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jurors reject the theme, the task of persuasion becomes difficult indeed. For example, if the plaintiff's theme of the case is that severely injured persons should be given sufficient compensation to enable them to stay at home rather than being placed in an institution, potential jurors who reject this theme are undesirable for the plaintiff. By the same token, jurors who reject the defense theme that appropriate and cost-effective care is best provided at an assisted care facility would be undesirable for the defense. Uncovering jurors' views on the case theme enables the lawyer to shape a more receptive jury by removing those jurors who react most negatively to the theme.

The Nature and Extent of Pretrial Publicity

Most cases have little or no pretrial publicity. However, in cases where there is pretrial publicity, it is important to consider the potential impact of this information. Social science research on pretrial publicity has shown that it does influence jurors' decision making.² Of critical importance is that research also indicates that jurors often do not recognize or admit bias produced by pretrial publicity. One study found that only 26 percent of jurors exposed to damaging pretrial publicity recognized their biases, while the remaining, supposedly "neutral" jurors who were exposed to damaging pretrial publicity still convicted the defendant at a 2-to-1 rate as compared to jurors not exposed to such publicity.³ Later studies have supported this finding.⁴ Similar results concerning the "hollowness" of assertions by respondents that they can be "fair and impartial" have been found in surveys and public opinion polling.⁵ To complicate matters even further, jurors tend to downplay their exposure to pretrial publicity, what has been termed the "minimization effect," making it difficult for lawyers to unravel the scope and impact of exposure of pretrial publicity.⁶ Finally, limiting instructions may be a potential remedy in terms of not considering outside information and setting aside any opinions formed. However, research generally has not supported the effectiveness of such instructions, with one study showing that both jurors and judges were equally influenced by inadmissible evidence and immune to the desired effect of limiting instructions.⁷

When an incident or case has attracted media attention or when other relevant cases (e.g., the McDonald's coffee-spilling case) have been publicized in the trial jurisdiction, jurors' views may be affected by this coverage. Thus, it is necessary to ask about the jurors' exposure to such publicity and to assess what impact this exposure has had on their views.⁸

Important Opinions and Attitudes of Jurors

Another step in case analysis is constructing a list of important opinions and beliefs of jurors. In Chapter 2, we discussed various global, case-specific, and legal opinions that can be important. It is helpful to examine all three areas of opinions and beliefs and make a list of them that is as detailed as possible. At this stage of analysis, it is better not to restrict consideration of potentially important opinions and beliefs.

Basic elements of case analysis:

- Determine the weaknesses and strengths of the case.
- Identify the best theme.
- Analyze the nature and extent of pretrial publicity.
- Identify important opinions and beliefs of jurors.
- Establish likely important experiences and reference groups of jurors.
- Determine potential grounds for cause.
- Develop a statement of contentions.
- Anticipate your opponent's important voir dire topics and questions.

Depending upon the case, it may be important to know the jurors' opinions on victim compensation, corporate responsibility, worker safety, business practices, contract disputes, the lawsuit (insurance) crisis, damages, eyewitness testimony, presumption of innocence, burden of proof, authoritarianism, capital punishment, or equity or fairness in relationships. The importance of making an expansive list cannot be overemphasized. Engaging in this process will help focus attention on the subtleties of the case. Considering the full range of opinions enables lawyers to do the following:

- anticipate and pursue additional opinions when given an opportunity to do so, i.e., in follow-up questioning;
- develop questions not included in the past; and
- uncover life experiences that tap into critical opinions that the lawyer may not be able to pursue, e.g., security guard experiences or other occupations associated with higher levels of authoritarianism.

After constructing the "long list" of opinions and beliefs, it is necessary to pare it down to a shorter list reflecting the most important opinion questions that the court will allow.

Important Experiences and Reference Groups of Jurors⁹

The case analysis also examines life experiences and reference groups that could be important. This examination considers the circumstances of the case, the parties involved in the case, and potential witnesses. Important areas of inquiry often include occupation and employment experiences; accidents and traumatic events; hobbies; social, volunteer, or religious activities; marital and family status; education; prior jury service; military service; exposure to pretrial publicity; experiences with consumer products, contract, and patents; leadership experience; and involvement or contact with the court system or litigation. It is helpful to develop a list that reflects the life experiences of jurors that may influence their beliefs and subsequent decision-making and

Dealing with the stealth juror poses even more formidable challenges than those involving difficult jurors. Only two of the three tools present with difficult jurors are available with which to address stealth jurors: peremptory challenges and challenges for cause. As would be expected, stealth jurors are not amenable to true rehabilitation. Since stealth jurors do not admit to bias (or give extreme answers), peremptory challenges are often exercised under conditions discussed earlier when the juror tends not to be viewed negatively by the other jurors.

Challenges for cause are extremely difficult. Special attention should be given to the following approaches when employing the techniques for removing jurors via a challenge for cause discussed earlier:

- Listen for key terms or phrases reflecting a negative viewpoint. Discuss with stealth jurors the meaning of the phrases (or why the term was chosen by the juror) and how the juror became exposed to such terminology.
- Phrase questions and potential follow-up inquiries in a manner that does not give the stealth juror a "technical" way to sidestep disclosure of critical information or that relies on the juror to volunteer desired information.
- When stealth jurors provide more candid answers on supplemental juror questionnaires, have these jurors state that they were being truthful and accurate in their responses to the questions. After such assurances, follow up on key areas where discrepancies have occurred or may occur on oral voir dire, highlighting for the judge key discrepancies with the previous answers.
- Finally, point out to the court any discrepancies between the assertions of the stealth juror and any objective information to the contrary (e.g., information from background or Internet investigations revealing prior participation in lawsuits, exposure to the criminal justice system, or letters to the editor).

Negative Spiraling

When the pattern of answers that jurors give reflects less willingness to give open and candid answers as questioning continues, lawyers have hit a negative spiral. Negative spiraling often arises when lawyers begin to address sensitive opinion areas. It also occurs when lack of variation in the style of questioning fosters "mindlessness."¹² For example, posing an identical question to a series of jurors can produce negative spiraling. If the lawyer asks one juror (juror 1) for an opinion and then asks jurors 2, 3, 4, and 5: "How do you feel about that?" juror 5 is likely to respond, "I agree with what juror 1 said."

Jurors also pick up key phrases from the answers of other jurors, subsequently reducing what lawyers find out about their true opinions. For example, when juror 2 says, "I have no preconceived opinions on that," a light may go on in the other jurors' heads: "Hey, that sounds like the kind of

answer I should give in court. I'll bet that's what the judge expects to hear." Adopting this phrase, they may answer subsequent questioning all too frequently with, "I don't have any preconceived opinions about that."

Breaking the Negative Spiral

Negative spiraling is the antithesis of what is desired on voir dire. Several steps are available to break the negative spiral: (a) treat jurors as reluctant jurors, (b) control the process, (c) use positive modeling, (d) capitalize on breaks in the process, and (e) use untainted jurors.

TREAT JURORS AS RELUCTANT. The first step in combating a negative spiral is to identify the situation early. Treat the jurors as reluctant jurors. Use the tools for encouraging openness in reluctant jurors: show empathy, return to the comfort zone, use disclosure reciprocity, empower the jurors, provide positive attention, and reinforce jurors for giving open answers. Breaking the negative spiral early through the use of these tools is the best strategy for achieving continued juror candor.

CONTROL THE PROCESS. When jurors start to rely on or echo other jurors' answers or phrases, lawyers need to control the process by gently but firmly restoring the desired behavior. Answers indicating agreement with previous jurors' responses, such as, "I agree with what number 1 said," or "same here," should be followed up with prompts such as "In what way?" or "How so?" to encourage the juror to explain his or her opinions and feelings. When jurors adopt a crutch phrase like "I have no preconceived opinions," don't let them off the hook. Ask them to give their thoughts, feelings, or impressions on the matter; for example, "I appreciate that. What are your impressions of . . . ?" The key is not to settle for uninformative answers and to continue to encourage jurors to fully participate in the questioning process.

USE POSITIVE MODELING. Modeling is an important tool in breaking negative spirals. Find and develop one or more positive juror models in the panel for use in counteracting negative spiraling. Return to them when necessary to show other jurors how they should respond to the questions. Ask several questions to which the juror can give open and detailed answers. Then, proceed with the questioning of the other jurors. The other jurors will be more likely to give more fruitful answers.

CAPITALIZE ON BREAKS. Use recesses to help break the "code of silence" that develops in a negative spiral. When jurors are in a negative spiral and a recess is imminent, take advantage of it. Do not proceed with important questions. If possible, ask basic background questions until it is time for the recess. After the recess, inquiry into more important areas can be undertaken with a jury that is refreshed. Important questions will not have been "wasted," and the jurors will be more willing to consider them.

CHAPTER 8

Jurors and the Internet

Objectives

- To understand the opportunities presented by jurors' presence on the Internet.¹
 - To understand the threats posed by jurors using the Internet.
 - To develop approaches that maximize the benefits of the Internet for jury selection.
 - To develop approaches that minimize the threats posed to jury trials by the Internet.
-

In June 2009, a San Francisco Superior Court judge heard comments from a potential juror revealing a fairly detailed knowledge of the case for which he had been called. Upon further questioning, the juror admitted conducting Internet research but said that he had not been told to avoid doing so. Subsequent questioning of other potential jurors revealed a number of potential jurors who admitted conducting Internet research on the case. Some jurors admitted having heard an admonition against investigations, while at least one potential juror did not think this applied to Internet research.

The result: The entire pool of six hundred potential jurors was dismissed.²

In a murder case in 2009, a potential juror received a juror questionnaire prior to trial. After completing it, he went online and researched the case. He admitted his transgression during voir dire questioning. When asked why he violated the court's instruction not to conduct Internet research, the juror responded that he did so because he knew, once seated as a juror, he would be unable to do so.

The result: Juror dismissed.³

In 2007, a potential juror received a jury summons and juror questionnaire for a civil wrongful death/product liability case. The juror conducted Internet research on the defendant company prior to trial yet failed to reveal this during voir dire questioning. During deliberations, the juror informed

other jurors he found no indication of problems with the defendant's product (seatbelts) during his searches on the Internet. The jury returned a verdict for the defendant.

The result: Juror misconduct, verdict vacated, and new trial granted.⁴

In March 2009, a federal judge in Miami received a note from a juror reporting that another juror had conducted research on the Internet. With hopes of minimizing the impact on deliberations, the judge questioned the offending juror and discovered the research revealed evidence excluded from the trial. Questioning of the remaining jurors revealed that eight additional jurors had conducted Internet research, including Google searches on the parties, accessing news reports and excluded evidence, and searching in Wikipedia for relevant legal and technical definitions. When queried about these actions, one of these jurors responded, "Well, I was curious."

The result: Juror misconduct, and a mistrial declared.⁵

In 2008, a potential juror who maintained a blog before trial, decided to write about his experiences once picked as a juror. This juror became foreperson of the jury and posted comments on the evidence, testimony, court personnel, and, through the use of his cell phone, posted a picture of the murder weapon itself. He even hosted a chat room where he would discuss the case with those who entered. His indiscretions were discovered after the verdict was returned. The juror testified during his contempt hearing that it was "never my intention" to violate the court's order regarding conducting outside research.

The result: Juror contempt for misconduct.⁶

Current Internet Usage

Results from a National Poll of American Adults 18 Years of Age and Older Addressing Internet Contact and Usage (August 18 through September 14, 2009)

- 77 percent use the Internet at least occasionally (up from 47 percent in 2000)

Of those using the Internet:

- 88 percent have used an online search engine to find information on the web
- 72 percent have used the Internet to get news online
- 47 percent have looked up information on Wikipedia
- 47 percent have used a social networking site like Facebook, MySpace, or LinkedIn
- 19 percent of online American adults have used a microblogging service like Twitter
- 11 percent have created or worked on their own online journal or blog

a negative rating on "views on punitive damages" while at the same time receiving a positive rating on "education"? In addition, it is highly unlikely that all of the many characteristics contained on the form are important in the determination of the juror's favorability. Using the checklist approach as a rating system requires attention to which characteristics are relevant and the relative importance of these characteristics.

CHOOSING A RATING FORM. In deciding on a method of recording information about jurors, it is important to use the approach that best suits the needs of the voir dire situation. In group voir dire, some variation of the jury box form is preferable. When jurors are questioned individually or in groups of two or three, the individual form or the checklist form may be the most efficient way to gather detailed information. During lengthy voir dire questioning in a group setting, using a jury box form in conjunction with a checklist or individual form may prove the best method for keeping track of information on potential jurors.

TABLE 4
SAMPLE ITEMS FOR AN EVALUATIVE JUROR CHECKLIST

RATING:				
YES	NA	NO		
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		Is the juror employed?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		Is the juror or immediate family employed in the insurance profession?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		Has the juror ever studied law?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		Any contacts in law enforcement?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		Education beyond high school
....				
"+"	"0"	"-"	"x"	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Belief regarding limits on monetary awards
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Views on punitive damages
....				
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Overall, nonverbal communication
OVERALL SCORES:				
LEADERSHIP:				
	1. <input type="checkbox"/>	VERY STRONG	3. <input type="checkbox"/>	SOMEWHAT WEAK
	2. <input type="checkbox"/>	SOMEWHAT STRONG	4. <input type="checkbox"/>	VERY WEAK
RATING:				
	1. <input type="checkbox"/>	VERY POSITIVE	4. <input type="checkbox"/>	SOMEWHAT NEGATIVE
	2. <input type="checkbox"/>	SOMEWHAT POSITIVE	5. <input type="checkbox"/>	VERY NEGATIVE
	3. <input type="checkbox"/>	NEUTRAL		
DECISION:				
	<input type="checkbox"/>	DEFINITELY REJECT	<input type="checkbox"/>	REJECT IF POSSIBLE
			<input type="checkbox"/>	ACCEPT
ADDITIONAL COMMENTS:				

Juror Number _____

Juror Questionnaire

Juror Name: _____

1. Gender: _____
2. Age: _____
3. Place of Birth: _____
4. What is your ethnic background?
 - _____ White/Caucasian, not Hispanic
 - _____ Black/African-American, not Hispanic
 - _____ Hispanic/Latino
 - _____ Asian or South Asian
 - _____ American Indian or Native American
 - _____ Other _____
(please specify)
5. In what town, city, or county do you currently live? _____
6. Length of time at current address: _____
7. How long have you lived in Northern Virginia? _____
8. If you have lived less than five years at your current address, indicate your prior town or community.

9. Do you read, speak, write, and understand English?
 - Yes, without difficulty _____
 - Yes, with difficulty _____
 - No _____
10. What is your current marital status? (Check all that apply.)

_____ Single	_____ Divorced
_____ Married ___ years	_____ Divorced and remarried
_____ Living with someone	_____ Widowed
_____ Separated	

Juror Number _____

11. If you have children or stepchildren, please list them:

	Sex	Age	Live with you?	Education Level	Occupation
1.					
2.					
3.					
4.					
5.					

12. If you have grandchildren or step grandchildren under the age of 21, please list them:

	Sex	Age	Live with you?
1.			
2.			
3.			
4.			
5.			

13. What is your occupational status? (Check all that apply.)

- | | |
|--|---------------------------------------|
| <input type="checkbox"/> Work full-time outside the home | <input type="checkbox"/> Student |
| <input type="checkbox"/> Work part-time outside the home | <input type="checkbox"/> Retired |
| <input type="checkbox"/> Full-time homemaker | <input type="checkbox"/> Disabled |
| <input type="checkbox"/> Homemaker with part-time employment | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Unemployed | _____ |

14. Without giving your place of employment, please state your current occupation.

15. Check the following category that best describes your employer :

- | | |
|--|---|
| <input type="checkbox"/> Federal government agency | <input type="checkbox"/> Private, for-profit organization |
| <input type="checkbox"/> State government agency | <input type="checkbox"/> Private, not-for-profit organization |
| <input type="checkbox"/> County government agency | <input type="checkbox"/> Self employed |
| <input type="checkbox"/> City government agency | <input type="checkbox"/> Other: _____ |

Juror Number _____

General Opinions and Beliefs about the Criminal Justice System

PLEASE CHECK THE ANSWER THAT MOST CLOSELY REFLECTS YOUR OWN OPINION CONCERNING THE FOLLOWING STATEMENTS.

- 75. Do you believe that if the prosecution goes to the trouble of bringing someone to trial, he or she is probably guilty?
Yes _____ No _____ Unsure _____
- 76. Do you believe that the law does too much to protect the rights of criminal defendants and not enough to protect the rights of crime victims and their families?
Yes _____ No _____ Unsure _____
- 77. Do you believe that defendants in criminal trials should have to prove that they are innocent?
Yes _____ No _____ Unsure _____
- 78. Do you believe that sometimes innocent people are convicted of crimes they did not commit?
Yes _____ No _____ Unsure _____
- 79. Do you believe that if the defendant in a criminal trial does not testify he is probably guilty?
Yes _____ No _____ Unsure _____
- 80. Do you believe that criminal defendants often get off on technicalities?
Yes _____ No _____ Unsure _____
- 81. Do you believe that "proof beyond a reasonable doubt" is too heavy a burden for the prosecution to have to meet in a child pornography trial?
Yes _____ No _____ Unsure _____
- 82. Do you feel that the criminal justice system treats criminals too harshly, about right, or too leniently?
Too harsh _____ About right _____ Too lenient _____
- 83. Do you believe that defendants accused of possession of child pornography should not be given the same rights as other criminal defendants?
Yes _____ No _____ Unsure _____

Religion

- 84. How often do you attend religious services?
Regularly _____ Occasionally _____ Seldom _____ Never _____

Juror Number _____

85. Has your church, synagogue, mosque, or other religious organization taken a position for or against adult pornography?

Yes _____ No _____

(a) If yes, what is that position: _____

86. Do you believe that viewing sexually explicit or X-rated materials is a sin?

Yes _____ No _____

87. Do you have any religious, moral or personal beliefs against the sale, possession, or viewing of sexually explicit materials?

Yes _____ No _____

(a) If yes, please explain: _____

Mental Health Training and Experience

88. Have you or anyone in your family or close personal friend ever been employed in any capacity in any type of psychiatric facility, hospital, clinic or rehabilitation center?

Yes _____ No _____ Unsure _____

(a) If yes, please explain: _____

89. Have you or anyone in your family or close personal friend ever received counseling, therapy, or any mental health services or medical treatment as result of any type of sexual assault crime, such as child molestation, sexual assault, or rape?

Yes _____ No _____

(a) If yes, please explain: _____

Sexually Explicit Materials

90. What is your opinion regarding a person's right to view sexually explicit materials within the privacy of his/her own home?

