
Jury Selection: Three Strikes, You're Out!

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Would you rather know which jurors reject your case—and why—after the fact or before?

Why retain a jury consultant (a.k.a. “jury picker”) before you are ready to pick a jury? Because you have no control over who shows up, and only a limited number of strikes. Besides, certain types of jurors are never going to vote your way, no matter what you do. When they reject you, they will do so vehemently (and, if possible, punitively), and they may even take other jurors along for the ride. The only good jury is one that agrees with you, but to know which jurors are on your side requires waiting until the trial is over. Or does it?

You can reliably discover what types of jurors accept or reject your case (through jury profiling) and why they do (through trying your case to mock jurors) before the fact, while there’s still time to do something about it. When it comes to persuading jurors after the trial has begun, attorneys tend to rely too heavily on evidence that often fails to change minds that are already made up, minds that more often than not use evidence to bolster their entrenched opinions. Case in point: the consequences of a certain tight-fitting celebrity glove of a few years back.

A full understanding of juries comes neither from law school nor from knowledge of the law and legal procedures, nor even from vast litigation experience. Understanding juries also requires significant knowledge of psychology, personality theory, group dynamics, cognition, human decision-making, perception, and properly designed research.

Some attorneys, however, dismiss the notion that you can predict what a jury will do, reasoning that “every jury is different” and “juries behave irrationally,” so why bother trying to gauge the unknown? In truth, the reasons and processes by which jurors reach their conclusions tend to remain the same from one jury to another. These processes follow patterns that can be determined through pretrial research. Trial teams can use the results of such research—at jury selection and in their case strategy—before the fact. While the behaviors of “bad” and “good” jurors are case-specific, they are also predictable through data that can be applied strategically to voir dire and jury selection.

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“Choosing” Jurors: Two Schools of Thought

With so few preemptory strikes available in most cases, there are two contradictory schools of thought: (1) We have to make the most of each strike; and (2) It doesn't pay to invest too much in jury selection. Both statements are true. However, the optimal solution for each differs: (1) Use your strikes to eliminate the most hostile people; and (2) Create a trial strategy that overcomes what bothers—and even what appeals to—remaining antagonistic jurors.

Jury Profiling

Rather than the mysterious and sinister endeavor described in the best-selling novels of John Grisham, jury profiling is the application of real-world social science: a reliable statistical model informed by the experience and insights of a trial consultant who uses data to assist trial teams in understanding the variables of choosing potential jurors. Of vital importance in this process is learning which people to avoid, by using pertinent information to guide the jury-selection process. The danger lies in overlooking factors more relevant (and subtler) than mere demographics, such as who will be most influential¹ in the jury (not necessarily the foreperson) and how influential the foreperson will be.²

Priority study³ shows that the most influential jurors tend to be extroverted, agreeable, conscientious, and emotionally stable. Equally important is knowing which jurors will be receptive to persuasion and influence. In other words, who will be the leaders and who the followers?

This recent research confirms that even nowadays, male jury members are perceived to be more influential than women. The research also reveals the fact that conscientious people (those willing to consider all opinions before deciding) and people generally less “open” are the ones most likely to report post-trial that they were influenced by others.

1 Hogan, R., Curphy, G.J., & Hogan, J. (1994). “What we know about leadership: Effectiveness and personality,” *American Psychologist*, 49, 493-504.

2 Foley, L.A. & Pigott, M.A. (1997). “The influence of forepersons and nonforepersons on mock jury decisions,” *American Journal of Forensic Psychology*, 15, 5-17.

3 Marcus, D.K., Lyons, P.M., and Guyton, M.R. (2000). “Studying Perceptions of Juror Influence In Vivo: A Social Relations Analysis,” *Law and Human Behavior*, Vol. 24, No. 2, 173-186.

Some litigators can spot these characteristics easily, but such people-watching is an unreliable art. Identifying traits in human behavior requires more than opinion, since jury selection is a form of smart-bombing. One must see the target clearly and know how to reach it most efficiently. Without the guidance of reliable data

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regarding what does and does not work, many trial teams operate in the dark at jury selection and trial. Despite a great deal of observable, inferable, and overtly learnable information that a skilled trial consultant can observe and interpret quickly to the trial team's benefit, most of the available information goes unused without the benefit of a trial consultant.

Psychology, Schmycology

How do trial lawyers know what to look for in voir dire, and how do they use that information in jury selection?

Some litigators dismiss jury psychology outright, despite its potential as the best source for identifying and understanding what jurors need before they can be receptive to your case. Lawyers unfamiliar with how profiles work are skeptical and rely on their own and others' experiences to conjure the kinds of jurors they want. The important question is, what plan do you use?

Plan A: Do It Yourself

Jury Research

“If it ain't broke, don't fix it.” vs. “What if it is broke, but you don't know it?”

Whether due to skepticism, unfamiliarity, or cost containment, some trial lawyers conduct their own in-house jury “research,” typically using a spouse, the sec-

retarial pool, or employees of local counsel (known as a “convenient sample”) to determine juror issues. This approach can do more harm than good. Using a sample that is too small, not a cross-section, and obviously biased limits your ability to predict how people on a real jury will react to your case. Just because people you pay or who are supportive of you or your firm see things one way is no reason to believe those reactions will be duplicated by actual jurors. For one thing, a jury will not share the same motivations as your familiar audience. In addition, the number of people with whom you test arguments/strategies represents too few examples of any specific factor (e.g., gender, age, experience, etc.) to allow you to say with any certainty whether potential jurors with similar traits share anything in common with your sample. Nonetheless, even experienced lawyers use this approach to decide which jurors to watch out for and what works for the jury. Why not? It’s free, it’s easy, and it has worked for them in the past. Invariably, however, those who try this realize the limitations afterwards.

Jury Selection

Trial lawyers often have theories about who among a group of potential jurors is good or bad for them. In fact, having sharp instincts and the confidence to rely on them are signs of a good trial lawyer. A trial consultant hears a variety of seat-of-the-pants strategies: “I’ve been trying cases for 20 years, and I can tell who likes me and who doesn’t.” “I know which cases I like to have women vs. men on.” “I intentionally tease a prospective juror to form a rapport.” “I like housewives.” “No widows.” “I’ll take a veteran any day.” “Forget students.” Research and post-trial jury interviews have actually shown such untested jury notions to be misguided and false, regardless of the years of experience of the person offering them. It is like asking someone “Are you happily married?” and receiving the response “25 years!” Quantity does not necessarily mean quality.

Business as Usual

Many attorneys are replete with war stories about individual jurors who turned out to be oddly favorable or unfavorable to their case; such stories are offered as anecdotal proof of how perceptive they attorneys were or how unreliable preconceived impressions about jurors can be. For example, a male juror nodded approvingly at everything a defense attorney did during trial, only to end up the single holdout against her client in deliberations. Jury-watching alone failed. In another case, a Hell’s Angels biker with an eye patch ended up championing a chemical manufacturer’s claim for payment from its insurer. These were not random occurrences, but consequences of a logical theory about the case, including

what it was about certain kinds of jurors who would accept or reject the trial team’s reasoning. In the instance of the chemical manufacturing trial, how did the trial team know?

We tested it before the fact. Pretrial jury research indicated that leniency toward the insured as to specifics

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omitted from its application for insurance would more likely come from anti-establishment types than from highly rule-governed people. This is intuitive and was confirmed.

Certain choices in assessing prospective jurors take little special knowledge and testing. Expecting dogmatic environmentalists to disfavor alleged polluters in toxic tort cases or strident feminists to favor female plaintiffs in sexual harassment suits seems logical and therefore to not merit jury consulting because such jurors tend to be “spear throwers,” i.e., extremists that anyone can easily spot as adverse and target for a strike. Assuming they are obvious, you can identify and get rid of your side’s worst/your opponent’s best jurors. But what if they are not obvious? What should you do with moderate jurors who remain and, like blinking yellow lights, warrant proceeding with caution? The issue then becomes how to distinguish between those shades of gray.

What You See Is Not What You Get: Counterintuitive Results

It takes more than experience to ferret out bad jurors from good ones. The clearest examples of how this can happen relate to counterintuitive factors: Will jurors similar to a plaintiff favor the plaintiff (due to “identification”) or seek to distance themselves (due to “defensive attribution”)?

There is no clear-cut way to predict which applies in a particular case without researching that case with surrogate jurors. Different venues with the same fact pattern—or slightly different fact patterns in the same venue—have yielded opposite results, as found in pretrial research and confirmed in post-verdict interviews. For example, in a patent infringement case, tinkers proved

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to be especially bad for an unknown, commercially unsuccessful patent owner suing for infringement against a technical giant. Why? Because technically oriented people like “new bells and whistles” regardless of their origin and thus appreciate the source that provides them, albeit an infringer. In a product liability matter, young, adventurous males were especially unsympathetic to a hot-dogging young man who “buzzed” tree tops with a private plane that crashed when it hit phone lines, killing him and his friends on board.

Counterintuitively, daredevil jurors were least sympathetic to the plaintiff. Why? Due to defensive attribution, jurors, similar to the deceased, needed to distance themselves from him to psychologically shield themselves from his fate. They did so by being critical of him and disparaging the choices he made. In another case against a well-known wrestling entity, wrestling fans were the least sympathetic to the defense. Why? Because they felt betrayed by something they cared about: wrestling. In each of these instances, the client benefited from the ability to identify these jurors as risks using very few questions in voir dire and maximizing the value of pre-emptory strikes.

These are only a few examples of how jury-profiling can be counterintuitive or less obvious than guessing might predict. Without prior research, we cannot know whether favorable jurors will follow an intuitive or counterintuitive pattern, and we cannot know the crucial questions to ask to distinguish bad from good jurors.

The “Right” Juror Depends on the Way You Try Your Case

Many attorneys ask trial consultants, “What kind of jury do we want?” Without an empirically based profile, the best one can do is to consider if “generic” juror profiles (which tend to describe jurors in tort litigation) apply to the case at hand. The following are some aspects of a generic plaintiff juror profile:

- Less educated
- Overeducated but underemployed
- Disgruntled/chip on shoulder/angry or depressed
- Disenfranchised/anti-establishment/marginalized (“fringe”)
- “External locus of control” (i.e., victims/blamers)
- Recent personal hardship/life stressors
- Emotional rather than cognitive deciders
- Little authority status socioeconomically
- Wild cards:
 - Case-related specialized skills
 - Leadership qualities/behaviors; ability to create consensus
 - Aware of amounts of money in business/can calculate damages

Here are some aspects of a generic defense juror profile:

- Mainstream, conservative
- Some authority status
- Analytic rather than emotional/intuitive
- Few life stressors
- “Internal locus of control” (takes personal responsibility/control)
- Possibly management experience

A Little Knowledge Is Dangerous

These profiles are seductive, and it would be nice to have an all-purpose set of guidelines to use and re-use for every case. However, since cases are not tried in a vacuum and different themes appeal to different people, deciding who your best consumers are can only be determined specifically and reliably by knowing the “product” you plan to sell and how people actually react to it.

Generic characteristics may not apply to your specific case at all. For example, if instead of a plaintiff, a defendant is seen as the victim, then the generic “plaintiff-oriented” profile (i.e., describing jurors who favor victims) may well be better at describing jurors who favor the defense in that instance.

What else can one use if not traditional wisdom or experience? Information from actual jurors.

Jury Interviewing

After a jury has rendered its verdict, a trial lawyer granted permission by the court would understandably want to pick the jurors’ brains. Such an interview puts presenters in touch with their audience, yet what is obtained from the jurors’ self-report can be unreliable. Someone involved in the case who questions the jurors is, de facto, biased. This in turn taints the results: Jurors who favored you are more willing to speak with you. They may want to please you and say what they think you want to hear. They could be more reluctant to criticize you to your face despite having some unfavorable reactions. Conversely, jurors who did not favor you are less willing to speak with you. If they do speak to you they may soften the blow of their criticism or omit praise despite favorable reactions to specific issues.

Aside from the issue of “experimenter bias,” information gathered in this manner is also flawed in other ways: Jurors may offer reasons for their choices that may not have been the actual causes responsible for their behavior. In fact, they may be completely unaware of the reasons for their choices (e.g., personal bias, agenda, experience, predisposition, lack of education/understanding, feelings about authority, etc.).

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Regardless of which side they favored, some jurors may not be amenable to discussing their thoughts and feelings or may be less articulate at doing so. Jurors may disagree about who among themselves they viewed as a leader. Overhearing another juror’s comments can contaminate opinions voiced by others, falsely implying more consensus than actually existed.

These factors, which slant the sample of interviewees and the data collected, can lead to false conclusions about juror traits. For example, did a lone holdout remain steadfast because she was female, or Asian, or due to her worldview or life experiences (say, a recent divorce)? Without the appropriate experimental controls to answer these questions, one cannot put a proper value, if any, on what is learned. Further, lawyers conducting interviews do not ask the same questions of each person they interview, in the same order, so one cannot compare their results, “apples to apples” to find true trends. Information based on too few people, with no experimental controls, is not reliable and can best be considered anecdotal information. Nonetheless, some take it as gospel.

Plan B: When Going to Rome, Consult Romans

Empirically based trial consulting can provide both actual data (not just opinions) and the ability to identify specific factors that separate bad jurors from good. The consultant asks surrogate jurors (who do not know which side is sponsoring the research) balanced, accurate questions from a sufficiently representative sample. This process provides objective data for qualitative and quantitative analyses from which to create juror profiles and case strategies. Even this method has its limitations (e.g., reliance on probability and the unlikelihood of learning all necessary information per the profile). Nonetheless, this statistical model is more reliable than gathering anecdotal information.

The Horse’s Mouth

When you have reason to believe that some jurors may be resistant to your story (no matter how well you tweak or spin it, or how much anecdotal information you have), it is wise to invest in the development of an empirically based profile of traits that prospective jurors can be scored on in *voir dire*—whether verbal, written jury questionnaire, reasonable inference, or observation. This is sometimes possible even in the absence of more direct information (e.g., through basic information provided by the court, via computer, or through local counsel’s knowledge about prospective jurors). Knowing in advance what the court will permit you to learn about prospective jurors is vital, so as to identify the profile factors on which to focus in the developmental stages of the survey and the statistical model.

Hands Tied

If you cannot get the information you need in order to apply the profile (e.g., you can't ask questions because the judge conducts his or her own limited voir dire and denies written jury questionnaires), you will be empty-handed even when armed with the right questions. Even if you know that people with college or higher education are more likely to be adverse to your client than those with less education, never learning about the potential jurors' educations renders your information moot. Or does it? Why have a profile if denied access to such juror-specific information? Because this type of information may be inferred without direct access. An experienced trial consultant knows how to (1) "reverse engineer" a jury selection strategy, based on what and how information is learned in the court, and will then design a test to identify the most relevant factors; (2) test and use observable and inferable information about jurors; and (3) incorporate the limitations of each jury selection into the presentation strategy for that case.

Win-Win: Prepare the Best Case for the Worst Jury (Everything Else Is Gravy)

Since we have more control over the story we tell than over who hears it, it is usually more cost-effective to invest in the development of the optimal story than to count on assembling the optimal audience. Allocate your funds wisely to discern the most effective story for both fans and detractors. Keep in mind that whatever you learn in voir dire, your adversary learns, too, and one of you will benefit more than the other. The less-popular party has a better shot by relying on chance rather than by exposing its few good prospects in voir dire, which achieves nothing other than having the opposition mark them as strikes. Based on the odds, striking in the dark gives you a better chance at keeping your few fans.

In the end, focusing only on a trial consultant's skill at jury selection underutilizes key advantages a trial team can gain from pretrial jury research — but it is a good start. Since any jury will inevitably have "unknowns" and "undesirables," you can overcome the unavoidable resistance and maximize the benefit of favorable jurors by knowing which arguments and evidence play best. Pretrial jury research is your strongest insurance policy. When overly depending on jury selection as a strategy: If all you get is three strikes, you're out before you begin.