Jury Selection in Employment Litigation
Preparing for Voir Dire and Selecting the Best Jury for the Case

WEDNESDAY, APRIL 10, 2013
1pm Eastern   |   12pm Central   |   11am Mountain   |   10am Pacific

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JURY SELECTION IN
EMPLOYMENT LITIGATION

April 10, 2013

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Jury Selection

• Court may permit parties or attorneys to examine jury panelists or may do so itself
• If Court examines, it must permit parties or attorneys to make further inquiry the court considers proper, or the court must ask any of the additional questions it considers proper
  - Fed. R. Civ. P. 47(a)
Jury Selection

• Parties get 3 peremptory challenges in federal court in civil cases
  – Fed. R. Civ. P. 47(b)
Effects of the Recession

• Can no longer generalize about jurors based on gender, race, ethnicity, national origin, religion, age, marital status, job history or current employment

• In Federal Court, jury selection is limited by time and ability to question jury panel members
Effects of the Recession

• There is increased anger among some jurors because of the recession
• We hear about the economy constantly
• Baby boomers are not able to retire
• Younger jurors are not able to find jobs
• Every panel member has either lost a job or knows someone who has lost a job since 2008
Effects of the Recession

• For employers, the good news is that the recession has caused jurors to be more unwilling to return large jury verdicts

• Jury panelists today question punitive damages during *voir dire*

• More panel members use economic hardship reasons to get off the jury
What Should Counsel Do?

- Use questionnaires
- Find the jurors who blame big business for the economy
- Find the angry jurors
- Use your theme to personalize your corporate client
JURY SELECTION IN EMPLOYMENT LITIGATION

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The Modern Jury

- More Educated – avg is now “some college education”
- Learn by Watching – not reading
- Grab & Go – get to the point
- Want to do good – need guidance
- Participate in Social Justice
- More Leaders
- More Business Acumen
- More Media Coverage
Jurors Are Like Icebergs
1. Listen, listen, listen…and with your eyes
2. Tell something about yourself to break the ice
3. Reflection builds rapport
4. Poisoning the Pool – just a myth
5. Question structure – open vs. closed
Jury Selection in Employment Cases:
Beyond the Basics

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Goal of Voir Dire (Beware of Demographics)

- Central task is to identify experiences/bias most harmful to your case
  - Process is one of de-selection
- Focus on experiences/bias replaces reliance on demographics
- Studies show demographic peers may judge party more harshly than non-peer
- Studies show jurors in employment cases more likely to disregard evidence in favor of own experience
- Studies show that juries in employment cases spend *more than 50% of time* discussing personal experiences, rather than the evidence presented
Factors Other than Demographics

Better indicator of juror experience and bias—media and personal consumption.

Nielsen stats show Americans spend a staggering 34 hours a week watching television.

Much can be learned about a person based on her personal consumption habits.

"… the question of what kind of information is being gathered from television watching is the key question to learn from a potential juror in attempting to learn how his or her values are being formulated."
Other than Demographics-Media Consumption

Television

– If a juror states that his favorite show is “60 Minutes,” or another news show, this might show that he is inquisitive or up-to-date in current events.

– If a juror responds with a legal drama like “Law and Order,” this may indicate that the juror considers herself an “expert” in the law and could be a dangerous juror to have in the jury room.
Other than Demographics-Media Consumption

News Outlets

– Jurors who identify as conservative or Republican; get news from Fox News, Glenn Beck and Sean Hannity; read news blogs like the Drudge Report or the Wall Street Journal; and believe that the “government does too much” and that “individuals should ensure their own safety,” more likely to return a defense verdict

– Jurors who identify as liberal, progressive, or Democrats; get their news from CNN, MSNBC, Hardball and Rachel Maddow; enjoy comedy news programs like Daily Show or Colbert Report; read news magazines and New York Times; believe that the “government should do more to solve problems” and that “the government should ensure our safety,” are more likely to return a plaintiff’s verdict
Other than Demographics-Income Level

Purchasing Goods/Services
- Inquiry can be a good proxy for potential juror’s economic status (e.g., a juror who buys all of his groceries at Whole Foods, versus HEB or Wal-Mart, more likely to have a higher level disposable income (question should only be asked in juror questionnaires as jurors may be embarrassed to answer in a group setting))
- Another useful proxy for income level—ask about favorite or most-frequented restaurants (jurors who express a preference for fast-food restaurants, versus big-box chain restaurants, versus more expensive restaurants, might reveal much about their level of disposable income)
Use of Social Media

Social media can be a powerful tool to identify bias.

Researching prospective jurors on social media sites offers several advantages over traditional voir dire.

- People arguably more honest and less likely to self-censor online.
- People less likely in an online forum to feel pressured to say the “right thing” or express the socially acceptable view.
Use of Social Media

Even if social media does not uncover directly relevant bias, it may reveal other highly useful information

- Basic demographic information too time-consuming to collect during voir dire
- Whether person is strident or overtly opinionated
- Whether person likes legal dramas and movies
- Whether someone is devoutly religious
- Whether someone has previously been involved with the legal system (as a plaintiff, defendant, or witness)
Use of Social Media

Examples of use of social media during the jury-selection process

– In products-liability case, defendant’s jury consultant discovered juror’s Facebook page that indicated her hero was Erin Brokovich

– In products-liability case against ConAgra, defendant discovered juror’s Facebook page with links to various websites highly critical of large corporations (including link to juror’s own blog, on which he had written: “F--- McDonald’s. I hate your commercials. I’m not ‘lovin' it.”); upon defense’s motion, judge removed juror from jury

– In criminal trial for sexual assault against black male defendant, defense counsel fought to seat a white female juror; while traditional demographic view might have counseled against her as defense juror because her Facebook revealed numerous pictures of her with black male friends
Use of Social Media

Sources of social media

- **Facebook**: current king of social-media sites, > 1 billion active users, users post information about demographics, families, marital status, education, occupation, politics, and entertainment preferences
- **MySpace**: used to be social-networking site of choice
- **Twitter**: a “micro-blogging” site in which users post “tweets” (messages of 140 characters or fewer), with 500 million registered users who post > 340 million tweets each day; users post tweets around certain “trending” topics, including current events and politics—subjects of great interest for identifying bias
- **Public records databases**: lawsuits, judgments, real estate records
Goal of Voir Dire—Getting Them to Care About Your Case

- After de-selecting jurors with biases, get the jurors to care about your case and your client
- A related goal of voir dire is to build rapport with the potential jurors—to persuade them to like and trust you
- Identifying bias does not mean playing the role of inquisitor
  - It involves having an open, honest conversation with the jury pool in which they can feel comfortable sharing their true views
  - One way to combine the dual goals of juror de-selection and education is to frame your questions in a way that assumes your version of the facts