before*** the fact, while there's still time to do something about it. After a trial has begun, attorneys tend to rely too heavily on evidence that often fails to change minds that are already made up, minds that more often than not use evidence to bolster their entrenched opinions, failing to realize that minds change evidence more than evidence changes minds.

A full understanding of juries comes neither from law school nor from knowledge of the law and legal procedures, nor even from vast litigation experience. Understanding juries also requires significant knowledge of psychology, personality theory, group dynamics, cognition, human decision-making, perception, and properly designed research.

Some attorneys, however, dismiss the notion that you can predict what a jury will do, reasoning that "every jury is different" and "juries behave irrationally," so why bother trying to gauge the unknown? Actually, the reasons and processes by which jurors reach their conclusions tend to remain the same from one jury to another. These processes follow patterns that can be revealed through pretrial research. Trial teams can use the results of such research, in jury selection and in their case strategy—before the fact. While the behaviors of "bad" and "good" jurors are case-specific, they are also predictable through data that can be applied strategically to voir dire and jury selection. In other words, there are ways to increase your odds of knowing trouble before the fact, and we know the worth of an ounce of prevention.

Jury Selection: So Few Strikes, So Much at Stake

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

With so few peremptory strikes available in most cases, there are two contradictory schools of thought:

(1) We have to make the most of each strike; and (2) It doesn't pay to invest too much in jury selection.

Both statements are true. However, the optimal solution for each differs:

(1) Use your strikes to eliminate the most hostile people; and (2) Create a trial strategy that overcomes the concerns of the remaining antagonistic jurors.

Jury profiling is the application of real world social science: a reliable statistical model informed by the experience and insights of a trial consultant who uses data to assist trial teams in understanding the variables of choosing potential jurors. Of vital importance in this process is learning which people to avoid, by using pertinent information to guide the jury selection process. The danger lies in overlooking factors more relevant (and subtler) than mere demographics, such as who will be most influential in the jury (not necessarily the foreperson) and how influential the foreperson will be.

Academic studies show that the most influential jurors tend to be extroverted, agreeable, conscientious, and emotionally stable. Equally important is knowing which jurors will be

receptive to persuasion and influence. In other words, who will be the leaders and who the followers?

Research confirms that even nowadays, male jury members are perceived to be more influential than women. It also reveals that conscientious people (those willing to consider all opinions before deciding) and people generally less “open” are the ones most likely to report post trial that they were influenced by others.

Some litigators can spot these characteristics easily, but such people watching is an unreliable art. Identifying traits in human behavior requires more than opinion. Without the guidance of reliable data regarding what does and does not work, many trial teams operate in the dark at jury selection and trial.

Despite a great deal of observable, inferable, and learnable information that a skilled trial consultant can observe and interpret quickly to the trial team’s benefit, most of the available information goes unused without the benefit of a trial consultant.

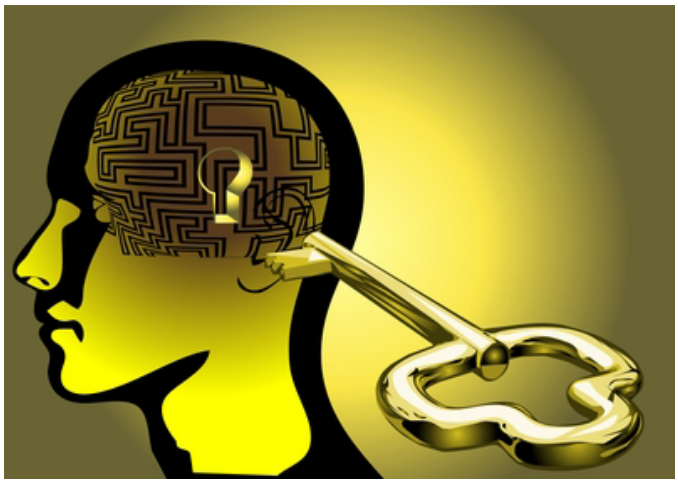
How do trial lawyers know what to look for in voir dire, and how do they use that information in jury selection? Some litigators dismiss jury psychology outright, despite its potential as the best source for understanding jurors’ needs. Lawyers unfamiliar with how profiles work are skeptical and rely on their own and others’ experiences to conjure the kinds of jurors they want. The important question is, what plan do you use?

Whether due to skepticism, unfamiliarity, or cost containment, some trial lawyers conduct their own in-house jury “research,” typically using a spouse, the secretarial pool, or employees of local counsel (known as a “convenient sample”) to determine possible juror attitudes. This approach can do more harm than good. Using a sample that is too small, not a representative cross section, and is obviously biased limits your ability to predict how people on a real jury will react to your case. Just because people you pay or who are supportive of you or your firm see things one way is no reason to believe those reactions will be duplicated by actual jurors.

For one thing, a jury will not share the same motivations as your familiar audience. In addition, the number of people with whom you test arguments/strategies represents too few examples of any specific factor (e.g., gender, age, experience, etc.) to allow you to say with any certainty whether potential jurors with similar traits share anything in common with your sample. Nonetheless, even experienced lawyers use this approach to decide which jurors to watch out for and what works for the jury. Why not? It’s free, it’s easy, and it has worked for them in the past. Invariably, however, those who try this realize its limitations afterwards.

Jury Selection: Should You Follow Your Instincts About a Juror?

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant



Many trial lawyers have theories about who among a group of potential jurors is good or bad for them. In fact, sharp instincts and the confidence to rely on them are among the characteristics of a good trial lawyer.

So a trial consultant will often hear a variety of seat-of-the-pants strategies: "I've been trying cases for 20 years, and I can tell who likes me and who doesn't." "I know which cases I like to have women vs. men on." "I intentionally tease a prospective juror to form a rapport." "I like housewives." "No widows." "I'll take a veteran any day." "Forget students."

However, research and post-trial jury interviews have actually shown such untested jury notions to be misguided and false, regardless of the years of experience of the person offering them.

Many attorneys love to tell war stories about individual jurors who turned out to be oddly favorable or unfavorable to their case; such stories are offered as anecdotal proof of how perceptive the attorneys were or how unreliable preconceived impressions about jurors can be. For example, a male juror nodded approvingly at everything a defense attorney did during trial, only to end up the single holdout against her client in deliberations. Jury-watching alone failed. In another case, a Hell's Angels biker with an eye patch ended up championing a chemical manufacturer's claim for payment from its insurer.

These were not random occurrences, but consequences of a logical theory about the case, including what kinds of jurors would accept or reject the trial team's reasoning. In the instance of the chemical manufacturing trial, how did the trial team know? We tested it before the fact. Pretrial jury research indicated that leniency toward the insured as to specifics omitted from its application for insurance would more likely come from anti-establishment types than from highly rule-governed people. This is intuitive and was confirmed.

Certain choices in assessing prospective jurors require little special knowledge and testing. Expecting dogmatic environmentalists to disfavor alleged polluters in toxic tort cases or strident feminists to favor female plaintiffs in sexual harassment suits seems logical, and therefore, not to merit jury consulting. Such jurors tend to be "spear throwers," i.e., extremists that anyone can easily spot as adverse and target for a strike. Assuming that they are obvious, you can identify and get rid of your side's worst jurors. But what if they are

not obvious? What should you do with moderate jurors who remain and warrant proceeding with caution? The issue then becomes how to distinguish between shades of gray.

It takes more than experience to ferret out bad jurors from good ones. The clearest examples of how this can happen relate to counterintuitive factors: Will jurors similar to a plaintiff favor the plaintiff (due to “identification”) or seek to distance themselves (due to “defensive attribution”)? For example, in a case involving injury from riding double on an ATV, jurors who actually did this – despite clear warnings – were most critical of the Plaintiffs, not the manufacturer defendant, claiming “We all do that, but we know we are not supposed to."

There is no clear-cut way to predict this without researching that case with surrogate jurors. Different venues with the same fact pattern -- or slightly different fact patterns in the same venue -- have yielded opposite results, as found in pretrial research and confirmed in post-verdict interviews. For example, in a patent infringement case, tinkerers proved to be especially bad for an unknown, commercially unsuccessful patent owner suing for infringement against a technology giant. Why? Because technically oriented people like “new bells and whistles” regardless of their origin and thus appreciate the source that provides them, albeit an infringer.

In a product liability matter, young, adventurous males were especially unsympathetic to a hot-dogging young man who “buzzed” tree tops with a private plane that crashed when it hit phone lines, killing him and his friends on board. Counter-intuitively, daredevil jurors were least sympathetic to the plaintiff. Why? Due to defensive attribution, jurors similar to the deceased needed to distance themselves from him to psychologically shield themselves from his fate. They did so by being critical of him and disparaging the choices he made. They openly insisted, “I would never do that.”

In another case against a well-known wrestling entity, wrestling fans were the least sympathetic to the defense. Why? Because they felt betrayed by something they cared about: wrestling.

In each of these instances, the client benefited from the ability to identify these jurors as risks using very few questions in voir dire and maximizing the value of peremptory strikes. Without the benefit of pretrial profiling data, the clients might have struck their best jurors or kept their worst ones, based on apparent common sense and folklore.

These are only a few examples of how jury profiling can be counterintuitive or less obvious than guessing might predict. Without prior research, we cannot know whether favorable jurors will follow an intuitive or counterintuitive pattern, and we cannot know the crucial questions to ask to distinguish bad from good jurors.

Many attorneys ask trial consultants, “What kind of jury do we want?” Without an empirically based profile, the best one can do is to consider if “generic” juror profiles (which tend to describe jurors in tort litigation) apply to the case at hand. Using a generic profile is like a doctor using another patient’s x-ray for your fracture. Maybe the bone will be set properly, but maybe it won’t. With that caveat in mind, below are common traits of Plaintiff-oriented jurors.

The following are some aspects of a generic plaintiff juror profile:

- Less educated
- Overeducated, but underemployed
- Disgruntled/chip on shoulder/angry or depressed
- Disenfranchised/anti-establishment/ marginalized (“fringe”)
- “External locus of control” (i.e., victims/ blamers)
- Recent personal hardship/life stressors
- Emotional rather than cognitive deciders
- Little authority status socioeconomically
- Unstable employment history
- Recent loss of job
- House repossessed
- Divorced/separated/recently widowed
- Recent serious illness or hospitalization
- Caretakers
- Volunteers/Charity work
- Religious
- Wild cards:

– Case-related specialized skills
– Leadership qualities/behaviors; ability to create consensus
– Aware of amounts of money in business/can calculate damages

Here are some aspects of a generic defense juror profile:

- Mainstream, conservative
- Some authority status
- Analytic rather than emotional/intuitive
- Few life stressors
- “Internal locus of control” (takes personal responsibility/control)
- Possibly management experience
- Long-term marriage

- Long-term employment
- Understand business
- Entrepreneurial
- Not experiencing financial hardship
- No recent personal hardship
- Better educated (college or more)
- Homeowner rather than renter

These profiles are seductive, and it would be nice to have an all-purpose set of guidelines to use and re-use for every case. However, since cases are not tried in a vacuum and different themes appeal to different people, deciding who your best consumers are can only be determined specifically and reliably by knowing the "product" you plan to sell and how people actually react to it.

Generic characteristics may not apply to your specific case at all. For example, if instead of a plaintiff, a defendant is seen as the victim, then the generic "plaintiff-oriented" profile (i.e., describing jurors who favor victims) may well describe defense jurors better in that instance.

What else can one use if not traditional wisdom or experience? Information from actual jurors.

Jury Selection & Jury Consultants: Three Strikes, You're Out!

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

Unlike the common process of querying actual jurors after a verdict has been rendered, empirically based trial consulting can provide trial lawyers with both actual data (not just opinions) and the ability to identify specific factors that separate bad jurors from good. In contrast to how attorneys involved in the case may approach questioning mock or actual jurors, a qualified trial consultant asks balanced and accurate questions to a sufficiently representative sample of surrogate jurors who do not know which side is sponsoring the research. This process provides objective data for qualitative and quantitative analyses from which to create juror profiles and case strategies. Even this method has its limitations (e.g., reliance on probability, the unlikelihood of learning all necessary information from the profile, and typically due to cost limitations a - a smaller than ideal sample size). Nonetheless, this statistical model is more reliable than gathering anecdotal information from jurors.

There are many situations for which it makes good sense to invest in a data=driven jury profile. When there is a lot at stake (whether financially, reputationally, or bad precedent setting). This is especially so, when you have reason to believe that some jurors may be resistant to your story, no matter how well you tweak or spin it, or how much anecdotal information you have. In those instances, it is wise to invest in the development of an empirically-based profile of traits that prospective jurors can be scored on in voir dire—whether verbal, a written jury questionnaire, reasonable inference, or observation. This is sometimes possible even in the absence of more direct information (e.g., through basic information provided by the court on the jury summons responses, via free computer database searches, or through local counsel's knowledge about prospective jurors). Knowing in advance what the court will permit you to learn about prospective jurors is vital so as to identify the profile factors on which to focus in the developmental stages of the survey and the statistical model. If you already have both sides' submissions of voir dire questions to the Court, include them in the research materials to the surrogate jurors. Of course, it is best to have the profile before submitting questions so that they carry the most value for you.

If you cannot get the information you need in order to apply the profile (e.g., you can't ask questions because the judge or clerk conducts his or her own limited voir dire and does not allow written jury questionnaires), you will be empty-handed even when armed with the right questions. Even if you know that people with college or higher education are more likely to

be adverse to your client than those with less education, never learning about the potential jurors' educations renders your knowledge useless. Or does it? Why have a profile if denied access to such juror-specific information? Because this type of information may be inferred without direct access. An experienced trial consultant knows how to (1) "reverse engineer" a jury selection strategy, based on what and how information is learned in the court, and will then design a test to identify the most relevant factors; (2) test and use observable and inferable information about jurors; and (3) incorporate the limitations of each jury selection into the presentation strategy for that case.

Since we have more control over the story we tell than over who hears it, it is usually more cost-effective to invest in the development of the optimal story than to count on assembling the optimal audience. Ideally, you can do both: assemble your best story and identify your worst jurors. If you cannot afford to do both, then allocate your funds wisely to discern the most effective story for both fans and detractors. Keep in mind that whatever you learn in voir dire, your adversary learns too, and one of you will benefit more than the other. The less popular party has a better shot by relying on chance rather than by exposing its few good prospects in voir dire by asking a lot of questions, which achieves nothing other than having the opposition mark them as strikes. Based on the odds, striking in the dark gives you a better chance at keeping your few fans. In the end, focusing only on a trial consultant's skill at jury selection underutilizes key advantages a trial team can gain from pretrial jury research — but it is a good start. Since any jury will inevitably have "unknowns" and "undesirables," you can overcome the unavoidable resistance and maximize the benefit of favorable jurors by knowing which arguments and evidence play best. Pretrial jury research is your strongest insurance policy. When overly depending on jury selection as a strategy, if all you get is three strikes, you're out before you begin.

6 Types of Jurors That May Fly Under the Radar

by Larry Carson, President, Smith & Carson

You've pored over the questionnaire answers, examined the body language, and characterized and rated the jurors based on your experiences with people of similar backgrounds, or better yet, a well-done jury profile based on data from mock-jury survey research; but you still feel uneasy, because you've been in this situation before. You know there's a good possibility that something is lurking in the deep end of the pool -- that potential juror who could cause massive unexpected consequences (good or bad) for your case.

Surprise, surprise . . . Here are six types of jurors that may fly under your radar:

1. **The forgetful litigant** . . . You've asked about prior civil litigation, and she answered "no" to every question, no matter how it was phrased.

Maybe she just forgot, or maybe she doesn't realize that all those nasty collection matters, eviction cases, bankruptcies, divorces, domestic violence, foreclosures, etc. are actually lawsuits and need to be divulged.

2. **The elusive felon** . . . He knows the ropes. He has a long history of felony arrests and petty crimes, but he always pleads down to misdemeanors and participates in diversion programs. Although his rap sheet is a block long, his official criminal record has been reduced to a few minor violations.

3. **The tech-savvy grandma** . . . With the help of her children or grandchildren, she has mastered the intricacies of bouncing in and out of her ten social media personae and has accumulated over 600 friends. She spends an inordinate amount of time each day consuming, digesting and voicing her opinion on everything in the world -- from her pastor's Sunday sermon to the best crockpot recipes to the horrible people making ills in the world. She's nobody's fool, and she stands ready to continue her commentary if selected.

4. **The extreme "moderates"** . . . you may think a moderate is somewhere between a liberal and a conservative, but one of these self- professed moderate jurors supports 25 liberal causes and camped out at Occupy events last summer, while the other contributed thousands to right-wing candidates and has attended tea party events. Compared with the average voter, their level of activism is outside of the norm, so why do they claim to be "moderate"? Maybe everyone they know is comparatively active, or perhaps they feel that "moderate" is the safest answer in a room full of strangers. Whatever the reason, strong beliefs and active engagement won't remain latent in the deliberation room.

5. **The start-up king** . . . In his dreams, he basks in a corner office, dines on a lavish expense account, and goes home to a mansion. Because he's formed numerous companies, he portrays himself as a serial entrepreneur. But they have all failed and, in reality, he's unemployed and deeply in debt. This is one Walter Mitty who may be looking for a way to even the score at your expense.

6. **The legal hotshot** . . . He's read all the John Grisham thrillers and treats himself to Law & Order marathons on demand. He watches CSI and thinks real-life cases are resolved within an hour. He knows about luminol and considers himself a forensics expert. He doesn't need to actually listen to the evidence or have those arrogant attorneys tell him the rules of law to know how the case should be decided. And he's too smart to answer those questions intended to ferret out his true personality. He's ready for his command performance. He just needs your vote.

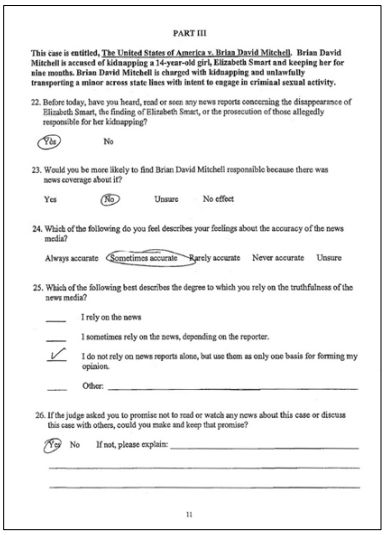
It may be fun to read about these types of potential jurors, but it isn't fun being surprised once they're in the box. You know the types of jurors that are preferable or risky to your case. Having information during that critical selection process on juror experiences, personality, and character cuts down on surprises and helps you affect your selection strategy.

Larry Carson, President and Joanna Sole, Esq., Executive Vice-President, of Smith & Carson provided this guest post. Smith & Carson is an investigation research company founded in1978, which specializes in litigation fact-finding, including fact-based juror research/voir dire investigations. Its work involving thousands of jurors each year provides essential information and an enhanced perspective to the jury selection process… Perspective only Experience can Bring.

10 Signs of a Good Jury Questionnaire

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

A jury questionnaire is distributed to jurors when they arrive for service. More often than not, this is a highly contested document that all parties want to have a voice in crafting. Knowing what to ask for without overreaching is critical since a judge may revert to a default jury questionnaire.



PART III

This case is entitled, The United States of America v. Brian David Mitchell. Brian David Mitchell is accused of kidnapping a 14-year-old girl, Elizabeth Smart and keeping her for nine months. Brian David Mitchell is charged with kidnapping and unlawfully transporting a minor across state lines with intent to engage in criminal sexual activity.

22. Before today, have you heard, read or seen any news reports concerning the disappearance of Elizabeth Smart, the finding of Elizabeth Smart, or the prosecution of those allegedly responsible for her kidnapping?

(Yes) No

23. Would you be more likely to find Brian David Mitchell responsible because there was news coverage about it?

Yes (No) Unsure No effect

24. Which of the following do you feel describes your feelings about the accuracy of the news media?

Always accurate (Sometimes accurate) Rarely accurate Never accurate Unsure

25. Which of the following best describes the degree to which you rely on the truthfulness of the news media?

___ I rely on the news

___ I sometimes rely on the news, depending on the reporter.

✓ I do not rely on news reports alone, but use them as only one basis for forming my opinion.

___ Other: _____

26. If the judge asked you to promise not to read or watch any news about this case or discuss this case with others, could you make and keep that promise?

(Yes) No If not, please explain: _____

11

As in any investigation, answers are only as good as the questions. Accordingly, a jury questionnaire should avoid "garbage in/garbage out" like the plague. I have seen far more bad questions than good ones on jury questionnaires. The following is a guide to help avoid questionnaires that ask a lot, but answer little by way of useful information and helpful results.

A good jury questionnaire …

1. Avoids questions that reveal your **good** jurors.

   Perhaps the most frequent mistake is asking questions to reveal friends rather than enemies. For example, why should a civil defendant ask, "Do you think there are too many frivolous lawsuits?" or "Do you agree there should be a cap on damages?" If someone agrees, you have just given your opponent a gift. You've done their job for them and made it easy to target your good jurors for follow-up questions or a strike, whether for cause or a peremptory.

   Instead, target enemies! For example, better defense questions leave more room to reveal adverse opinions to your side, such as, "Do you believe that if a case gets to court, it must have merit?"

2. Is based on **data**, not opinion or past experience alone.

   Often, litigators hold beliefs about what makes a good or bad juror. Sometimes those beliefs travel from case to case, venue to venue, just like their courtroom suits, but have little to back them up when tested. Jury research, done properly, with a sufficient sample size to perform statistical analyses may reveal traits unrelated and unexpected to those theories.

   Who cares if they have children, unless it might relate to the case? Instead of asking 5 or so questions, e.g.,

Do you have children?
If so, what are their names, ages and genders?
Are any employed?
If so, what is their job and who is their employer?
Are they married?
Etc.

… ask what you need to know, e.g., "Do you or any immediate family member know any of the parties or witnesses in this case?"

For example, in a patent dispute involving American inventors with no commercial success and Japanese alleged infringers with great commercial success, the Japanese defendant wasted all its strikes on people who expressed anti-Japanese sentiment. The reality was, based on extensive statistical profiling, that was unrelated to verdict preference. Instead, what mattered was whether a prospective juror liked new gadgets or not. Those who did not were inclined to find for the inventors; those who did tended to find for the Japanese defendant.

3. Isn't **too long**.

   Though the return on investment is unlikely to be worth it, one of the only benefits of an extensively long questionnaire is that it reveals people willing and able to complete it, possibly indicating endurance, perseverance, patience, and other traits.

   However, there are better, more efficient ways to do so, such as looking for detail orientation in the nature, number and literacy of the responses. Another hazard of lengthy questionnaires is that trial teams tend to underestimate the time it will take to review and rank them all.

   Unless you are doing an apples-to-apples comparison, i.e., using the same basis to rank all prospective jurors using all the answers, it is wasted, or worse: ranking using different criteria.

   Ask what matters and what you need to know, not everything there is to ask. Tasking associates without trial experience with drafting the questions can be a recipe for lengthy, but misguided, questionnaires. Trying to prove their diligence often equates to longer, not stronger, questionnaires. In addition, it is imperative for anyone drafting the questions to have a firm grasp on the strategy planned for trial so the questions reveal who might reject it. For example, are you going to bash a competitor who isn't a party? If so, you must ask if anyone may have ties to them.

4. Makes it **easy to express hostile feelings** toward you/your client.

   This is high art. An anemic, yet typical way to ask such questions is, "Have you reached any opinion in this case?" Or, "Do you have any negative opinions about

(my client)?"

A more likely way to yield what you need to know (bias against your client), is to ask questions such as "Do you have the slightest doubt that you could find for my client if the evidence proved the case?" "Is there any reason, no matter how small, that you might not be able to see my client the same as the other side?" "Can you think of anything at all that might make you lean more toward the other side?" "Everyone has experiences that they bring with them to court. Can you think of any experiences that may make you think, right from the start, that you might not like my client or have sympathy for the other side?" "Is there any reason you might be uncomfortable finding against the other side?" "How difficult would it be to accept that my client did nothing wrong?" It is important to add a follow-up, "If so, please explain."

Be sure to use **open-ended questions** (rather than yes/no) to learn *more* of what they think and how they express themselves.

5. Looks for signs of **potential leadership** and impact on other jurors (higher education, related experience, prior jury service, extroversion, leadership positions, management experience, self-reliance, articulate communicators, know statistics, prestigious job, and the like).

   Again, think broadly about this, not just literally. For example, a nursery-school teacher may have more skills to bring consensus and lead a group than a burly truck driver. Ever tried to get a dozen toddlers to nap at the same time?

6. Explores potentially **related knowledge or experience**.

   Don't analyze your case in narrow terms when it comes to exploring potentially relevant experience. For example, if it's a patent case, knowing whether or not someone ever applied for a patent isn't likely to yield information about the majority of potential jurors. Instead, explore the mindset that could hurt you and applies to more people.

   If you are the patent holder, you might ask, "Please explain if you believe that patents hurt competition." "Do you think patents hurt consumers by driving up prices?" "Do you agree that, unless an inventor can make their invention a commercial success, it has no value?" "Have you or someone close to you ever been hurt in business by a larger/better known competitor? If so, how?"

   If you are the alleged infringer, you might ask, "Do you believe it is unlikely for the U.S. Patent and Trademark Office to make a mistake when issuing a patent?"

   More broadly, you might want to explore whether they are interested in gadgets and new innovations and the type of technology and factors they consider when deciding whether to buy new technology in order to determine their attitudes about

innovation. This may be more predictive of jurors who value commercial success over inventive credit.

Perhaps someone has a high regard (higher than warranted) for government agencies and doesn't feel equipped to disagree with the U.S.P.T.O.

7. Isn't afraid to ask **probing questions** that *are* relevant, but **assures privacy** if the juror reveals such information.

8. Isn't afraid to express **advocacy** rather than pretending to be entirely neutral.

   Do you really want someone impartial? Of course not! You want someone partial… to *you*, or at least not partial to your adversary, but you have to be able to ask a question that is allowed. Remember, though, not to ask questions to reveal your friends (or go back to point 1).

   The solution? Ask about bias *against your client* and let the other side do its own handiwork. Instead of asking, "Can you be fair to both sides equally?" – you'll do better asking, "Can you think of any reason you might not be able to be fair to my client? If so, please explain."

9. Includes questions that may **bother the opponent, but not the judge**.

   Most judges amenable to a jury questionnaire will do so if the sides can agree on the questions. When there is a disagreement that goes to the judge – unless it is so vital that you ask certain questions – avoid ones that are merely for curiosity, but yield little fruit. For example, there is research that shows people who have bumper stickers tend to be angrier (*regardless* of what the sticker says) and wish to extend their ego boundaries to impact others more than people who don't, but if your case is venued where most people take public transportation, why bother?

10. Include **meaningful follow-up questions to get to the truth** if standard, but useless questions ("Can you be fair and impartial?"), must be asked.

    The problem with stock questions is that they yield almost nothing useful. Perhaps you will find a rara avis who stretches out its neck and announces in public, "Yep. I can't be fair or impartial." The majority, however, will give the "pc" answer and say they can. And, they're not lying. But what "fair" means to them is not what it may mean to you or the next person. It just means that whatever they believe, they can abide by their own yardstick. The problem is, what *is* their yardstick?

    Better questions ask about their actual beliefs, experiences, and views. For example, are they more inclined to believe in personal responsibility, or tend to be victim/blamers? Do they inflate the obligations of others to take care of them? Do they believe in more regulation? Are they offended by decisions that are "just

business"? These are more likely to get to prospective jurors' world view and potential view of the case than wholesale questions that do not.

10 Key Things to Know About Social Media and Jury Consulting

by Laurie R. Kuslansky, Ph.D.

As the jury pool progressively ages and more and more jurors hail from the Facebook generation, it has become utterly crucial for litigators to consider social media in the processes of jury selection, jury consulting and persuasion. The statistics of Facebook's prevalence alone are astonishing.

- Facebook has more than one billion members worldwide
- The average person spends about 12 hours/month on it
- The average person has 229 friends, but for the 18-34 set, the average is 318
- The average person creates three pieces of new content every day
- Fifty percent of all users log in every day
- Fifteen percent of all users update their own status every day
- One billion pieces of content are shared every day
- About one-third of the U.S. population is on Facebook
- Ninety-eight percent of 18-24 year olds use social media
- The fastest growing demographic of Facebook users is age 35 and older

As we view social media, we must remember that research has shown that – perhaps surprisingly -- most people present their real self, rather than their idealized self, on social media profiles. In court, in contrast, jurors may intentionally put their best or worst foot forward, depending on their agenda. Thus, social media offers a wealth of data about prospective jurors not evident in court.

Here are 10 places in the jury consulting process where we need to pay particular attention to social media:

1) **Voir Dire:** Ask questions such as, "Do you use any social media? If so, is it for personal use, professional use, or both? Which ones do you use and for what purpose(s) specifically? How often?" A good jury consultant will provide other useful questions.

2) **Voir Dire Investigation:** Learning about a potential juror's likes and dislikes from social media can be very helpful in making peremptory challenges. Make sure there is WiFi in the courtroom and that you have someone available who is fast and focused on running the names of prospective jurors on the major sites. It's a key part of the modern jury consulting process.

3) **Peremptory Challenges:** If possible, check sites such as Facebook and LinkedIn to see whether prospective jurors use discretion, have private or public information, and whether what they report in court matches their posted information or not. A demure female in court may post photos of herself on Facebook in a bikini. An unemployed person may claim a different profession or work status on LinkedIn or fail to report prior work history to the court. This information can greatly inform the use of follow up questions, challenges for cause, and the use of peremptory challenges.

4) **Social Media Monitoring Pre-Trial:** If you have a client that is in the news or a case that is in the news, monitoring social media can be an excellent way to get a sense of buzz around a topic.

5) **Testing Attitudes Toward a Brand:** One of the great benefits of social media is that one can easily run tests, often in the form of ads or other offline testing platforms.

6) **Finding a Good Demographic Sample:** If you plan to conduct a test, whether it be a mock trial, online jury research, or attitude surveys as part of the jury consulting process, social media like Facebook and Linkedin offer an incredible ability to slice and dice up the perfect demographic sample for a particular venue, keeping in mind that there is the potential for bias insofar as non-computer literate or non-users are excluded.

7) **Social Media Monitoring During Trial:** In a high profile or televised case, monitoring the sentiment on social media is important. Social media discussions may very well reflect the overall success or failure of the case. It may help you understand, in near real time, what people do or do not understand about the case or what questions need to be asked as part of an examination and addressed in closing. For example, during the highly publicized Casey Anthony trial, a jury consultant for Anthony's attorneys analyzed more than 40,000 opinions on social media sites and used them to help the defense put together their trial strategy. Further, if you spot a juror using social media during a trial, you may have a case for a mistrial or new trial.

8) **Social Media Evidence:** Many cases involve the use of social media evidence. Facebook communications during divorce hearings may get a lot of press, but increasingly, we are seeing social media evidence in large corporate cases too. Since not all jurors are familar with social media, jury consultants and graphics consultants will need to work hard to explain it to the uninitiated, which is often related to juror age.

9) **Finding and Evaluating Potential Mock Jurors:** What better way to recruit mock jurors who fit a particular venue's demographic than via social media tools, when applicable? This applies equally well for online and offline juror recruitment. However, if you seek older, non-computer users, this approach may not fit your needs. Who doesn't use the internet?

- 1/5 Americans does not use the internet.
- 59% of U.S. seniors don't go online.
- Nearly 60% of U.S. adults who didn't complete high school don't use the Internet.
- Nearly 40% of people with annual household incomes less than $30,000 don't go online.
- Only 54% of people with disabilities are Internet users

However, "mobile devices such as smart phones are closing the gap for young adults, minorities, those with no college experience, and those with lower household income levels who are more likely than other groups to say their phone is their main source of Internet access" according to the Pew Internet Project.

10) **Using what you reveal:** If you learn information that is helpful to your case during jury selection, that is one thing, but if it is potentially harmful or reveals dishonesty by the prospective juror in their prior voir dire responses, don't suffer in silence. Check the local rules and bring it to the Court's attention.

Don't Overlook Deleted Social Media Profiles During Voir Dire

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting/Mock Trials

"Given high profile stories such as WikiLeaks and the recent NSA surveillance reports, individual citizens are becoming increasingly more wary of cyber-related privacy concerns."[1]

Privacy breaches encountered by the public, such as the theft of Social Security numbers and the unprecedented hacking of 40 million credit card numbers and 70 million addresses, phone numbers, and other personal information of Target customers (Thanksgiving 2013) add to such wariness.

Indeed, there's a movement toward more restrictive privacy settings among people who have profiles on social media and a search for more Internet privacy.[2]

All Atwitter?

In response to these concerns, instead of wearing their hearts on their sleeves and posting a photo of it online, a number of people have opted out of social media *after* participating in it. They don't just elect to make their profiles invisible to others through settings – they are removing their profiles altogether.

People who remove their profiles may surprise you in terms of their privacy concerns, their addiction to the Internet, and personality[3] compared to ongoing users.

"Quitters" are:

- More cautious about their privacy
- More addicted to the Internet
- More conscientious

It is useful in *voir dire*, therefore, to inquire -- not only if someone currently has any accounts on the Internet -- but to ask if they **ever** had any such accounts, and if they no longer do, to have them explain why they elected to make a change. If privacy and diligence are relevant to your case, this line of inquiry may be a new window into prospective jurors who must decide such issues.

In addition, there is a relatively large body of research that offers insights into Internet use and its impact on users.[4] A few highlights are that passive users (who merely scroll through posts by others to see what others/peers are doing) on sites such as Facebook, end up feeling bored, disconnected and depressed because they tend to compare themselves to

others, whereas active users (who interact with others and post their own information) tend to feel more connected and happier.

Hence, *voir dire* is an opportunity to ask – not only if prospective jurors *use* the Internet, and how frequently or which sites they use or where they have accounts, but to dig a bit deeper into *how* they use it and *how actively* engaged they are when doing so, if at all.

Privacy

While at least 75% of Millennials (born at the turn of the millennium) have a profile on a social networking site, most have placed some level of privacy boundaries on their social media profiles.[5]

Research[6] has shown that adults with greater desire for privacy had feelings of less control over personal information and less satisfaction with their perceived degree of control.

Interestingly, despite an increased level of concern over privacy in general, research has shown a "privacy paradox," whereby even people who report concerns about their privacy nevertheless provide personal information on public profiles in social media, i.e., their attitudes are inconsistent with their behavior.[7]

In the old days, one might ask how often, if at all, a prospective juror shopped late at night on TV channels such as QVC or HSN as a potential indicator of loneliness, or at least of insomnia. Nowadays, you must broaden your inquiry to connect – or disconnect – as the case may be.

[1] Brenda K. Wiederhold, PhD, MBA, BCIA, Editor-in-Chief of Cyberpsychology, Behavior, and Social Networking, from the Interactive Media Institute, San Diego, CA.

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3 Articles Discussing What Jurors Really Think About You

by Ken Lopez, Founder/CEO, A2L Consulting

I enjoy reading any article about juror feedback. However, finding such articles is pretty tough. Few authors have the time, budget or access to jurors to ask them what they think about the experience of trial and the lawyers involved.

As a litigation consultant, I have had the privilege of seeing many trials and mock trials over the past 20 years. In that time, I've observed certain characteristics that all mock juries possess. My colleague, Dr. Laurie Kuslansky, wrote a great article about commonalities among mock juries that is one of the best I have seen on the subject. Still, while we litigation consultants spend quite a bit of time with juries and mock juries, there is real value in hearing what others, such as judges and law professors have observed through study.

Below are three articles that offer meaningful insight into the minds of jurors. I think by reviewing these articles, any litigator will be better prepared for trial.

1. What Jurors Think About Attorneys: What if a judge collected data over a ten-year period from more than 500 jurors and compiled it in a meaningful way? Well, that is exactly what one Minnesota state court judge did, and the recently published results are fascinating.

Eighty-nine percent of this judge's jury trials were criminal. His goal in surveying his juries was to collect data about many aspects of the trial from the court building to the evidence displayed to the performance of counsel. The jurors were mostly from a rural part of the state.

You should read Judge Hoolihan's article. I found some of the interesting takeaways to be these:

- Jurors tended to rate attorneys highest when they represented the prevailing party. From the data, I can't tell whether jurors tended to side with the attorneys that they liked best, or whether the high ratings were the result of a form of the Ben Franklin effect where jurors tended to like the people they sided with more, simply because they sided with them.
- Jurors rated defense lawyers lower than plaintiff-side lawyers who were mostly prosecutors. Judge Hoolihan wonders whether this results from an anti-defense lawyer bias generated by Hollywood, but I would ask whether this is because the government generally has an advantage. I suspect it is mostly the latter.

- Jurors tended to rate defense attorneys much lower when they lost a case compared to the ratings of plaintiff side attorneys when they lost.
- Jurors wanted to see and hear more evidence.

2. Trial Presentation Too Slick? Here's Why You Can Stop Worrying: I wrote this article in 2011, and the real focus of the article is on a trial consultant who smartly took the time to interview a jury post-trial and record it. The results are fascinating, especially when you consider that this was a rural Arkansas jury. The jurors shared that:

- Jurors expect the use of technology.
- Jurors expect the use of PowerPoint.
- Video depositions synced with the transcript were very helpful.

3. What Jurors Think About Trials [PDF]: In this book chapter from a law professor at Northwestern University Law School, the surprisingly limited scientific study of jury trials is well-summarized. Here are some interesting findings:

- About 40 percent of all jurors initially want to get out of jury duty. When they were done with jury service though, more than 60 percent thought highly of jury service.
- 40 percent of jurors thought jury selection lasted too long.
- Jurors "are active information processors who bring expectations and preconceptions with them to the jury box, filling in missing blanks and using their prior knowledge about the world to draw inferences from the evidence they receive at trial."
- 51 percent of jurors wonder why certain people mentioned at trial did not testify. 27 percent of jurors held that very lack of testimony against the side that did not call the witness.
- 83 percent of jurors in civil trials said that an exhibit helped them reach a decision.
- 30 percent of civil trial jurors say that the verdict ultimately reached was not the majority viewpoint when deliberations started.

I find many of these statistics fascinating and helpful, and I hope you do too. If you are aware of similar articles that discuss the scientific study of jurors, I would encourage you to post them in the comments section below.

Jury Questionnaire by the Numbers

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting, A2L Consulting

Attorneys considering using a jury questionnaire may not consider the math involved. Here are some guidelines that can help to prepare properly and make wise decisions:

JURY QUESTIONNAIRE - PROs

- Ironically, prospective jurors who don't have a background in the law or security seem to be more willing to admit bias in writing than in open court.
- Just by the style, grammar and legibility of the responses, one can learn a lot.
- One is more likely to gather more information about the potential jurors from a jury questionnaire.
- You can rate the prospects on an apples-to-apples basis using the answers to all the same questions.
- You have a written record to support potential strikes for cause.

JURY QUESTIONNAIRE - CONs

- It reveals a lot about your potentially good jurors to your opponents making them easier to strike.
- It can lengthen the jury-selection process.
- It can be costly to prepare.

JURY QUESTIONNAIRE - COMMON MISTAKES:

- Not asking the judge if a written jury questionnaire is permitted
- Asking closed-ended ("Yes" or "No") questions that tell you little about the person, rather than open-ended and multiple choice questions that can reveal much more
- Just as in voir dire, asking questions that can reveal your good jurors to your rival(s).
- Asking so many questions that you don't have enough time to truly consider the answers and compare each prospective juror to the others
- Asking questions that are intellectually interesting to the drafter, but not good at revealing bad jurors for your side
- Failing to ask questions that go to the root of the decision-making on core issues of your case
- Omitting questions that can tee up bad jurors for cause strikes

- Tasking people with little or no jury litigation experience with drafting the questions
- Not opposing adversary's questions which are off base.
- Being afraid to ask questions about your side's areas of vulnerability.
- Giving up your good questions too easily without minor revisions that would leave them in the mix.
- Wasting a precious opportunity asking "cute" questions that really aren't meaningful predictors of bad jurors for your client(s)
- Not building in enough time to draft the questions, vet them with the appropriate team members, and engage in negotiations with your opponent(s) on which are objectionable, which require revision, and the like.
- Not coming up with a ranking system in advance so that you can truly compare your options on an apples-to-apples basis
- Over-rating the risk of jurors unlikely to have any leadership potential or who are simply followers who pose little risk (e.g., barely literate, barely educated, insecure, shy, little or no related experience, poor verbal skills, weak knowledge of the language, etc.).

JURY QUESTIONNAIRE - THE NUMBERS:

To understand why it is essential for a written jury questionnaire to be lean and mean, let's use an example to help you consider the following:

1) How long will it take for prospective jurors to complete it?

If there's 10 questions per page and 5 pages (50 questions), it will take about an hour.

2) How long will it take to make copies for all the parties?

Assuming two copies per side(4) and the Court keeps the originals, that's 4 x 5 pages x 45 prospective jurors = 900 pages to be collated and distributed.

3) How long will it take to review all the answers?

In this example, 50 questions x 45 prospective jurors = 2250 answers to read and rank!

4) How long will it take to ask follow up questions?

Assuming that each juror has 1-2 issues that arise as a result of their answers or failure to answer to questions on the written questionnaire, there can be about 45-90 follow-up questions per side, or 90-180 follow-up questions total, aside from any other questions that may be posed orally. If each question takes one minute to ask and answer (which is a conservative estimate), that's potentially 3 hours of oral questionnaire follow-up in addition to the prior tasks.

Asking too many questions can be a case of diminishing returns if you don't have enough time to weigh the answers and compare them among the prospective jurors. In addition, everything you learn from their answers, your adversary also learns, so consider who gets the advantage by revealing that information more.

In brief, if you are going to use a written juror questionnaire, you will get more by asking less, as long as the questions you do ask are extremely well thought out, allow room for open-ended replies, are written to permit potential jurors to feel comfortable to reveal even the slightest bias against your side, and leave enough time for you to review and follow up on the responses.

5 Ways the Economic Crisis Has Changed Jurors

by Laurie R. Kuslansky, Expert Jury Consultant

We have participated in a number of Great Recession cases. They tend to be related to banking, lending, LIBOR, fraudulent conveyance, securities, housing, a partnership gone bad, failed corporate spin-offs, failed transactions, or some type of fraud. We're about to start another one that also has its roots in the economic crisis and the government's response to it.

In many of these cases, we have had the challenge of reminding jurors that economic conditions looked awfully good in the years leading up to the staggering downturn. It was only at the very end of 2008 that real fear set in for the masses. So, often a jury is now asked to put themselves into a pre-recession mindset. We have used a variety of visual and rhetorical techniques to do so. From litigation graphics that incorporate a rear-view mirror or Monday morning quarterbacking metaphors, to a whole host of really scary charts showing just how bad things got and just how fast the economy crumbled, but that at some earlier point in time, it was unforeseeable.

“I knew it all along…”

The challenge is that looking back in the absence of what one already knows is daunting, and what psychology terms as “hindsight bias,” [1] “The term hindsight bias refers to the tendency people have to view events as more predictable than they really are. After an event, people often believe that they *knew* the outcome of the event before it actually happened.”[2]

So, on this backdrop, how does it go when we ask jurors to get into a pre-recessionary mindset and judge the decisions our client made then in that light? Well, as you’d imagine, not well. It turns out that, for the most part, jurors cannot shift their thinking to really get into that mindset and some just can't even remember good times anymore or aren’t willing to do so. They can’t un-know or un-feel what they have experienced since. This is similar to the scenario in pollution cases in which, unless a juror is old enough to remember changing their car oil and dumping it, it seems unfathomable.

So, what is one to do if your case depends on a judge or jury reaching a conclusion that decisions were reasonable -- then -- not now? We're finding that the answer is embracing the reality, changing your approach, and managing for the new reality. In martial arts terms, you might think of it as redirecting your opponent's energy instead of resisting it.

Here are 5 ways jurors have changed because of the economic crisis and what to do about it.

1) Rethink Jury Selection: Most of us have stereotypes about who is the typical plaintiff or defense juror. These must be revisited freshly and on a one-to-one basis during jury selection. Some formerly defense-minded jurors have turned into virulent plaintiff-oriented

ones. If their once-secure portfolio or job were hindered, they tend to be less defense-oriented;

2) Bankers Will Pay: If your opponent is a bank, use it against them relentlessly. If you or your client is a bank, expect a jury to punish that fact. To inoculate against a banker attack, you should, to paraphrase Gordon Gecko, say, "Of course my clients are greedy, they're bankers! So why do you think they would do something that would yield *bad results*? They wouldn't, because they are (greedy) bankers (or CEO's or business people or a Board of Directors)."

3) Perceptions Have Changed - But Not How You Might Think: Since the recession, Pew Research Center polls consistently find that the general public actually says their first priority in this economy is time -- not *money* -- as one might expect. Therefore, you must not waste the jury's time! Make your case very efficient by refining it with your mock jurors and litigation consultants and by summarizing the key information into user-friendly graphics. Don't show pages of information that can be better condensed into one graphic. Know your point and get to the point.

4) Embrace New Emotions: Because of the Great Recession, emotions may be running high in voir dire depending on the length of your case, the subject matter of your case or by factors that have nothing to do with either. Rather than run from these emotions, encourage jurors to let it all out and express what is on their mind. Remember, revealing your enemies is the first goal in jury selection. Of course, those who do express themselves strongly stand a fair chance of being excused for cause and you might just be able to tamp down some of the emotions in the jury room IF this is helpful to your case. Jury selection is one of the rare instances in which it helps you and your client to welcome hostility.

5) Trial Presentation Matters More Now Than Ever: Jurors expect faster trials than we used to see twenty years ago. You have to be quicker and very often your trial presentation is the best way to achieve that. Do not beat around the bush. Tell jurors exactly what they need to know. Rather than putting up litigation graphics that encourage a conclusion to be made, show the chart AND show them the conclusion they should draw from it.

It's not just a new normal in the legal community, it is a new normal for most Americans. Things *are* getting much better and most people's optimism is returning, cautiously. For many jurors however, you can expect to see a lag, corporate distrust, and a way to finish the job of serving so they can get back home and to their real job, *if they have one*.

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[1] Myers, David G. (2005). *Social psychology (8 ed.).* McGraw-Hill Education. pp. 18–19.

[2] Cherry, Kendra http://psychology.about.com/od/hindex/g/hindsight-bias.htm

5 Secrets for Trying Cases in SDNY

by Laurie R. Kuslansky, Expert Jury Consultant

One of the most common venues for federal jury trials is the Southern District of New York. This district includes Manhattan as well as the Bronx and Westchester, Putnam, Rockland, Orange, Dutchess, and Sullivan counties. The court sits in the Thurgood Marshall U.S. Courthouse and in the Daniel Patrick Moynihan U.S. Courthouse in downtown Manhattan, and in the Charles L. Brieant Federal Building and Courthouse in White Plains, in Westchester County.

The district includes urban areas (Manhattan, Bronx) as well as suburban and exurban areas (Westchester, Putnam, and Rockland counties) and basically small-town and rural areas (Orange, Dutchess and Sullivan counties). Clearly, a juror from Greenwich Village is often going to see things differently from a juror from New Rochelle. Here are some tips on trying cases in this district.

1. **Westchester/Putnam jurors are a different breed from the rest of the venire.**

Jurors summoned to SDNY can be quite diverse, and sometimes, the pool is heavily weighted one way (e.g., doctors and lawyers), or the other (blue collar, poor minority). Those coming from the suburbs are more likely to have higher socio-economic status, be better educated, more stable (homeowners, married), and better employed or stationed (think Stepford wives married to lawyers), whereas those from the Bronx are more likely to be the reverse.

In Manhattan, anything is possible and runs the gamut – from janitors to Wall Street traders. Depending on which side of the case you are on, the pool will likely sway for or against you, before voir dire even begins. Be aware of Westchester/Putnam folks who, as homeowners, tend to be financially conservative, whereas jurors from the Bronx are more inclined to throw the book at a perceived wrongdoer. In Manhattan, watch for what people say they do rather than what they aspire to be. For example, aspiring actors and other artists may well have a different job, such as the proverbial waiter/waitress or bartender. Anyone whose job includes a “slash,” such as a writer/teacher, also signals the need for follow up, because either they need more than one job, don’t have a single full-time job (why?), or other reasons worth exploring. Whether someone owns or rents their home is also worthwhile pursuing. There’s a great difference in their perspectives and experience. Someone can live in a penthouse or have roommates in the basement.

One subtle way to aim for a better pool is to exercise whatever control you may have in the timing of the jury selection in trial.

2. Timing is everything:

- If you want accountants, avoid tax-season trials
- If you don't want teachers, avoid a summer trial
- If you want psychologists or psychiatrists, avoid an August trial

3. You can ask more in voir dire than you may think.

Many SDNY judges accept at least proposed jury questions from counsel and, if the case is high profile, a written questionnaire. Many litigators assume – without asking the clerk – that they can have virtually no role in the voir dire.

The only way to know is to ask. Keep in mind that the proposed questions, other than those for cause, should be well-thought out, relevant to the issues and parties, and brief. The more questions submitted, the more likely a judge will be to edit them down. The problem is that your most cherished questions may end up on the cutting-room floor, so keep it lean and mean. In addition, construct open-ended questions, or at least do so for follow-up questions. For example, "Have you ever owned your own business? If yes, please describe if it is still operating or, if not, what happened."

4. If you want higher socio-economic status jurors, aim for jury selection as early in the week as possible and vice versa.

Toward the end of week is slim pickings as those deemed qualified have been put on juries and the pool is not replenished until the remains are picked over further. Avoid August when those who can, go on vacation, including families, psychologists and other professionals. Those who can summer outside the city, in the Hamptons, Fire Island, or elsewhere.

5. "500 Pearl St." is actually 200 Worth St. Ask for the back entrance – the line is shorter to get through security

Are Jurors on Your "Team"? Using Group Membership to Influence

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting, A2L Consulting

People who identify as being in the same group as others are more likely to give others in their group preferential treatment over people not in the same group (also known as in-group favoritism or in-group bias).[1] In litigation, if you lead jurors to identify with *your* client as a member of the same group as the jurors in terms of their social identity, the jury may be more likely to "help" your client in their decision-making.

Team fan or Soccer fan

Two fascinating studies in the U.K. illustrate how far a little group membership can go, showing that **people are more likely to help "in-group" members than others**.

In one study,[2] fans of a popular English soccer *team*, Manchester United, filled out a questionnaire about that team and wrote an essay on the **joys of being a Manchester United fan**.

They were then directed to walk to another building across a parking lot. En route, the group witnessed a (staged) accident in which someone was running, tripped, fell and clutched his ankle in pain, wearing one of three T-shirts: a plain one, a Manchester United one, or their arch rivals' team, Liverpool FC. Observers who noticed the accident were significantly more likely to help the injured man when he wore **their group's Manchester United T-shirt** than either of the other two shirts.

A second study[3] showed how flexible group boundaries are and how important inclusion in a category can be.

In that instance, instead of aligning subjects with Manchester United as the group's identity, they were aligned with *soccer* in general. The questionnaire asked about soccer and the essay was about **the joys of being a soccer fan**. This time, observers were equally likely to help the injured man when he wore**either soccer team's T-shirt**, but not when he wore one unrelated to soccer.

Imagine that, instead of a soccer team, the group identity was Plaintiff or Defendant. What about your client represents a group to which a jury can identify? How can you "prime" the jury to focus on that factor? As seen in research, rather little effort was required in order to underscore the focus of the observers' social identity (a questionnaire and an essay) prior to observing the in-group preference.

In court, how can you recreate such focus?

Conventional wisdom suggests only seeking out adverse jurors who reject your case and that still holds true. However, if you are permitted to provide *voir dire* questions or a written questionnaire to prospective jurors, it is worth considering including "priming" questions, e.g., say that your client is the Plaintiff and has a rags-to-riches history. Your questions can ask about valuing such a history. If your client is the defendant unfairly accused of wrongdoing, perhaps you can ask about such experiences of prospective jurors. In opening statement, you can reinforce that group story to further prime the jury to identify with your client. To the extent you can align jurors with specific traits or experiences of your client that they may share, you may raise the odds of jurors' bias being in your favor and becoming fans. In addition to other considerations of people who may be an unfavorable juror, those who do not exhibit any relationship with the social identity of your client may merit being moved up on your strike list.

[1] Turner, J. C.; Reynolds, K. H. (2001). "The Social Identity Perspective in Intergroup Relations: Theories, Themes, and Controversies". In Brown, S. L.; Gaertner. Blackwell Handbook of Social Psychology: Intergroup processes 3 (1): 133–152.

[2] Levine, M., Prosser, A., Evans, D. & Reicher, S. (2005) Identity and Emergency

Intervention: How Social Group Membership and Inclusiveness of Group Boundaries

Shapes Helping Behavior. Personality and Social Psychology Bulletin, 31, 443-453.

[3] Op Cit., Levine, et al.

Phone Surveys Aren't What They Used To Be

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

Research has shown that a variety of individuals are not fully represented in telephone surveys, especially Democrats,[1] the young, nonwhite, and urban voters who can be the hardest for pollsters to reach.[2]

In addition, the migration from landline phones associated with home addresses to portable cell phones unrelated to home addresses compounds the problem of reaching and surveying a representative sample using traditional approaches to phone surveys.

And, not all venues were created equally. Some have more hard-to-reach residents, while some have more cell phones replacing landlines.

In general, “It has become increasingly difficult to contact potential respondents and to persuade them to participate,”[3] dropping from 36% in 1997 to 9% now willing to participate in phone surveys.

Consequences?

There are many. To name a few:

Lower representativeness of people willing to respond to phone surveys requires taking additional measures to assure a representative sample, but the options aren’t ideal:

- Even if you weight the sample, you may simply be giving undue weight to those you reach who may not actually match the ones you missed;
- It may cost more money to buy additional samples to get a sufficient number of people who represent a particular category.

o For example, if you are seeking to survey jury-eligible adults and voter registration is one of the requirements, you may have to spend extra money and buy a list of registered voters if not enough people in the normal random digit dialing (RDD) sample turn up eligible to be a juror, assuming they answer the phone and are willing to answer questions in the first place... and 91% on average are not.

- You may have to spend more money and/or time to reach a reasonable representative sample because of the low incidence rate (i.e., people willing and able to complete the survey). This approach has improved the field rate of responses from the 9% average to 22%,[4] but added time means added cost.

Are people who answer telephone surveys different than people who don't?

Yes. Among other things, people who engage significantly more in volunteerism and civic activity are more likely to agree to participate in telephone surveys than people who do not."[5] Intuitively, this makes sense.

What does this mean for telephone surveys of mock jurors?

- Anecdotally, the kinds of people unwilling to agree to participate in phone surveys are more similar to people unwilling to be on a jury than those who end up as jurors. Hence, those who respond to surveys are perhaps a better representation of likely jurors than those who do not.
- Financial information tends to be hard to gather in phone surveys in general. If that information is pertinent to a jury study, it can perhaps be gleaned indirectly from other factors (education, employment, home ownership, marital status, etc.). Instead of the specific dollar amounts, one might be able to code someone who has more vs. fewer markers of likely affluence vs. poverty;
- Many work to design the sample of a study by first referring to the latest (2010) Census data and the ACS (American Community Survey) estimates, but they are somewhat off, especially in terms of under-estimating the rise of Hispanics. The problem is that such information is often the only or best available data. Other options that may be more current are real-estate websites that describe communities as well as anecdotal information from local counsel about a particular jury pool. Putting together the specifications for the polling sample is part of the art and science of polling.

Are There Any Solutions?

Yes. "A new study by the Pew Research Center for the People & the Press finds that, despite declining response rates, telephone surveys that include landlines and cell phones and are weighted to match the demographic composition of the population continue to provide accurate data on most political, social and economic measures."[6]

In addition to the technical issues that depress response rates, one should also consider how easy or hard you make it for someone to reply to the questions. Shorter and easier are better than longer and more difficult. Questions that require greater effort or too many questions are more likely to end up being asked, but not answered.

Ironically, the data that are missing is that which describe people who don't take surveys or end up making much difference on juries.

[1] Midterm Calculus - Why Polls Tend to Undercount Democrats by Nate Cohn, The Upshot, N.Y. Times 10/30/14 at http://www.nytimes.com/2014/10/30/upshot/why-polls-tend-to-undercount-democrats.html?_r=0&abt=0002&abg=1

[2] Assessing the Representativeness of Public Opinion Surveys, by Pew Research Center for the People and The Press, 5/15/12 at http://www.people-press.org/2012/05/15/assessing-the-representativeness-of-public-opinion-surveys/

[3] Op. Cit. at Pew

[4] Op. Cit. at Pew

[5] See Katherine G. Abraham, Sara Helms and Stanley Presser. 2009. “How Social Processes Distort Measurement: The Impact of Survey Nonresponse on Estimates of Volunteer Work in the United States.” Am. J. of Soc. 114: 1129-1165. Roger Tourangeau, Robert M. Groves and Cleo D. Redline. 2010. “Sensitive Topics and Reluctant Respondents: Demonstrating a Link between Nonresponse Bias and Measurement Error.” Public Opinion Quarterly 74: 413-432.

[6] Post-election assessments of poll accuracy by the National Council of Public Polls at http://ncpp.org/files/NCPP%20Election%20Poll%20Analysis%202012%20-%20FINAL%20012413.pdf

Grandma Took a Selfie?! 7 Voir Dire Questions for Older Jurors

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting, A2L Consulting

courtesy Abbey Elaine photography

Recent research[1] reveals that assumptions about the use of technology may be surprising: there's a significant rise in Internet use (from 53% to 59% since 2012) – not by high-schoolers – but by people over 65! "Many seniors face hurdles to adopting new technologies, but once they join the online world, digital technology often becomes an integral part of their daily lives."[2]

Which seniors use technology?

- 3/4 adults over 65 own a cell phone (vs. 90% of adults), an increase from 69% to 77% since 2012.
    - Only 18% had smartphones; most rarely use them for texting or apps, but rather, for the convenience of having a phone handy.
- 3 of 5 have Internet access (compared to 90% of adults)
- However, only 27% of seniors use social networking sites, so don't expect to see grandpa on Facebook (46% of seniors vs. the national average of 73%) or Twitter (only 6% of seniors) any time soon.
- There is a significant drop in technology use after age 75.

Technically, Not All Seniors Were Created Equal

Unsurprisingly, older adults tend to be suspicious of the Internet and the risk of losing privacy, face physical challenges dealing with it, and find learning new technology difficult. Faced with change, they don't readily see the need or usefulness of it. However, once taught, many embrace it, but have to get there first. Many of those who do use the Internet go online daily. Seniors who use social networking sites also claim to socialize more than those who do not. Older women outnumber older men using social networking (52% v. 39%).

YOUNGER (mid-late 60s) **AFFLUENT (Annual household income ≥ $75,000)** **HIGHLY EDUCATED (≥ College degree)**	**OLDER (≥ 75)** **LESS AFFLUENT (<$30,000)** **LESS EDUCATED (No college)** **SERIOUS HEALTH OR DISABILITY ISSUES**
Quite connected to the digital world	Largely disconnected
Own multiple devices	Hardly use technology
Integrated the Internet to daily lives	Not comfortable learning how to use technology on their own
Have positive attitudes toward online life	Don't feel like they are missing out on too much

Who takes "selfies"?'

In the age of documented narcissism and individuals starring in their own imaginary reality shows, those who take selfies are more likely:

- Women than men
- Young (averaging under 26 years old)

Gender Differences

- Men who take selfies tend to be older than women
- Men are more likely to post them on Instagram than women
- Women's poses are more expressive than men's (e.g., 50% higher rate of head tilt)

(For more data on selfies, see SelfieCity's interesting analysis.[3])

New approaches to older jurors

When digital technology was in its pioneering stage, many assumed that it excluded older adults. Nowadays, however, more people age 65 and older are joining the ranks of users, so it behooves you to explore them differently and, as usual, make no assumptions. In voir dire, knowing that older users tend to have other traits relating to education and household income, knowing their Internet use can be a window into other, relevant information about them. In addition, if you check the Internet during voir dire, including social networking sites, don't forget to see if older adults are active. You may be surprised. [4]

What to ask in voir dire?

Instead of skipping over seniors, include them in the inquiry:

1. How often do you go online, if at all?
2. What do you usually use the Internet for, if anything?
3. Do you use any social networking sites such as Facebook?
4. If so, which ones?
5. What type of cell phone do you use, if any?
6. What types of things do you use your cell phone for, if anything?
7. What are your feelings about new technology?

Remember, "None are so old as those who have outlived enthusiasm" (Henry David Thoreau) ... or technology.

[1] Smith, Aaron. Older Adults and Technology Use 4/3/14 at http://www.pewinternet.org/2014/04/03/older-adults-and-technology-use/

[2] Op Cit. Smith, Aaron. 4/3/14.

[3] Investigating the style of self-portraits (selfies) in five cities across the world athttp://selfiecity.net/#selfiexploratory

[4] Selfies for Oldsters: It's Time to Represent. 3/4/2014 at http://seniorplanet.org/selfies-for-oldsters-its-time-to-represent/

12 Astute Tips for Meaningful Mock Trials

by Laurie R. Kuslansky, Ph.D., Jury Consultant

I have led or helped lead over 400 mock trials in the past thirty years. In that time, I have learned what works and what does not. Below, I share twelve of the best lessons that I believe litigators can take from all of my accumulated experience.

1) Don't pull punches on the opposing side.

In mock trials, we often see counsel hone their messages and themes, as well as throw their best ammo at their own side's presentation, but come up short when preparing the case for the opposing side, whether intentionally or unwittingly. The result is a Pyrrhic victory and makes a mockery of the process. If you aren't rigorously testing whether your position stands up to the toughest attacks, what are you actually testing, and how well will that prepare you for the actual trial? In addition, one common request by counsel is for their side to have the last word to stack the odds of winning. Actually, the opposite approach serves counsel better. It is better to mock lose and to understand why than to actually lose. One way to avoid that is to give the other side every advantage, including the last word during presentations.

2) Use balanced litigation graphics for both sides.

Understandably, in an effort to contain cost, as well as their natural desire to make the best case for their client, counsel often creates more and better-aimed litigation graphics for their own side, but may make an anemic attempt, if any, to create punchy graphics to drive home opposing points. Again, this is a disservice to their side, because what comes out of a research exercise is only as good as what goes into it, so if the input is skewed favorably, a favorable result is unreliable.

3) Less is more – 2-3 hour presentations leave less time to gather feedback and overload participants

Considering that an actual trial is typically years in the making, entails thousands of pages of testimony or hours of videotaped depositions in discovery, and may last several days, weeks or even months, it is challenging and frustrating for counsel to leave anything out of the mock presentations. There are several problems in doing so:

- Telling is not teaching and teaching is not learning, so dumping information on mock jurors' (or actual jurors') heads lacks strategy and is likely to have diminishing returns;
- Everyone has limits in attention and memory, so the more you tell, the less will be noticed and remembered;
- The more that is said, the more likely it is to be misquoted;
- There are realistic time limits to mock trials that balance format with cost, so there isn't an unlimited amount of time for presentations;
- Most mock jurors glaze over after about 35 minutes, so what difference does it make if you keep talking, but they stop listening?

A tightly constructed presentation with appropriate litigation graphics to punctuate key points respects the audience better and has more promise of driving home what needs to be tested. Actual post-trial interviews of actual jurors show that only certain key points were memorable.

4) Rehearse in advance.

The only way to actually know how long and how well a presentation runs is to do it. Paper is not reality, so while something may work well on paper, it may not work as well in 3D. It may also take a lot longer, or the segues may not flow, or the details may come off as tedious when presented in person, as opposed to listed on the page. In addition, if there is any confusion as to what should be shown when using a computer-based presentation, the operator and presenter need to coordinate their cues and timing, rather than to waste precious time learning that there is a miscue, or a document is missing, or the video is too long and the like. In addition, reading a script verbatim is a good sleeping pill but doesn't make for a presentation that will garner attention. If the presentations go longer than expected because they weren't properly tested and edited, the lost time will come from somewhere else in the schedule, such as the critical mock deliberations time. Last, but not least, if a client attends the research and/or observes the video of the presentations, and they aren't smooth, it does not show the participating lawyers in their best light.

5) Have a professional handle the technology for computer-based presentations so that visuals and video clips appear on cue.

There is a video of trial technicians working in the hot seat here.

6) Keep video clips of witnesses short – it doesn't take long to form an impression and there isn't enough time to show entire depositions for feedback on substance. Its purpose is to evaluate form.

According to Carol Ginsey Goman, who has studied and written about nonverbal behavior and communication, researchers from NYU found that we make 11 major decisions about one another in the first seven seconds of meeting. The human brain is hardwired in this way as a prehistoric survival mechanism. First impressions are more heavily influenced by nonverbal cues than verbal cues. In fact, studies have found that nonverbal cues have more than four times the impact on the impression you make than anything you say.

According to Daniel Goleman, author of *Emotional Intelligence* (1996), "brain circuitry allows a by-passing of the neo-cortex by way of the so-called amygdala hijack: 'this smaller and shorter pathway allows the amygdala to receive some direct inputs from the senses and start a response before they are fully registered by the neo-cortex'" (p.18). In just a few *milliseconds* of perceiving something, we not only unconsciously comprehend what it is, but decide whether we like it or not.

Given these findings, there is no reason to present lengthy clips to learn what first impressions witnesses make. A few minutes of video will suffice for mock jurors to form first impressions, largely based on appearance, body language and nonverbal behavior. If more than that is desired, e.g., how people react to the content of the witness's responses, it is more efficient for the presenter to summarize the substantive points, present them visually based on the transcript, or use multiple days to present them on tape, assuming the additional expense is acceptable.

7) Test your worst-case assumptions, not your best.

To determine if someone has diabetes, how meaningful would a glucose tolerance test be without glucose? Not at all. Yet we often see something similar attempted in the draft presentations and discussions leading to mock trials, which exclude the poison pills of the opposing case. Counsel squirms at the notion that we are giving the adversary an unfair advantage, prefer not to assume the worst about rulings on motions in limine, and wish to hide or shield areas of vulnerability. We understand why – they can't take off their competitive adversarial hat. However, jury research is a different animal for a different purpose – not to win, but to test. To have a meaningful test means we must put our side through the paces of vigorous attack. Otherwise, the test is meaningless.

8) Don't have a novice play the opponent and an ace play your side.

It is a waste of time or worse to stack the deck by having a seasoned litigator who is intimately familiar with the case and has his or her heart and mind invested in the case present for the client at a mock against an associate who has far less experience in front of juries and is less familiar with the nuances of the issues. The result may be the result of a "presenter effect," not the evidence and issues, yielding findings that are not instructive for if or how to try the actual case. If the purpose of the research is to compare presenters, there

are other ways to do so properly – e.g., have different presenters present the same material to comparable audiences.

9) Don't have witnesses testify live at the mock.

There are a myriad of reasons not to have live witnesses at research:

- Research is not meant to be live theater. Time limits tend to be tight and must be kept to stay on track and leave enough time for the mock deliberations and other forms of data collection. If done live, there is no guarantee that the Q&A won't go over time;
- If scripted to control the content and timing, it looks like what it is,a canned presentation, garnering less attention and decreasing the ratings of the performance rather than forming a true read of the witness;
- It opens up the witness under deposition or cross examination to discovery issues as to his or her past participation at a mock trial;
- The witness will reach his or her own conclusions about the meaning and implications of the research, reducing counsel's control over trial preparation;
- If unscripted, the answers may go somewhere that counsel does not want;
- It blows your cover in jurors' eyes as to which side is sponsoring the research, since live witnesses won't be testifying for the adversary. If using actors to cover that, it is never the same as the real thing, creating an unwanted imbalance.

10) Consider who should and should not attend. Once a client or witness observes the research, they may reach their own – erroneous – conclusions.

You can't put the cat back in the bag. Once someone has observed a mock research on a case, there is no way to control their takeaways, whether correct or incorrect. If they may testify, it also opens them up on discovery of that fact. Inevitably, they will fixate on the results (We won!), or on isolated points that stood out in the moment, but had no statistical or general importance when taken in context.

11) Focus on the process of mock jurors' decision-making, not the result.

Invariably at mock jury research, we see someone dash into the hallway and call the client to report the results hot off the press ("They awarded $100 million!" "We lost 2 of the 3 groups." "They hated our CEO." "The email was a smoking gun that sank us.") We understand why they do this, but it's like going to the Mayo Clinic for a battery of tests and reporting the results of one test to decide the diagnosis, ignoring all the other results. It's likely to be faulty. What has proven reliable for decades of well-done research is the decision-making path, not the actual results. In other words, while one cannot typically predict the final result (win or lose), what seems consistent is what matters to both mock and

actual jurors, such as: What ultimately caused favorable vs. unfavorable reactions to the majority? What was confusing? What information was lacking? Why? What angered them? What backfired? What themes stuck? How did multiple jurors refer to the key points in their own language? It would take many more mock jurors than is typically feasible financially to make generalizations based on the results rather than process. If a new drug were tested on 36 people and no one died, would you take it or would you wait till thousands took it without adverse effects?

12) Avoid assuming which types of jurors are bad based on one or two that stand out in mock deliberations.

Imagine you host a small dinner party and one of the five guests is obnoxious. They ruin the whole night. They happen to be male, a part-time actor/waiter, short, with curly hair. Which of those facts ruined the party? Would all short, male actor/waiters with curly hair be obnoxious and ruin your party? The fact is that we don't know. However, it is very common to react strongly when observing an individual expressing strongly adverse opinions during the mock deliberations and brand anyone like them as bad for your case. The problem is that you don't know what it is about that person, if anything, that is the root of the negative responses (is it because they are uneducated? Is it because they had a bad related experience? Is it unique and not a pattern of similar people?). Until you have enough people representing different traits and a statistically significant pattern emerges, these rushes to judgment are often misleading and unreliable. Instead, wait till the actual analyses are done that show the factors that more accurately describe adverse traits. You may be surprised that they have nothing to do with what someone assumed about one or two hostile individuals.

Hurry Up and Wait - Using Silence in Depositions, Voir Dire and More

Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting, A2L Consulting

When are you most likely to get the best information?

When you say nothing at all.

We frequently notice that — just as a deponent, as an afterthought, is about to drop good information — he or she is interrupted by an unaware, impatient questioner jumping to a new question. It is in that magic moment when one is pensive and a truth is about to be revealed that somebody invariably steps on it and loses the moment.
However, *thinking* (e.g., remembering facts and engaging in cognitive processing of the information, synthesizing it, reflecting on it and drawing inferences) takes time.

Some refer to the critical pause after asking a question or after getting a response as "Golden Silence" (Miller Heiman Conceptual Selling®)[1], described as:

"… a technique where the salesperson asks a question and then allows three or four seconds of silence afterwards. Through its extensive research and experience, Miller Heiman learned that when faced with a Golden Silence, buyers will often open up and share an insight that helps both the buyer and the seller get a better grasp on the buyer's needs. Often, this leads to another question (based on the insight) followed by more silence and more insights. In this manner, salespeople are able to guide a meaningful, in-depth, and on-topic discussion that leads to a win-win where the customer's actual needs are met through a solution, not just through a product."[2]

Others (particularly in educational research) call it "wait-time." [3] Increasing the typical wait time of 1 second to 3-7 seconds (after asking a question or after receiving an answer before speaking again) has significant benefits: the length of responses can increase between 300% and 700% or more![4] In addition, instead of short phrases that rarely involve explanations of any complexity, pausing for 3 seconds or more tends to yield more elaborate, detailed responses.

So, the next time you ask a question or get an answer, the best thing you can do may very well be … nothing. Let silence do the heavy lifting.

[1] http://www.millerheiman.com/Our-Clients/Case_Studies/Case_Study/

[2] *Ibid.*

[3] Rowe, Mary Budd. "*Wait Time: Slowing Down May Be a Way of Speeding Up.*" AMERICAN EDUCATOR 11 (Spring 1987): 38-43, 47. EJ 351 827
at http://www.sagepub.com/eis2study/articles/Budd%20Rowe.pdf

[4] *Ibid.*

Why Do I Need A Mock Trial If There Is No Real Voir Dire?

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting, A2L Consulting

Answer: So you can learn the best story for the worst jury.

Have you ever gotten to your seat on an airplane and, without speaking to anyone, seen who was next to you and thought, “This is gonna be trouble!”? Or boarded a train and decided to keep walking before choosing your seat? Of course you have. And that’s because there is a wealth of information that we, as humans, gather instinctively and automatically all the time.

We observe a myriad of valuable information before any questions are asked out loud, such as:

- How does someone look?
- Are they attractive?
- Are they neat or sloppy?
- Do they appear dressed appropriately for court?
- Are they flamboyant or conservative?
- Did they show up on time?
- Are they chatting with neighbors or reading a book?
- Are they using Kindle or reading People magazine?
- Are they fidgeting?
- Are they asking someone questions?
- Did they drop everything on the floor?
- Are they limping on the way to their seat?
- Are they having problems seeing or hearing?
- Did they complete the jury summons form correctly?
- According to the form, where do they live and work? Do they have children and where do they work? How’s their spelling and punctuation on the form?
- Are they speaking too loudly?
- Are they laughing and acting like they’re on stage?
- Do they have photos on their Facebook profile for the entire world to see?

- Are they on LinkedIn or on Plenty of Fish?

If you can answer these questions, you know most of what you need to know to make important jury-selection choices – but only if you know how best to use this information, i.e., what are the personality traits that may indicate adverse jurors, who are unlikely to favor your client and your view of damages. So, the real issue isn't whether you can control voir dire, but what to do with the information that you *can* glean with your ears and eyes (and maybe a few keystrokes on a laptop).

For an amusing read on what merely seeing how someone dresses can tell you, for example, see http://lamasatonline.net/en/psychology-of-clothing

What does "no real voir dire" mean?

There are several typical scenarios for voir dire:

1) Counsel has almost unlimited ability to directly ask prospective jurors questions

2) Counsel can use an extensive written jury questionnaire

3) Counsel can ask a few questions directly

4) Counsel can only ask a few follow-up questions

5) The judge or clerk conducts an extensive or abbreviated voir dire and accept a few proposed questions from counsel or not

6) There is a liberal or draconian policy about letting people off for claimed hardships.

7) Cause is construed very narrowly or broadly by the Court.

8) The judge or clerk conducts voir dire just looking for a pulse and accept everyone who does.

In each of these scenarios, you will be permitted unlimited strikes for cause that the judge accepts and limited (usually 3 per side) peremptory strikes. The key is to fight to use cause strikes against harmful biases and exercise your peremptory strikes against true enemies and not inadvertently strike potentially good jurors or mildly bad ones in favor of worse ones. The question is: how do you know which ones they are? It isn't because you can't get relevant information about them because you didn't get to ask, but because you need a reliable blueprint for what makes a potentially bad juror for your case, or you risk striking blindly.

"The only thing worse than being blind is having sight but no vision." (Helen Keller)

Jury research is one of the only ways to avoid that by informing your vision. In particular, several critical outcomes emerge from properly conducted jury research which can provide counsel with night vision goggles, so that even if you operate largely in the dark at voir dire, you are armed with:

1) A thematic story of your case that works best for most jurors – good and bad alike;

2) A list of statistically significant traits, attitudes and experiences that jurors most adverse to your case seem to share.

3) A clear sense of the issues, facts, evidence and arguments that detractors reject in your case and why, as well as how to overcome them (e.g., What they'd need to hear or see to accept your position, which reasoning or argument turned them off and how you can modify it, and the like).

4) Knowledge about what was misunderstood, distorted or unclear, and what you need to do about educating before you advocate.

"No voir dire" is a myth. It's that simple. It is only a short-sighted, narrow view of voir dire that permits the belief that, just because counsel doesn't ask the questions or there isn't an extensive opportunity to make inquiry of prospective jurors, that it is an all-or-nothing proposition when it is not.

In our daily lives, without interrogating strangers, we make judgment calls all the time about who seems dangerous, who seems friendly, and many other "attributions." That is, we can draw inferences about other people without asking them a single question. It is ingrained and a matter of survival. The key to doing so effectively in court is to be a skilled observer, knowing what you are looking for and looking out for, and avoiding what is called the "fundamental attribution error" (Lee D. Ross), which is attributing causes for observed traits to internal factors (such as personality characteristics) rather than to external, situational variables (such as how the setting may alter a person's behavior, dress and mannerisms). Consider how the setting may itself be altering prospective jurors' natural tendencies, if at all.

What is interesting and useful in the courtroom setting is that the situational variables (an unusually authoritarian, formal setting to most prospective jurors) and how people react to it is, in and of itself, critical information to consider in limited voir dire situations insofar as one can see, for example, how people dress for court. If they are wearing a running suit or a business suit speaks volumes, and if they are doing so because they hope to get out of being picked and going straight to work – whether as a gym instructor or financial analyst – you are likely to know and draw the proper inferences about them. If someone is tardy or punctual is itself a marker of behavior that people draw inferences about everywhere else in life, so why not in the courtroom?

In brief, jury research is more important than ever when you will be making important decisions based on limited information and the information you get matters, but only reliable data can tell you how.

11 Problems with Mock Trials and How to Avoid Them

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting, A2L Consulting

A mock trial is one of the most sensible things a trial team can do as part of their trial preparation. Not only does a mock trial inform the trial team about how real jurors or a real judge will react to the fundamentals of the case, but it also helps narrow the scope of the evidence and arguments to use. If the research is done before the close of discovery, it can inform the key messages to assert or defend, the type of experts to retain, and the expert testimony that is sought or backfires. It can also inform the trial team if the case is a no-go when all arguments fail or the damages tend to be greatly higher against the defense or lower for the plaintiff(s) than expected. We have seen the results inform clients about dedicating additional resources to support counsel when the client underestimates what is needed to prevail.

In short, there are few pre-trial preparations one can conduct that have a higher return on investment than a mock trial. However, if you fail to avoid some very common mistakes, you are not using your time or your client's money as effectively as you otherwise could.

Below are 11 problems with mock trials and how to avoid them.

1. **Winning.** You want to win for your side instead of actually testing your side's strengths and weaknesses.

2. **Show Me – Don't Tell Me.** It is well established that most jurors prefer visual evidence and all modern trials use it. If you test a case without visuals, it's a bit like going to the movies with a blindfold on and trying to understand the story. You will understand some of it, but there is a lot you won't understand. Plus, the extra time invested in creating graphics pays for itself over and over in time efficiency and it is work you'll use at trial anyway. Often, when it comes to creating a core set of graphics to show and tell your case, it forces you to focus on what is truly most important and what needs you to educate before you advocate. *See Testing Graphics in a Mock Trial*.

3. **Stacking the Deck.** You provide graphics for your client, but not your adversary, so you tilt the results. Related to the first item and surprisingly common, if anything, you should work to stack the deck against yourself. It is better to mock lose than to mock win so you learn as much as possible to remedy while there's still time.

4. **Denial.** You omit worrisome evidence. Often, trial counsel will leave out troubling evidence in a mock for a variety of reasons – some quite legitimate. However, you are better off knowing ten ways you might lose rather than one way you might win.

5. **Verdict on Liability.** You use the results to predict the actual outcome on liability and damages. The reason to conduct a mock is not to predict what will happen -- although some analysis of that is inevitable and useful. Instead, use the mock to learn what works and what does not. Use the mock to gain language tools and learn

subjects that require graphics tutorials that you can use at trial. If it helps to call someone a serial liar during the mock, you know you can do it at trial and it will help. If it boomerangs, better to know in advance.

6. **Buck to the Future.** You use the results to predict the likely damages. It is unlikely that the economics permit such a large sample size that you can rely on the statistical results for predicting actual damages. Instead, you can learn the facts and arguments that fuel higher damages and ones which tend to mitigate damages and adjust for trial accordingly.

7. **Goliath vs. Some Other Guy.** The best and most experienced person presents for your side and someone unequal to the task presents for the other side. No wonder you won, but what is that worth? Instead, make it an uphill battle. Put your 1st chair on your opponent's side whenever possible. We understand that clients often want to see their advocate argue for their side, whether as a trial run or to put their best foot forward, but in the end, it can be a huge disservice.

8. **Chronology vs. Story.** You try to cover too many details rather than creating a compelling story to test. Rattling off what happened is not telling a narrative. Use it as a foundation to tell the highlights in your story. It's the spine, but not the body. *See A2L's Storytelling in Litigation Webinar*.

9. **Home is Where the House is.** If you don't do the mock trial in the actual trial venue, it is hard to know how the real jury pool will react and what they might be sensitive to as local issues that can impact their perception of the parties and the case. Clients may be over-sensitive to the risks of local research. If there are local rules against it (e.g., as in the E.D. Texas) or the pool truly is tiny, that's a valid reason. If not, there are native sensibilities that are important, but will be missed if a matched venue is used.

10. **Cast of Characters**. Without explaining who witnesses are when citing their testimony (e.g., the credentials of expert witnesses or the roles of fact ones), their testimony is flat. Instead, make a visual glossary of key players. If their positions are pertinent, include an organizational chart. If their credentials are important, present their CV visually.

11. **Set Client Expectations.** Mock trials are best if you lose so that you learn challenges to overcome, but if your client loses confidence in the trial team for mock losing, then what? Instead, explain to your client up front that you are going to make it a challenge to win this so we can learn how best to fight this case by testing the worst-case scenario. The more criticism we hear from jurors, the better.

It is better to fix the problems in the case than for the mock to be fixed.

Jury Selection Experts . . . True or False?

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting, A2L Consulting

Ever take a medical test that came back negative, but your doctor said they *still* think you have whatever it tested for, anyway? Or have you ever had a lot of symptoms that seem to fit one diagnosis, but your doctor said you don't have it? And, in both instances, did they turn out to be right? If so, they're probably doctors you'd rely on again, because they represent the best of combining the art *and* science of their profession. Theory only goes so far. "Objective" tests have a margin of error. "Statistics" are not fool-proof. Everyone, after all, really is an individual.

The same principles apply to "experts" in jury selection. Some may be well trained in statistics and able to yield a jury profile on paper with probabilities of negative juror traits, but don't have the skills to apply them in the real world once they leave the lab. Others may be students of human behavior, but ill-armed when it comes to data and uninformed as to how the facts actually play out in a certain venue and case. Some have neither. It is the rare person who has both.

The word "expert" has been bandied about for over a century, if not more. It stems from the Latin word "expertus," the past participle of a word that means "try." There is no doubt that many people who tout themselves as Jury Selection Experts "try." However, you need to be able to rely on people who succeed, not just try. How to tell them apart?

Nowadays, an "expert" is defined (by the Oxford English dictionary) as "a person who has a comprehensive and authoritative knowledge of or skill in a particular area." As an adjective, Merriam Webster defines it as "having or showing special skill or knowledge because of what you have been taught or what you have experienced." That's a far cry from just trying to be knowledgeable.

In order to assess the skills and contributions a jury selection "expert" can bring, the following are worthwhile to explore:

1. Get their credentials and evaluate whether they can bring both solid theory, facts and data analysis together with good boots-on-ground know-how to the task;
2. Ask questions about their experience – not so much in the venue – but in the professional application of their skills in actual jury selections, regardless of venue;
3. Definitely speak with their references to learn if and how they made a difference – or not in a real-life situation;
4. Pose different scenarios to them (what happens if there's a written jury questionnaire, judge-conducted voir dire, etc.?)

5. Ask about the mechanics of how they operate so it fits with your needs and the situation;
6. Remember, experience is part of what defines an expert, so question their experience with cases and clients as those involved in your case;
7. How well do they understand the relationship of how different themes influence the decision about who's good or bad on the jury?
8. How quickly can they think on their feet? That is, what if the judge makes a ruling on the spot that impacts jury selection?
9. Find out what they look for when assisting with jury selection.
10. Ask why they see themselves as an expert, or if not, why not?

No Advice is Better Than Bad Advice in Litigation

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting, A2L Consulting

Often, celebrities and other litigants have entourages, a circle of advisors, and all kinds of ties with other people, so it is understandable that they will turn to them for advice when engaged in legal battles. The problem is that often those people have little to no experience or expertise dealing with this arena, but are chock full of advice, are motivated to jockey for attention and control, know which buttons to press with their friend/client to gain their consent for a course of action, but have trouble admitting they need help, may feel threatened to do so, and thus, misguide the litigant. We have seen this phenomenon many times with the same result . . . bad.

In an infamous criminal trial of a famous football star, the best and brightest jury consultants, armed by lots of good data, advised the prosecution and provided a solid and reliable trial strategy based on decades of experience plus case-specific mock-trial testing. Was it accepted? No. What was? The advice of a psychiatrist neighbor with no such expertise, prior (different) experience, and personal opinion. Result? Bad.

In a lesser known matter, a bookworm-style intellectual property attorney with no jury trial experience turned away mock-jury testing and the expertise of a jury consultant. He concluded they were outside his normal comfort zone of operating, and instead, replaced them with the advice of someone who saw things “his” way – i.e., ignored how real people decide these cases and what they cannot understand or use as evidence because they lack the cognitive ability, interest, or motivation to do so, and relied on dry, tedious, technical information and a deep understanding of the guiding legal principles to guide the jury’s decisions – which as warned and predicted all failed at trial. Result? Bad.

A well-known movie producer had a number of people hanging on to his coattails, enjoying the reflected glory of being in his inner circle. A new group of wannabes wanted to garner his attention and become his new entourage, replacing his old one. How? By claiming the others were mismanaging his business and that his best friend and financial supporter cheated him out of money. They knew that a great way to attract the attention of an artist is to alert them to the notion that they are being cheated out of money. And so, to no good avail, the producer sued his best friend. Result? You guessed it.

If your best friend was a dentist, and you had heart problems, you might ask your friend for a referral, but would you take their advice over a well-regarded cardiologist?! Of course not, but we see this pattern in litigation all the time. When heeding someone’s advice, make sure

they are coaching you or your client based on more than your relationship, but on information, experience and expertise. If not, you may as well treat your heart with a dentist.

A Clash of Two Communication Worlds: Lawyers vs. Jurors

by Laurie R. Kuslansky, Ph.D., Managing Director, Trial & Jury Consulting, A2L Consulting

Traits descriptive of many lawyers are at cross purposes with traits of the general public serving on juries, worsened by decreased trust in lawyers and their clients.

Introversion and Intuition vs. Extroversion and Sensing

Extensive research has shown that the majority of lawyers prefer **Introversion and Intuition** vs. the majority of non-lawyer adults, who prefer **Extroversion and Sensing** (explained more fully below), and that lawyers tend *not to be as interpersonally oriented* as the general public.[1]

To understand this dichotomy better, below you will find research and findings that show how the mindset and personalities of lawyers and jurors differ to help make litigators more aware of their audience and work toward bridging the gap when it serves them to do so.

For example, The Myers-Briggs Type Indicators test determines people's personality along 4 dimensions:

1. Extroversion ("E") v. Introversion ("N")

2. Sensing ("S") v. Intuitive ("I")

Sensing: making decisions using a sequential, detailed process using facts and logic from the input of our 5 senses, what is present, history, experience, and what is useful;

Intuitive: using a global process using emotions and constructing patterns placed on that input; enjoy theorizing on possibilities and what is intriguing or different.

3. Thinking ("T") v. Feeling ("F")

Thinking: making decisions impersonally based on logic and what works

Feeling: using personal values and impact on others, seeking interpersonal harmony.

Note: Strong thinkers judge strong feelers as wishy-washy and soft-hearted; feelers deem thinkers as cold blooded.

4. Judging ("J") v. Perceiving "(P")

Judging: organized who like to resolve ambiguities task-completers

Perceiving: flexible types who prefer taking information in, starting projects, but not completing them, who prefer keeping options open.

Various practitioners have culled the results into personality types in different ways. A

popular, streamlined approach was created by psychologist David Kiersey, yielding 4 "temperaments":[2]

1) **Guardians** ("SJ" Sense/Judgers) talent at managing goods and services, keep things running smoothly.

Key traits: dependable, loyal, hard-working, cautious, traditional and want justice; – needs group membership and responsibility; value stability, security, community; trust hierarchy and authority. Pay attention to detail. They are "pillars of the community" (Shaub)

2) **Rationals** ("NT" Introverted Thinkers) rational, analytical problem solvers.

Key traits: pragmatic, skeptical, self-contained, even-tempered, trust logic, yearn for achievement, prize technology, value expertise and precision in language; tend to be impersonal.

3) **Idealists** ("NF" Introverted/Feelers) On a spiritual journey for self-knowledge and self-improvement, helping and inspiring others.

Key traits: enthusiastic, trust their intuition, giving, trusting and prize romance and kindheartedness. Need a sense of purpose and meaning working toward a greater good. They value unity, self-actualization and authenticity, prefer cooperative interactions w/focus on ethics and morality. **NF Idealists comprise 31.4 % of female litigators vs. 13.3% of males.**[3]

4) **Artisans** ("SP" Sensory Perceivers) excel in the arts and value aesthetics.

Key traits: fun-loving, optimistic, focused on the here and now, unconventional, bold, spontaneous, excitable, trust their impulses, want to make a splash, seek stimulation, prize freedom. Like seeing results from action. Their learning style is concrete, random and experiential.

To learn your own temperament for free, you can take The Keirsey™ Temperament Sorter at http://www.keirsey.com/sorter/personal_page.aspx.

A snapshot of the American public's opinions: not a pretty picture.

- **The public's perceptions of lawyers:** They aren't trusted and hold too much sway on things political:
    - Who has too much power and influence in Washington, D.C.? [4]
        - PACs (88%)
        - Big companies (86%)
        - Political lobbyists (85%)
        - Banks and financial institutions (81%)
        - News media (73%)

- Drum roll… **Trial lawyers** (62%)

- **Trust**
  - 68% of 1,002 U.S. adults reported that they would not trust lawyers when asked: "Would you generally trust each of the following types of people to tell the truth, or not?"[5] If roughly 7 of 10 people distrust lawyers in the public, then on a typical civil jury of 8-10, only 2 or 3 jurors per panel are *not* jaundiced toward counsel.

- **Honesty and ethical standards**
  - Only 20% rate lawyers as high or very high on honesty and ethical standards (compared to 82% for nurses and 70% for pharmacists and grade-school teachers)[6]
    - Who trust lawyers less?
      - Republicans
      - People aged 55 and over

- **Trust** has declined in 18 of 19 major industries in 2013:[7]
  - 42% of 2,250 U.S. adults polled in 2013 said they trusted none of the major industries.
  - The *least* trusted industries? Tobacco and oil companies.
  - The greatest decline in trust? Banks and packaged food companies.
- **Contribution** to society[8]
  - Among 10 occupations surveyed by Pew, lawyers are at the bottom of the list. Only 18% said that lawyers contribute a lot to society; 1/3 said that lawyers contribute not very much or nothing at all.
- **Alienation** toward the government and corporate America is on the rise:[9]
  - 80% of 2,368 U.S. adults polled in 2013 said the rich are getting richer and the poor are getting poorer.
  - The less educated the person, the more alienated they are.
  - Alienation increases as annual household income decreases, especially under $50,000
- Who's **not very happy** now in America?[10] Two out of three U.S. adults, especially:

- Disabled
- Minorities
- Recent college graduates
- Political Independents

- The very happy?
  - Only 1/3, the fewest being Hispanics
  - Slightly more women than men
  - People age 50 or older

A snapshot of lawyers: Brace yourself

- Corporate/business/commercial lawyers tend to have an “SJ Guardian” temperament.
- The “Rational temperament (NT)” dominates the litigation practice area and is higher in the legal profession than in the general population.[11]
  - In the practice of law, generally, the NT temperament comprises 41.2 % of the total.
  - When combined with the SJ Guardian, these two temperaments account for 76.2% of the total (NF's are at 14.7% and SP's are at 9.7%).[12]

The findings show that the practice of law draws and nurtures a high percentage of people who preferorder over spontaneity; intellectual challenge over sensuality; maintenance of institutions over change, and pure logic over diplomacy.

Research also indicates a consistent pattern in childhood of personality traits for lawyers:[13]

- Highly focused on academics
- Greater need for dominance, leadership and attention
- Prefer initiating activity
- Emphasis on reading
- Have dominant fathers

Concern for emotional suffering and for the feelings of others tended to be less emphasized in the childhood homes of eventual lawyers than in those of dental or social work students.[14]

In contrast, the personality type with the highest law-school drop-out rate (28.1%) and least common in the practice of law (2.7%) is characterized as *mainly concerned with people*, valuing harmonious human contacts, being friendly, tactful, sympathetic and loyal, enjoying approval and bothered by indifference (known as "ESFJ" based on Myers-Briggs Type Indicator research).[15]

What does it all mean?

Assume nothing, including what jurors will or won't like about you. We encounter brilliant litigators all the time who make cogent, rational, fact-based, legally-driven arguments . . . that fall flat. Such arguments tend to be 2-dimensional, missing the critical third dimension of the human interest story, the personal impact on those involved and on the jury. Without the third dimension relying more on interpersonal skills, the lawyers end up largely arguing to themselves and persuading no one else, or as some say, are "drunk on their own wine." Like writing an original novel that is kept in the nightstand, a case presentation that has no audience has questionable value.

Start by finding out where you fall along these dimensions so you know what separates you from relating better to jurors, if anything. As Oscar Wilde said, "To love oneself is the beginning of a lifelong romance." Understand the strengths of your native personality, and take inventory of aspects that might work against you in court, considering the snapshot of the American public and its preferences, distrusts and beliefs. Some of them will likely end up on your jury and you need them on your side.

Change is difficult, if not impossible for some. As the research indicates, in fact, lawyers particularly prefer to maintain institutions as they are, rather than seek change, which may sound odd, considering that you may assume you do seek change by virtue of your practice. Nevertheless, the change at issue here is not outside in the world, but internal. No doubt, many litigators have the gifts of charm and are greatly skilled interpersonally. If you are one of them: Mazel Tov. If not, remember that just one change can have ripple effects and returns that multiply, so keep reading:

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Useful Directory of Peer-Approved Legal Consultants and Vendors

by Ken Lopez, Founder/CEO, A2L Consulting

Yesterday, *Legal Times* released its annual directory of top legal consultants and vendors, The Best of *Legal Times* Reader Rankings 2014. While this reader-generated list focuses on Washington, DC, most of the categories have national relevance. In fact, most winning firms, like ours, are national firms who win similar accolades from *Legal Times*' sister publication, *The National Law Journal*.

600 firms were in the running for the various categories that include everything from jury consultants to litigation financiers to law firm web design to expert witness providers and much more. I'm very pleased to share the news that **A2L Consulting, was voted #1 or #2** in all three of our core service areas. Click the green button at the end of this article to download your free copy of this useful directory.

***Legal Times* readers voted A2L Consulting:**

- **#1 Demonstrative Evidence (Litigation Graphics) Provider**
- **#2 Trial Consultants (Courtroom Trial Technicians)**
- **#2 Jury Consultants**

Legal Times appears to go to great lengths to ensure that only lawyers, paralegals and other members of the legal community are allowed to cast a vote. Legal vendor votes are not counted and neither are votes coming from non-work addresses like Gmail and Hotmail. Thus, this directory is quite valuable since each highly ranked firm is genuinely peer-approved.

In January, the *National Law Journal* will open its annual survey for voting. I hope that you will vote in this and other similar polls. Doing so helps highlight firms who are best-of-breed and elevates the performance of the entire legal industry.

Are You Smarter Than a Soap Opera Writer?

by Laurie R. Kuslansky, Ph.D, Expert Jury Consultant, A2L Consulting

Believe it or not, soap opera writers are better at storytelling than some litigators. Why? Not because of their subject matter or their wisdom, but because they know how to activate more of the brain than some lawyers. They put events into a story context, and they know how to use language to activate the brain better. If they can do it, so can you. Why is that important?

Raymond Mar, a psychologist at York University in Canada, performed an analysis of 86 brain imaging studies, published last year in the Annual Review of Psychology, and concluded that there was substantial overlap in the brain networks used to understand stories and the networks used to navigate interactions with other individuals — in particular, interactions in which we're trying to figure out the thoughts and feelings of others. Scientists call this capacity of the brain to construct a map of other people's intentions "theory of mind." **Narratives offer a unique opportunity to engage this capacity, as we identify with characters' longings and frustrations, guess at their hidden motives and track their encounters with friends and enemies, neighbors and lovers**. [1] [Emphasis added]

But where is the "story" in a complex patent?

Where's the emotion in tedious insurance language?

The answer is that if people are involved, there is *always* a story, including emotion, social interaction, sensory experiences and more – but they are usually left on the cutting-room floor in favor of dry facts and figures. This actually turns off the brain, rather than bringing it into action. Reciting facts using only factual words is like wrapping a gift of cardboard in a brown paper bag. Not very exciting or memorable, is it?

We understand why some litigators resist simplifying and looking for the "story." For one, they know too much and can't unlearn what they know in order to simplify. They are also concerned about oversimplifying to the point of inaccuracy. In a jury trial, they also must present to a diverse audience with conflicting needs: the judge and the record on one side and the jury on the other. There are also experts to satisfy who earn their keep by the details they can dispute and the hairs they can split – the more, the better. The less understandable their charts, the more diligence they may think they show, bolstering their expertise and justifying their high rate of pay. Finally, some trial lawyers may think that telling just the facts -- rather than telling the story -- is more powerful and credible.

Unfortunately, science disagrees.

Brain scans have revealed that just the facts, absent sensory language, only stimulate the language areas of the brain, and that hackneyed metaphors are processed as mere words by the frontal cortex.

Employing stories that incorporate metaphors and sensory experience activates the whole brain. It actually stimulates the same areas of the brains of the audience as the original action does (e.g., the olfactory cortex when hearing descriptive words involving smell such as lavender and cinnamon or the motor cortex when hearing about movement). Of course the facts matter, but the adjectives, the motives, the cause and effect, and the reasons jurors should feel, remember and care, matter too.

There's always a story, but if you don't tell yours, jurors will use their own.

Humans automatically make stories out of virtually all life events in order to make sense of them. Random events are given meaning through personal interpretation because we crave an explanation for the cause and effect of life. It gives us a sense of control, even if it's false. If you don't provide your version of the story, jurors will create their own narrative anyway, so it's better for you to exercise more control over the story than to leave it to amateurs and detractors.

How can you make the case into a story? It is easier than you may think. For one, make it priority one. We often find that lawyers overlook this task, or worse, resist it. Instead of merely tracking the facts, ask questions in terms of human behavior, not just the law or the chronology, such as:

"What *really* happened here on both sides?"

"Why did they do that?"

"What were they thinking and feeling?"

"What did they know or not?"

"What were their options and choices?"

"What were they each trying to accomplish?"

"Why did they succeed or fail?"

"How did that affect everyone involved?"

"Who tried to correct it? Did it work? Why or why not?"

"How did the story end? Who won or lost?"

"What caused the problem to become a lawsuit?"

"What would make it right?"

"Why is that fair?"

"Why should anyone *care* about what happened?"

But this is just the beginning of the process, not the end. After you've figured out "what *really* happened," you need to breathe life into it. You need to put jurors in the shoes of your client – from the beginning -- so they can experience what your client did, understand the client's dilemmas, feel the client's frustrations, and align with the client's decisions – in human terms, not legal ones. And you need to tell it using the art and the science of effective description and compelling storytelling.

1. The simpler the story, the better.
2. The simpler the language, the better.
3. Use metaphors involving sensory descriptions (e.g., prickly personality, velvet voice, leathery hands, etc.).
4. Reduce the facts to a story connecting to jurors' real-life experiences, feelings and thoughts. Make it relate to what jurors may have experienced.
5. Assume jurors have no context for the facts unless you provide one.
6. Remember how long it took you to wrap your head around the case, whereas jurors have only a few days, so don't start in the middle or the end.
7. Use word pictures, including visual and sensory details of important moments, and have witnesses do the same, for example:

Q: Why did that email in particular stand out to you?

COMPARE:

A: "Because the subject was in all caps."

TO:

A: "Because when that email came in, it was very early in the morning. I was groggy and drinking my second cup of black coffee, while I was pressing the down arrow key on my computer to quickly see my new emails. That email stood out when I was scrolling through my inbox because the subject was the only one all in capital letters, so it caught my attention."

8. After jury selection, when you know more about jurors' individual backgrounds, refine your story to connect better with them.

Don't only use your brain, but jurors' brains too. Activate their senses, their feelings, their thoughts, and their social experience. Take the extra step, while sipping on warm green tea or frothy cappuccino, to choose more descriptive words. Wear a comfy, plush robe or close your eyes in the breeze to figure out the story, but do it.

[1] Your Brain on Fiction by Annie Murphy Paul, Published: March 17, 2012 in the NY Times.http://www.nytimes.com/2012/03/18/opinion/sunday/the-neuroscience-of-your-brain-on-fiction.html?pagewanted=all&_r=0

21 Ingenious Ways to Research Your Judge

by Ken Lopez, Founder/CEO, A2L Consulting

For small town attorneys, it is possible to get to know a local judge quite well. Not only do you spend time in front of the local judges frequently, but you very likely see them socially as well.

Most of our clients, though, work in large and medium sized law firms in big cities. They likely try more cases outside of their home town than they do within it. They likely appear in court more often on a *pro hac vice* (temporary) basis than they do in the jurisdiction where they are admitted to practice. So for these lawyers and the teams that support them, it can be a real challenge to understand your judge's likes and dislikes.

Local counsel's anecdotal statements can be helpful, it's true. All too often, however, they are hard to get much value from. Local counsel can usually tell you whether the judge has tried many cases like yours, something about his or her demeanor, his or her tolerance for outsiders, along with a sense of what arguments work. Like using Yelp for restaurants however, you have to judge not only the quality of the review but also the preferences of the reviewer.

In some jurisdictions, such as the Eastern District of Texas and the District of Delaware, local counsel know the judges well enough so that you can come to understand a judge's likely approach to your case. However, if you want more information, there are other techniques that make sense.

Here are 21 ways to research your judge:

1) **Watch the Judge:** Above all else, if your client has the budget, there is no substitute for watching your judge hear motions and preside over a similar case.

2) **Commission a Judge Study:** Our senior trial consultants prepare detailed judge studies that will help inform the tactics you use at trial.

3) **Conduct a Mock Bench Trial:** We are big believers in mock bench trials. The benefits are many and include: 1) forcing yourself to practice early; 2) hearing advice from colleagues of the judge; 3) getting a sense of what works and what does not. We have previously offered some great tips for conducting mock bench trials and getting great results.

4) **Find Past Clerks:** Here is an advanced Google search for finding former clerks of a judge. For this and other sample searches below, replace the judge's name and district as appropriate.

5) **Research Any Controversies:** Here is an advanced Google search for ferreting out controversies or scandals a judge may be involved in.

6) **Research Memberships and Affiliations:** Here is an advanced Google search for researching the memberships or affiliations of a particular judge.

7) **Consult Judgepedia:** This site is a comprehensive, up-to-date site that contains vast amounts of current information on federal and state judges. Modeled on Wikipedia, it gives useful background data on thousands of judges and on the state and federal court systems.

8) **Visit The Robing Room:** This judge-rating site is valuable because the feedback from lawyers is anonymous.

9) **Visit RobeProbe:** Here is another judge discussion site with reviews from lawyers. This site also has a number of international lawyers listed.

10) **Research Donations:** Here is a site to research donations to Pennsylvania judges' campaigns. Donations to campaigns regulated by the FEC are listed here.

11) **Consult Social Media:** Some judges are on LinkedIn, some are on Facebook and some are even on Twitter. It's up to you to find out. Our guide to social media for litigators will be generally helpful.

12) **For Federal Judges, Read the Almanac of the Federal Judiciary:** Unless you find a copy on Westlaw/Lexis or in your local law library, this tome will set you back almost $2,000. Still, it has a lot of useful information about judges including notable rulings, impressions of lawyers who have experience with the judge, as well as demeanor analysis and more.

13) **Use Westlaw Tricks:** Here is a guide that Westlaw offers for researching a judge.

14) **Use Lexis Tricks:** Here is a link to a PDF from LexisNexis entitled Researching A Judge. It has some useful tips if you use Lexis. Here are a variety of resources that Lexis lists as well.

15) **Use LawProspector Tricks:** LawProspector is a service designed primarily to help litigation support business development efforts, however litigators can use it to quickly see other attorneys who have recently had a trial or hearing before a particular federal judge. It starts at $299/month, so a one-month subscription might be useful to find out who can give you some good advice.

16) **Local Websites:** Many jurisdictions, like Pennsylvania, New York and Florida, have detailed information about state court judges online.

17) **Visit the Federal Judicial Center:** Here you will find some useful information about federal judges and there is a focus on history here as well.

18) **Subscribe to TRAC:** This tool covers cases since 2004 in the federal judiciary and claims to "provide a unique way to examine the year-by-year work product of individual federal district judges." You'll find it here.

19) **Visit Judicial Watch:** This site attempts to collect financial disclosure information about particular judges. The coverage does not appear to be extensive in the federal courts, but you might luckily find your judge listed here.

20) **How Long Will That Motion Take:** Here are a variety of lists of slow moving judges in the US Courts.

21) **Local Counsel:** Of course you should talk to local counsel. This blog article from Texas law firm Charhon Callahan does a great job of explaining the value of local counsel and what to look for when selecting them.

[New and Free Webinar] 12 Things Every Mock Juror Ever Has Said

by Ken Lopez, Founder/CEO, A2L Consulting

If you can learn the secrets of how mock jurors commonly behave during mock trial deliberations, you will be better positioned to win at trial. These behavior patterns are understandably foreign since most people see mock juries deliberate infrequently. However, when you are a jury consultant, mock trials are routine, and repeat behavior patterns become clear over a long career.

Surprisingly, it turns out that no matter where you go in the country, mock jurors tend to act in similar ways. Although there are venue-specific idiosyncrasies, mock jurors act quite similarly from locale to locale. If you understand the questions they almost always ask, the order of deliberations they usually follow and how mock juries address damages almost every time, you will be far ahead of almost all of your peers.

We at A2L have put together a free 75-minute webinar, *12 Things Every Mock Juror Ever Has Said*. It will be conducted live on December 9, 2014 at 1:30pm ET and is designed to share A2L's accumulated knowledge about mock jurors. **Click here to register for it for free**.

This webinar will be led by Laurie R. Kuslansky, Ph.D., one of the world's top jury consultants and managing director of A2L's jury consulting team. She has conducted over 400 mock trials in more than 1,000 litigation engagements throughout the country over the past 20+ years. Dr. Kuslansky will describe **how mock jurors make decisions about liability and damages**. She will address how mock jurors tend to apportion justice, how they calculate damages, how they react to contracts and how mock jury trial deliberations compare to real-life trial deliberations.

Other topics expected to be discussed are how to best position a jury to discuss damages, how mock jurors handle verdict forms and instructions, how mock jurors split up blame among multiple parties, how mock jurors use graphics, what juries forget and much more. This event is suitable for anyone with an interest in litigation, but this webinar is designed for the courtroom lawyer.

Here are the details of the free webinar:

- ***What: 12 Things Every Mock Juror Ever Has Said***
- ***When***: Tuesday, December 9, 2014 at 1:30pm ET
- ***How long:*** 60 minutes + 15 minute Q&A
- ***Where***: Online, once registered you will receive a personal login link
- ***How much***: Free
- ***Why***: Understand how fact-finders make decisions and you can win more cases.

- ***Who***: Led by veteran jury consultant, Dr. Laurie R. Kuslansky, A2L Consulting's Managing Director of Jury Consulting.
- ***How***: Click here or on the button below to register for the complimentary webinar.

7 Reasons In-House Counsel Should Want a Mock Trial

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

Times have changed. No longer will in-house counsel approve every request outside counsel makes related to trial. Budgets are demanded and negotiated. Litigation team structures are scrutinized. Expenses of outside consultants are doubly scrutinized.

So, it is not uncommon for outside litigation counsel to propose that a mock trial is conducted only to have in-house counsel push back. Indeed, A2L recently supported a case with nearly $100 million at stake where in-house counsel was quite skeptical about conducting a mock trial.

Outside counsel made the case for a mock trial, and in-house counsel ultimately approved the expense and attended the mock trial. Like most instances when a client attends the mock trial, the value is immediately clear to them, but that that realization is until not after the fact. Once the actual jury trial was completed, not only did A2L's client win a complete defense verdict, they won substantial counter claims as well. A true slam dunk, thanks to the skill of the attorneys working for the defense and their secret weapon - a preview of unexpected areas of weakness and strengths of both sides.

Here was a typical example where in-house was skeptical about conducting a mock trial before doing one, convinced it was a good idea once they saw the mock deliberations and once the result came in, certain it was a great idea. This is not uncommon for A2L, and not all that uncommon for the high-caliber litigators we have the privilege of working with throughout the country. So, how can we all help doubtful in-house counsel appreciate the value of a well-conducted mock trial?

Here are seven reasons we believe in-house counsel should want a mock trial:

1. **Risk/Reward:** The process of litigation is expensive. The longer one stays on that course, the more it will cost. By identifying the case's potential risk/reward earlier rather than later, you will be able to control the budget more rapidly and more wisely.

2. **Evaluate Settlement Intelligently:** Knowing the strengths and weaknesses of the case will help you develop a more focused approach, will improve the preparation of witnesses and depositions of opposing witnesses, and will help in-house counsel decide whether, when and for how much it makes sense to settle.

3. **Negotiate with Strength:** Most cases settle before trial, so the better armed you are during discovery and pretrial, the more strategic you can be during settlement talks.

4. **Guide Discovery Efficiently:** While many in-house counsel understandably prefer to spend “no dime before its time,” i.e., only conduct a mock trial when a trial is certain and imminent, conducting a mock trial before the end of discovery might yield greater rewards. That may seem counterintuitive because all the facts are not in hand, expert discovery is not completed, and rulings that may affect the nature and scope of the case are pending. However, it is a great advantage, while there is still time, to get a read on the case even in its skeletal form in order to guide rather than react to the way in which the discovery evolves.

5. **One Early Bite at the Apple:** Once it’s over, it’s too late. In other words, what if a particular type of expert or subject of testimony is seen as critically relevant and helpful to mock jurors – but you only find this out after the deadline? Then it would be of little use and frustrating. Mock trials often reveal this information, so why not get it when it could make the most difference?

6. **Trial Strategy Alignment:** Sometimes in-house counsel and outside counsel have different opinions about trial strategy, the importance of certain witnesses, and the need to spend money on certain items. A mock trial usually clarifies the issues and leads to agreement.

7. **I.D. Major Problems Early:** If the case is unwinnable or can’t be settled, the sooner you find out, the better. That way, you can make informed decisions. If anyone on the trial team is under the false impression that the case is better than it is, the mock trial will help clarify any misguided beliefs.

5 Things Every Jury Needs From You

by Laurie R. Kuslansky, Ph.D., Jury Consultant

1. To be able to like you.

Ever hear someone assume everything their ex says is a lie, even when it's true? Ever notice how gullible people seem when they find a new love, even when it's all a lie?

That's because we *want* to believe people we *like* and vice versa. So, you don't need the jury to fall in love with you (although that would be nice), but you can't afford for them to *dislike* you. There is research on what creates liking and disliking, but some highlights are:

- Speak in a way they can understand
- Don't overly out-dress them to show off how rich you are
- Show respect for their time by being organized and prompt on your feet and not wasting time
- Don't overload them with information
- Don't be presumptuous ("You all know what it's like to have a 401k.")
- Don't act angry *all the time*. It's exhausting to witness.

2. To trust you and your witnesses (*after* they like you/them)

- Don't over-promise and under-deliver.
- Don't make it too personal. It's "icky" to witness other people feuding and unprofessional, especially since they view counsel as the "grownups" in the room.
- Keep it simple for them to keep score, from opening, throughout the evidence, and closing, by being thematic and giving them reminders as the pieces fit together.
- Work with your witnesses to overcome arrogance or trying too hard to be perfect.
- Demonstrate that you are qualified and that your message stays the same over time.
- Show respect to the court.
- Don't act harshly to your adversary in court, only to act like buddies as soon as you leave the courtroom. Jurors will think you are playing a game and won't trust you.

3. To feel OK about you winning/the other side losing

- If you're Goliath, jurors need a message that makes it OK to find for you or against David.
- Alternatively, you may want to shape your message to explain why it would be wrong to find against Goliath.
- Assuming that a 2D explanation that is purely factual ("The evidence is not there for liability, so you cannot find for Plaintiff.") is not a message.
- If finding for your client would feel bad to the jury, it's your job to deal with it.

4. What you actually need them to do, not vaguely, but exactly

- Asking jurors to find for your client does little to guide them when it comes time to answer actual verdict questions.
- Provide them with the actual questions, the appropriate answers as you see them, a summary of the evidence that supports those answers (ideally in graphic form), and the reasoning.

5. You're saying and showing many things. What's most important?

Everything you say and do is not equally important. You know what is critical and what is not. While you are required to lay foundations and assemble the case from the bottom up, jurors are more likely to judge the case top-down. They tend to focus on a few key things that stand out to them and form their own story of what happened, then fit the choice things that fit well into that construct.

What happens if what stands out to them misses your point altogether? What if they have no idea why you went through all that information and didn't pay as much attention because it was boring?

To avoid leaving your most important evidence – as you see it – as the stuff of their naps, reduce the risk by alerting them to vital points. Have witnesses repeat key answers. Ask, "What is the most important thing about that?" Fill your side of the courtroom with spectators when your star witness will testify. Thin out your spectators when opposing witnesses should not be seen as important. Use prefaces that alert jurors' attention like a drum roll. Have your spectators wear their finest for special moments in the trial. Avoid being too cute, but be clear and send clear signals that help lead jurors to pay more attention to (or ignore) information so they get out what you put in to the trial.

10 Ways to Spot Your Jury Foreman

by Laurie R. Kuslansky, Ph.D., Jury Consultant

While someone ends up sitting in the first seat on a jury and is presumed or named foreperson by the Court, they may very well be one *in name only*. In fact, someone else may function as the foreperson.

Guess Who?

Who do you think is the most likely foreperson? Do you think someone old enough to be her parent will defer to a 20-something pixie in seat 1? Will an accountant in seat 6 rely on the homemaker foreperson for damages decisions? Is it the butcher, the baker, or the candlestick-maker? Unlikely.

Is there a pattern?

Yes. Surprise, surprise! The power pattern in the jury room mirrors real life outside court:

1. **Male,**[1] despite the proportion of males to females in a venue's population.
2. **White**[2]
3. **Higher socio-economic status** [3]
4. **Better educated** [4] (such as a graduate degree)
5. **Past juror**[5]
6. **Age 45 to 65**[6] (possibly related to prior jury service)
7. **Act like leaders,**[7] such as:

- **Sit at the head** of the table[8]
- **First to speak**[9]
- **First to *mention* needing to choose a foreperson** [10]
- **Participate and speak more often** than other jurors [11]

8. **Extroverted** [12] (although extroverts are more likely to be struck during jury selection)[13]
9. **Higher levels of political self-efficacy** [14]
    - **More regular voting records of participating in past elections**.[15]
    - **More experience discussing politics** in conversation[16]
10. **Statistics background** (3:1 more likely to be foreperson than someone without it!)[17]

A perceived **"expert"**

Alternatively, someone on the jury who is perceived by other jurors to have expertise seen as relevant to the case may emerge as the foreperson. The funniest part of perceived expertise is how tenuous it can be. For example, in a high-tech patent case, an entry-level, part-time mechanic may be the closest available "expert" on the panel. Someone married to a lawyer may be the "expert" on a legal malpractice case. It is often a matter of "a little knowledge is dangerous."

But -- Haven't Things *Changed* Since the Women's Movement?

Uh… not so much on juries. As recently as 2007,[18] 71%-78% of forepersons were *male*, echoed in 2010.[19] In addition, how males and females act as foreperson also differs, in the off-chance that a female is elected (rather than typically volunteers) and actually functions as foreperson. Female forepersons tend to encourage others to *share their opinions* to build consensus and exert *less influence* on others' opinions, whereas male jurors tend to *interrupt, hold the floor*, and make *more declarative statements*.[20] Result? Male-led juries tend to reach verdicts quicker.

There is no guarantee of who will be the leader on your jury, but pay special attention in jury selection to leadership qualities and the traits noted here, because they will likely have significant influence if they end up on your jury. They may end up as juror #1 or enemy #1 if they become the foreperson.

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6 Secrets of the Jury Consulting Business You Should Know

By Laurie R. Kuslansky, Ph.D., Jury Consultant

1) Anyone can call himself or herself a "jury consultant."

There are two basic types of jury consultant: those with appropriate credentials . . . and everyone else. Those with appropriate credentials have a background in a relevant field, such as psychology, sociology, or the law, with the training, skills and knowledge to provide bona fide and reliable data collection and interpretation. This includes knowledge and respect for appropriate research design, statistics, and individual and group decision-making. It also includes a working knowledge of the law and legal procedure. However, since ours is an unregulated profession, anyone can and does tout himself or herself as a jury consultant. But knowing the law alone is insufficient to interpret human behavior professionally. And knowing psychiatry alone does little to assist with legal decision-making. Case in point: then D.A. Gil Garcetti relied on his neighbor, a psychiatrist, on the O.J. Simpson criminal trial, instead of turning to the legitimate jury consultants at his disposal . . . and we know how that worked out in the end.

A good jury consultant not only has the appropriate training, but also has the ability to use both art and science to make a significant contribution to a trial team. Although there are organizations, such as the ASTC (American Society of Trial Consultants) with practice guidelines and membership requirements, they have no enforcement teeth, and no licensing authority exists for jury consulting, other than groups such as the American Psychological Association that can qualify their specialists.

As a result, we in the jury consulting field have encountered a colorful array of individuals who lack some or all of the credentials desirable in a jury consultant. Some may lack sophistication in research design; others may rely excessively on qualitative, small-group testing to overgeneralize; still others may be ignorant of the psychological and cognitive bases for perceiving and processing information or of the factors that drive verdicts. Some even come from utterly unrelated backgrounds such as jewelry design or acting. Yet they all call themselves "jury consultants."

Verdict: Buyer beware. Make sure to vet the credentials of your jury consultant and make sure he or she holds the requisite background to assist in what you need. You don't go to a dentist for a back problem, so don't use a communications consultant for psychological insights.

2. Fame is a game.

There are jury consultants who have garnered significant media attention, but they aren't the best ones out there. In fact, one should question the motives of someone who serves a client in litigation and seeks the limelight rather than holds discretion at a higher premium. In fact, some of the best jury consultants have rarely or never had publicity – to the benefit of their clients and of their professional integrity.

Verdict: Seek out a jury consultant with the goods and a good name, not tip-of-the-tongue media hounds.

3. It's a small world.

In the beginning, there were very few pioneers in jury consulting, and they all knew one another. As the field expanded over the past 30-40 years, the profession has spawned numerous individual practitioners, small boutiques and larger, national firms. However, throughout this expansion, most experienced jury consultants either know one another or know of one another and probably know everyone's true worth – or lack thereof -- but are loath, outside exchanges with colleagues, to reveal it. They hold a wealth of knowledge about the field and competitors, but it is seen as bad sportsmanship to disclose negative opinions, even though such opinions may be widely held within the profession and well founded.

How do you tell a prospective client that the person they are considering merely echoes what the attorneys say, rather than providing something of value? Or that someone well known does bad research? Or that a company merely retreads old findings? Or that someone is actually crazy?

Verdict: You don't.

4. Some tell you what you want to hear vs. what you need to hear.

Jury consulting is not only a profession, it's also a business. To that end, some counsel – especially newer users of the field – are highly resistant to hearing about any doubt or trouble with their case, even if that is the best value they may gain from a jury consultant. As a result, to avoid losing a client, many jury consultants sugar-coat at best, or at worst conceal, the bad news, mirroring what the client wants to hear rather than delivering critical information.

Verdict: If you only want to hear what you already think, don't pay someone else to say it.

5. We usually know what won't work, but if you make us do it anyway, we'll let you do it.

An experienced jury consultant has plenty of experience watching failed approaches, such as purely scientific presentations with no story, presentations that are cognitive overloads or too long, "tutorials" that are too complex, avoidance of difficult issues, uninformed jury-

selection approaches without data to support them, endorsement of an “expert witness” who is clueless about connecting with lay people, and the like. We have also often heard attorneys say, “In order to win this case, the jury must X.” It is rarely supported by the data. In these situations, if the attorneys are rigid in their thinking and not truly open to the input of a solid jury consultant, either the consultant quits (unlikely) or the consultant capitulates to the client, to the client’s disadvantage. It takes someone bold enough to face the risk of losing a client to insist on telling the truth.

Verdict: If you hired a good jury consultant, talk less and listen more.

6. We often know what will work, but you won’t try it, thinking “If it isn’t perfect, it isn’t good.”

Some litigators have a difficult time embracing new ways of seeing their case once they’ve formed their own opinions about it. New themes proposed by a skilled jury consultant may largely fit the evidence, even if not all of it, but when some points don’t, counsel may dismiss the otherwise appealing theme entirely, rather than trying to find ways to make it fit by slightly modifying the theme or revisiting the evidence to support the theme. If a good jury consultant has proposed a theme, the consultant likely has good enough reason to do so, based on an assessment of the evidence and experience with juries. Remember, most litigators have gone to trial far fewer times than most experienced jury consultants. It is only after investing many thousands of dollars that counsel discovers what the consultant suggested in the first place is true. Jurors are far less likely than the lawyers to scrutinize all the facts and all the evidence and all the legal implications at the level that the lawyers do, so they are not as likely to reject broader-sweeping themes that are appealing and largely account for the evidence more simply.

Verdict: Try more, spend less.

12 Insider Tips for Choosing a Jury Consultant

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

1. **Ask people you know and trust who have gone to trial with the jury consultant for recommendations.** There is no substitute for talking with people who have actually worked with the consultant. Reputation alone is not enough to go on.

2. **Test the waters.** Provide the candidates with the same set of information and see what suggestions they come up with at an initial meeting. This allows the jury consultants to do what they are hired for – absorb and interpret information and turn it into useful recommendations. This kind of trial run enables counsel to test the waters at no cost or risk.

3. **Find a consultant whom you are comfortable with, but not too comfortable.** In other words, if the jury consultant is merely a yes-man or woman, look further for someone who is willing to speak their idea of truth in support of your success, rather than just echoing what you want to hear.

4. **Look for someone who asks questions you haven't thought about yet.** Sometimes a jury consultant will ask searching questions to a lawyer at their initial meeting. This usually means that the consultant has found a gap in information, logic or evidence based on the consultant's preliminary review of the case information. An experienced jury consultant will have very good "gut" reactions shaped by hundreds of similar cases. Ignoring these questions as "irrelevant" or "not important" is a missed opportunity for the attorney. Unless the question is entirely off-base, or answered easily by information the consultant did not know, take it seriously. A jury consultant who stimulates you to think about your case from a new angle is likely someone who can make a real contribution to the case.

5. **Find a consultant who is willing and able to point out weaknesses in your case.** Often, lead counsel does not want to hear faults or weaknesses with his or her case. Associates are then afraid to explore them. If a jury consultant dares to go there, it will also be a useless exercise -- unless the consultant insists on being heard, rather than being in denial. It's important to know that the consultant can be the one who tells you that the emperor has no clothes.

6. **Look for a consultant with a knack for coming up with catchy ways to encapsulate the heart of the case in a few words to offer appealing, fitting case themes.** Often, a case is won or lost on the basis of these brief summaries.

7. **Ensure that a consultant uses common sense as an important consideration in putting forth evidence and theories.** The consultant should not just look at legal theories. For example, say a particular cause of action does not call for the jury to find a motive. Jurors will still want that blank filled in, and a skilled jury consultant will identify this gap and offer good ways to address it.

8. **Look for a consultant who is willing to disagree, but is not intolerant of your opinion.** The consultant should get what you're saying but not just regurgitate what you want to hear. Being a jury consultant requires confidence and a certain amount of ego to balance the attorney's ego, but too much of a good thing is not good. Hence, you want a jury consultant who is not intimidated by you, but who isn't always the smartest one in the room.

9. **Seek a consultant who has experience with the issues in the case and is a quick study.** Familiarity with the trial location is much less important than many lawyers think, because a good approach translates well in any venue. A strong strategist who is good on his or her feet, quickly grasps information and synthesizes it into tactical steps, is excellent at reading people, can translate data into a practical course of action, and has an intuitive sense of the right case themes – are all more important than knowing the ins and outs of the courthouse. People are people, and there are other people on the trial team (e.g., local counsel), who can provide what is needed that relates to the venue.

10. **Look for a consultant who can show some flexibility in method, pricing, approach and adaptability.** Litigation is a moving target, there are many moving pieces and constituents, and change is the norm. Hence, in selecting a jury consultant, you want someone who can adapt to those changes alongside you and work in your best interest. Find out how they approach such changes, the cost implications, and their willingness to try different approaches if your needs, client or case are not a "one-size-fits-all" situation.

11. **Choose the best jury consultant, not just the closest jury consultant.** Do not fall into the regrettably too common thought pattern that the "local" jury consultant is the best. Just because someone regularly works in the venue does make them the right fit for your case. You should be relying on local counsel for venue tips and the best jury consultant you can find to help extract meaningful guidance from your mock jury and to assist as needed during jury selection.

12. **Choose a jury consultant who is integrated with a litigation graphics team.** Not all jury consultants understand litigation graphics, yet almost every competent jury consultant will tell you that most juries prefer visual information. Simple question, if juries are going to

count on visual information as part of their decision-making, and your consultant is not insisting on testing graphics, do you really believe you have the best jury consultant?

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