



How to Win Your Case During Jury Selection

Ty Hyderally and Stephen Fox

Agenda

- What does the modern jury look like?
- (De)-selecting jury members
- Danger of relying on demographics
- Factors other than demographics
- Use of questionnaires
- Use of social media

The Modern Jury

- More educated ... average is now “some college education” (esp. Millennials)
- Learn by watching, not reading
- Grab & go culture ... get to the point quickly
- Most want to do good ... but need guidance
- Participate in social justice
- More business acumen
- Familiar with court process b/c of media coverage

The Modern Jury (Millenials)

- More safety-conscious than prior generations
- Higher standards of personal responsibility
- Accustomed to job-hopping
- Short attention spans
- Comfortable with technology (as aid)
- Experts get no respect

Jury (De)-Selection Process

- Central task—identify experiences/bias most harmful to your case
 - Process is one of de-selection
- Focus on experiences/bias rather than demographics
- Studies show:
 - Demographic peers may judge a peer-party more harshly than non-peer
 - Jurors in employment cases more likely to disregard evidence in favor of own experiences
 - Employment case juries spend more than 50% of time discussing personal experiences, rather than evidence

Jury (De)-Selection Process

- Dangerous to generalize about jurors based on demographics
 - Gender, Race, Ethnicity or national origin
 - Religion, Age, Marital status
 - Socio-economic status
- Difficult to obtain reliable demographic info during voir dire
 - In federal court, jury selection is limited by time and ability to question jury panel members

Jury (De)-Selection Process

- Court may permit parties or attorneys to examine jury panel or may do so itself
- If Court examines, parties/attorneys may make further inquiry court considers proper (Fed. R. Civ. P. 47(a))
- Parties get 3 peremptory challenges in federal court (Fed. R. Civ. P. 47(b))
 - State court peremptory challenges vary according to jurisdiction and panel size
 - State court procedure for seating alternates also varies

Jury (De)-Selection Process

- In voir dire, jurors are excused, challenged for cause, challenged peremptorily or qualified
 - Excused—usually for a personal reason
 - Challenged for cause—based on a specific disqualifying situation
 - Challenged peremptorily—based on party's unspoken desire to strike a particular juror
 - Peremptory challenge—subject to challenge by another party

Jury (De)-Selection Process

- Trial judge has nearly unreviewable discretion during jury selection
- Challenges for cause—no hard and fast rules
 - Ultimate question—can juror reasonably be found able to render a fair and impartial verdict even in light of some factor suggesting possible bias or prejudice?
 - If prospective juror expresses doubt about her ability to be fair, she should be disqualified

Jury (De)-Selection Process

- Some biases too grave to permit juror to continue even if juror professes ability to be fair
- Examples:
 - Juror has a financial interest in the litigation
 - Juror knows a party, attorney, witness
 - Juror is employed by a lawyer or law firm
 - Juror is an attorney who practices employment law
- Judge will rarely disqualify juror just because he has been fired and states company was unfair
- Trial counsel must have follow up questions for each area of inquiry

Jury (De)-Selection Process

- After de-selecting jurors with biases, get jurors to care about your case/client
- Build rapport with potential jurors—persuade them to like and trust *you*
- Identifying bias does not mean playing the role of inquisitor
 - Involves having open, honest conversation with jury pool in which they feel comfortable sharing their true views
 - One way to combine dual goals of juror de-selection and education ... frame questions in a way that assumes your version of facts

Questioning the Panel

- Listen, listen, listen ... and do so with your eyes
- Tell something about yourself (to break the ice)
 - Reflection builds rapport
 - Respect boundaries and personal space
- Poisoning the pool—just a myth
- Question structure—open vs. closed
 - Get information in a non-threatening manner

Factors Other than Demographics

- Better indicator of juror experience and bias—media and personal consumption
- Nielson stats show Americans spend 34 hours/week watching TV
- Much can be learned about a person based on her personal consumption habits
 - “... the question of what kind of information is being gathered from TV watching is the key question to learn from a potential juror in attempting to learn how his/her values are being formulated.”

Factors Other than Demographics

- Jurors who identify as:
 - Conservative or Republican,
 - Get news from Fox News, Glenn Beck and Sean Hannity,
 - Read news blogs like the Drudge Report or the Wall Street Journal, and
 - Believe that the “government does too much” and that “individuals should ensure their own safety,” ...

Are more likely to return a DEFENSE verdict

Factors Other than Demographics

- Jurors who identify as:
 - Liberal, progressive, or Democrats,
 - Get their news from CNN, MSNBC, Hardball and Rachel Maddow,
 - Enjoy comedy news programs like Daily Show or Colbert Report,
 - Read news magazines and *New York Times*,
 - Believe that the “government should do more to solve problems” and that “the government should ensure our safety,”

Are more likely to return a PLAINTIFF’S verdict

Tools to Obtain Insightful Data

- Questionnaires
- Social Media



Supplemental Juror Questionnaires

- Juror information card typically only contains demographic information (not good predictor of juror decision-making)
- SJQ
 - Uses questions more likely to be predictive of juror decision-making
 - Uses case specific questions
 - More likely to get realistic answers, as opposed to socially acceptable answers in large group of strangers in formal setting
 - Gives data points for each panel member
 - Makes voir dire more efficient

Supplemental Juror Questionnaires

- Obtain agreement from opposing counsel to use questionnaire
- Seek agreement on questions
- Tell judge both sides desire use of questionnaire
- Have agreed-upon plan of how to administer questionnaire (the easier for the court staff, the better)

Constructing Supplemental Questionnaires

- Know jury information card; don't ask repetitive questions
- Collect juror number and name for reference
- Use combination of multiple choice questions, short answer, and open-ended questions
- Use "Likert" style questions to assess level of agreement (e.g., strongly disagree, disagree, agree, strongly agree)
 - Important to know what potential juror thinks about a certain question but equally important to know WHY they feel that way

Use of Questionnaires at Trial

- Prepare directions for panel members:
 - “After filling out questionnaire, please place a “C” before any answers you deem confidential.”
 - “You must fill out every answer completely.”
 - Questionnaire is confidential
- Trial team should develop plan for:
 - Instructing the jurors on how to complete questionnaires
 - Copying questionnaires and sharing with opposing counsel
 - Analyzing and coding questionnaire responses

Sample Questions

- Have you ever served on a jury? Did you find in favor of the Plaintiff or Defendant?
- Have you ever been a party to a lawsuit? Witness in a lawsuit? If yes, please explain.
- Have you ever had a business dispute with your employer? If yes, please explain.
- What three people do you admire the most? ... the least?
- If you do not object, state your political preference.
- If you do not object, state your religious preference.
- Have your or a member of your family had any form of legal training?
- Describe your leisure time activities: (a) hobbies, (b) clubs, groups, fellowships, unions or other organizations, and whether you are an officer, (c) newspapers or magazines you read regularly, (d) favorite TV programs.

Use of Social Media

- Social media can be powerful tool to identify bias
- Researching prospective jurors on social media offers advantages over traditional voir dire
 - People arguably more honest and less likely to self-censor online
 - People less likely in online forum to feel pressured to say the “right thing” or to express the socially acceptable view

Use of Social Media

- Sources of social media
 - **Facebook**: king of social-media sites; > 2.07 billion active users; users post information about demographics, families, marital status, education, occupation, politics, and entertainment preferences
 - **Twitter**: a “micro-blogging” site in which users post “tweets” (messages of 140 characters or fewer); 330 million registered users who post > 340 million tweets each day; users post tweets around certain “trending” topics, including current events and politics—subjects of great interest for identifying bias
 - **Instagram**: social networking app made for sharing photos and videos from a smart phone; similar to Facebook or Twitter, everyone who creates an account has a profile and news feed

Use of Social Media

- Sources of social media
 - **Linked In:** social networking site for the business community. Allows members to connect and network with people they know or want to know professionally
 - **Google:** Conduct a Google search for the potential juror and/or potential juror's spouse using name and city to see what hits can be found
 - **Public records databases:** lawsuits, judgments, real estate records

Use of Social Media

- Even if social media doesn't uncover directly relevant bias, may reveal other highly useful information, like ...
 - Basic demographic information too time-consuming to collect during voir dire
 - Whether person is strident or overtly opinionated
 - What kind of movies and music the person likes listen to/watch
 - Whether someone is devoutly religious
 - Whether someone has previously been involved with the legal system (as a plaintiff, defendant, or witness)

Use of Social Media

- Examples of use of social media during the jury-selection process
 - In products liab. case, defendant's jury consultant discovered juror's FB page reflecting her hero was Erin Brokovich
 - In products liab. case against ConAgra, defendant discovered juror's FB page with links to various websites highly critical of large corporations (including link to juror's own blog, on which he had written: "F--- McDonald's. I hate your commercials. I'm not 'lovin' it.")
 - Upon defense motion, judge removed juror from jury

Use of Social Media

- Examples of use of social media during the jury-selection process
 - In criminal trial for sexual assault against black male defendant, defense counsel sought to seat a white female juror
 - While traditional demographic view might have counseled against her as defense juror, her FB page revealed numerous pictures of her with black male friends

Considerations for Social Media Analysis

- Timing is the primary determinate of whether a social media analysis is appropriate
 - When will you learn the names of panel members?
 - What information will you know (e.g., name, age, address)?
 - Which members of trial team are available to conduct search?
 - How will you collect the information for use in jury selection?
 - Recommend physical description if common last name

Social Media Warning

- ABA Opinion 466 (April 2014)
 - Passive lawyer review of website or ESM—like driving down street where juror lives to observe environs and glean public information—OK!
 - Active lawyer review where lawyer requests access to juror ESM—like driving down the street, getting out and asking juror for permission to look inside juror’s house—Not OK!
 - Passive lawyer review where juror becomes aware of identity of viewer from ESM feature—like a neighbor recognizing the lawyer’s car and telling juror that lawyer drove down the street—OK!

Social Media Warning

- State Bar Opinions

- NYCLA Opinion 743

- Proper and ethical for lawyer to undertake pretrial search of prospective juror's ESM
 - ... provided "no contact or communication" with prospective juror and the lawyer does not seek to "friend" jurors, subscribe to Twitter accounts, send tweets to jurors, or otherwise contact them

- New York City Bar Association Formal Opinion 2012-2

- Jurors may be monitored during the evidentiary and deliberation phases of the trial
 - Lawyer may not directly or indirectly attempt to "friend" or otherwise communicate with jurors
 - Prohibited communication includes juror becoming aware of lawyer's efforts to monitor

Social Media Warning

- State Bar Opinions

- Johnson v. McCullough, 306 S.W. 3d 551 (Mo. 2010)

- May monitor jurors during evidentiary or deliberation phases of trial
- Lawyer may visit publicly-available Twitter, Facebook or other ESM site of juror, but may not “friend”, email, send tweets to jurors or otherwise communicate with juror or act in a way by which juror becomes aware of monitoring

Contact Information

Stephen E. Fox
Polsinelli PC
2950 N. Harwood, Suite 2100
Dallas, Texas 75201
(214) 661-5582

sfox@polsinelli.com

Twitter: @StephenEFox

<https://www.linkedin.com/in/stephenefox/>

Ty Hyderally
Hyderally & Associates PC
33 Plymouth Street, Suite 202
Montclair, NJ 07042
(973) 509-8500

tyh@employmentlit.com