



THE ESSENTIALS OF JURY DE-SELECTION

BY THOMAS M. O'TOOLE, PH.D.

Some attorneys will openly admit that they are “scared to death” of jury selection. No part of the American justice system is more shrouded in mystery, gimmicks, pop psychology, and other clever theories that give attorneys a sense of control over this intimidating process. The theories vary. Some argue that cases are won in jury selection. Some see it as a time to build rapport with potential jurors. Some see it as an opportunity to “sell” the case.

When the process is broken down into its essential elements, the most important and effective jury selection strategy becomes apparent. Jury selection is about de-selection. In fact, the phrase “jury selection” is a misnomer. Attorneys do not “pick” their jurors as if it were the NBA draft. Yet, this remains the focus for many attorneys. Perhaps it’s the psychological appeal of focusing on “good” jurors. However, the only thing attorneys have control over is who does not make it onto the jury. This control is exercised through the use of cause challenges and peremptory strikes. Consequently, the focus should always be on individuals an attorney does not want on the jury.

Even if attorneys could “pick” jurors, research suggests it would not be the best way to approach the process. Negative attributes are more predictive of



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behavior than positive attributes. It's why comment sections on news sites are always filled with naysayers. Negative attitudes and experiences seem to drive people to act more than positive attitudes and experiences. Furthermore, from a risk analysis perspective, the risks of focusing on who is "good" for the attorney's case and being wrong are so much greater than the risks of focusing on who is bad for the attorney's case and being wrong. In the situation of the former, an attorney is left with an adverse juror who may negatively influence the course of deliberations.

THE IMPORTANCE OF ATTITUDES AND EXPERIENCES

Attitudes and experiences are most predictive of human behavior and decision-making. These are what drive people to act. Demographics have strong allure from a pop culture perspective. The most popular questions posed by attorneys in preparation for jury selection are questions such as, "Do I want men or women?" The news media perpetuates this focus by regularly framing issues along demographic boundaries. Despite this common approach, demographics are rarely predictive of verdict preferences. There are certainly cases where demographics might play a prominent role in the actual issues in the case, such as sexual harassment cases or police profiling, but demographics are rarely useful jury selection strategy components. In reality, we tend to think demographics are important because we assume people of similar demographics have similar attitudes and experiences, which can be and is often wrong (believe it or not, not all men think alike!). So why not cut out the middle part (i.e. the indirect and less predictive element of demographics) and focus directly on attitudes and experiences? This significantly decreases the chances of getting it wrong and avoids legal hurdles of focusing on demographics such as Batson challenges.

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CRAFTING AN EFFECTIVE JURY SELECTION STRATEGY

The ideal way to begin the process of jury selection strategy is by developing an adverse juror profile. An adverse juror profile is a list of the case-related attitudes and experiences a potential juror may have that pose the risk of resulting in an adverse case leaning. For example, in a product liability case, some adverse attitudes a corporate defendant would likely have on their list



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are:

- Believes large corporations put profits before safety.
- Believes large corporations routinely cut corners in order to save money.
- Believes too many products are rushed to market without adequate testing.

Examples of adverse experiences for the same corporate defendant could include:

- Has ever had a negative experience with a product due to what they believed were unclear instructions in the user manual.
- Has ever been unexpectedly injured by a product.
- Has ever returned a product because they felt it was unsafe.

While developing an adverse juror profile, attorneys should consider as many dimensions of the case as possible. For example, attorneys should also consider the legal dimension of the case, which might produce the following profile items for a corporate defendant in a product liability case:

- Believes, if a case makes it all the way to trial, it must have merit.
- Believes large corporations have an unfair advantage in the American legal system.
- Believes large damage awards are a “drop in the bucket” for large corporations.

There are many dimensions to be explored. The more inclusive the adverse juror profile, the better.

IMPLEMENTATION THE STRATEGY DURING VOIR DIRE

Attorneys’ questioning styles vary. Style plays a critical role in the process. In order to obtain the critical information necessary to make decisions about who to strike, juror must feel comfortable disclosing this information. The attorney’s questioning style plays a pivotal role in managing juror comfort. One question-type that is particularly effective at increasing juror comfort is the forced choice question. For example, a generic adverse attitude for civil defendants is the belief that just because a case makes it all the way to trial, it must have considerable merit. The forced choice question for this attitude



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might go something like this:

"I have some friends who would say, if a case makes it all the way to trial, there must be considerable merit to the claims. I have other friends who would say cases make it to trial for all sorts of different reasons that might have nothing to do with the merit. By a show of hands, how many of you are more like that first group of friends and think, if a case makes it all the way to trial, there must be considerable merit to the claims?"

There are a few benefits to this forced choice question style. First, the "friends" language is a way of saying to jurors there's no right or wrong answer. After all, the attorney asking the question has friends on both sides of the issue. It implies that it is perfectly reasonable to have an opinion on either side of the issue, which generates comfort among venire members. Second, since an attorney only wants to know about, and only asks about the adverse



side of the opinion, the attorney is not doing the work for the other side and revealing their adverse jurors. In fact, it is for this reason that open-ended questions are not always desirable. A big part of jury selection is not doing the other side's work for them. It's the same reason why "selling themes or your case" in voir dire is a bad idea. In this situation, an

attorney sells his or her case in voir dire and jurors who agree start vocally agreeing or nodding their head in the process. This, in turn, flags these adverse jurors for the other side. In other words, the attorneys on the other side now know who is a problem for them. Plus, selling the case in voir dire takes away from the impact of the opening statement since opening statement will now be the second time jurors have heard the attorney's theories and themes. Finally, jurors are simply not persuaded in voir dire. They lack the context among other things, so why waste valuable time trying to accomplish so little?

THE CHALLENGE OF INFORMATION MANAGEMENT

In voir dire, the hardest part is information management. Fortunately, there are easy ways to manage the tremendous amounts of information in voir dire.



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Here's one easy strategy for managing the process. Number the voir dire questions from 1-10, etc. Ask the voir dire questions in a way that gets jurors to raise their hands/juror numbers to indicate their adverse response (i.e. have you had this experience?). Request that they keep their hand/juror number raised until their juror number has been called. For each juror who raises their hand, place an "X" next to their name on the juror list provided by the court. This provides a quick visual way to assess the venire and figure out where the strikes are. When voir dire is over, the attorney can quickly look down and see which jurors have the most "Xs" marked next to their name. These individuals become priorities.

A more sophisticated strategy involves using numbers rather than "Xs." The idea of using numbers is based on the notion that some attitudes and experiences present higher risk than others. Consequently, using numbers provides attorneys with a way of "weighting" the questions. For example, venire members who hold generic high-risk legal attitudes might only get a "1" for that attitude. However, venire members with experiences with product defects may present higher risk. Consequently, these individuals might get a "3" for this question. At the conclusion of voir dire, the attorney can quickly add up each venire member's score and prioritize the strikes based on which jurors have the highest overall score.

A final note is to look for leadership attributes in voir dire. A verdict is often a product of who exerts the most influence in deliberations. Research shows prior jury experience is a strong predictor of who will be foreperson. Attorneys should also look for "soft power" leadership. Soft power leaders are the venire members who seem very comfortable striking up conversations with the strangers around them during breaks and downtime. This is a sign that they will be very comfortable speaking up and taking control in deliberations. Other attributes are people who speak confidently and articulately when answering voir dire questions. These leadership attributes can help an attorney make tough calls with limited strikes. If the attorney has two high risk jurors and only one strike, he or she should get rid of the one with more leadership attributes.

TAINING THE JURY

Some attorneys express concern about "tainting the jury" as a result of bringing up negative attitudes or experiences. The reality is that jurors are not persuaded during jury selection. In fact, most do not even remember it by the



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time the trial is concluded. But the bottom line is that there are two places jurors can talk about negative attitudes/experiences: during jury selection when the attorney can do something about it or during deliberations when there's nothing that can be done. Finally, even if jurors were persuaded during voir dire, the juror who is going to change his/her mind as a result of a voir dire question is probably the type of individual who is going to change his/her mind a few more times over the course of trial.

ABOUT THE AUTHOR

Thomas O'Toole, Ph.D., is President and Consultant at Sound Jury Consulting. He has practiced across the nation for over ten years in nearly every litigation type. He has consulted on matters as small as low exposure medical malpractice and as large as "bet-the company" MDL class actions and billion dollar environmental claims. He received his Ph.D. in litigation psychology and communication at the University of Kansas. His dissertation focused on the how jurors attribute fault in medical malpractice litigation and he has published extensively on the subject.



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