

Starting the search for the right juryⁱ

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Our legal system is based on the assumption that citizen juries in America will be fair, impartial and well-intended. Attorneys act as advocates, judges as umpires and juries as objective observers and decision makers. Parties risk their fortunes and lives on the system. How can a lawyer representing a party strive for fairness in a particular trial?

It all begins with the case and the jury. The people that make up our juries are individuals with individual attitudes and beliefs. If those attitudes and beliefs run counter to your case, you are unlikely to win. In addition, we must face the fact that there is a rising trend of so-called stealth jurors attempting to get on juries. These individuals may lie on questionnaires and during voir dire to get a seat on the jury. Outside research confirms our own research that between 15 and 18 percent of potential jurors would be fatal to one side or the other – usually the plaintiff’s side. Research has also shown that stealth jurors want to make a statement or influence the outcome in a biased way. (Some states assess a penalty of \$2,000 for lying in voir dire or on a jury questionnaire.) Cases are won and lost based on the jury, the facts and the presentation, and therefore it’s essential that you figure out who the stealth jurors are in your pool. The first two important steps toward selecting the right jury are assessing the beliefs of your potential jurors based on jury research and, when possible, attempting to get individual voir dire.

Assessing jurors’ beliefs

The research is quite clear that a person’s beliefs and how his or her beliefs mesh with the case have a greater impact on verdict preference than anything else. Discovering the beliefs of prospective jurors helps to determine how you should use strikes.

In addition to the beliefs and expectations of potential jurors, attorneys must also discover their “heuristics.” Heuristics involve automatic thinking or what is referred to as “cognitive shortcuts.” They are basically hard-wired or learned processes that may explain how jurors go about making decisions, forming judgments and solving problems. Discovering these decision-making short cuts and what invokes them can work wonders for your case. For example, the size of the lump in a failure to diagnose breast cancer case may lead a jury to believe the doctor should have discovered it. In a car wreck case, something as simple as evidence that the defendant was driving barefoot could lead jurors to conclude that he was responsible. Focus groups or other jury research will reveal these likely guides to decision making.

Most of the time, heuristics lead to accurate jury decisions, but not always. By understanding that decision-making shortcuts will affect a juror’s assessment of your case, a lawyer can support or minimize the impact of the shortcut, depending on whether it helps or hurts his or her position. Jurors, of course, do not make conscious decisions to use heuristics to simplify their job – rather, heuristics are used involuntarily.

Although jurors generally do not comprehend the details of the case the same way lawyers and expert witnesses do, they do display a rather remarkable ability to sort out right from wrong and fair from unfair.

While the losing side of any case often rationalizes the loss as a juror comprehension failure, research on juror behavior indicates a different kind of failure. Jurors, as human beings, develop a series of expectations and beliefs over their lifetime. These beliefs create expectations and guide their view of the world and how it works. Persuasion, in a nutshell, is about showing jurors how a particular outcome is consistent with their beliefs and expectations. That's why it's essential that attorneys discover how potential jurors see the world.

Framing is critical because people like their own ideas. People like people who agree with their ideas. People like cases that are consistent with their ideas. You need to discover their ideas and frame your case to be as consistent as possible with those ideas. Lawyers can use a number of methods to discover potential juror attitudes and beliefs, including:

- Setting up pre-discovery and pre-trial focus groups.
- Conducting formal or informal surveys.
- Reading letters to the editor.
- Listening to talk radio.
- Asking family and friends what they think.

Try to get individual voir dire

The best way to discover information about jurors is by doing individual voir dire in a private setting. Research reveals that 19 percent of jurors disclosed information in individual voir dire that would not have been discovered otherwise and resulted in a challenge for cause. In the jury selection process, we strike the potential jurors we know won't decide in our favor, and hope we have enough strikes.

There are two main purposes in voir dire – getting rid of potential jurors who will hurt your case and establishing rapport and trust with potential jurors. The first requires an advance plan and careful execution and the second requires considerable relationship skills. Most potential jurors fall on a continuum. It is important to determine how far they are one way or the other. Depending on the case, you may also want to educate jurors and condition them to your case core – your theme and short statement of what this case is about.

Although there is little research available concerning the actual impact of voir dire, other than the definite impact of striking a potential juror, studies find that asking strategic questions does indeed influence jury decision-making for the better and even the worse. Strategic questions have a goal of persuading the jury as opposed to merely requesting information.

For example, a strategic question could be designed to reinforce a person's promise to follow the burden of proof of more likely true than not. If the juror commits in front of the other panel members, he or she will feel group pressure to behave consistently during deliberations.

Careful use of strategic questions can increase the likelihood that the jury will adopt your view of the case.

