Identifying Key Juror Attitudes in *Voir Dire*

BY JEFFERY R. BOYLL

At the conclusion of a jury trial, some jurors may favor your case, others may not — yet all will have heard and seen the same facts, arguments, witnesses, and testimony. Each juror has evaluated what has transpired and interpreted trial events based on prior life experiences, learning, beliefs, morals, and attitudes. It is simply impossible to do otherwise. As a result, few trial attorneys dispute the critical importance of the jury's composition in affecting the outcome of the case. Consequently, the challenge of effectively utilizing *voir dire* to identify the jurors who will be most favorable for you (and thus should be seated), and those who will be unfavorable (and thus should be stricken), may be the key to a successful defense.

Trial attorneys often begin their assessment of favorable versus unfavorable juror types with some broad generalizations, such as:

- "I think engineers and professional types will be especially good for us." (But what are the odds of getting any?)

- "We need to avoid liberals and people from the East Coast. Our best bet is probably upper to middle class people originally from the South or Midwest." (Broad generalizations with no bases.)

- "Unemployed, lower-income, and especially minorities are probably going to be bad for us." (Often true for the defense.)

The problem with this approach is that these hypotheses are often based on the attorney's own stereotypes, derived from his or her own background, attitudes, and particularly, past trial experience. For example, the renowned Clarence Darrow once wrote:

"An Irishman . . . is emotional, kindly and sympathetic. If a Presbyterian enters the jury box, let him go. He is cold as the grave. Then, too, there are the women. These are now in the jury box . . . I formed a fixed opinion that they are absolutely dependable, but I did not want them."

Although the stereotypes have changed, the philosophy of exercising challenges based on the demographic or background features of a prospective juror generally remains alive and well. With increased restrictions on attorney-conducted *voir dire*, this information is oftentimes all there is to go on.

Can juror demographic features provide reliable information from which the exercise of intelligent challenges can be made? In some instances, yes. Occupational status and, particularly, specific job titles, provide the most useful information. It would be unusual to find a juror who has been employed in a field adverse to your case who would have the sorts of favorable attitudes you seek. Most people gravitate toward and remain in careers that are consistent with their beliefs and attitudes.

Unfortunately, many occupations do not provide much in the way of predictive information, while others provide conflicting possibilities. For example,

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will a prospective juror who is a nurse be favorable or unfavorable to the defense of a medical malpractice action? Will nurses side with their professional colleagues, or rely on their own medical knowledge or negative experiences to be *more* critical of the doctor's actions (or inaction)? Before making an informed assessment of this issue, more will need to be known about the particular nurse and his or her role in the facts of the case.

The background and demographic features of prospective jurors must be examined in intricate detail. Such examination provides the first level of analysis and, under highly restrictive *voir dire*, may be the *only* information with which to proceed. However, reliable demographic predictors of the favorability of a particular juror cannot be based on broad generalizations. For example, in an action involving sexual harassment in the workplace, older, more traditional, higher-status males may be more favorable to the defense, yet this same sort of juror may be especially hostile to the wealthy Japanese defendant named in an automotive product liability action.

A determination as to the favorability of a juror that is based on a single demographic variable, such as race or sex, is often unreliable as well. Demographic categories are too broad to provide meaningful and reliable predictions. For example, will a college-educated Hispanic who owns his own business react to issues and reach the same verdict as an unemployed Hispanic laborer? It is a common trap to stereotype a prospective juror based on a single category or previous experience with that "type," and waste a valuable strike on an otherwise unbiased or even favorable prospect.

The various demographic features of prospective jurors certainly need to be considered, but only with an eye towards their probable impact in the particular case. More than one demographic feature should be examined. For example, in a recent age discrimination case, pre-trial jury research and attitudinal surveys revealed that males and females were generally equally favorable to the defense; likewise, their age category was not a significant factor. However, by combining the gender and age variables, we found a significant relationship: older males and younger females were favorable to the defense, while younger males and older females were not. Analysis of the groups revealed that the reasons for these differences were related to attitudinal features which were distinct for each subgroup.

When we take into account all of the possible demographic combinations, this type of analysis becomes quite complex. Actually, there is a simpler and more accurate method, assuming attorney-conducted *voir dire* is permitted. The favorability of a prospective juror is *most reliably* determined by assessing pre-existing attitudes and beliefs.

JUROR ATTITUDINAL PROFILES

The most effective means of identifying favorable versus unfavorable juror types is to identify attitudes and beliefs specific to the case. Juror demographic characteristics, such as age, sex, and marital status, only moderately differentiate between plaintiff and defense jurors, and even when they do, there tend to be alarming exceptions. Many defense trial attorneys have had the unfortunate experience of learning after the trial that their assumed "perfect" juror wound up most adamantly opposed to the defense position. The lawyer must go beyond demographics to find out how prospective juror attitudes and lifestyles relate to the issues of the case. This information can form the basis for more sophisticated approaches to identifying unfavorable jurors.

The defense needs to learn which kinds of prospective jurors would be most biased against particular defendants and how they can be identified. In a recent action against a savings-and-loan association, the defense examined various groups and conducted surveys; the resulting analysis of juror demographic and background information revealed disappointingly few significant correlations. However, in this type of litigation where individual plaintiffs are pitted against large corporations, it was hypothesized and substantiated by the research that an individual's political orientation was related to verdict preference. Global political attitudes, such as liberalism versus conservatism, are frequently predictive of verdict preference in both civil and criminal cases.

However, in *most* lawsuits, the most reliable predictors of verdict preference are knowledge and attitudes towards specific case themes. For example, a prospective juror's attitudes and experiences with investing, knowledge of investment options, personal savings habits, and even recognition of certain investment terms are often found to be highly predictive of verdict decisions in securities litigation.

IDENTIFYING JUROR ATTITUDES

The process of identifying favorable and unfavorable juror types should begin well in advance of trial. In fact, the pursuance of a particular case strategy must be evaluated with an eye towards the types of jurors one is likely to encounter, their level of sophistication, and so forth.

Let's assume you are defending a large health food company which manufactures and distributes a powdered diet mix. The plaintiff claims that he used the product and then became sick. The mix was analyzed and found to contain a cleaning solvent that is poten-

tially cancer-causing. The plaintiff is suing for damages to cover routine diagnostic testing, potential treatment cost, and emotional trauma. What follows is a recommended process of juror analysis.

First, determine the themes of the lawsuit, which will be the focus of the jury's attention, and therefore will dictate the types of persons you will and will not want on the jury. Conversely, the chances of obtaining a majority panel of favorable jurors may also dictate which themes and strategies to pursue. Jury research may assist in this respect.

Next, determine the relevant attitudes towards various general aspects of life, such as crime and punishment, government entities, and so on. The hypothetical action has an individual suing a large company, alleging toxic poisoning. Relevant attitudes are beliefs regarding large corporations and beliefs about toxic substances. Specifically, we need to know if prospective jurors are cynical towards big business, view them as greedy and uncaring, willing to readily sacrifice safety for profit, and so forth. Secondly, what are their general ideas about incidences of toxic poisoning? Do they feel they have probably been exposed to toxins themselves without knowing it?

In determining the attitudes of prospective jurors in the hypothetical case, here are some exemplary questions to ask:

- "Tell me about the biggest company you have ever worked for, and how you feel about the company?"

- "Do you feel businesses always sacrifice safety for profit? What makes you feel that way?

- "Do you feel you have definitely been exposed to a poisonous substance without knowing it? Please explain. Do you feel it is affecting you now?"

- "What have you read or heard about people who claim they have contracted a disease from drinking tap water?"

Note the two words in bold-face. They have been carefully inserted in "asymmetrical" *voir dire* questions that are designed to identify prospective jurors who may be biased against your client, without inadvertently helping your opponent. Suppose you had asked the panel:

- "How many of you feel corporations sometimes sacrifice safety for profit?"

Chances are the majority of the panel will raise their hands. Those few who do not are very trusting of corporations and are your best jurors. You just helped your opposition identify them. However, if you ask:

- "Do you feel corporations **always** sacrifice safety for profit?"

Chances are only the few most cynical and dangerous jurors will be identified, and your few "prize" jurors will remain hidden in the pack. If you get no responses to the "always" wording, you can reword the question to "usually" or "routinely." Always follow asymmetrical questions with open-ended questions that encourage jurors to talk.

After determining prospective jurors' general attitudes, develop case-specific attitudinal questions. Let's assume you have uncovered some evidence to suggest that the plaintiff is a fraud, e.g., he put the toxic substance in the container himself. Pre-trial jury research substantiates this as a viable and persuasive defense theme. What type of person will most readily accept your evidence regarding this theme? A potentially unfavorable juror is one who will naively ask *why* this man would do such a thing.

Since it is objectionable to slap prospective jurors across the face with the wad of thousand dollar bills the plaintiff is requesting, you must identify jurors' attitudes and knowledge toward lawsuits and people's motives for bringing them. Here are some questions that can be helpful.

- "Is there anyone here who has never heard of a person getting millions from a jury award?"

- "Do you believe that money is *not* a motive for a person coming to court?"

- "Do you find it impossible to accept the idea that a person would make up false claims and come to court in order to get money?"

Under restricted *voir dire* conditions, many of the above questions may not be usable, in which case their effectiveness in eliminating biased jurors has been significantly reduced. Still, when attitudes *can* be determined, they can often be correlated to demographic characteristics. For instance, here is a likely attitudinal profile:

Dangerous Juror Attitude	Possible Demographic Correlate
Naive/trusting	Less educated
Biased against big business	Unemployed/lower income
Favors large awards	College student/Democrat

Keep in mind, however, that these are stereotypes that, even with assistance of extensive attitudinal surveys, may prove unreliable.

Non-verbal behavior of prospective jurors should be considered. The visceral reaction you, as the trial attorney, have toward a prospective juror cannot be overlooked. However, it is a most unwise practice to

leave a juror on the panel whose attitudinal, background, and demographic profile suggests danger, simply because he or she seems to like you. Attorney likability is a factor in juror decisions, but not to the extent that a juror will override his or her beliefs regarding the case and commitment to arrive at a "just" verdict. Simply put, to win, you have to do a whole lot more than get the jury to like you.

Another critical factor in *voir dire* is evaluating a prospective juror's persuasion and leadership capabilities. It is generally accepted that a persuasive leader can have a significant impact on the jury's ultimate verdict. Consequently, whatever type of scoring system is utilized during *voir dire* should include special points for "leadership."

The attorney conducting *voir dire* should have another person monitoring the panel. This assistant can observe the non-verbal behaviors and facial expressions of prospective jurors not being directly questioned. An analysis of these observations may reveal critical information that will help select the most favorable persons for the jury.

CONCLUSION

When selecting a jury, it may be possible to identify some demographic features that differentiate between jurors more or less likely to favor your case. However, litigators must develop juror profiles of favorable and unfavorable juror types in each new case, avoiding the trap of generalizing that a certain juror demographic feature will regularly and reliably predict verdict preference.

When attorney-conducted *voir dire* is allowed, always move beyond demographics and stereotyping to capitalize on the most powerful means of identifying biased jurors: case-specific attitudinal analysis. The time and effort expended in preparing for and conducting an in-depth *voir dire* may make the difference between winning and losing the case. Δ

NEW MEMBERS, Continued

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David T. DeCelles, Belmont
James M. Galliher, Worcester
Joseph F. O'Connell, III, Boston
Brent A. Tingle, Worcester
Kevin S. Wattles, Cambridge
- *MICHIGAN*
Thomas F. Blackwell, Grand Rapids
Sharon R. Brinks, Grand Rapids
Richard C. Sheppard, Bay City
Stanley J. Stek, Grand Rapids
- *MINNESOTA*
James P. Ashley, Minneapolis
Dale J. Evensen, Minneapolis
Eric Fosaaen, Moorhead
Rebecca Havlisch, Minneapolis
Craig R. Kieffer, Minneapolis
- *MISSISSIPPI*
Senith C. Tipton, Jackson
- *MISSOURI*
Dennis J. Dobbels, Kansas City
- *NEVADA*
Robert L. English, Las Vegas
- *NEW HAMPSHIRE*
Jill K. Blackmer, Concord
Bradley A. Stolzer, Manchester
- *NEW JERSEY*
David J. Klinger, Westfield
Kenneth L. Malmud, Roseland

- *NEW MEXICO*
Paul R. Koller, Albuquerque
Lourdes Martinez, Las Cruces
Denise B. Shepherd, Albuquerque
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John R. Cashin, Brooklyn
Christopher L. Gallinari, New York
Robert L. Hartford, Buffalo
Joseph G. Rende, White Plains
Howard F. Strongin, New York City
John J. Weinholtz, Buffalo
- *NORTH CAROLINA*
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Kirk Gibson Warner, Raleigh
- *OHIO*
R. Jeffrey Baker, Xenia
David T. Davidson, Hamilton
F. Theresa Dellick, Youngstown
Alan B. Dills, Toledo
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James D. Martin, Wooster
Gary L. Nicholson, Cleveland

Jonathan P. Saxton, Cincinnati
Richard D. Schuster, Columbus
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Cullan J. Uhlinger, Cleveland
Barbara A. Wagner, Dayton
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Mary Quinn Cooper, Tulsa
John A. Dunnery, Tulsa
Karen M. Grundy, Tulsa
Anne Livingston, Oklahoma City
Malinda Matlock, Tulsa
Jennifer Mustain, Tulsa
Terry S. O'Donnell, Tulsa
Gary Payne, Oklahoma City
William D. Perrine, Tulsa
Rob D. Ramage, Oklahoma City
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Nancy M. Erfle, Portland
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Blake C. Marles, Allentown
Samuel J. Pace, Jr., Philadephia
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- *RHODE ISLAND*
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