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How To Tap the Potential of the Juror Questionnaire

George R. Speckart, Ph. D., and Lyndon G. McLennan

Most litigators know that juror questionnaires can reveal biases that potential jurors would never reveal openly. But few realize that winning the battle over the juror questionnaire provides a vital strategic edge.

• First and foremost, seek out the assistance of a qualified litigation consultant to help you to develop the questionnaire. The kinds of questions that will ferret out potential biases are far from obvious. Experienced consultants have a large bank of empirically tested evidence to help you determine not just which questions to ask but how to ask them.

• Aside from enhancing the likelihood of candor in potential jurors, why should you use a questionnaire?

□ To get an "early look" the potential jurors. You will find out more about the jurors, and find it out earlier, by using a questionnaire;

□ You will be able to identify the riskiest jurors early and request a "shuffle" (random rearrangement of the order of the jurors);

□ You will have prepared strategic follow-up questions for use during oral voir dire;

□ You can test not just what potential jurors believe, but how they process and use information. For example, a question that asks for a description of work history may seem innocuous, but how thoroughly, carefully, and precisely the potential juror answers the question will tell you about that potential juror's intelligence and literacy; and

□ You can weed out the cynical jurors and the "know-it-alls." Questions that ask potential jurors to rate their own knowledge or familiarity are important. Potential jurors' beliefs about their own knowledge are reliable predictors of bias.

• Be prepared to defend your questionnaire. Some judges regard them as intrusive or an unnecessary complication, but the opposite is true. Anticipate the need to argue how using one will streamline the process (fewer questions to ask on voir dire) and protect juror privacy (no in-court answers in front of other potential jurors).

George R. Speckart, Ph. D., and Lyndon G. McLennan are senior litigation analysts with Courtroom Sciences, Inc. in Irving, Texas. Updated from the January 1999 issue of *The Practical Litigator.*

AFTER REVIEWING OUR EXPERIENCES

in hundreds of cases, we have formed the opinion that the juror questionnaire is the most commonly neglected weapon in trial strategy. The full capabilities of the juror questionnaire in exposing risky jurors during selection seem to be rarely used, even in very important cases. Moreover, there appears to be a strong correlation between Losing the battle over a juror questionnaire to opposing counsel and losing the verdict itself. Although obviously many factors may influence a final verdict, our experience in a number of landmark trials has been the distinctive impression that the trial was won— or lost— before opening statements began, that is, during voir dire and jury selection.

In some respects, the bigger the case, and the more witnesses and evidence which must be prepared, the easier it is to overlook the juror questionnaire, and the motions to the court which are necessary to get it approved. On the eve of trial in one of the largest damages cases in history, lead defense trial counsel was asked why plaintiff's juror questionnaire got the nod from the court. He replied sheepishly, "We just dropped the ball."

Ironically, with increasing pressures in larger cases, proper attention to the juror questionnaire often becomes even more likely to be overlooked. Although many litigators do not need to be convinced with regard to the desirability of a juror questionnaire, there are many who see it as a relatively low-priority item. We repeatedly see counsel on the eve of trial with no plans for a juror questionnaire, even though they heartily agree that they should be using one. As we discuss in this article, adequate preparation entails not only the painstaking design of the questionnaire, but beating opposing counsel to the punch in getting the questionnaire submitted and justified before the court.

WHY USE A JUROR QUESTIONNAIRE?

Typically, when heading for trial, we want to see the actual venire from which our jury will be drawn as early as possible, so that we can know with whom we will be dealing during selection, and indeed, throughout trial. Impressions and preliminary ratings from a well-designed juror questionnaire generally comport very closely to the characteristics that are later observed in court after the panel walks in. As a result, the first benefit from the questionnaire is an "early look"; that is, we know the characteristics of prospective jurors earlier than what would otherwise normally be the case.

Possible "Shuffle"

Since the first preliminary juror ratings based on the questionnaire alone are frequently quite accurate, in some courts a request can be made to "shuffle" the panel before voir dire (i.e. rearrange the ordering of jurors) when the riskiest jurors appear early in the sequencing. Furthermore, subsequent oral voir dire can be tailored in advance for optimum strategy without having to improvise on the courtroom floor. Specific follow-up questions formulated in advance can be much more beneficial for tactical purposes than those generated on the spur of the moment. These refinements cannot be made without a questionnaire.

Likelihood of Candor Enhanced

As we have stated, a well-designed juror questionnaire typically generates impressions of jurors that are very similar to the final impressions received by the end of voir dire. The close correspondence between questionnaire-based impressions and in-court impressions tends to break down, however, in the case of more sensitive voir dire issues. For example, in sexual harassment cases, probate cases, and others, it may be quite difficult to obtain candid accounts of one's personal relationships in open court. Similarly, we have seen jurors refuse to admit environmental leanings in the presence of large oil company defendant counsel during voir dire. However, the reason we are in a position to know in the first place that information is concealed in open court is because information concealed during

oral voir dire is often present in the juror questionnaire. Thus, for example, in an anti-trust case against a large oil company defendant, a juror indicated in her questionnaire that she was a member of the Sierra Club because of her concern for the environment. When asked by defense counsel her reasons for joining the Sierra Club in open court, her response instead was, "I like the hikes."

The "Deindividuation" Effect

Social psychologists use the term "deindividuation" to refer to circumstances in which a person becomes less inhibited or restrained as result of detachment from the personal consequences of an act. In the comparison between responses to juror questionnaire items versus oral voir dire questions, jurors feel much greater and much more immediate personal consequences in connection with their responses to oral voir dire, where in-court social pressures can be overwhelming. In contrast, there is little social pressure connected to the written questionnaire response. One frequently observed example of this phenomenon is found in the extemporaneous comments written by jurors in various places within completed juror questionnaire. Some of these comments can be quite extreme, unusual, and in some cases even bizarre. However, oral voir dire seldom elicits the intensity or extremity exhibited in such comments when the prospective juror is questioned in court. Obviously, then, the questionnaire affords a clearer view of what is really going on in the juror's mind.

STRUCTURE OF JUROR QUESTIONNAIRE ITEMS

• In complex cases, such as intellectual property disputes, it is crucial to determine the levels of intelligence and the information-processing styles and capabilities of jurors. Observation of handwritten responses in a juror questionnaire provides a great deal of information about how meticulous and comprehensive prospective jurors typically are in their use and reporting of information.

You Can Learn a Lot from the Way Potential Jurors Answer Questions

Consider the typical question that requests the potential juror to list three or four of his or her most recently held jobs, to name the employer, list the position and duties, and indicate how long he or she held each position. The handwritten responses will reveal a great deal about the precision, thoroughness, and detail with which a prospective juror generally processes information. Jurors with more sophisticated information-processing skills will generally be more accurate with titles (e.g., will include "Inc." after the employer name); more comprehensive in the description of their work duties; and more precise with their dates of employment. Other examples from juror questionnaire items can provide additional insight into the intelligence and cognitive sophistication of prospective jurors. Such intelligence-related characteristics are not only important for rating jurors in intellectual property cases, but in many other types of complex litigation as well. The ability to gather such information from handwritten responses far surpasses the capabilities of oral voir dire.

Are There Patterns in the Responses?

The preceding example demonstrates that the way a potential juror answers a question may be as important as the answer's content. For example, in a Superfund toxic waste case involving a landfill, a question asked about the potential juror's knowledge of the community effects of the landfill and asked the potential juror to rate whether he or she was "not at all," "a little," "somewhat," "quite," or "very" familiar with the effects. We discovered that jurors who professed to knowing the most about the repercussions of the dumpsite before mock trial deliberations also invariably delivered high-figure plaintiffs' awards. Analysis of their responses to questionnaire items obtained before the mock trial revealed that these same jurors typically had a "know-it-all" response pattern coming in to the project. Why was this so important? Because it

was not the prospective juror's actual knowledge that was predictive of a particular orientation; rather, it was likely the juror's belief about his or her own knowledge that was predictive. In this case, the most dangerous jurors—those responding in the most extreme category (the know-it-alls)—can be most reliably identified with properly formatted items in a questionnaire.

"Ratings" Can Tell You About the Potential Juror's Predispositions

A similar example can be found in ratings of litigants, and more specifically, corporate defendants. If the question asks the juror to rate his or her opinion of a corporate defendant as "very favorable," "somewhat favorable," "no opinion," "somewhat unfavorable," or "very unfavorable," an extreme answer will reveal much. Our experience has demonstrated unequivocally that jurors will not hesitate to use extreme negative response options in a questionnaire while they will hesitate to admit to such a position in open court. In fact, we have seen jurors pick the most negative option available in a response scale and then claim to have made a mistake later when being questioned orally. In cases when such jurors' oral retractions were believed by counsel, the results were very damaging to the corporation after such jurors were seated for trial. Most importantly, however, those jurors with extremely negative attitudes may not be apparent at all without the use of a juror questionnaire containing appropriately formatted items. Obviously, a simple "favorable/unfavorable" dichotomy as a response option will not accomplish the intended purpose.

CHOOSING QUESTIONNAIRE ITEMS. Generally, one cannot determine on an a priori basis which questionnaire items will reliably identify which potential jurors are leaning toward the plaintiff and which toward the defendant. Quite often, simple hunches about which questionnaire items will most effectively identify risky jurors turn out to be more clever than correct. One of the most noteworthy examples comes from an insurance coverage case filed by a large pharmaceutical company against the insurers. Pretrial research demonstrated that negative attitudes toward insurance companies, and negative experiences (such as policy terminations and problems with claims) were not related to the verdict disposition in the case. However, negative attitudes and experiences with the pharmaceutical industry and various pharmaceutical products did predict verdict outcomes. At best, misidentification of valid predictors in the exercising of peremptory challenges leads to the waste of valuable strikes, and at worst leaves a destructive juror on the panel.

Only Research Can Reveal the Predictors

The most effective juror questionnaires have behind them the presence of empirical research, conducted in the venue, which explicitly identifies the characteristics of risky versus favorable jurors. In some cases, these characteristics are readily observable (such as employment-related variables, income levels, and ethnicity). In other cases, these predictive variables are represented by deeper beliefs, values, and attitudes held by the individual. Again, it is not clear how to chose among the myriad of alternative measurements that may be put in a juror questionnaire without being armed with the appropriate empirically derived data base to guide such efforts.

Expect the Counterintuitive

As another example, pretrial research was conducted in several sexual harassment cases. Interestingly, in all of the cases, females were not more likely to be plaintiff-oriented than males—even those females with liberal political views. In fact, the most successful predictors of a plaintiff verdict orientation turned out to be attitudinal measurements. Of these, one notable example was found to be the extent to which prospective jurors agreed with the phrase, "Most married men cheat on their wives." Without the benefit of research, young liberal females might well have been stricken on a "hunch."

However, many of those women were defendant-oriented because they believed the plaintiffs had not handled their cases well against their male supervisors.

Attitudinal Constellations

In the sexual harassment cases, and many others that we have studied, a particular group or "constellation" of attitudes and experiences signifies the greatest risk of a high-damage juror. The importance of explicitly identifying such a group of critical markers for flagging the riskiest jurors makes reliance on hunches or educated guesses of appropriate selection criteria even more tenuous.

JOCKEYING FOR POSITION

• Too few litigators give juror questionnaires adequate thought or preparation. Many even treat them as something of an afterthought, a last-minute bit of preparation to get out of the way once all of the "important" work is done. This is a mistake: The juror questionnaire is a vital tactical weapon that requires a special place in trial preparation.

Be Prepared To Defend the Questionnaire

Be sure to submit the questionnaire as soon as possible. Often, judges will put the burden on counsel submitting the later questionnaire to demonstrate why it should be used instead of the questionnaire submitted first. The same is true for individual questionnaire items: Two items ostensibly measuring the same thing are not necessarily the same. As we have seen, the wording of the question and the manner in which response options are formatted can do much to reveal or conceal a particular type of juror. Be sure to cover all possible issues in your questionnaire. If you don't, the court might incorporate items from both sides into a "synthesis" questionnaire. Be prepared to defend a juror questionnaire item-by-item if necessary. You need to preserve the strategic edge that comes from having specially designed measurements that only expose the riskiest jurors for their own side.

Explain the Advantages to the Court

Some judges resist the idea of a juror questionnaire, or, if they accept the proposition that one should be used, will enforce a provision that it be kept short (possibly two or three pages). Even when the court imposes obstacles that you can't overcome, you can still make cogent arguments that a juror questionnaire expedites the entire voir dire process and makes it much more efficient. Thus, instead of asking each juror fundamental questions related to employment, case-related experiences, and bias issues connected with cause challenges, this information will already be obtained by the time the venire walks in. Oral voir dire can then be limited to streamlined, specially targeted followup queries that eliminate duplication and redundancy in questions asked of the prospective jurors. Our experience has been that some judges object to juror questionnaires because they are seen as an invasion of privacy," or are seen as otherwise intrusive. Although we believe that open court questions are more intrusive than a written questionnaire, some judges believe the opposite, and are often intractable. However, precautions can be implemented to safeguard the confidentiality of juror questionnaires, and these measures can occasionally assuage the concerns of some judges.

CONCLUSION

• Reduced to its simplest terms, picking off the worst jurors is what jury selection is all about. In many instances, with a limited number of peremptory challenges available, separating the "bad" from the "worst" may become an essential priority. In any case, separating the "neutral" from the "bad" is always a crucial task. These gradations can only be reliably measured and inferred when the response options to a questionnaire item have been explicitly and appropriately formatted. A review of many important trials leads to the inescapable conclusion that the side which succeeds in having its juror questionnaire adopted by the court often delivers a blow from which opposing counsel never quite recovers.

George R. Speckart, Ph.D.
Dr. Speckart received his Ph.D. in Psychology from UCLA in 1984 with a specialization in personality measurement. He has been active in the jury consulting field since 1983, and has conducted over 500 mock trials and focus groups in pre-trial research for numerous types of litigation. Dr. Speckart has worked with litigatiors in over 150 jury selections, beginning with Dalkon Shields cases in 1983, the Agent Orange litigation in 1984, and the Exxon Valdez litigation in 1994.

Lyndon G. McLennan
Lyndon McLennan, a Senior Litigation Analyst at Courtroom Sciences with a background in forensic psychology, has over 12 years experience evaluating fact patterns, conducting research, analyzing results and strategizing with trial counsel on all types of cases in venues across the U.S. Mr. McLennan has prepared witnesses, written juror questionnaires, developed specialized voir dire questions and assisted trial counsel with jury selection in numerous matters including Products Liability.

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American Law Institute - American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street • Philadelphia, PA 19104-3099
www.ali-aba.org

4950 N. O'CONNOR RD SUITE 100 IRVING, TX 75062-2778 PHONE: 972.717.1773 FAX: 972.717.3985 TOLL FREE: 800.514.5879