Jury Selection in Employment Litigation: Preparing for Voir Dire, Identifying Bias, Leveraging Strikes

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Today’s faculty features:

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JURY SELECTION IN EMPLOYMENT LITIGATION

Emily McDonald, PhD, Bloom Strategic Consulting

Gayla C. Crain, Gray Reed & McGraw, P.C.

Stephen E. Fox, Polsinelli PC
Agenda

• What does the modern jury look like?
• What is the goal of voir dire?
• Should you rely on demographics to select a jury?
• What factors other than demographics should you rely upon to assist in selecting a jury?
• Use of social media in jury selection
• Use of questionnaires in jury selection
Overview

• Can no longer generalize about jurors based on
  • Gender
  • Race
  • Ethnicity or 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
Modern Jury

• More educated – average is now “some college education”
• Learn by watching, not reading
• Grab & go – get to the point quickly
• Want to do good – but need guidance
• Participate in social justice
• More leaders
• More business acumen
• Used to more media coverage
Modern Jury—Getting The Information

- Listen, listen, listen … and do so with your eyes
- Tell something about yourself (to break the ice)
- Reflection builds rapport
- Poisoning the pool—just a myth
- Question structure—open vs. closed
Jury Selection Process

• 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 court considers proper, or court must ask any of the additional questions it considers proper
  • Fed. R. Civ. P. 47(a)

• Parties get 3 peremptory challenges in federal court in civil cases
  • Fed. R. Civ. P. 47(b)
Goal of Voir Dire

• Central task—identify experiences/bias most harmful to your case
  – Process is one of de-selection
• Focus on experiences/bias rather than 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 experiences
• Studies show that employment case juries spend more than 50% of time discussing personal experiences, rather than evidence presented
Goal of Voir Dire

• After de-selecting jurors with biases, get jurors to care about your case and your client

• A related goal of voir dire is to build rapport with 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 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 questions in a way that assumes your version of the facts
Implicit Biases

- Implicit biases are unstated and unrecognized and operate outside of conscious awareness.
- Social scientists refer to IBs as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful.
- Unfortunately, they are also much more difficult to ascertain, measure, and study than explicit biases.
Implicit Bias

• One scientific explanation suggests IBs formed by repeated negative associations—such as the association of a particular race with crime—that establish neurological responses in area of brain responsible for detecting/quickly responding to danger

• Most surprising research discovery into implicit biases – judges and other participants in the legal system are as susceptible to implicit biases as anyone
Jurors Are Like Icebergs

• Demographics, while immediately visible, are less important than personal attitudes and experiences
Factors Other than Demographics

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

• Nielson stats show Americans spend a staggering 34 hours/week watching TV

• Much can be learned about a person based on her personal consumption habits
  - “… the question of what kind of information is being gathered from TV watching is the key question to learn from a potential juror in attempting to learn how his/her values are being formulated.”
Factors Other than Demographics—Media Consumption

• Television
  • If juror states that favorite show is “60 Minutes,” or another news show, this might show that he/she is inquisitive or up-to-date in current events
  • If juror responds with 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
Factors Other than Demographics—
Media Consumption

• 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
Factors Other than Demographics—Media Consumption

• 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,” …. 

• More likely to return a plaintiff’s verdict
Factors Other than Demographics—Income Level

• Purchasing Goods/Services
  - This inquiry can be a good proxy for potential juror’s economic status (e.g., juror who buys groceries at Whole Foods vs. HEB or Wal-Mart more likely to have higher disposable income (note, ask in questionnaire as jurors may be embarrassed to answer in group setting))
  - Another useful proxy for income level—ask about favorite or most-frequented restaurants (jurors who express a preference for fast-food restaurants vs. big-box chain restaurants vs. more expensive restaurants might provide insight about level of disposable income)
Identifying Implicit Biases

• Most trial court judges dominate voir dire because of perceived efficiency

• Problem is that empirical research suggests that potential jurors respond more candidly and are less likely to give socially desirable answers to questions from lawyers than from judges

• One judge recommends that judges or lawyers inform jurors at start of trial of real likelihood that each person suffers from implicit bias and urge jurors to attempt to control or eliminate them
Identifying Implicit Biases

• Because lawyers almost always know case better than trial judge, lawyers are in best position to determine how explicit and implicit biases among potential jurors might affect the outcome

• Trial lawyers have greater access than judges to cognitive psychologists, jury consultants, and other resources to develop voir dire strategies to address explicit and implicit biases of prospective jurors
Use of Questionnaires

• After filling out the questionnaire, please place a “C” before any answers you deem confidential
• You must fill out every answer completely
• Questionnaire is confidential
• First Name and First Initial of Last Name only:
• Date & Place of Birth: County of Residence:
• Marital Status and How Long:
Use of Questionnaires

1. What is your present address and how long have you lived there?

2. Do you (a) own, or (b) rent your place of residence, (c) live with a family member, or (d) other? If other, please explain.

3. What is the last grade of school, including college or graduate school, which you finished and where?
Use of Questionnaires

1. Describe your leisure time activities:
   (a) Hobbies
   (b) Clubs, groups, fellowships, unions or other organizations, and whether you are an officer
   (c) Newspapers or magazines you read regularly
   (d) Favorite TV programs
Use of Questionnaires

• 1. What three people do you admire the most? The least?
• 2. If you do not object, state your political preference.
• 3. If you do not object, state your religious preference.
• 4. Have your or a member of your family had any form of legal training?
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 online forum to feel pressured to say the “right thing” or to express the socially acceptable view
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
Use of Social Media

• Even if social media does not uncover directly relevant bias, it may reveal other highly useful information, like …
  – 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 reflecting 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 motion, judge removed juror from jury
Use of Social Media

• Examples of use of social media during the jury-selection process
  – 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, her Facebook revealed numerous pictures of her with black male friends
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