



EDUCATION

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Advocacy Track: Using Jury Bias and Voir Dire Techniques to Prepare for Trial

Presented with the Jury Bias Litigation Group

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FINDING OUT WHO HAS THE BIASES AND GETTING THEM OFF THE JURY¹

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Once upon a time, plaintiffs' attorneys thought we could ask straight-forward questions in voir dire, closed-ended questions. "Is there anyone here who thinks that you should not award money for pain and suffering?" followed by "I take it by your silence that everyone agrees."

We avoided bringing up controversial topics such as tort "reform."

We now have a vastly different approach, thanks to the work done by David Wenner and Greg Cusimano on jury bias and David Ball's work in *David Ball on Damages*.

The first thing we must do is get the jury talking. We at one time believed that if we brought out negative impressions of our case from the panel during voir dire, that we ran the risk of contaminating the remainder of the jury pool. We now know that the pool is already contaminated and our task is to find the jurors who we cannot persuade, i.e., have the biases, and remove those jurors from the panel.

The jury system that commenced in 13th Century England started with the people who knew the most about the facts of the case. We now have jurors who may not know about the facts of our particular case, however, they are likely to be very knowledgeable as it relates to the type of the case we are bringing, and have pre-loaded negative opinions about it or plaintiffs in general.

We must find the jurors who have the anti-plaintiff attitudes of personal responsibility in a negative way toward our clients, are excessively suspicious of plaintiffs, are stuff-happens jurors, who see themselves or the defendants as victims of the tort system or are likely to find fault with the plaintiff.

¹ This paper was first presented at AAJ's (formerly ATLA®'s) *Mega College: Integrating "Rules of the Road," Overcoming Juror Bias, "Reptile," and Damages from Case Intake to Trial*, Scottsdale, AZ, Apr. 2010.

We know that we need to address each of these issues in every case, and voir dire is the place to start. Here are a few guiding principles for every case.

First, with very limited exceptions, we must ask fully open-ended questions. If the question can be answered yes or no, it fails this simple test. The objective is to get the jurors talking, not for us to persuade them with our eloquent prose. At this point in time in the trial process, jurors are not inclined to accept anything we say as truthful, and will likely view our attempts to persuade them as disingenuous.

We are gathering information. The questions should presume that someone will respond in the affirmative. For example, the question to ask is “*Who* would have trouble awarding money for pain and suffering,” *not* “*Does* anyone think he or she would have trouble awarding money for pain and suffering.” The distinction is important. With the first question, we posit the assumption that there are people on the jury who would have trouble awarding money damages for pain and suffering. For the second question, the panel can sit still and not worry about having to respond. With the first question, we provide a psychological step up for jurors who have this attitude to realize that you are talking to them, causing them to be more likely to raise their hand to comment. The second question is less likely to bring those jurors over the threshold and cause them to raise their hands.

When that first juror responds to the open-ended question, providing us with some insight into his or her thinking, follow up most likely should be, “Tell me more.” We need to use the “tell me more” approach for as long as we can, consistent with what we need to learn from the juror and the patience of the judge. We accomplish two things in this process.

First, with luck, we get to the root of the juror’s thinking so that we better understand why he or she may or may not be a good juror for us in this case. Second, we bring out the juror’s thoughts in enough detail that it may stir the minds of other jurors to realize that they have information to convey as well.

Once a jury has made a statement that is unfavorable to us, e.g., “I do not believe in including money for pain and suffering,” the next step is to use that helpful² answer.

We ask who else on the jury feels that way. For example, “Thank you, Mrs. Smith. *Who else* feels as Mrs. Smith does?” Once again, we are not asking the question of “*Does* anyone feel as Mrs. Smith does?” Instead, we are assuming for purposes of going forward that there are others who feel the same way, thereby giving them license to raise their hand. Mrs. Smith in fact has done us a favor by expressing an attitude that others may be reluctant to express. By getting her to open up, we can leverage her answer to obtain similar responses from others who would be

² Seeing this answer as helpful, may seem counterintuitive, however, the juror has the attitude; we cannot change that hard fact, and now we at least know the juror has this attitude. However, the juror has provided us with the opportunity to use his or her answer to find other, like-minded jurors.

less reluctant to bring that information forth. Jurors with these attitudes might bring out these attitudes for the first time in the jury room during deliberations. We want to find this attitude during voir dire and keep that person out of the jury room.

Another good method to use in getting jurors to open up is to provide some personal connection. For example: “I have a sister who I am very close to, and as much I care about her, she simply does not think that a jury should award damages for pain and suffering.” Then follow up with “How many of you feel as my sister does?”

By taking this approach, we have made it safer for the jurors to talk about their feelings. We have told them we have a personal connection with someone who feels as they may feel, which gives them license to speak up.

Toward the beginning of voir dire, it is worth telling the jurors that there are jurors for whom this is the right case, and there are undoubtedly jurors for whom this is not the right case. We can use a personal example, by stating something along these lines.

I have a family member who was badly injured by a drunk driver. If my brother were called to sit on a case involving a crash caused by a drunk driver, he probably would say he could not be fair. On the other hand, if it was a case involving someone who had run a stop sign, he would be fine. Part of what I will be asking you to do today is to help us decide if this is the right kind of case for you to be a juror on.

This helps to make the jurors realize that they can speak up about their real feelings—because this may not be the right case for them.

Part of the process of conducting voir dire to find the jurors’ biases has to be that we relax and genuinely engage with the jury. If we try to take on a different persona, it is evident, and is stilted. Practicing voir dire by this approach, whether it be with people in the office, family members, or at an AAJ program, is the only way to develop a comfort for the moment we step in front of a panel of jurors. We must be honest and human with them. If we make a mistake, we must acknowledge it. If they do not see us as credible during voir dire, they will not be forthcoming with information during voir dire and will likely be less willing to accept our evidence during the trial.

In addition to being credible, to learn their biases, we must be open to what jurors have to say. When a member of the panel states that they hate lawyers, our response must *not* be to grimace at them. Rather, we must say something along the lines of “Thank you for expressing your opinion. I appreciate your honesty.” Then we use this answer to springboard by asking “Who else feels as Mr. Smith does?” In each instance, no matter what we may be feeling inside, we express openness, a willingness to receive the information, and an acceptance of the juror’s perspective. By doing this, we keep the flow of information open, even if it is bad news. The reason why we are able to keep the flow of information moving is because the jurors know that it

is safe to speak honestly with us. We of course plan to use it for our purposes at a later time at the bench, but it is only by maintaining a warmth and openness that we can continue to receive the answers we need.

The key to what we are doing is to get the jurors talking. We need to use English words, not legalese, and be that warm and friendly person. That probably means leaving behind, for men, the dark power suit, the power tie, and the white shirt. The women's equivalent also needs to be left in the closet. We want to have the jurors see us as human beings trying to understand their attitudes, and not as the all-powerful being, ready to leap out at them or to lecture them about their inadequacies. That is how we may be perceived, but how we work with the jurors can overcome this perception.

One of the things that is hardest for us is when jurors start talking. We often fail to pay full attention to the answer, or, worse yet, cut the answer off part way through because we do not like the answer. We need to *actively* listen. By actively listening, we learn more, we honor the jurors' answer, and give them the incentive to provide us with more information that they thought we did not want to hear or were not prepared to tell us.

Someone else needs to take notes, make observations about the jurors, and assist us when the time comes to move for challenges for cause. We need to be fully focused on the jurors while talking with them so as to understand and hear them in every sense of that term and to learn their biases.

The one time to use closed-ended questions is after a juror has provided a fixed bias. For example, a juror states "I do not believe that anyone should receive money for pain and suffering." At that point, ask "I take it this is a long-held belief?" "Setting this aside would be hard or impossible?" Follow up with, "I take it this is not an attitude which is likely to change over the next ___ weeks?"³ At this point, the judge may be a little annoyed, but we have succeeded in making it very difficult for the judge, or defense counsel, to rehabilitate the juror. Under the case law in many states, that juror has now evinced a fixed opinion and is not subject to rehabilitation. Instead, he or she must be dismissed for cause.

In the process, with frightening frequency, we will encounter a juror who always wants more information. These are people whom we are not likely to be able to satisfy with our proof at trial. Rather, they are "stuff happens" jurors, who will find the plaintiff at fault and exonerate the defendant if given the opportunity. It is critical to find out who the "stuff happens" jurors are by determining those who always want more information before providing an opinion. Once we know who these jurors are, the only solution is to get them off the panel one way or the other.

Voir dire is not the place where we are going to change the jurors' attitudes. The only thing we are doing is finding out what those attitudes are, using them to find other jurors with anti-

³ The timeframe here should be whatever the timeframe is for the completion of the trial.

plaintiff attitudes, and removing these jurors if necessary. We will not convince anyone in voir dire that the *McDonald's* case was correctly decided, or that they did not understand the facts if they think the verdict was wrong. We have to take their attitudes as they exist, find their biases, and remove them from the panel.

Jurors do not knowingly advertise their biases to us. However, if we ask the right questions, they will self-identify right in front of us.

USING BIG DATA RESEARCH FOR MORE EFFECTIVE JURY SELECTION¹

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In a litigation environment where judges are frequently putting extreme time limits on voir dire, cause challenges are being limited, and attorney-conducted voir dire is becoming less available, the need to find additional ways to make the most effective use of peremptory challenges, and to both predict and bolster cause challenges, is becoming not just more important, but critical.

One strategy for dealing with these restrictions is to undertake research to harvest data about the members of the venire panel; data which informs and targets both peremptory and cause challenges.

In the last five to ten years:

- Much more data is being collected on individuals
- More companies are selling data to one another to create richer profiles

Websites and apps using Application Program Interfaces (APIs) that access huge databases have made it possible for you to get individual data online in seconds.

The ability to get this information depends on resources available and, more importantly, when the jury list becomes available. Getting the list early should be the first goal of every attorney. However, there are ways to get useful information even if the list is received as the panel members are entering the courtroom.

¹ This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Voir Dire Workshop*, Austin, TX March 2020.

Another key factor affecting the ability of getting information, of course, is the judge. While most venues have become more accepting of juror research, with some even expecting attorneys to conduct this type of research, these authors still run into some judges who restrict social media lookups. We have run into only a few judges who limit database research, although it is possible that some judges have no idea it exists for jury selection. An attorney should find out the judge's preferences and be ready to compensate for limitations that are imposed. We recommend asking other attorneys who have appeared before your judge to learn if he or she has permitted or limited juror research. A court's local rules may also reference such research, so you should consult those as well.

The main emphasis of this paper is to discuss the use of social media and huge proprietary databases, often with predictive analytics (known as "big data"), to fill gaps in identifying and eliminating unpersuadable venire panel members. We will also briefly discuss strategies to use if online data is not available.

I. Using Social Media and Database Research to Gain Knowledge of Venire Members

By using internet and database research, the attorney can:

- Harness the power of big data, discovering hidden risks, bias, and potential leaders in the jury panel
- Combine a wealth of public and social data, with artificial intelligence (AI) insight and analysis, to help discover the real person the juror is
- Maximize for-cause opportunities and identify peremptory challenges using the right combination of data, tools, and experience
- Gain deeper insights into people, refine courtroom strategy, and make better decisions regarding the jury
- Use social media to provide key insights into a juror's personality, opinions, and world view
- Quickly spot congruency or contrast between a juror's objective digital footprint and more subjective information, such as questionnaire and voir dire responses
- Utilize big data to level the playing field by informing and improving the trial communication strategy
- Use public and social media data to spot potential conflicts of interest, adverse relevant opinions, or other issues in the jury panel.

The internet provides many opportunities to learn about venire members, depending on when you obtain the juror list.² Of course, this has been the case for some time. Today, it is common for people to put information about themselves on the internet, and it is unusual not to find some useful juror selection information about a person online or in available databases.

In our research, we have found members of the venire who “forgot” to mention significant information even though the panel had been asked direct questions about these topics. Some examples are:

- Panel member ran for local office on a tort reform platform
- Panel member “made a fortune because of the defendant”
- Panel member worked in the same company as the defendant
- Panel member posted negative comments about lawsuits on social media

This information about the panel members was left off completed supplemental questionnaires, was not mentioned in voir dire despite being asked relevant questions and was only uncovered by social media research.

Gathering Social Media and Big Data Information

There are three frequently employed methods for obtaining this information: using staff or hired researchers, using litigation consultants, or using litigation data firms.

1. Using Staff or Hired Researchers

For those cases where funds for this type of research are very limited, or the attorney has access to multiple staff members or skilled internet researchers, using staff is the obvious choice. For most individuals, researching people online needs little explanation. However, care should be taken, as noted previously, to follow the ABA and local rules of professional conduct. The New York City Bar Association Formal Opinion 2012-2 states, “A lawyer must take measures to ensure that a lawyer’s social media research does not come to the attention of the juror or prospective juror” as even inadvertent or unintended discovery by the juror might be a prohibited communication with the juror. N.Y. City Bar Assoc. Prof’l Ethics Comm., Formal Op. 2012-2 (2012). That rule is beneficial to the attorney, as jurors who discover an attorney is researching them seldom appreciate it. These rules make research on LinkedIn problematic, since LinkedIn

² Although the internet offers valuable information that can help you make more informed decisions about potential jurors, you must use this resource responsibly. The American Bar Association (ABA) has promulgated a rule on researching jurors online, and many other jurisdictions have also established rules. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 466 (2014). For example, the New York City Bar has a very strict policy set out in Formal Opinion 2012-2, Jury Research and Social Media. Professional responsibility rules and caselaw should be reviewed regularly for the latest information before proceeding with research.

notifies members exactly who is checking their profiles unless specific privacy settings are implemented by the researcher. Although obvious, it is worth stating that all rules prohibit “friending” venire members.

Obviously, a search includes running names through common search engines, but do not limit your research to just Google and Facebook. You can find additional information using Yahoo, Bing, or many other search engines, as well as real estate sites like Zillow and local newspaper archives. Also, sometimes Google Earth can provide significant information such as automobile ownership and type of residence the juror lives in.

There are also legal database sources, such as LexisNexis Accurint, which are available in most law offices and can be very helpful in providing information such as income, home value, licenses, arrests, likely relatives and associates, and more.

Finding and making this information useful can present a challenge. We have seen significant variations in quality of research by law office staff. Also, except for LexisNexis or Westlaw, there is little access to database information on the web and none containing the analytics discussed below.

2. Use of Litigation Consultants

Many litigation consulting firms have individuals that do online juror research, and many collaborate with litigation data firms to gain access to big data. A few have their own apps for accessing consumer data and analytics.

3. Use of Litigation Data Firms

By far the most comprehensive, fast, and dependable approach is to use one of the many firms that have come into existence to provide this type of information. Most of these firms can provide the information rapidly—even when a juror list is not available until voir dire is about to start. Additionally, most have individuals skilled at getting information that the casual researcher would miss. *Most important, most have developed relationships with big data firms that supply specialized knowledge not available to the infrequent researcher.*

Information Provided by Litigation Data Firms

The types of information most firms access include:

- Political preference
- Consumer preferences
- Criminal history
- Foreclosures

- Property ownership
- Professional licenses
- Online petitions signed
- Newspaper files
- Blog posts
- Analytics

The Analytics Advantage

Perhaps the greatest advantage of using a litigation data firm is that most also have developed, or have access to, predictive analytics that can provide descriptive attitudinal data that can be very helpful.

These analytics may include information such as the small sample below drawn from a recent profile that has been reduced from fifty to thirteen factors for brevity's sake.

- Activist: Yes
- Abortion: Pro-choice
- Affordable Care Act: Support
- Border wall with Mexico: Oppose
- Citizens United Supreme Court ruling: Overturn
- Fiscal: Liberal
- Gay marriage: Strong support
- Gun control: Support
- Undocumented immigrants pathway to citizenship: Support
- Party affiliation likely: Strongly Democratic
- Social orientation: Liberal
- Trump impeachment: Yes
- Trump opinion of President: Disapprove

- Labor unions: Support

Additionally, the materials are generally provided in a useable form, although at times it may be helpful to have them output in summary form. Most of these firms can provide a dashboard where you can look up panel members in real time. You may also be able click on specific areas to expand information, score or rate in real time, add notes and other information, and then save as a list or printout.

There is a cost involved, but with the competition that has developed in this niche, those prices have decreased significantly.

Some examples of the firms that these authors are familiar with and have used for jury selection include:

- *Voltaire* (<https://voltaireapp.com>)
- *Jury Mapping* (<https://jurymapping.com>)
- *TrialSmith (JurySmith)* (<http://www.trialsmith.com>), which provides juror reports exclusively available to plaintiffs' attorneys

There are several others, but these are provided because of the knowledge of these sources by the authors.

*Research Firms' Products*³

1. Voltaire Dashboard Lookup Example

Insights	Count
Insights	1 2 4 >
Politics	4 >
History	12 >
Finance	3 >
Social	22 >

- JOB RELATED RISK**
Works in Law Enforcement
- FACTOR**
May have preconceived notions based on personal involvement with legal system
- VT INSIGHT**
Interested in Trophy Hunting

³ These examples are used with the permission of the respective firms. All data is real but the names and identifying information about panel members are altered.

2. Reports of Research Firms

Both of the following reports are significantly reduced and show only a sample of the data available.

Voltaire Report:

Burke, Kevin #0061

MALE • 5/4/1943 • Person 32adda85-df9d-40f8-bedf-a6f2398d06d2-G1027945286873653525

Tags: ["MILLERCOORS"]

9	Factors	
	Executive Level Job Experience Profile indicates experience in high level management positions	⚡
	Pro Law Enforcement Profile indicates support for law enforcement organizations and causes.	⚡
	Traditionalist/Patriotic Nationalist Social footprint shows themes of belief in respect for country over individual, iconography of the flag, or other items related to nationalistic identity	⚡
	Demonstrates Opinions Publicly Analysis of Kevin's history of online petition signatures may indicate a proclivity to outwardly sharing beliefs and opinions.	⚡
	Owns or Has Owned a Business Analysis of Kevin's public records indicate a they currently or have owned a business.	⚡
	Climate Science Denial Social footprint shows themes of climate science denial and/or influence from climate science deniers.	⚡
	Conservative Worldview Social footprint includes themes of conservative policy or thought.	⚡
	Pro-Law Enforcement Footprint Social footprint includes themes of law enforcement or LE supporter organizations.	⚡
	Pro-Military Sentiment Social footprint shows themes of supporting troops, military spending, or forward projection of US hegemony.	⚡
1	TermTRACK	
	TermTRACK: MILLERCOORS Follows MILLERCOORS	⚡
1	Petition Signatures	
	Online Petition - SAVE COCOHATCHEE BAY AREA FROM MORE DEVELOPMENT! - Signed 2015-04-11T14:40:59Z by Kevin Burke Naples, FL Cancelling a deal made in good faith creates the opportunity for future acts of bad faith. Honor the commitment.	⚡
1	Voter Registrations	

Jury Mapping Inc. Report:

JUROR PROFILE REPORT

NAME:Sally Smith

GENDER:Female

BIRTHDAY:1988-03-09 (31 years old)

ADDRESS:1234 Main St Anywhere USA



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INSIGHTS

POLITICAL VIEWS



- Voted in 2016 general election

- Democratic Party very frequent voter (4 of last 3 eligible primary and general elections)
- Only Democratic voters in household

WEALTH & LIFESTYLE



- Likely rents an apartment valued at \$376,612

MEMBERS OF HOUSEHOLD



Jane Doe

- 27 years old
- Political affiliation: Democratic

HOUSEHOLD INTERESTS

- Computer owner in home

COMMUNITY INFORMATION

NEIGHBORHOOD	
Socioeconomic rank	90th percentile
Median housing value	\$376,612
% with children	9%
% Spanish speaking	13%

COUNTY	
2016 Clinton vote	66%
2016 Trump vote	27%
2016 voter turnout	65%

Organizing the Data

While big data provides an enormous advantage, especially where focus groups, questionnaires, and occasionally surveys are involved, the data can become overwhelming.

Time is often critical during jury selection, and when the judge is expecting immediate responses, having a pile of data can be almost as worthless as no data. So, the key is to organize the data to access it as rapidly as possible. Occasionally, that means having an organized computer file, however often and especially in federal courts, those may be difficult to use in the courtroom. Additionally, there is a possibility that when you are looking at data on a computer the panel members can see it and raise questions.

Because of these factors, we find it is usually important to have the material in book form. Three sections are important: data listed in juror number and name order, jurors listed in priority order, and individual profile reports.

1. Juror Number or Name List

These lists provide for quick cross reference. A partial juror list by name appears below.

Table One—Juror List by Name

Juror #	RJ Score	Last Name	First Name	City, State, Zip	Age	Occupation
13	35	Aaron	Eliza	Anyplace USA	24	Entertainer
38	100	Andrews	Andrew	Anyplace USA	43	Production Tech
43	50	Bailey	Lee	Anyplace USA	44	
28	90	Beers	Cervasa.	Anyplace USA	33	Corrections Officer
29	20	Beatnick	Brian Albert	Anyplace USA	67	Retired
14	65	Bell	Ring	Anyplace USA	66	Inspector Water & Sewer

2. Priority Order

Below is a partial example of an excel file listing the panel members from worst score to best. Since it is deselection, we list the jurors with the most defense-oriented score first.

Table Two – Priority Strike List

Juror #	RJ Score	Last Name	First Name	City, State, Zip	Age	Occupation
33	110	Smith	Susy.	Anyplace USA	57	Accounts Payable Specialist
38	100	Andrews	Abraham.	Anyplace USA	43	Production Tech
25	100	Boonei	Daniel	Anyplace USA	40	Accounts Receivable
31	100	Thomas	Thomas Michael	Anyplace USA	38	
39	95	Jones	G.	Anyplace USA	53	Engineer
28	90	Beers	Cervasa D.	Anyplace USA	33	Corrections Officer

This list is just a matter of sorting but can give quick reference to those panel members that the research has indicated are most probably defense oriented.

3. Individual Profile Report

The following report is the most important form. When the most important items to track for each juror are identified, then a program is developed to combine or pull out data from social media, supplemental questionnaires, and standard juror questionnaires so all information is easily accessible and each juror is listed on just one page. Then, two or

sometimes three copies are made and put in three-ring binders by juror number and another by juror name.

Of course, each attorney should decide what process for keeping track of jurors is most useful for them. Some attorneys take this to the podium to use it for reference, while others depend on a consultant, associates, or paralegals to use it to track and rate jurors.

Table Three—Individual Juror Profile Report, Including Supplemental Questionnaire Responses and Internet Research

#: 13

Name: John Doe

Cause: No

PERSONAL	
<i>Age: 52 Zip: 11111</i>	<i>Marital Status: M</i>
<i>City: Anyplace USA Years: 32</i>	<i>Military/Law Enf.: None</i>
EDUCATION/WORK	
<i>Degree:</i>	<i>Graduate Work:</i>
<i>Current Employer: City of Anyplace</i>	<i>Current Job Duties: Mechanic</i>
<i>Best Job Employer: Current job</i>	<i>Occupation Status: City of CC - Fleet maint</i>
<i>Spouse Degree:</i>	<i>Spouse Grad Work:</i>
<i>Spouse Current Employer: Wal-mart</i>	
POLITICAL: Vote for who I agree with	
VOTER REGISTRATION: Independant	
OPINIONS	
<i>Most large co's honest: Somewhat agree</i>	<i>People file others/blame for inevitable: Strongly disagree</i>
<i>Large co's put profit over safety: Somewhat agree</i>	<i>Too many lawsuits: Somewhat agree</i>
<i>Corp exec's lie/increase profit: Somewhat agree</i>	<i>Jury awards too high: Somewhat disagree</i>
<i>Any injured/deserves compensation: Strongly agree</i>	<i>Jury awards are too low: Somewhat agree</i>
<i>Ever lost child? No</i>	<i>Lawyers take unfair advantage: Somewhat agree</i>
<i>Ever been caregiver? No</i>	
HABITS/TRAINING	
<i>Admire most: Henry Munoz, David Pulido, John Wayne</i>	<i>Admire least: Barack Obama,</i>
<i>Organizations: Catholic</i>	<i>Religious: Catholic</i>
<i>Read/Watch: Fox News, Local TV</i>	<i>Personality type: Kind, warm, friendly</i>

<i>Learn best by:</i> Both, audio and visual	<i>Describe self:</i> Head of household, always working, have 2 jobs
<i>Hobbies:</i> None	
TRAINING	
<i>Medical:</i> None	<i>Legal:</i> No
<i>Auto:</i> Auto mechanics in high school and beyond, still in automotive field	<i>Engineering:</i> No
<i>Law Enforce:</i> No	<i>Claims Adj:</i> No
<i>Accidents/Recon:</i> No	<i>Traffic Engrg:</i> No
LAWSUITS	
<i>Ever involved in lawsuit?</i> No	<i>Ever served on jury?</i> I have served on a jury in a criminal case yes, 3 -4 years ago Bank robbery
<i>Corp. to blame/indiv compensation:</i> Strongly disagree	<i>Punitive damages:</i> Strongly disagree
<i>Pain shouldn't be awarded:</i> Strongly disagree	<i>Punitive damages shouldn't be awarded:</i> Strongly disagree
<i>Mental anguish shouldn't be awarded:</i> Somewhat disagree	
AUTOMOBILE RELATED	
<i>Ever had serious car crash?</i> Parents rear-ended in vehicle accident, mother had 3 broken ribs at the age of 79	<i>Someone close killed in accident?</i> No
<i>While driving:</i> Listen to the radio, talks to passengers and talks on the cell phone	<i>Ever have CDL:</i> No
<i>Ever in accident?</i> No	<i>Were you responsible for accident?</i>
TRUCKING RELATED	
<i>Bad experience with trucks?</i> No	<i>Negative experience w/truck co?</i> No
<i>Opinion/trucking co's:</i> Neutral	<i>Opinion/Safety training/trucking:</i> No opinion - unsure
PARTIES	
<i>Anderson Columbia Co:</i> Who	<i>Bad experience with defense?</i>
<i>KNOW:</i>	
ABILITY TO SERVE	
<i>Unwilling/unable to serve:</i> No	<i>Issues re: ability to serve:</i> No
<i>Juror Comments:</i>	
HOME VALUE: 79283	

INTERNET SEARCH
<i>Google:</i> Parts foreman at City of Anywhere. Salary: \$33,189. Possible BMX Racing (motorcross).
<i>Facebook:</i> Recently posted pic of (cartoon) man & woman in car. Man driving with seatbelt; woman with seatbelt and one that goes across her face/over her mouth titled, "New seatbelt design: 45% less car accidents." Shared video of motorsports/truck with torque. Post
<i>Other:</i>
<i>Law Office Notes:</i>
Comments: Since plaintiff's wife was in car at time of wreck, concerned about cartoon.

II. Other Sources of Information That Can Enhance Online Data

Other sources of information that can enhance online data or can stand alone without online data are:

- Focus groups, which show patterns of bias that can help inform the substance of voir dire and, if available, the findings of online data.
- Supplemental juror questionnaires, which can provide significant stand-alone information and provide more opinion information to combine with online data.
- Survey research, which is much less understood and little used, can work to significantly improve the use of other juror data by providing statistically reliable targeting information about juror biases.

These areas which support and improve online and database research are extremely important, and except for survey research, are frequently discussed and well understood. Because there is significant existing information about focus groups and supplemental questionnaires, the benefit of these sources, combined with online data, will be briefly touched on.

Focus Groups Help Identify Patterns and Issues

We and many of our colleagues use information obtained in focus groups to assist with jury selection.⁴ Of course most experienced attorneys recognize focus groups can be especially helpful in identifying strategic questions for voir dire, particularly if you are permitted to converse with members of the venire in your jurisdiction.⁵ Questions may be directly related to

⁴ See Valerie Shea & Caroline Robbins, *Jury Consultant Article*, TRIAL ADVOC. Q., Oct. 1995, at 24, 27.

⁵ Dr. Jo-Ellan Dimitrius reportedly "relied on voir dire questionnaires and formal and informal surveys" to guide her clients in jury selection in the infamous O.J. Simpson criminal trial. Marc Davis & Kevin Davis, *Star Rising for Simpson Jury Consultant: Social science and luck helped Jo-Ellan Dimitrius choose sympathetic panel*, 81 A.B.A. J. 14 (1995).

the events in your case or may relate indirectly to personal characteristics, attitudes, and experiences that seemed to have an impact on focus group participants' decisions.⁶

For example, you might learn from the focus groups in your specific case that because of case circumstances, people who have filed bankruptcy tend to be more defense oriented. Most database research includes information about bankruptcies. While focus group data has too small of a sample size to tell you whether all individuals with bankruptcies are defense oriented, or what percentage of bankruptcy jurors are defense oriented, it will tell you that in this specific case, members of the venire who have filed bankruptcy need to be questioned or require additional analysis.

Supplemental Questionnaires and Online Data Complement Each Other

Although it may be difficult to get judges to approve a request for a supplemental questionnaire, whenever possible—even if only remotely—you will want to ask to use supplemental juror questionnaires. Supplemental questionnaires improve your ability to identify biased jurors. Supplemental questionnaires are particularly useful in obtaining opinion responses. Online data gives significant information about areas that are difficult to cover in court, but they cannot ask direct questions about willingness to award noneconomic damages, for example. Questionnaires also provide an opportunity for those who prefer expressing themselves in writing rather than speaking in front of a crowd when sharing their thoughts. Furthermore, they allow jurors to privately answer questions they might feel embarrassed discussing in public. This is particularly important when your case involves clients or witnesses who are minorities, or involves sexual assault or other prejudicial or sensitive subjects. Combined with the background information and opinions expressed on social media, supplemental questionnaires make for very in-depth analysis and comparisons.

Supplemental questionnaires are often worth the extra effort to push for inclusion in the selection process. All too often, we find as we begin exercising peremptory challenges, we know very little about certain jurors. Not everyone responds with candor in open voir dire.

III. Surveys Can Work with Online Data to Identify Biased Jurors

By using survey research, the attorney may accomplish the following:

- Use detailed and specific analyses to categorize, compare, and target jurors
- Analyze patterns and relationships of attitudes that form biases

⁶ Roy Lachman, et al., *AI, Decision Science, and Psychological Theory in Decisions About People: A Case Study in Jury Selection*, 19 *AI MAGAZINE* 111 (1999); Shari Seidman Diamond, *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 *DEPAUL LAW REV.* 301 (1998).

- Craft supplemental questionnaires to identify juror bias
- Develop oral voir dire questions that identify juror bias
- Analyze demographic variables included in online research that have a correlation with bias
- While focus groups, mock juries, blind juries, and personal experience can aid the intuitive lawyer to understand the effect of community attitudes and opinions on a particular case, the development of a practice is well served by the inclusion of regular community surveys in the firm's research activities.

Community surveys can tell you what percentage of individuals who share a particular characteristic have a leaning toward pro plaintiff or pro defense. For instance, you might learn that 70 percent of people who have filed bankruptcy lean defense in a specific case, or that 83 percent of jurors who have a certain professional license are pro defense in your particular case. The survey can inform the attorney if recent or old past victims, past defendants, people who own homes valued \$500,000 or more, or people with pro tort reform attitudes (among many other characteristics), are more likely to start out with a pro-defense bias.

Surveys can provide this kind of analysis for every significant issue. Online data then gives you the background information about each juror that you need to identify and rank negative panel members.

Scoring Data

For most consultants, including these authors, the scoring process is proprietary. However, there are several simple scoring processes that we have seen many attorneys utilize.

First, there is qualitative scoring. That is, just as one would do in oral voir dire, some information must simply be noted. Obviously, if Ford is the defendant and the panel member's web address is "Ford-man.com," that person is then an automatic strike score, even if he fails to mention it in voir dire. The same would be true of many social media responses. Also, if the panel member writes on the supplemental questionnaire (as these consultants have seen) "punitive damages are of the devil," that bias is obvious and should be noted as a cause strike, or a peremptory challenge if the cause challenge is not granted.

However, most panel members' data are not that obvious. One process we have seen used to deal with less obvious strikes is to simply add up the number of negative items on the list based on experience, focus groups, or other research, and give a total score to each juror. Some attorneys use a scale of 1 to 10 or pluses and minuses to score jurors' responses. Frequently pretrial research will provide some differentiation and a ranking of bad responses.

Second, is quantitative scoring. If this is one of the rare occasions where a community survey is available, then statistical analysis will give a precise score to each juror based on demographic information and attitudinal data.

IV. Conclusion

With more and more restrictions on voir dire and jury selection, the ability to collect information on venire panel members is becoming more and more important. In the last 10 years, the availability of such data has grown exponentially. Additionally, many firms have gone into the business of providing not only data, but also psychodynamic modeling and summarizing of juror attitudes and opinions.

In addition to, or in the case of unavailability of such data, effective use of social research including surveys significantly helps to minimize the impact of juror bias. Even with extensive online juror information, a well-crafted supplemental juror questionnaire can be very helpful. These tools belong in every attorney's arsenal.

THE JURY BIAS MODEL™¹

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I. Why Was The Jury Bias Model™ Developed?

It was apparent that good lawyers were increasingly losing good cases. As a result of decades of public relations campaigns and manipulation of the media, the majority of the American people have formed attitudes or beliefs that negatively impact most plaintiff cases and the civil jury system. It is helpful to be aware of, counter, inoculate, and use our knowledge about these negative attitudes or beliefs to our benefit.

II. What Is Bias?

Bias is an inclination or prejudice in favor of or against something—a person, group, or thought—when compared to another. Bias is often considered to be unfair. Bias can work for or against you.

III. What Is the Jury Bias Model™?

The Jury Bias Model™, in its simplest form, helps analyze fact patterns and accomplishes the disclosure of attitudes, beliefs, and biases, as well as teaches us how those that negatively affect the case can be countered or used for our benefit.

¹ This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Weekend with the Stars Seminar: The Power of Persuasion*, New York, New York, December 2018.

The filters through which jurors receive and process information are firmly ingrained and shaped by a lifetime of schemas and social and political influences. The Jury Bias Model™ provides powerful insights into how jurors are likely to think and feel about the issues raised.

How was it developed?

In 1994, David Wenner and Greg Cusimano originated and served as faculty members on the first focus group college convened by the Association of Trial Lawyers (ATLA) (now the American Association for Justice (AAJ)) National College of Advocacy (NCA) in Charleston, South Carolina. More than 30 trial lawyers brought cases and participated in 60 focus groups involving several hundred people. On the final day of the college, when the faculty and attendees analyzed results from the various focus groups, they discovered a similarity of negative attitudes concerning the plaintiffs' purported responsibility for their own injuries. The following year, David and Greg again led the NCA's second focus group college in Houston, Texas. The results in 1995 were identical to those in 1994. The anti-plaintiff bias was undeniable.

In April 1995, Larry Stewart, then president of ATLA, appointed a committee that Greg initially had the privilege of chairing. Later, Greg and David cochaired the committee. After a meeting or two, David and Greg continued to work on their own to discover the problems and test solutions. They wanted to level the playing field in their own cases and help other plaintiff lawyers through teaching what they had learned in the NCA and ATLA education programs limited to ATLA members only. The model was in development for 10 years.

They used focus groups, mock trials, post-trial interviews, social science research, common sense, psychology, national surveys, and a myriad of other methods to develop the model. They wanted to know if there was a way of determining how lawyers' persuasion techniques and arguments impact the decision-making of jurors. They tested and they learned.

The research was conducted the way any scientist would. Over several years, they experimented with hundreds of different focus groups. They developed what they called "concept focus groups," now generally accepted as the way to discover attitudes schemas, beliefs, and expectations. In addition, they continued to explore, test, and confirm their ideas and findings with other trial lawyers as they taught regularly at ATLA's focus group college, Case Workshop, and at Overcoming Jury Bias (OJB) Programs.² To understand the psychological underpinnings of the behaviors they were observing, Greg and David conducted an exhaustive review of the academic literature in several fields of the social sciences. They went straight to the leading scholars and thought leaders in the fields of law, psychology, neuropsychology, cognition, decision-making, persuasion, and communication to learn all they could about the psychological principles underlying the

² The Overcoming Jury Bias program was submitted to a national organization by the NCA of ATLA and won the award for a CLE program that year.

anti-plaintiff biases they had uncovered. They consulted with Geoffrey Garin, the president of Hart Research Associates, one of the nation's leading survey research firms, in trying to find answers. They reviewed much of the research Ed Lazarus carried out during his service with ATLA.

They met with Neil Feigenson, a lawyer who spoke at one of ATLA's earliest OJB Programs and was interested in some of the same issues Greg and David were studying. In his book *Legal Blame*, Feigenson relied on some of David and Greg's research with focus groups to analyze how juries make decisions.³

They also began a dialogue with Valerie Hans,⁴ one of the nation's leading authorities on social science and the law. Trained as a social scientist, Dr. Hans also used David and Greg's focus group research in publishing a law review article concerning jury decision-making.⁵

They worked with Dr. Stephen Daniels, a senior research professor at the American Bar Foundation and with Joanne Martin, a senior research fellow in Liaison Research, also with the American Bar Foundation.

Things began to click into place, however, when David and Greg began working with David's friend, Stanford psychologist Dr. Lee Ross, a pioneer in research on human inference. Years earlier, Ross had published a book on human inference that focused attention on the social psychological research of Daniel Kahneman and Amos Tversky.⁶ When David read Ross's book, he quickly realized that Kahneman's⁷ and Tversky's work had big implications for trial practice in general and for his and Greg's research in particular.

³ NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (American Psychological Association, 1st ed. 2001).

⁴ Hans is presently a professor at Cornell Law School. She is the author or editor of eight books and over 100 research articles, many of which focus on juries and jury reforms as well as the uses of social science in law.

⁵ V.P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 *JUDICATURE* 242 (1996).

⁶ RICHARD E. NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS IN SOCIAL JUDGMENT* (Prentice Hall 1980).

⁷ In 2002, Kahneman received the Nobel prize for his contributions to the field of Economic Sciences. In 2011, *Foreign Policy* magazine named Kahneman to its list of top global thinkers. His and Tversky's book *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011), was a New York Times best seller. In 2015, *The Economist* listed Kahneman as the seventh most influential economist in the world.

Out of this research, David and Greg created the Jury Bias Model™, providing trial lawyers with a process for analyzing cases and determining their strengths and deficiencies. The Model is founded upon psychological principles identified in peer-reviewed research, the sort that could withstand the most withering *Daubert* challenge. Greg and David discovered what biases trial lawyers should be wary of and then armed them with the tools to combat those biases. And they did it based not on their own experience or intuition, but on thousands of hours of painstaking independent experimentation and research.

Probably the most accurate way to determine how jurors make decisions, think, and talk about issues in civil lawsuits would be to observe and listen to them deliberate an actual case. We know that this has rarely been done, and is generally prohibited. Consequently, the next best sources are focus groups, mock jury deliberations, and post-verdict interviews with actual jurors and surveys. They engaged in all those sources.

How does it work?

The Jury Bias Model™ works through a system of analyzation, implementation, and utilization. Through the use of the Model, and Bottom-Up Preparation, you can drive decision-making.



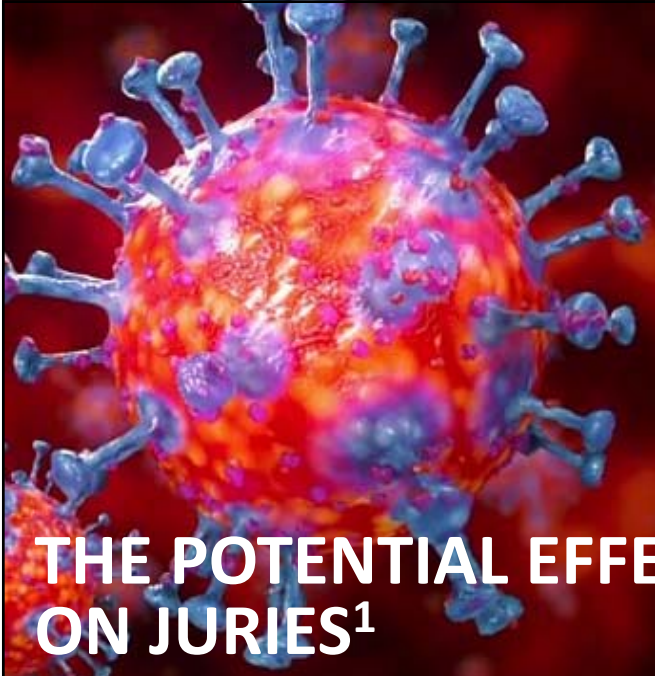
The first part of the Model is based upon what they observed in focus groups and mock trials during jury deliberations. Particularly, they noticed that participants had attitudes that were anti-plaintiff and largely developed because of the public barrage of tort “reform” rhetoric over the last 30 years. They confirmed our finding through social science research.

The second part of the Model is drawn primarily from social and cognitive psychology. It consists of 10 decision-making tools that they call “The Ten Commandments,” that can minimize the impact of anti-plaintiff biases and promote persuasion.

The Model can and will influence decision-making and affect the amount of any verdict.

Does it have any other uses?

In that the data was tested and drawn from resources all over the country and generally from participants on voters list—it was determined that the same attitudes and beliefs that exist in the jury box exist in the ballot box. The Model is a powerful persuasive system that can be used in multiple ways. The utilization of the Model regarding beliefs and decision-making can be implemented in public relation campaigns, political campaigns, mediation, arbitration, and one’s person life.



ROBERT HIRSCHHORN

LISA BLUE PH.D, J.D.

THE POTENTIAL EFFECT OF COVID-19 ON JURIES¹

¹This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Jury Perception Webinar*, June 2020.





What will you

LEARN

today?

Recipe:

Our Favorite Recipe for Voir Dire

Start Strong

- What you want the jury panel to do
- Law
- Burden of proof
- YEAH BUTS (Δxcuses)
- Damages-Burden of proof
- Save Good Jurors

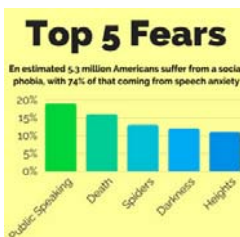


End Strong

5

NOW MORE THAN EVER

USE A JURY QUESTIONNAIRE



6

ABOTA QUESTIONNAIRE

Juror Name: _____ Juror # _____

1. Name: Age: What part of Dallas do you live in?	2. Highest grade you completed in school? If college, please list any degrees received and major area of study:	3. If you or a loved one were actually harmed by someone's negligence, would you file a lawsuit? <input type="checkbox"/> YES <input type="checkbox"/> NO
4. Who is your current employer, if retired or not working, what was your last job? What is/were your job title and dates: Type of business:	5. Marital/relationship status: Significant other's educational background: His/her occupation: His/her job duties:	6. Number of children and stepchildren and ages: Children's occupations: Parents' occupations (or previous occupations if retired or deceased):
7. Are you a: <input type="checkbox"/> Democrat <input type="checkbox"/> Republican <input type="checkbox"/> Independent <input type="checkbox"/> Libertarian <input type="checkbox"/> Other	8. (Which group do you identify with?) <input type="checkbox"/> Executive <input type="checkbox"/> Manager <input type="checkbox"/> Worker	9. Have you ever owned or managed a business? <input type="checkbox"/> YES <input type="checkbox"/> NO Please explain:
10. Have you or someone close ever been a Plaintiff (person suing) or Defendant (person being sued) in a civil lawsuit? <input type="checkbox"/> YES <input type="checkbox"/> NO If YES, describe the case: How did you feel about the outcome?	11. Have you ever served on a jury? <input type="checkbox"/> YES <input type="checkbox"/> NO If YES, what was the case about? What was the verdict? Were you the foreman? <input type="checkbox"/> YES <input type="checkbox"/> NO	12. Have you or someone close ever owned a business or been senior manager of a company? <input type="checkbox"/> YES <input type="checkbox"/> NO If YES, who and what kind of business? Was that business ever sued?
13. Have you or someone close ever worked for a company that does claims adjusting? <input type="checkbox"/> YES <input type="checkbox"/> NO If YES, who, for what company(ies) and what was this person's job?	14. What is your religion? Are you a member of any organizations (including religious or unions)? <input type="checkbox"/> YES <input type="checkbox"/> NO If YES, what organizations?	15. Have you or someone close ever worked in the medical or legal field? <input type="checkbox"/> YES <input type="checkbox"/> NO If YES, who, for what company/office, and what was this person's job?

THE AUTHORS BELIEVE



THE AUTHORS BELIEVE

Shorter
Questionnaires
are better for
plaintiffs



9

THE AUTHORS BELIEVE

Long voir dire helps the
defense

**allows the defense
lawyer more time to get
off our good jurors*



10

THE AUTHORS BELIEVE

People that are trying
to get out of jury duty
are generally bad for
the plaintiff



FAKE
NEWS

Not True, "don't say Lisa Blue said to ask these questions"

**These are samples of what you MAY want to ask depending on the issues in your case*

DO YOU BELIEVE..... MOST PEOPLE ARE???????



BASICALLY GOOD



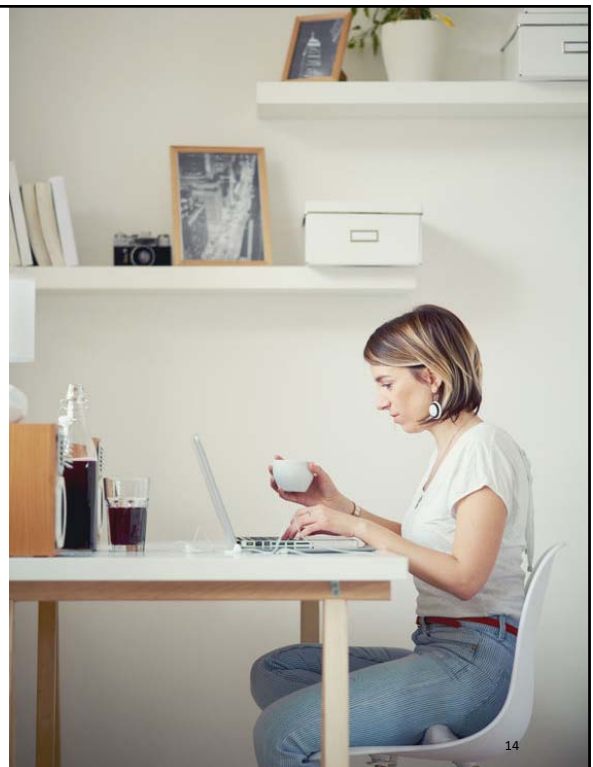
BASICALLY BAD

13

HAVE YOU EVER WORKED FROM HOME BEFORE?

PLEASE STATE WHEN, HOW LONG, & DETAILS OF THE EXPERIENCE?

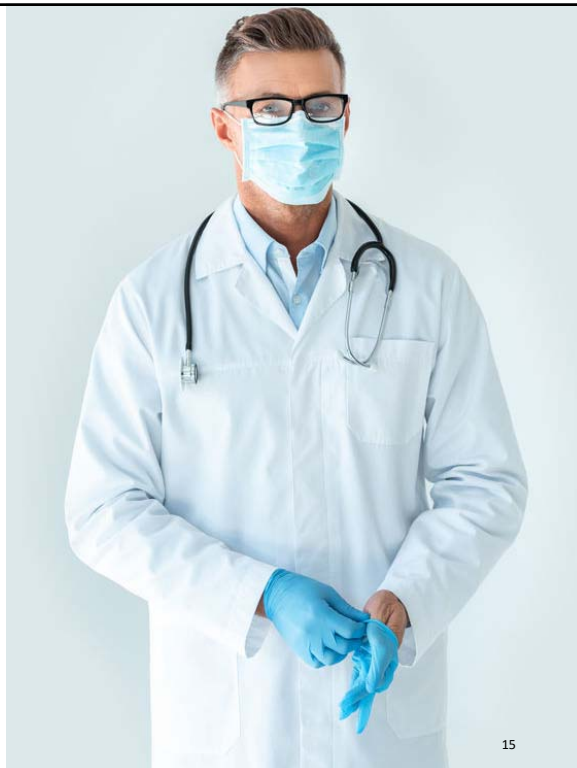
How did your work environment change during COVID-19?



14

IDENTIFY THE ISSUES IN YOUR CASE BEFORE YOU DESIGN VOIR DIRE QUESTIONS TO IDENTIFY FEELINGS OF THE JURORS

* ex: med malpractice case where you are suing a doctor... need to know general opinions of how the prospective juror now feel about doctors.



15



How deeply were you, friend, or relative affected by COVID-19



**Please describe your answer in detail*

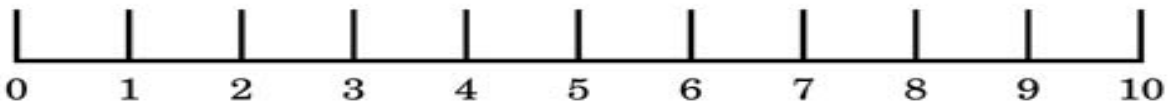


What (if any) are your feelings about the government* regarding the handling of the COVID-19

** substitute in hospitals, politicians, the medical community*



Because of the effects of the Covid-19 on the economy, I would tend to hold down or reduce the damages in this case.



Agree

Disagree



Circle the adjectives or words that you most closely felt during the time of the COVID-19

Lonely

Overblown

Isolation

Grateful

Depressed

Helpless

Fearful

Blame

Angry

****DO YOU HAVE ANY OF THESE EMOTIONS IN YOUR CASE***

19

Describe the most important thing you learned about yourself
or your family as a result of the COVID-19



20

Which of the following
did you personally miss
the most because of
COVID-19?

21

- A. Sports
- B. Going to the Gym
- C. Going Out to Dinner
- D. Hugging Friends and Loved Ones
- E. Work
- F. Travel/Vacation
- G. Personal Care (hair/nail salons, massages,
etc.)
- H. In-Store Shopping

22

What did you personally miss most because of the COVID-19 situation?

Vacations?



23

What did you personally miss most because of the COVID-19 situation?

Out to Dinner with Friends?



24

What did you personally miss most because of the
COVID-19 situation?

Hugging Loved Ones?



25

What did you personally miss most because of the
COVID-19 situation?

Working?



26

DURING COVID-19



Some folks were more concerned with the economy while others were more focused on the health and safety of people.

Which way did you lean?

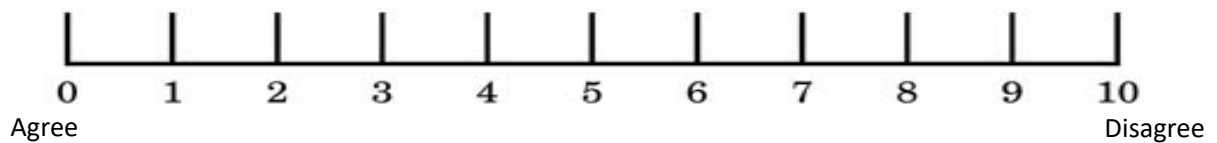
Health and safety of the nation

Economy

27

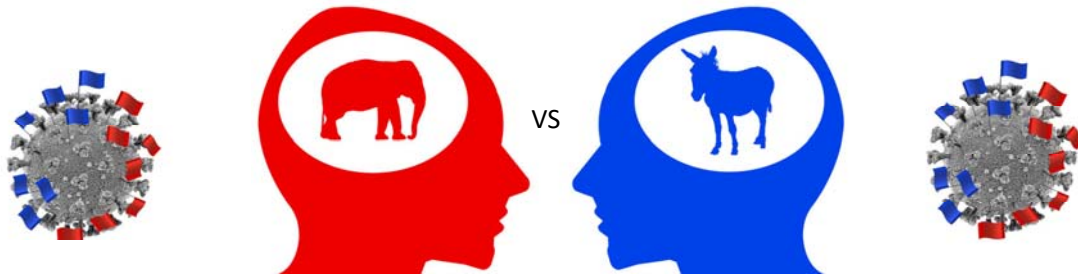


I believe the federal government blew the dangers of the Covid-19 out of proportion.



*media

28



Do Democrats and Republicans
view the severity of the COVID-19 the same?

Fear that someone you
know might be exposed to the virus

Dems-73%

Rep -42%

Mid March, 2020

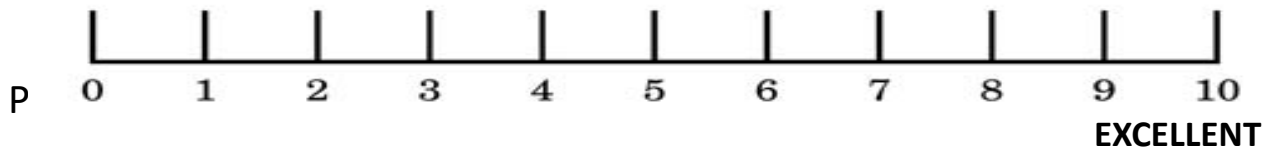
Americans who thought the virus was a real threat

Dems-76%

Rep-40%

FEDERAL GOVERNMENT HANDLING OF COVID-19

On a scale of 0 (Very Poor) to 10 (Excellent), what is your opinion of how the Federal Government has handled COVID-19?



31

THE NEWS MEDIA HAS EXAGGERATED THE EFFECTS OF THE VIRUS*



79%



35%



54%

* nyt april 19,2020

32

**DO NOT SAY
TRUMP'S NAME IN
ORAL VOIR DIRE**

**Thanks to Randi McGinn*



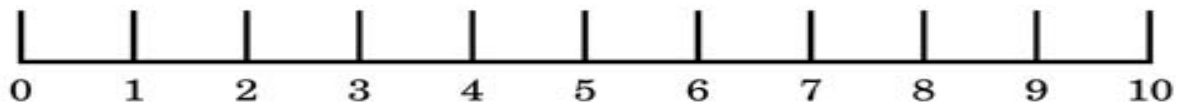
On a scale from 1 to 10
How much were you inconvenienced by the lockdown



Please list your most severe inconveniences ...



People that do not wear masks at the height of the virus endanger the
rest of our community



DID NOT CLOSELY FOLLOW

CLOSELY FOLLOWED



Are you so preoccupied by the effects of the coronavirus on the economy or any other aspect of your life that you could not focus on the evidence of this case?

*Free Get out of jail card

The Set up Question

**I DON'T KNOW YOU
OR WHAT'S IN
YOUR HEAD
OR WHAT YOU ARE
THINKING ABOUT
OR YOUR LIFE
EXPERIENCES**

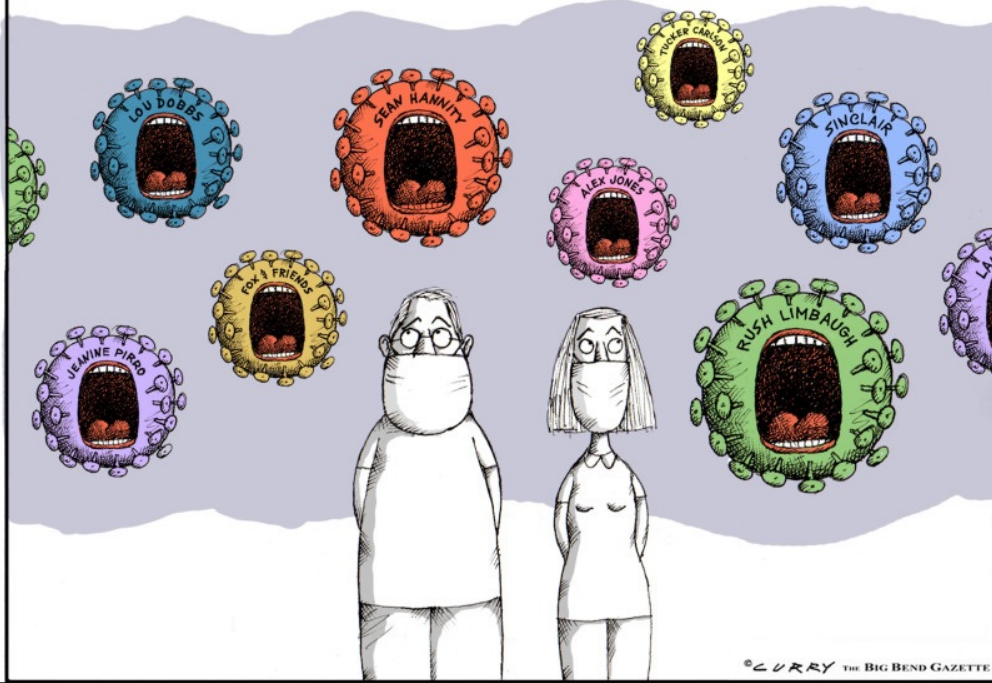
Based on everything going on with your life (virus or not).

Who feels they can not serve for any reason?



1. Video depositions- be thoughtful of set up (bad guys could be setting you up to make surroundings look bad)
2. How the video will look through the juries eyes.
3. How long is the deposition.. its all relative.. we spent 9 hrs. We cut it to one hour 30 minutes less than your standard blockbuster.

THE FARRIGHTSPINAVIRUS PANDEMIC



© CURRY THE BIG BEND GAZETTE

THE NEUROSCIENCE OF SOCIAL DECISION MAKING¹

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As lawyers, we want to believe that decisions flow from a stable set of rules, combined with a given set of facts, activated by a person's choice. The truth is the decisions people make are profoundly influenced by our individual experiences and our environment or social interactions. Humans are social creatures even when we are alone. Our minds depend on other people and our thoughts and choices are shaped by social interaction. The study of social decision making has historically been anything but a science—until now. This paper will provide a basic explanation of the neuroscience of social decision making, set out what neuroscientists have discovered, and highlight what the science of social decision making means to the practice of law.

I. How the Science Works

In the 1990s, it was discovered that the same MRI machine that allows us to use magnetic fields and radio waves to take grey scale pictures of our knees and spinal cord could also be used in a different mode to make microscopic blood flow movies from hundreds of thousands of sites independently in the brain (fMRI).

Why is this important? Your brain is your operating system or “software” that guides what you do and how you do it. When you think, neurons fire (neural activity). Neural activity boosts blood flow in the brain. An fMRI records the location of blood flow in the brain.

¹ This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Winter Convention*, Miami, FL, Feb. 2013.

So what? Before the discovery of the fMRI, we could not safely eavesdrop into healthy brain activity. Now, with fMRI technology, we can map what part of the brain is used when making a decision and map patterns to determine why.

What does this mean for the future of the neuroscience of social decision making? Still in its infancy, a computer program has been developed to synchronize up to six fMRIs over the Internet to record the neural activity of people while they interact. We do not think you will ever see a day where, as lawyers, we will be permitted to stick jurors in fMRIs hooked up to the Internet; however, the new frontier of the cognitive science will be mapping the patterns of neural activity that occur within the interaction of a group of people.

II. What Neuroscientists Have Learned So Far

The threshold of neural activity needed to make a decision relies on three factors:

1. Triggering memory,
2. Accessing a value system, and
3. Eliciting an emotional response.

Before you make a decision, your brain takes the following steps:

1. Assesses the evidence for and against,
2. Evaluates the possible outcomes and risks,
3. Accesses certain learned responses and biases, and
4. Lays down building blocks (choices flow from the outcome and perceived rewards and punishments of one choice after the other).

If we are alone in making a decision, the process might stop here. However, choices and decisions that we make are rarely in social isolation. So, the next consideration will be a reflection on competing interests. Competing interests that influence decision making include:

1. Psychological conflict (self-interest versus interest of others),
2. Cost-benefit analysis (short-term reward versus long-term gain), and
3. Social conflict (emotion versus reason).

The distinct features of social decision making include:

1. Reciprocal exchange,
2. Reciprocal benefit (benefit beyond a reward driven by the minimization of primary guilt, or the feeling of initiating a negative effect),

3. Response to fairness and equity, and
4. Altruism and punishment.

Refining it even further, nine key factors in social decision making include:

1. Trust,
2. Reciprocating trust or mutual cooperation,
3. Responding to breaches of trust,
4. Decisions about sharing,
5. Responding to inequities,
6. Altruism (helping someone at a personal cost),
7. Norm-abiding social behavior (sensitivity to the opinion of others),
8. Social learning (what the actions of others teach us), and
9. Competitive social interaction (intention detection).

J.K. Rilling & A.J. Sanfey, *The Neuroscience of Social Decision-Making*, 62 ANN. REV. PSYCHOL. 23 (2011).

How did neuroscientists figure this out from watching a microscopic blood flow movie? The answer is valuation. What is valuation? Valuation is reducing variation to a common class or group so that you can assign a value. In the context of social decision making, neuroscientists have borrowed from a branch of experimental economics known as “game theory” to map social decision making.

Consider the prisoner’s dilemma: Two men are arrested, but the police do not have enough information for a conviction. The police separate the two men and offer both the same deal: If one testifies against his partner (defects/betrays), and the other remains silent (cooperates with/assists his partner), the betrayer goes free and the one that remains silent gets a one-year sentence. If both remain silent, both are sentenced to only one month in jail on a minor charge. If each “rats out” the other, each receives a three-month sentence. Each prisoner must choose either to betray or remain silent; the decision of each is kept secret from his partner.

What should they do? If it is assumed that each player is only concerned with lessening his own time in jail, the game becomes a non-zero sum game—where the two players may either assist or betray the other. The sole concern of the prisoners seems to be increasing his own reward. The interesting symmetry of this problem is that the optimal decision for each is to betray the other, even though they would be better off if they both cooperated with each other and remained silent.

In the classic version of the game, collaboration is dominated by betrayal (i.e., betrayal always produces a better outcome) and so the only possible outcome is for both prisoners to betray the other. Regardless of what the other prisoner chooses, one will always gain a greater payoff by betraying the other. Because betrayal is always more beneficial than cooperation, all “purely rational prisoners” would seemingly betray the other.

However, in reality, humans display a systematic bias towards cooperative behavior in this and similar games, much more so than predicted by a theory based only on rational self-interested action.

Ok, so what's our point? Games like the "prisoner's dilemma" show us the rational or "optimal decision" to compare and value why we as humans do not always make the "optimal" choice. We can use the "optimal decision" to provide a framework for mapping the neural activity captured in the microscopic blood flow movies recorded by fMRIs.

Let's give you another example. Consider the "ultimatum game." Red person is given \$100 and can offer a split to Blue person. Blue person can accept or reject any offer Red person makes, but if Blue person rejects the offer, they both get nothing. A rational choice economist would say that Blue person should take any offer that is more than zero. However, clinical studies prove that if Red person offers an \$80-\$20 split to Blue person, there is a 50/50 chance that Blue person will reject the split, resulting in both people getting nothing.

Why? Blue person knows what is fair and an \$80-\$20 split will make Blue person mad. The point of the game is to highlight how emotion can influence the decision you make.

III. What It Means to the Practice of Law

Jury deliberation is pure social decision making. A consensus must be reached. Considering the game theory examples, emotion will drive the process of deliberation more than the facts of the case. What this means is that case facts will only get you so far. Your success at trial is dependent on your ability as a lawyer to motivate jurors to adopt your legal arguments as their own and become the "social pigeon" or carrier of the idea. Durant (2011).

How do you turn a juror into a social pigeon? To transfer your idea to a juror, your opening must first call the juror to action and then arm the potential carriers of your legal arguments with the tools to grow and promote your ideas.

So, how do you use this in a trial? Structure your trial story around contrasting opinions and rules. Why? The human brain is wired to process and contrast good and bad, right and wrong, healthy and injured. Contrast is what forms the basis of all cognition, including what you see, hear, and think. Without contrast there are no boundaries.

For example, a lack of contrast explains why people fall down unmarked stairs. I call this "compare and contrast." Macknick & Martinez-Conde (2010). If you don't create contrast, jurors will automatically do it for you. So weave into the case story intentional moments of contrast. Contrasting ideas can include comparing what is with what could be or what we know in relation to what they did or what they said. Compare and contrast the "happy ending" if the rule had not been broken with the "tragic ending" of the story because of the defendant's choice to break the rule.

Why does this work? Each time you compare and contrast your ideas, you are forcing jurors to make assessments. When a juror makes an assessment, he or she is making a choice. A juror will believe information that he or she accepts and learns independently, and in the face of competing ideas will always elevate his or her own choice over the choices of others. Remember that you are making a social pigeon.

The information that you choose to contrast must be carefully selected. Do a focus group to figure out what facts are critical to your case. Why is the information that you choose to contrast so important? The human brain is the ultimate green machine constantly looking for order, pattern, and explanation to make predictions and assumptions. We are cognitive misers, creating shortcuts that are both conscious and subconscious; but by being cheap we pay a price. The price is that we do not see things as they are—we see things as “we” are. In other words, what you see, hear, and think is what you expect to see, hear, and think.

Jurors don't believe what they see. They see what they believe. What you expect depends on what you have experienced in the past, what has been useful to you, or what you remember. In this way, you relate everything you see, hear, and think back to yourself (the I-brain). Test it. Tell a story, and if your story makes a connection with the people you tell it to, they will relate back to you their own personal experiences that are the same or similar. As advocates, we can use this concept to improve our power of persuasion. If you can tap into the I-brain of a juror, you are another step closer to creating a social pigeon.

Why are rules important? Rules are tools for prediction, shortcuts, and filing cabinets for case facts. When you use rules in a trial, you are asking the jurors to make an assessment. Is the rule fair? Did the defendant break the rule? If the juror accepts the rule, it becomes the shortcut he or she will use to file all of the case facts. The juror will accept or reject a case fact as something that either fits inside the rule or not. In this way, rules establish bias. A bias is an assumption. An assumption is powerful because it is accepted as a truth. Facts need to be proven; assumptions must be disproved. If jurors choose to accept the rule, they will not only sort the case facts through the rule, they will work to enforce the rule during deliberations. A social pigeon is hatched.

When you compare and contrast information and frame rules to lead jurors to evaluate rule violations for themselves, you have created an advocate in jury deliberations who will influence the social decision making process that we, as lawyers, cannot be a part of.