THE RIGHT JURY

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INTRODUCTION

There are many techniques implemented by trial consultants in order to expose juror proclivities and prejudices and select the jurors most inclined to vote for that side's client. These techniques are used to guide attorneys in analyzing juror attitudes, identifying strengths and weaknesses of the case, and predicting the outcome of the case. Aside from case analysis and stratagem (the psychological effects of the attorney's chosen words on the juror), the trial consultant also conducts witness preparation (how to answer questions, eye contact, body language, etc.), focus groups, mock trials, and voir dire research.

CHANGE OF VENUE STUDIES

When a potential panel has been tainted by pretrial publicity, one of the jurors yelling out biased misinformation in front of the others, or the identity of one of the parties/attorneys, the judge has various remedial measures at his disposal to counteract the negative effects. Because of this prior knowledge, potential panels in the community may have preconceived notions about the facts or a dislike/distrust of one of the parties. In this case, a judge may be inclined to grant a motion for change of venue. Trial Consultants conduct change of venue studies to determine the extent of community knowledge, pre-existing community attitudes, and the prospects of a prejudiced jury pool. Two techniques are utilized in order to accomplish the change of venue study: **media content analysis (i.e.: publicity research) and *community attitude surveys*.**

A venue study entails researching the demographics, media coverage (print and television) in the nearby counties, social media coverage (is it viral?), and community attitude surveys conducted in those areas. First, the trial consultant would contact the chamber of commerce in the county to research the general demographics of the area (i.e. how many women, how many Hispanics, the mean age, etc). In order to measure the extent of knowledge the surrounding counties have of the specific case, he/she should Google information about the case dating back to when the case actually occurred.
The community's attitude can be measured by calling people in the area or going to a local mall and asking them questions about a "hypothetical case." For a fee, the local phone company usually provides a list of approximately 500 random phone numbers in the area. Obviously, out of the 500 contacted, many refuse to answer the survey; however, if even a third complete the questions put to them, then the trial consultant will

have a sufficient amount of data in order to support a motion for change of venue. Ask people if they knew about the case, how much they remembered, where they learned it from, how much, how they felt about it, what we could say that would change their mind, and general demographic questions (i.e. age, income, status, occupation, and what social media platforms they frequent). Even if the court denies a motion for a change of venue, evidence of potential prejudice may convince the court that individual as opposed to group questioning is appropriate, may persuade the court to expand the questioning of prospective jurors during the voir dire, and may increase the willingness of the court to grant challenges for cause when a juror gives some sign of predisposition in the case.

FOCUS GROUPS/MOCK TRAILS

In a **focus group**, mock jurors hear abbreviated arguments presented by the trial team and are given actual jury instructions. They are carefully observed and evaluated during deliberation to pinpoint problem areas that may require more explanation. The main goal of the focus group is to analyze issues in a case in order to shape or refine the case. A focus group consists of about 6-12 individuals who are a representative sample of the possible jury pool within the particular venue. These "jurors" believe that they are participating in an arbitration, with the head arbitrator being the trial consultant, and the attorneys for each side being the actual plaintiff and defendant in the case. By informing the jurors that their input will help resolve the disagreement in a peaceful manner, the jurors will feel as if they have a stake in the outcome, and therefore, will be more likely to concentrate and take their role seriously. It is the role of the arbitrator to skew the decision against our client deliberately, in an effort to determine what issues are important to the jurors and how to strengthen our case.

Each "party" will have approximately 25 minutes to impart their "side of the story" to the jurors in a friendly, informal manner. The jurors are then allowed to openly ask questions, which allows the consultant to take note as to what issues are important to the jurors and/or what issues need to be clarified. Following the question and answer period, the "arbitrator" will hand out a copy of the jury instructions and verdict form to each juror, the "parties" will leave the room, and the consultant will instruct the jurors to deliberate on the issues and reach a verdict. During this phase, the consultant carefully observes the jurors in order to pinpoint possible problem areas which either require further explanation and/or expansion. Usually, the issue of liability is deliberated first,

and then, after a second session of questions and answers with the "parties", the jury will decide the extent of damages to be awarded. The reason for this bifurcation is that in the likely event that the liability issue is determined against our client, the trial consultant can then say, "If we told you A,B, and/or C, would that change your mind?….Is X, Y, and/or Z important to you?….If you were told all of those things right now, would that change your answer?…." The consultant then asks the jurors to assume those things to be true, and determine the amount of damages awarded in that event; thus, separating the issues of liability and damages in the juror's minds.

A **mock trial** is a more in depth, formal, and extensive focus group which also tests the effect of opening and closing statements on the jury. In a mock trial, jurors will be exposed to opening statements, closing arguments, crucial witness testimony, and any evidence or demonstrative evidence which is important to the case. During mock trials, however, the attorneys play themselves, with one attorney from the firm playing the opponent and advocating accordingly. Should the attorney wish for his/her client and/or star/expert witness to be examined in front of the jurors, then the actual client and/or star/expert witness must be present.

Jurors fill out questionnaires before, during, and after the evidence is presented. The questionnaires before the trial begins seek background information on the jurors as well as their views on the particular facts and law in the case. The questionnaires during and after the trial enactment ask, among other things, what issues the jury believes to be the most important, why they voted a certain way, and what could have been said that would have changed their minds. After comparing the questionnaires, it becomes possible to determine what type of person would likely be pro-plaintiff (or state) and

what type would be pro-defendant. Lawyers are sometimes so involved with the case that they think they are explaining all the pertinent information in an understandable manner. However, A pretrial test of juror reactions to the facts of the case and arguments that both sides are expected to make can provide a crucial warning that the theme initially selected is not plausible, that the message is unclear, that jurors will be unconvinced by the message, that jurors are troubled by missing information, or that emphasis should be placed on an issue that the attorney deemed minor.

Key witnesses may be directly examined or cross-examined either in person or by allowing the jurors to view portions of a videotaped deposition. This allows the consultant to test the effect of the witness's testimony and demeanor on the jury, and determine which areas of testimony/demeanor need to be strengthened and/or corrected during witness preparation. In the event that the attorney wishes to test his key witness in this manner, the jury will be given another questionnaire concerning the likeability and believability of the witness. Obviously, this exercise is especially appropriate for the actual client, if he/she is taking the stand, and any expert witnesses that may be crucial to the case. Then, as in focus groups, the issues of liability and extent of damages are bifurcated, and jurors are given verdict forms and jury instructions and are told to deliberate and reach a verdict.

WITNESS PREPARATION

Based on the information elicited from the witness examination during the focus group and/or mock trial, the consultant can then help the witness better prepare for the delivery of his/her testimony and/or the way in which he/she conducts him/herself in the way of demeanor. In order to develop a more effective and believable witness, various communication techniques are utilized. The Consultant will work one-on-one with the witness in an effort to make him/her more relaxed (i.e.: through relaxation techniques, hypnosis, repetition, visualization, etc.) and more likable to the jurors (i.e. less arrogance, sneering, and/or defensiveness, and more sincerity, compassion, and intelligence).

DEMONSTRATIVE EVIDENCE

Studies show that the attention spans of the American people have decreased significantly throughout the years. For that reason, demonstrative evidence is utilized in an effort to reinforce key arguments and facts, better clarify important points, and insure more effective courtroom communication. By combining the trial consultants research results and working with graphic artists , the trial consultant can effectively design, produce, and utilize during trial various visual aids such as document enlargements, charts and graphs, timetables, computer graphics, models of the crime scene, video productions, photographic services, computer animations, and many more. Clients will be especially pleased to learn that the firm does not have to contract out in order to develop these aids because the MIS department is more than efficient when it comes to creating the necessary demonstrative evidence.

VOIR DIRE

While profiles of favorable juror prospects can be compiled through pre-trial attitudinal questionnaires, and a search of social media, a trial consultant implements techniques in the courtroom as well (**i.e.: jury selection, demonstrative evidence, structuring opening statements and closing arguments, and phrasing jury instructions favorably**). Techniques such as focus groups, mock trials, community attitude surveys, and pre-trial publicity research help to educate the attorney about the extent of knowledge the prospective jurors will have about the case, their preconceived opinions and views on the case, problem areas that need to be emphasized or refined, and how the wording of their arguments will psychologically effect the jury. However, studies have shown that 90% of jurors have decided the case during voir dire based on which attorney they like better. The remaining 10% make their determination after hearing opening statements. Thus, cases are often won or lost during jury selection.

In-Court rating of attitudes and non-verbal communications can be accomplished during voir dire by asking questions and taking notice of body posture, speech disturbances, and tone of voice. In an effort to curb the extensive jury questioning on voir dire, judges have been more willing to allow the use of jury questionnaires. Lawyers can use these questionnaires effectively to screen jurors for more extensive inquiries at voir dire by finding on its face an indication of bias in the jurors answers. This would allow freer and more expansive questioning of the potential jurors; however, it is very unlikely that the jurors would be honest and readily reveal bias on the questionnaires.

There are other ways to detect bias and determine which of the jurors would be the most advantageous to select. Attorneys can help with this by asking the right questions in the right way. The true, yet unstated purpose of voir dire is to attempt to select those jurors who will be receptive to the attorney's view of the facts. This can be accomplished by building a rapport with the juror, preconditioning the juror, and delving into each juror's private thoughts and experiences. Cases are won and lost on Voir Dire. While the socially accepted purpose of voir dire is to isolate and excuse potentially biased jurors, the true, yet unstated, purpose of the process is to reject jurors biased against *your side.*

Attorneys select jurors who they will be able to persuade, not jurors who will be "fair and impartial" to both sides. The art of manipulation is used by both sides to precondition the jurors to each client's advantage. Since voir dire gives the jury its first impression of the attorneys, it is the counsel's best chance to sell himself and his client. The questions on voir dire enable the attorneys to ascertain how a juror thinks and what he will be receptive to hearing.

Attorneys can educate jurors on the facts and the law through the voir dire questions. The attorneys should become adept at asking questions in a way that will elicit the desired response. Many attorneys attempt to educate jurors not only to ascertain which ones would be favorable but also to make them more favorable by educating them about the issues in the case. By asking questions of one potential juror, the lawyer can educate and bias the others on the panel. If one juror replies in the sought-after manner in front of the rest of the panel, then the other potential jurors become exposed to that way of thinking. For example, consider the case where the main issue was proper installation

of a child seat in a car. There is one mom on the panel, and the rest of the jurors are older men. The attorney can ask her how she installs her car seat to best keep her child safe. If the attorney can get her to say that a particular installation is unsafe, then she becomes an expert witness of sorts. This may plant a lasting impression that the lawyers would want to make in the mind of other jurors who may not have had similar experiences.

Since it has already been established that voir dire is crucial to the outcome of a trial, it would behoove the attorneys to find out as much as they can about the jurors who will be deciding their client's fate. Attorneys should ask a variety of questions covering a wide spectrum of beliefs, attitudes, and backgrounds in order to determine juror bias. Good questions to ask jurors which tend to build a rapport with them and delve into their privacy include: age, number of children, marital status, spouse's occupation, children's occupation, attitudes toward big corporations, stock held in any corporation, political affiliation and views, religion, education, publications read and the frequency with which they are read, views on the death penalty, experiences with the legal system, social organizations, hobbies and interests, social media platforms, etc. Life experiences and psychological characteristics are more important than demographics alone considering the complexities of the modern world.

Open-ended, non-directive questions that require more than a yes/no answer are best in order to get the desired answer. For example, instead of saying, "Can you abide by the principle of law that a defendant is not deemed guilty if he chooses not to take the stand?", more would be learned about the juror by stating the question in a different way: "Defendant is not required to take the stand and testify, and if he does not, it can not be taken as evidence of guilt. Some jurors have difficulty with this, and that's okay. How

would you react if the defendant did not take the stand and testify on his own behalf?" A case study on non-directive voir dire found that the informal style of asking questions created an atmosphere where jurors felt less constrained to give a socially desirable response and freer to express his actual feelings.

During voir dire, the attorney must set the stage for the jury so they know what to expect if they are chosen. It is often said that a case is won or lost on voir dire because it is the first time that the attorney has the chance to build a rapport with the prospective jurors. Since it is essential that each juror serving be sympathetic to the case the attorney wishes to present, voir dire must be utilized as a tool to precondition jurors. Preconditioning serves two important functions: it prevents the jury from thinking that the attorneys are trying to hide information because the bad evidence is admitted right away, and it causes the jury to be familiar and sympathetic to the client's case. While preconditioning may not be a "proper" role for voir dire, we do not live in a perfect world and sometimes justice is best served by preparing prospective jurors to be receptive to views they may not have otherwise had coming into court.

Jurors not only learn about the law and facts of the case by listening to the others on the panel, but they also may learn incorrect information or various strategies to get excused from serving. Jurors can be questioned individually or in front of the rest of the panel. As suggested previously, because individual voir dire is time consuming, most judges prefer group voir dire. For this reason, many jurors may imitate answers they have heard given by their peers. This creates an obstacle for attorneys who are trying to discover backgrounds and attitudes and isolate prejudices. Because attorneys have found that delving into juror proclivities is a psychological task, experts called jury consultants

are hired. Consultants practice scientific jury selection which entails linking demographics and personality traits to juror predispositions in order to predict verdicts.

Attorneys should begin by introducing themselves and their client and discuss various aspects of the law. For example, the pool of jurors should be informed that the plaintiff has the burden of proving the case, what that standard of proof entails, and a quick sketch of the facts in the case. The Lawyer should ask the jury panel right away whether they can hold the plaintiff to his burden, if they know anything about the accident or crime, if they have any bias against the particular law to be used in the case, and if they know any of the parties or witnesses in the case. Silent responses reveal much about a person, so during the potential juror's response, the attorney must carefully watch his movements, body language, facial expressions, and mannerisms to determine if the juror will be receptive to his later arguments. For example, a juror who can not look his interrogator in the eye or who can not stop playing with his top button may just be nervous, or he may be telling a verbal untruth.

It is extremely important to sound sincere and express genuine interest in each juror. One way to do this is to apologize ahead of time for any prying personal questions. Jurors resent having to display their personal life in public, so the attorney should explain the purpose and ask forgiveness of the jury pool as a whole. The jury should be addressed in a friendly, calm, courteous, and respectful manner that allows the juror to feel like an equal to the attorneys. Attorneys can make each juror feel like the most important person in the room by addressing each juror by name, active listening, and some humility. An attorney should never be sarcastic because it may offend jurors, but if the attorney inadvertently embarrasses a juror, he should apologize immediately.

Attorneys should avoid repetition, so that the jurors will not become bored. If routine questions are repeated for each juror, the panel begins to feel as if the attorney does not really care about the responses or about them as human beings. Also, jurors should be prepared for harmful evidence against the lawyer's client. If jurors discover damaging information at a later point in the trial, they will become distrustful of the attorney because of the belief that he was trying to cover up the secret. Similarly, the lawyer should quickly object to misstatements of law made by opposing counsel during voir dire. He should object in a clear, calm, informative manner, using simple language so the potential pool does not think he was trying to block the truth. If a prospective juror should become antagonistic, the attorney should refrain from exhibiting belligerence at all costs because another venireman selected to hear the case may resent the display of attitude. The best thing to do would be to politely and unobtrusively move on to questioning the next juror.

Friends should not sit on the same jury because they may be more apt to be persuaded by the other. Jurors who are experts on the particular issue in the case should also not be impaneled because of the potential for impressing his outside knowledge upon the rest of his peers. When excusing jurors, counsel should be very careful to be extremely polite. This is because that person may have become friendly with a juror who was selected to hear the case, and offending that person could be enormously detrimental to one's case. The smartest attorneys are those that remember the juror's responses concerning issues and beliefs during voir dire and proceeds to use those very words in closing argument.

Counsel should make a concerted effort to display a laid back demeanor. Attorneys may want to consider turning their chairs around to the other side of the desks in order to face the jury pool. Begin by acclimating the jury to the courtroom procedures, facts of the case, and relevant law, and then ask all prospective jurors the same general questions: What do you do for a living, What does your spouse do for a living, What are your feelings on the law, Have you ever been a victim of a crime, Did they catch that person, What do your children do, What do you teach, Is there anyone close to you in law enforcement, What are your hobbies, Have you sat on a jury before, Did you reach a verdict, etc. If the attorney is a local, he/she should make sure that all the veniremen are aware of that fact. One may make comments such as, “"Barney is your brother? He can sing so well! .... I heard you give a speech yesterday .... You are a stay at home mother? G-d Bless You.” It is also important to ask how much pre-trial publicity or outside knowledge they have of the case.

Attorneys should be sure to introduce themselves, remember everyone by name, and relax people with humor. Before questioning the panel, make a brief ‘speech’ as follows: “Are you nervous? Well, it’s okay to be nervous and it’s normal. I read a pole a few days ago that said the biggest American fear is public speaking. Number two is death. I am nervous speaking in public too. I am especially nervous because I have to ask you some very personal questions. I am not trying to pry, but this allows us to know more about you. I want to apologize for those questions right now. I promise not to embarrass you, and if I inadvertently make you uncomfortable, just tell me you’d rather answer that question in private. I also want to thank you now for your time and your honesty.”

There are ways to make people reply in the desired manner. The best thing to do is slightly change around their words when repeating their answer to get the answer you want. For example, "Would it be fair to say……If I understand you correctly, you are saying……." Also, just by asking the same question repeatedly in a different way, the jurors will change their answers. The jurors will begin to open up, tell stories (i.e. rapes, murders, accidents, etc.), and share feelings. With active listening and one-on-one friendly conversational style, the attorney will make it easy for those jurors to disclose the most private of information. Above all, respect should be displayed for everyone, no matter the occupation or status because they all have their own stories to tell. By asking case specific yet general questions, the attorney is essentially suggesting what the theories of the case will be and planting the seed as to how the prospective jurors should be thinking.

The Trial Consultant not only creates specifically tailored voir dire questions which uncover biases and prejudices, but also help to educate the prospective jurors as to the issues and themes of the case. The questions are phrased in such a way as to precondition and hopefully elicit the desired response from one of the jurors for all the others to hear. The trial consultant is also available to assist the attorney during the actual jury selection by observing and analyzing the potential juror's responses, and then helping to formulate challenges for cause peremptory challenges.