



# THE JURY BOX

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Happy New Year! This is the first issue of year two for **THE JURY BOX**. Thank you all for the comments and advice that helped make the first year such a success. I am always gratified when someone tells me that they found something in here interesting or helpful. Keep sending in those suggestions! If you know of anyone who might benefit from receiving **THE JURY BOX**, just drop me a note or direct them to the website.

Look for additional pearls of wisdom in my recurring column in **LAWYERS WEEKLY USA**. The first one, published in December, is entitled "Why Mock Trials are Bad Diagnostic Tools." I will be archiving the column on my website, as well.

For those craving more than the print version of me, you can catch my act in person, at the Mid-Winter Social of the Massachusetts Defense Lawyers Association, on January 17, 4:30-7:30 pm, at the BC Club (which is at the top of 100 Federal Street). Visit their website ([massdla.org](http://massdla.org)) or e-mail them ([mdla@comcast.net](mailto:mdla@comcast.net)) for more information.

In this issue, I delve into some of the myths and mysteries of jury selection. I focus on problems associated with group voir dire and the use of open-ended questions. I will also review some lessons to be learned from the Vioxx trials.

- Edward P. Schwartz

Mention of jury consulting often evokes images of Gene Hackman's minions repelling down office buildings to spy on prospective jurors. The high profile trials of O.J. Simpson, Robert Blake and Martha Stewart reinforce the first-blush impression that jury consulting is **all about jury selection**. I hope that the past year of **THE JURY BOX** has shown you all that trial consulting is really mostly about what the jurors see and hear, rather than who they are. That said, jury composition can matter in certain kinds of cases. It is important to know how best to elicit valuable information from prospective jurors and make use of that information.

## Don't judge a book by its cover

While many jurisdictions allow lawyers to question prospective jurors at length, there are some places (such as New Jersey and Massachusetts) where judges conduct a fairly cursory voir dire with limited attorney input. Under these circumstances, a lawyer has very little information with which to select a jury. Are observable characteristics, like age, race, gender and socio-economic status good predictors of verdict choice? The short answer is "no."

Several scholars have tested the efficacy of relying on demographic information during jury selection. The results suggest that no more than 5% of verdict choice can be

explained by these descriptive variables. Tests of lawyers' practice manuals have shown these methods to be even less successful. A civil litigator would be wise to spend her resources on perfecting her trial presentation, rather than trying to select the "right" jury.

There are certain types of cases in which "types" of jurors do vote differently. For instance, gender differences have been detected among jurors in rape and sexual abuse trials (in combination with age and family effects). One does have to be careful about ascribing to "type" a tendency that is actually the result of "experience." Many prosecutors will assert that African American jurors tend to be pro-defense in criminal trials. When one factors in experience with the police, however, the race effect disappears. It just so happens that black people are more likely than whites to have had negative experiences with law enforcement.

## To Tell the Truth... or not.

Not only does limited, group voir dire reveal less information about jurors than individual voir dire, the information that does come out is less reliable, too. That's right; jurors lie during group voir dire... a lot.

District of Columbia Superior Court Judge Gregory E. Mize conducted a very interesting experiment in his courtroom. (Mize 1999) Rather than following his traditional procedure of interviewing individually only those jurors who answered affirmatively to some question during group voir dire, he started individually voir diring every juror. He found that 28% of prospective jurors who *should* have raised their hands at least once during group voir dire (triggering an individualized voir dire) failed to do so. Remember that this number only represents those who "fessed up" when asked about their answers in private. The total amount of lying could have been even greater. The most common excuses given for a juror's failure to reveal potential bias during group voir dire were embarrassment, shyness and a belief that her answer wasn't very important. Needless to say, Judge Mize immediately started conducting individualized voir dire for every juror in every case.

Similar results were uncovered in several studies employing post-trial interviews with jurors who actually served on cases (Zeisel and Diamond 1978, Seltzer, et al. 1991, Johnson and Haney 1994). In the Seltzer study, for instance, more than half of jurors who had been victims of crimes failed to reveal this information during group voir dire. Only a quarter of those who had ties to law enforcement (which was more than 1/3 of the sample) volunteered this information during voir dire.

Scholars are unanimous in concluding that limited voir dire reveals an incomplete and inaccurate picture of each prospective juror. As such, it does a very poor job of eliminating jury bias. I turn now to methods of securing useful information from jurors.

## Right here in black and white

One obvious solution to the problems of group *voir dire* is to move to individualized *voir dire*, as Judge Mize has done. Unfortunately, prospective jurors are not always honest in this context either. While it might be somewhat less embarrassing to admit something to a judge and a couple of lawyers, rather than to a whole courtroom full of people, some people will still be reluctant to come forward with personal, sensitive information.

Researchers have learned that people are generally more honest on written questionnaires than when being quizzed orally (Spaeth 2001). As such, many trial consultants advocate the use of a supplemental juror questionnaire (SJQ) whenever possible.

SJQs have advantages beyond the ability to elicit truthful responses. The questions are submitted to the judge in advance, allowing the parties to agree on lines of questioning without the need for objections and sidebars in front of the jury. The lawyers also can craft the questions with greater care than is possible on the fly during *voir dire*. A questionnaire can be completed by prospective jurors in advance of *voir dire*, freeing up valuable court time for other matters. Finally, the results of the questionnaire can aid the judge and attorneys in the subsequent *voir dire*, by identifying which issues to focus on with which jurors.

## Are you now, or have you ever been...

Even a supplemental juror questionnaire won't generate much useful information if the questions are not crafted carefully. While the public nature of group *voir dire* certainly contributes to its ineffectiveness, the type of questions employed in that setting certainly doesn't help. It is generally a bad idea to ask people to volunteer potentially negative information about themselves, especially in very broad terms. We should not be surprised that few people respond affirmatively to a question like "Is there any reason why you feel you cannot be fair and unbiased in a case like this one?"

Multiple-choice questions typically elicit more honesty. For instance, one can ask prospective jurors:

Which of the following best describes your feelings about medical malpractice lawsuits?

- a) There are too many lawsuits against doctors because people without a real case sue anyway.
- b) The legal system does a pretty good job of making sure that doctors who make real mistakes compensate their patients.
- c) It is so expensive and time-consuming to sue a doctor that most injured patients don't get a fair chance in court.

While none of the options may exactly describe a prospective juror's views, forcing a juror to choose one can reveal a lot about how she thinks. Asking the same multiple-choice questions to all jurors also helps the litigator to compare answers for the exercise of peremptory challenges.

It is important to be aware of framing and order effects when interpreting juror answers on questionnaires. If a juror seems to always pick the first choice, the answers may not be very reliable. In addition, if a juror always chooses the most "positive" or "optimistic" option, she is probably not being completely candid. It is always a good idea to mix up the order of the options throughout the questionnaire.

## In the News

### Vioxx trial results a real pain to decipher

The first federal Vioxx trial ended in a hung jury last month, in Houston, TX. According to juror interviews, the split was 8-1 in favor of the defendant. That would be good enough for Merck to win in most state jurisdictions, but federal civil trials still require unanimous jury verdicts. This is an interesting result because pro-defense jurors tend to "hold out" more tenaciously than pro-plaintiff ones (although the effect is much more pronounced in criminal trials). The plaintiff in this case had a host of medical woes, making proving causation a particularly tricky proposition. The case will be retried, with the new jury having access to recent revelations that Merck withheld known risks in the 2001 publication of its clinical study.

Two Vioxx trials have been completed in state courts. A Texas jury awarded \$253 million (which was reduced to \$26 million by a Texas cap on punitive damages) to the wife of a man who died of a heart attack after taking Vioxx for arthritis. That vote was 10-2 in favor of the plaintiff.

In Merck's home state of New Jersey, where most of the Vioxx cases are filed, the pharmaceutical company won a defense verdict by a 9-1 margin. In New Jersey, jurors are permitted to ask questions of witnesses, at the discretion of the judge. Judge Carol E. Higbee permitted it here, as she usually does. The jurors submit written questions to the court and the judge asks them if she finds them in order. This New Jersey jury asked lots of questions, mostly about scientific issues. In the end, causation appeared to be the plaintiff's weak link once again. The plaintiff suffered from multiple ailments and the jury was not convinced that Vioxx had caused his heart attack.

It is also important to note implications from the fact that the plaintiff here did not die from his heart attack. First, Merck's lawyers could attack the character of the plaintiff without being perceived as disrespectful of the dead. Secondly, many studies have shown that calculations of harm and liability regularly get conflated by juries. The more the plaintiff has suffered, the more likely the jury is to find the defendant liable, all else equal. So, it is possible that had Mr. Humeston died, the jury would have been more inclined to hold Merck responsible.

The lesson that I would take away from these three trials is that procedure matters. A litigator should always account for jury size, voting rules and opportunities for strategic use of a jurisdiction's particular rules of civil procedure.

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