
Jury Issues

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Jury Research – How To Use It

*Stephen J. Paterson
Norma J. Silverstein*

Consider one of the world's most successful consumer products companies: Procter & Gamble (P&G). P&G markets hundreds of products to billions of consumers worldwide, and launches dozens of new products every year. It is no secret that the success of P&G lies, to a large extent, in its ability to effectively market test, beforehand, each and every one of the products it decides to sell to consumers. P&G wouldn't dream of launching an untested product into the marketplace. Yet, every day in this country, trial lawyers enter the courtroom and launch an untested theory of their case to 12 complete strangers without an ounce of statistically reliable information about how those jurors are likely to react to the facts and parties associated with the matter. Jury research, most simply, is a behavioral sciences tool used by the trial lawyer to assist in: 1) understanding how jurors are likely to react to a case, and 2) identifying those jurors who possess attitudes and beliefs that are inconsistent with the trial lawyer's theory of the case.

The field of jury research has existed for decades. In the beginning, it was primarily limited to academia — social science university professors who would consult on behalf of defendants in high-profile criminal cases. In the early 80's, the field logically migrated to high-stakes and complex civil litigation in which juries were sometimes being asked to make decisions worth hundreds of millions or billions of dollars. Only recently have prosecutors at both the local and federal level begun to embrace jury research as a tool to assist with jury selection and the development of effective trial strategy. Traditionally, jury consultants have been viewed narrowly as experts at "picking" good and bad jurors. They go by many names — "Jury Pickers", "Trial Consultants", and "Jury Experts" to name a few – and possess a wide range of academic credentials and experience. Many of these so-called "experts" purport to utilize a variety of pop psychology methods — such as the

ability to read body language — in order to identify juror types. Unlike the legal and accounting professions, anybody can become a jury consultant, as there is no official body that governs the profession or issues any sort of license. Fortunately, in spite of a lack of formal standards, the field has evolved into one in which the most highly regarded consultants have adopted rigorous social science research techniques to help develop persuasive trial strategies and juror profiles.

An effective approach to jury research, in many ways, is no different from how P&G would market test a product or how a political candidate would use political polling when running for office. Each approach aims to develop a specific "message" or "benefit" to a particular type of person. In the O.J. Simpson criminal case, one of the key defense "messages" was that the Los Angeles Police Department (LAPD) was intent on bringing down a prominent African-American. The message was targeted at the jury, many of whom had negative experiences with the LAPD. O.J. Simpson's trial team retained and effectively utilized a jury consultant, not only to conduct pretrial jury research, but also to conduct periodic research during the course of the trial to understand how the jurors were likely reacting to key thematic messages and pieces of evidence as they were introduced during the trial. In short, the benefit of jury research is to identify, up front, how various types of jurors will likely react to case "themes" or "messages".

At the most basic level, jury research is broken down into three discrete steps:

1. The assessment of how attitudes, experiences, and beliefs will affect juror decision-making;
2. The design and testing of a persuasive trial strategy; and
3. Juror profiling.

There are, of course, other areas of jury research that go beyond the scope of this article, such as witness preparation and the design and testing of effective demonstrative exhibits. The basic approach to these areas is, however, the same as in standard jury research methodologies.

The most effective way to accomplish these three steps is through a combination of qualitative and quantitative research techniques that have been developed for use in the social sciences. Qualitative research involves relatively small sample sizes (24 to 48 surrogate jurors, for example) and is the most cost-effective way to obtain juror reactions to the specific fact pattern associated with a case. Focus groups, mock trials, and trial simulations are examples of qualitative jury research. Quantitative research involves larger sample sizes (400 or more) and is the most effective way to develop reliable juror profiles. Community attitude surveys conducted via the telephone (as well as the Internet) are the most common form of quantitative jury research.

Mock Trials and Trial Simulations

For most attorneys, the jury deliberation process is a complete mystery. Opening statements are given, witnesses testify, closing arguments are made, the jury is instructed, and the verdict is rendered. Mock trials and trial simulations provide an opportunity for the trial lawyer to witness, firsthand, how surrogate jurors interpret evidence and come to a unanimous verdict. In addition, the process can be invaluable in identifying case strengths and weaknesses. When Dan Petrocelli, who represented Fred Goldman, asked us to assist in the O.J. Simpson civil trial, he wanted to know what, if anything, he should do with Mr. Simpson on the stand. Prior to conducting any research there were two schools of thought. The first was that Mr. Simpson would help his own case because of his charisma. Petrocelli feared that the jury would find him entirely believable. The second school of thought was that he would be perceived as a liar and a murderer and would only undermine his case. Reactions to Mr. Simpson were tested using a publicly available videotape he was selling, in which, he described his version of the events of the evening of June 12, 1994. Surprisingly, we

found that all juror types, even those who were predisposed to finding *for* Mr. Simpson in the civil case, found him to be less believable the more he talked. Consequently, the decision was made not only to call Mr. Simpson as a witness, but to keep him on the stand as long as possible.

Most mock trials in criminal matters involve two or three panels of 12 jurors who view abbreviated versions of the prosecution and defense cases, complete questionnaires designed to obtain demographic information as well as specific reactions to the case, and deliberate to verdict. In conducting a mock trial, careful consideration must be given to the following:

- C Who are the subjects or “surrogate” jurors? Many times the trial lawyer, in the interest of saving money, will recruit office secretaries, mail room employees, and relatives of colleagues as jurors and conduct his or her own mock trial. This is a mistake. A bad sample leads to unreliable results and the probability of a “false read” increases significantly. Subjects should be recruited at random by professionals, should have no “stake” in the outcome of the mock trial, and should not know who is sponsoring the research. It is better to do no research at all than to conduct flawed research with a bad sample.
- C How strong and persuasive is the opponent’s case? This is probably the most challenging task researchers face when conducting jury research – to get the trial lawyer to prepare and deliver an effective opposition case. Oftentimes junior lawyers who have little or no trial experience are given the task of preparing and presenting the opposition arguments and have to face more seasoned and better prepared attorneys arguing the other side. Again, this has the potential to skew the research results and give a false read. In order to generate reliable research results, the opposition’s case must be persuasive and realistic. Many times it makes sense for

the lead trial lawyer to take the opposing side's case in the mock trial. Not only will it provide for a more balanced approach, but also the trial lawyer will be forced to put himself in the shoes of his opponent – an extremely helpful exercise in preparing for the real trial.

- C What happens if I lose? The mock trial process is less about who wins and loses and more about learning how jurors behave and make decisions. In fact, many trial lawyers argue that they learn more from the process when they lose and are better able to make meaningful modifications to their trial strategy.
- C How accurate are mock trials in developing juror profiles? One of the most dangerous conclusions the trial lawyer can reach based on small group research relates to juror profiling. No researcher can say with a high degree of confidence that a certain type of juror will behave in a certain way based on a sample size of 24 or 36. It is simply not a large enough sample to make such a generalization to the larger population. The purpose of small group research is to understand how jurors, in general, are likely to react to the case. We may, however, identify trends in the small group research that we then pursue in large scale profiling research.
- C What about confidentiality? How can I be assured that the mock trial won't become public? Although no researcher can guarantee that a mock juror won't, in a high profile case, go to the local newspaper with their story, steps can be taken to minimize that possibility. First, all surrogate jurors should be required to sign confidentiality agreements. Second, the research can be disguised through the use of "decoy" cases that are also presented to the surrogate jurors. Finally, surrogate jurors should be

effectively screened prior to the research to ensure that nobody who participates has any connection to the media, the lawyers involved, or one of the parties.

Juror Profiling and Juror Questionnaires

Juror profiling is best accomplished by conducting community attitude surveys using a minimum sample size of 400. This allows the researcher to be confident in the results to within what is commonly known as the 95% confidence interval. These surveys, usually conducted via the telephone, assist the trial lawyer in understanding the types of jurors who will likely be predisposed to find for or against a particular party. Obviously in a criminal case, the key objective for the prosecutor is to identify those people who will view the defense case favorably and/or the government's case unfavorably so that peremptory challenges can be effectively exercised.

Traditionally, trial lawyers want to know which demographic characteristics will correlate with juror predisposition (age, socioeconomic status, employment, etc.). This is understandable because of the limitations placed on attorneys during voir dire in federal court. Demographic characteristics are fairly easy to observe even under the most restrictive voir dire situations. Unfortunately, social science research has shown that demographic characteristics are not very good predictors of juror behavior. In addition, because each case contains different fact patterns, any demographic "trend" that may exist (e.g. the belief by some that women may be more sympathetic to a criminal defendant) may not apply to a specific case. For example, in a case in which the victim is a woman, women jurors may be less sympathetic to a male defendant. What have been found to be much more reliable in predicting juror behavior are attitudes, experiences, and beliefs that are related to the elements of the case. These are the variables that make up the human psyche and generally contribute the most to how a person will behave as a juror. A fairly simple illustration comes from a recent case in federal court in which we were retained by the government. As part of our juror profiling, we were interested in, among other things, people's attitudes and behaviors towards

politics and politicians. We conducted a community attitude survey and included some of the following types of questions:

C How closely do you follow your state's politics?

1. Very closely
2. Somewhat closely
3. Not very closely
4. Not at all

C How interested are you in politics?

1. Very interested
2. Somewhat interested
3. Not very interested
4. Not at all interested

In both questions, not only were we interested in whether they followed and were interested in politics, we also wanted to identify *the intensity* with which they engaged in this behavior and held this interest. The results of the survey indicated that there was a relationship between political interest and activity, and verdict predisposition. Those who were very active and very interested in politics (answered a "1" to both questions) were, in this case, much more defense-oriented than those who answered something other than a "1" to both questions.

Attitudinal, behavioral, and experiential variables that relate to verdict orientation only become beneficial to the trial lawyer if he or she can identify them during the voir dire process. In the above case, this was accomplished through the use of a juror questionnaire allowed by the court. Members of the venire completed this questionnaire several days before jury selection was scheduled to begin. In developing the government's questionnaire submission to the court, the survey results became critically important. Certain questions – questions researchers refer to as "hot" questions – emerged from the survey as predictive of juror behavior in this particular case and it became important for the government attorneys to argue before the court that those questions should be included. Once prospective jurors completed the questionnaires, we input the data into a computer and conducted a number of statistical analyses. The first was to compare each prospective juror, statistically, to the

results of the community attitude survey. A computer model was developed to evaluate questions individually and in combination and then rate each juror according to how they answered each of the "hot" questions. Once the computerized rating process was complete, an attorney rating was assigned to each juror based on a subjective evaluation by each of the lawyers on the case. The computerized and attorney ratings were then compared and where there were differences, adjustments were made and each juror was then assigned an overall rating. We then rank ordered each of the jurors to obtain an overall evaluation of the venire and decisions about peremptory challenges were made. Once this process was complete, the computer provided the trial lawyers with a number of tools to assist in preparing for jury selection. Probability scenarios were developed to predict the makeup of the ultimate jury. In addition, the computer generated a one-page report for each prospective juror. The report flagged those jurors who did not appear, based on answers given in the questionnaire, to be able to serve as fair and impartial jurors. This became extremely helpful in preparing for challenges for cause. Finally, the report identified those areas where "good" jurors would likely require rehabilitation.

There were a number of other areas where the questionnaire data and resulting statistical analysis became helpful to the trial team. Those "good" jurors who were likely to be struck by the defense for no reason other than race or gender were identified by the computer and flagged in the report. The attorneys then, based on oral voir dire and peremptory challenges, evaluated whether a *Batson* challenge should be made. In addition, for each juror the government was likely to strike, the computer identified and included in the report those areas of the questionnaire that could be used to *defend* against a potential *Batson* challenge made by the defense. Finally, the computerized system was used quite effectively as a management and timesaving tool throughout the course of jury selection.

To be sure, not all cases, particularly in federal court, have the luxury of a juror questionnaire completed days in advance of jury selection. However, where they are available —

and some courts are beginning to adopt them on a regular basis in certain types of cases — questionnaires can be extremely helpful in preparing for jury selection. When questionnaires are not allowed, evaluations can be made based on juror responses during oral voir dire. Computers, when allowed in the courtroom by the court, can be programmed to accept data input as voir dire is being conducted and an analysis of the venire, much like the one discussed above, can be conducted.

Conclusion

Jury research can be an effective tool to help the trial lawyer prepare a case for trial. It is important to note, however, that it should be viewed as a tool and used carefully. It should not serve as a substitute for a lawyer's common sense

and practical experience. However, used correctly, scientifically designed jury research methodologies can go a long way to assist in understanding how those 12 people sitting in the jury box will likely go about rendering a verdict behind the closed door of the jury room.

ABOUT THE AUTHORS

Stephen J. Paterson and **Norma J. Silverstein** are the co-founders of Jury Sciences, LLC, a limited liability partnership specializing in jury research and trial consulting services.

They worked together on a number of high profile cases, such as the O.J. Simpson civil trial (for the plaintiffs), the retrial of Erik and Lyle Menendez (for the People), the Oklahoma City bombing case (for the United States), and the criminal trial of former Louisiana governor, Edwin Edwards (for the United States).²

Understanding Your Prospective Juror — Jury Selection and Strategies

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Imagine trying a terrorist case along the lines of the Oklahoma City bombing trial and having the jury selected in ten minutes! This is just what happened in England during the trial against suspected IRA terrorists accused of bombing the Canary Wharf Tower in London. The bombing resulted in two deaths, 50 injured and over \$100 million dollars in property damage. A panel of only twenty people was ushered into the courtroom and, as an individual's name was called, they were sworn in and seated. If either side had a challenge for cause, they had to announce it between the time that individual's name was called and the time it took him to walk to the jury box and be sworn in. This took less than a minute per person. As both sides have very little information about the

prospective juror, it is extremely rare to see a cause challenge. This will usually occur when a juror does not understand English, was prejudiced by information about the crime from their spouse or knows the defendant had a criminal record. However, the attorney must first lay a foundation of fact as to how he knows this, almost impossible to know unless the juror volunteers this information. There are no peremptory challenges in an English court. What is more interesting, is that the English bar is satisfied with this arrangement. Moreover, it has been shown that judges and juries agree on the outcome a vast majority of the time. *See M. Zander and P. Henderson, Crown Court Study*, Royal Commission of Justice Research Study No. 1993 (majority of respondents thought that the verdict was understandable in the light of evidence); *see also The American Jury* by Harry Kalven, Jr. and Hans Zeisel (Little Brown Co., 1966) (the response of 555 judges to the 3576

actual trials before them concluded with 75% agreeing with the jury's verdict). What was most refreshing to see was the juror's ability to put aside their prejudices and to follow the court's instructions in reaching a verdict. Of course, it helps that there is no unanimous verdict requirement in England. After two hours of deliberation, an English jury is allowed to vote 10-2 either way.

Sadly, however, jury selection in the United States today is often consumed as much with uncovering and removing what we think is prejudice in jurors than in actually presenting the facts of the case. How many high profile cases spend as much time selecting the jury as putting on the case in chief? Today, the use of jury consultants and their arsenal of profiling techniques appears to be the norm rather than the exception. While our paranoia is fueled by the belief that one single-minded juror can thwart a conviction or acquittal no matter how strong or weak the evidence is, bear in mind that the unanimity requirement is not a recent phenomenon. Rightly or wrongly, times have changed and an entire cottage industry of juror consultants compete for business on more and more high profile cases. Our preoccupation with jury selection is perpetuated by the prevailing myth in the legal profession that cases can be won or lost during the jury selection. *See* Times Picayune article on Monday, January 10, 2000, p. A-5 regarding the jury selection in the federal trial against former Louisiana Governor Edwin Edwards.

Many attorneys believe they can predict the outcome of a case once the jury is selected. Some social scientists or jury consultants also believe that predicting the outcome of trial can be linked with the make-up of the jury. However, there is no doubt that the better you prepare your case, the better your side of the argument is presented. Juries are most persuaded by the *facts* that are presented to them, not by the lawyers presenting those facts. Michael Zander, *Cases and Materials on the English Legal System*, 393 (Butterworth 7th ed. 1996) (research in England shows that juries decide rationally and on the basis of the evidence). Don't worry as much about whether an individual juror could be biased (everyone has

biases they bring into the courtroom). It will be the rare person who enters a federal courthouse unable to follow a judge's instructions to put aside any prejudices they have and deliberate impartially when reaching a verdict. Keep focused on the facts of your case and how best to communicate them. That being said, some of the processes of trying to understand your jurors can be of value.

Picking a jury is unique to each attorney and judge. While the making of challenges, whether for cause or peremptory, is left to the individual attorney trying the case, the entire process is very much outlined by the individual judge who has wide discretion on how a jury is to be seated. *See* Fed. R. Crim. P. 24. The judge can permit voir dire by the attorneys (even individual voir dire), determine the order in which challenges are made and how many alternates will be selected, and decide whether questionnaires are sent to the venire prior to trial. The judge may also permit community attitude surveys of the district, grant cause challenges or force you to exercise your peremptory challenges, permit jurors to take notes, decide how long the opening and closing will last, and of course, rule on a myriad of objections. Consequently, it is perhaps more important to know your judge than to know your jury.

This article will explore along the procedural route leading up to the final peremptory and cause challenges.

Selection of Federal Jury Panels

As a general rule, jurors are usually found from voter registration lists. Since the 1940's, the United States Supreme Court has required that jury pools be representative of a cross-section of the community. *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946). In 1979, the Court held in *Duren v. Missouri*, 439 U.S. 357 (1979), that to make a prima facie case of a Sixth Amendment impartial jury violation, a defendant must prove the following:

- 1) That the group alleged to be excluded is a 'distinctive' group in the community;
- 2) That the representation of this group in the district from which jurors are selected is not

fair and reasonable in relation to the members of such group in the community; and

3) That this underrepresentation is due to systematic exclusion of the group in the jury selection process.

439 U.S. at 364. The *Duren* Court invalidated Missouri's automatic exemption from jury service for any woman requesting not to serve. This exemption had resulted in a jury pool that was 15 percent women while the state population was 53 percent woman.

The Jury Selection and Service Act of 1968 (JSSA), 28 USC §§1861-1878, sets forth procedures for the selection and summoning of jury panels in the federal courts. The purpose of this act is to assure non-discrimination in federal jury selection and service. Section 1 states the policy of the act is "the random selection of jurors in such a manner as to produce a jury venire which constitutes a fair cross-section of the community in the district wherein the court sits." Note, however, that the Sixth Amendment does not demand a "representative" jury but an "impartial" one. *Holland v. Illinois*, 493 U.S. 474, 480 (1990).

Motions challenging compliance with these selection procedures are governed by 28 U.S.C. § 1867. That section provides, in relevant part:

- a) In criminal cases, before the *voir dire* examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the grounds of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.
- b) In criminal cases, before the *voir dire* examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on

the ground of substantial failure to comply with the provisions of this title in selecting the grand jury or petit jury.

A motion challenging the jury selection system should contain a summary of how the selection system operates, both general and specific allegations of illegality and unconstitutionality which form the basis for the challenge, and a sworn statement of the facts supporting the allegations.

In a recent ruling from the Middle District of Louisiana in the prosecution of former Governor Edwin Edwards, 72 F. Supp. 2d 668 (M.D. La. 1999), the Court found that even though there were some defects in the jury selection process, those defects taken separately or cumulatively did not constitute a substantial violation of the JSSA such as to warrant dismissal because the defects did not affect the random nature and objectivity of the grand jury selection process. The court further held that the second requirement of *Duren*, that there be substantial representation, was not satisfied because the absolute disparity between the percentage of eligible black voters and their representation on the jury venires ranged from over-representation by 3.21% to under-representation by 8.39%. An absolute disparity of less than 10% was insufficient to satisfy the second prong of *Duren*.

While it is a federal violation to exclude jurors from federal or state courts based on race or color, 18 U.S.C. 243 (\$5,000 fine), research has disclosed no attorney charged under this statute for losing a *Batson* challenge.

Counsel should also be cognizant of the timing provisions in 28 U.S.C. §§1867(a) and (b). For example, in *United States v. Layton*, 519 F. Supp. 946 (N.D. Cal. 1981), the court held that a challenge to a jury selection plan was barred as untimely because, although defense counsel alleged that she discovered facts on which the motion was based within seven days of the time she filed it, she did not allege that, with exercise of diligence, she could not have discovered such facts earlier. The movant is entitled to a hearing based on a sworn statement of facts, which if true, would constitute a *prima facie* case. *See also, United States v. Beardon*, 659 F.2d 590 (5th Cir. 1991) (when

defendant relies on jury challenge motion filed by codefendant, seven day period begins to run from the date defendant has knowledge or would have obtained knowledge of earlier motion).

Federal courts depend initially on the self-reporting process to create a panel of qualified jurors. For example, in the “Plan for Random Selections of Grand and Petit Jurors Pursuant to the Jury Selection Services Act of 1968” devised by the Court for the Eastern District of Louisiana, a master jury wheel and a qualified jury wheel are maintained. After reasonable public notice, names are publicly drawn at random from the Master Wheel as needed. The names themselves are taken from the voter registration list. The clerk or jury commissioner will then mail to every such person drawn, a Juror Qualification Questionnaire accompanied by instructions to fill out and return that questionnaire, duly signed and sworn, to the Clerk or Jury Commissioner by mail within ten days. This form will be returned if corrections or additions are required by the Clerk and such person may be summoned to the Court to fill out such forms if they fail to return the forms within ten days. Therefore, prospective jurors have already provided the court information about themselves, in writing, before ever appearing for jury duty.

At the time of their appearance, jurors may be required to fill out another form in the presence of the Jury Commissioner, Clerk of Court, or the Court itself and may be asked questions but only with regard to their responses on the juror form. A second process is then initiated whereby jurors are excused or exempt as provided by the Selection Plan and the remaining names are placed into a Qualified Jury Wheel.

This Qualified wheel is emptied and refilled from the Master Wheel every four years. Names from the Qualified Wheel are again publicly drawn at random as may be required for assignment to grand and petit jury panels. The Clerk then serves her summons to report for duty upon the panel list either by first class mail, certified mail, registered mail or, if personal service is required, by United States Marshall or those authorized thereunder. The summons includes the date and time required for appearance and 17 follow-up questions to be answered and subscribed to under penalty of

perjury and returned within five days. Accordingly, by the time a prospective juror reaches a federal courthouse, he or she will have already completed two questionnaires.

In higher profile cases, the judge may permit either side to submit an additional questionnaire. What is more likely is the Court asking both sides to agree on a single questionnaire to be further edited by the Court.

Video

All prospective jurors who are brought to a federal court are routinely shown a video prior to jury selection. This video attempts to inform the panel how a trial works and what role they will perform as jurors. It can be viewed by request to the Jury Administrator in your district.

For instance, in the video shown in the Eastern District of Louisiana, jurors are told about the importance of their responsibility, appealing to their historic sense of pride by indicating that those who wrote the Constitution of the United States thought juries, “were a valuable way to bring the voices of the people other than government officials or legal professionals into the judicial process as jurors... who’... serve as a protection against the power against the government.” Videotape: Called to Serve (E.D. La. 1995) Further on, the video instructs the juror that, “(Y)our everyday common sense, combined with what you learn in the courtroom, will help you reach an impartial decision based on the evidence — which is the most important part of the juror’s job.” *Id.*

The video advises the prospective juror about some of the processes they may experience, including waiting for long periods of time before being selected, the purpose of voir dire, what “cause” and “peremptory” challenges are, and some reasons why they are exercised. It also explains the judge's and lawyers' roles, trial procedure with opening statements, presentation of evidence, objections, closing arguments, the judge's instructions to them or jury charge, and how they are expected to conduct themselves during deliberations and otherwise as jurors both in and out of court. The entire video lasts twenty minutes.

This video is a good attempt to inform jurors about the trial court processes in a neutral manner. However, more plain speaking about jurors' prejudices and the expectation that they should be left outside of the courthouse would advance the goal of obtaining impartial justice. A carefully constructed passage dealing with the subject of prejudice would make hours of voir dire time superfluous. A short segment could illustrate the point that, like all humans, we carry a body of conceived notions but are capable of setting those aside in order to evaluate the evidence fairly, i.e., impartially.

Juror Consultants

It has been argued that the United States courts do not begin with the assumption that a juror will perform his duties in accordance with his oath by setting aside whatever biases or preconceived notions they have and by following the judge's instructions. Valerie P. Hans and Neil Vidmar, *Judging the Jury*, 69 (Plenum Press, New York, 1986). On the contrary, courts and lawyers frequently expend significant amounts of time and money on researching prospective jurors' attitudes and lifestyles often with the aid of a hired jury consultant, in order to satisfy themselves about the citizen's competence to serve as an impartial juror. There is, in effect, a presumption of bad faith. This has not only led to excessive jury selection time, but left a sour taste in the mouths of prospective jurors in the community unable to rationalize why they have been excluded. See Michael Sartisky's editorial in "Louisiana Cultural Vistas" (Fall 1997).

The use of "jury researchers" is now commonplace in the United States and can be quite expensive. While the ability of the jury "researchers" or "consultants" to predict how jurors will ultimately respond to the evidence cannot be measured accurately, Michael J. Saks, *Social Scientists Can't Rig Juries "in" In The Jury Box - Controversies in the Courtroom*, 56 (Lawrence S. Wrightsman, Saul M. Kassim and Cynthia E. Willis eds. 1987), they are nevertheless employed in a variety of ways. They are used to assist attorneys in selecting jurors or understanding jury behavior, including the employment of

community attitude surveys, juror questionnaires, focus groups, mock trials and shadow juries.

a) Community Attitude Surveys

The mainstay of a consultant's method of research is the "community attitude survey". This is usually a large survey conducted by telephone in an effort to obtain a random selection of voting residents. The survey will contain a range of questions endeavoring to sample the attitudes of the various citizens, not just about the criminal case at hand, but also regarding the more general psychological predispositions of those interviewed. The particular demographics of each respondent (age, gender, race, education, occupation, religion and political party) are also inquired into and this data compiled statistically to create profiles of jurors who are favorable or unfavorable. These surveys are valued by attorneys who prepare questions for voir dire and devise trial strategy with this information in mind, though there are reported cases of attorneys ignoring or refusing to accept the logic of their conclusions. See Jeffrey Toobin "Marcia Clark: How She Lost the Simpson Case." *The New Yorker*, 58-71, Sept. 9, 1996. Furthermore, by assessing prevailing attitudes in the community, attorneys can draft questionnaires, under the judge's strict control, to be sent by the clerk of court to the venire.

It is important to remember that courts do not like hearing from the opposing party that you are conducting polls in the community. Whenever possible, let the court know that you are doing this, at least *in camera*, before your opponent does. Otherwise, the court may not let you use that information. Compare *United States v. Collins*, 972 F.2d 1385 (5th Cir. 1992) and *United States v. Lehder-Rivas*, 667 F. Supp 827 (M.D. Fla. 1987). You should also check your local federal and state bar rules regarding ethical parameters of juror investigations. See Debra Sahler's, "Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule", 6 Alb. L.J. Sci. & Tech, 383, 400 (1996).

b) Questionnaires

Like surveys, the questionnaire contains numerous questions regarding the particular trial those questioned may be called upon to decide, as well as general inquiries on a range of personal subjects, including the prospective juror's attitude toward law enforcement, the criminal justice system and the demographic questions of age, gender, race, occupation, education, political party and religion. They can also be asked questions concerning the kinds of programs they enjoy on television, preferred literature, their hobbies and the social organizations to which they belong. All of this, of course, is at the discretion of the judge who can edit the questionnaire or refuse to send one out altogether. *See Mu' Min v. Virginia*, 500 U.S. 415, 431 (1991); *Turner v. Murray*, 476 U.S. 28, 36-37 (1986).

c) Focus groups

Jury consultants have the ability to hire groups of randomly selected citizens who reflect ordinary prospective jurors, often from groups known to be either prosecution or defense oriented. The attorney who has hired them will then give an opening statement of his or her case (and/or some of the issues in the case) while other attorneys on the team will give the opening statement or position for the opposition.

A two-way mirror is often used to monitor the jurors' reactions to the presentations. Thereafter, all hired jurors are divided by groups of 12 and asked to deliberate. Their deliberations are often filmed behind two-way mirrors so the attorneys can watch and evaluate.

While the actual outcome of their vote may not be correlated to the real trial, nevertheless lessons can be learned. For example, what if during the focus group deliberations in a murder case one of the jurors stated, "The evidence showed that the victim was a drug user, therefore she probably would have died sooner or later anyway because of her drug involvement" and was not willing to convict the defendant? At the start of the real trial, an attorney for the prosecution could, during the voir dire, make prospective jurors commit that they would not hold that fact against the victim, or for that matter, the prosecutors, in their deliberations. Therefore, focus groups help narrow down the

attorneys understanding of possible controversial issues before trial. Unless the court permits prospective jurors to be questioned either by questionnaire or during the voir dire about the issues surfacing from the focus groups, such exercises will have little value other than perhaps rehearsing ones presentation. Time might be better spent, however, gathering the evidence and preparing witnesses.

d) Mock Trials

Again the consultants will hire people to perform the role of trial jurors while the attorneys present their entire case and anticipated opposition before them. The jurors will deliberate and then be questioned by counsel, and perhaps the consultant, on what the strength and weaknesses were of each party. Rehearsing an entire trial just one time is usually more time consuming than an attorney can justify on an ordinary criminal case, but it is not a rare practice in big money civil trials.

e) Shadow Juries and Mirror Juries

Consultants will try to hire individuals whose demographics resemble the actual 12 jurors chosen at the trial and have them sit in the back of the courtroom during the trial, leaving the room whenever the real jury does. Each evening, or often at certain breaks during the trial, they will meet with the attorneys who have hired them in an attempt to evaluate how the case is proceeding. This is extremely time consuming and can be very costly as well.

f) Miscellaneous Research

Other services of questionable value have been employed by attorneys to predict jury behavior. These include the use of reputed experts to assess jurors by their appearance and mannerisms and to assess the positive or negative input the defendant or his attorneys appearance may have on the jurors. One noteworthy article suggests that ugly appearances are detrimental and that a defendant ought to have the right to be allowed a handsome substitute to sit in their place during the trial. *See David L. Wiley, Beauty and the Beast: Physical Appearance Discrimination in American Criminal*

Trials.” 27 St. Mary’s L.J. 193, 234 (1995). If the defendant is African-American it has been suggested that placing at least one African-American on the jury might suppress the open expression of racial prejudice. Valerie P. Hans and Neil Vidmar, *Judging the Jury*, 50-51 (Plenum Press, New York, 1986). These and other areas of analyzing potential jury behavior are beyond the scope of this article except to say that extensive literature exists involving studies and theories on jury behavior. It should be admonished that these analyses, like other attempts to predict or understand complex human behavior, are prone to substantial error. Even professional people watchers, like psychiatrists and psychologists, have produced a statistically poor track record. *Id.* at 92.

Voir Dire

Voir dire (literally meaning “to see, to tell”), that period of the trial during the jury selection process where questions can be asked of prospective jurors either by the judge alone or with the assistance of counsel, is reputed to have been utilized by litigants to select favorable jurors since the medieval period. Irwin A. Horowitz, *Juror Selection - A Comparison of Two Methods in Several Criminal Cases “in” In The Jury Box - Controversies in the Courtroom*, 63 (Lawrence S. Wrightsman, Saul M. Kassim and Cynthia E. Willis eds. 1987). It is part of the mainstream procedure in state criminal courts in the United States and becoming more common place in federal criminal courts as well. The English have abandoned the practice of attorney-led voir dire altogether, though judges continue to question jurors regarding their ability and suitability to sit on juries. Consequently, the time spent on selecting a jury is drastically reduced in England, while in the United States, more time can be spent selecting the jury than presenting the evidence.

In federal criminal courts of the United States, prospective jurors are questioned to determine if they are suitable to judge the facts. Questions may be asked not only to determine if the juror has any personal interest in the case, but also about their general beliefs and prejudices. A juror is naturally expected to “speak truthfully” or

“to say the truth,” i.e. voir dire. The judge has great discretionary control over how this voir dire process is conducted. Ordinarily, these questions are directed to a group of prospective jurors at the same time. However, in certain cases, the judge will remove from the courtroom all but a single individual for examination.

In theory, voir dire is used to learn more about existing prejudices on the part of the prospective jurors. Questions can be wide-ranging or more specifically related to the case, depending on what the court allows. Sometimes, however, it is hard to understand the relevance of certain questions. For instance, during the voir dire of one of the prospective jurors in the first Oklahoma City bombing trial in Denver, the following series of questions and answers were recorded: (Juror No. 568 — Voir Dire)

Q ...I understand you have some interest in riding your bicycle?

A Yes, sir

Q And country and western dancing?

A Yes, sir

Q Ever go to the Grizzly Rose

A Yes sir

Q ...on occasions? Were you out there when Brian White and Leann Rimes, two good Oklahomans, were there two weeks ago?

A No, sir. I would have liked to have gone, I have a couple of Leann Rimes' CDs. She's a fabulous singer.

Court TV Case files: Oklahoma City. . . Selection Transcript (4/21 am)
<http://www.courtTV.com/caseFiles/.../transcripts/voirdire/0421.am.html>

Reading this line of inquiry makes one almost forget that the trial was about a horrific crime. No wonder this was prospective juror number 568! What sort of relevant prejudice were these questions aimed to elicit? Would this juror be unsuitable if he didn't like riding bicycles or the

reverse? What is the relevance of a country and western music fan to this trial? Has a juror consultant warned that lovers of country and western music and, in particular, Brian White and Leann Rimes fit a "favorable" or "unfavorable" profile? Or was it an insidious attempt by that attorney to ingratiate himself with the juror by displaying his appreciation of country and western music?

There are, however, valid aspects of attorney-led voir dire. One is to form agreements with the prospective jurors about being fair and impartial. Get them to commit to certain propositions. For instance, have them agree to follow the law as given by the judge whether they agree with that law or not. Someone who can't make this commitment will surely be dismissed for cause.

Pre-publicity and Gag Orders

Perhaps the most perceived threat to an impartial jury is the amount of pretrial publicity that has taken place regarding the crime and/or the defendant. Lord Mansfield long ago cautioned: "They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it." *Bright v. Eyrton*, 1 Burr 390, 97 Eng. Rep. 367 (1757).

Future jurors are current subscribers and followers of the media. Television footage of the aftermath scene of terrorist acts, interviews with ailing victims, editorials regarding the nature of the crime, reported statements and confessions of the crime made by a defendant, press releases by law enforcement, prosecutors, defense attorneys or subjects of an investigation can all prejudice a prospective juror. Both the English and American systems illustrate their great concern over this phenomenon but the United States has the trickier task of balancing restrictions on the press with the freedoms quoted in the First Amendment of the Constitution. Furthermore, parties to a prospective criminal trial quite often attempt to influence potential jurors by releasing statements to the press regarding the crime, the evidence obtained, or the impropriety of such investigations. The importance of the media in influencing prospective jurors in publicly notorious cases is a factor some defense attorneys cannot ignore in formulating a strategy

for defending a client. Roscoe C. Howard "The Media, Attorneys, and Fair Criminal Trials". 4 Kan. J.L. and Pub. Pol'y 61 (1995).

Manipulation of the media by both the prosecution and defense attorneys can often be aimed at influencing the judge. How the judge controls the parties can make a difference in the presentation of the evidence. Thus, staging a public debate played out through the media to inform a judge or a jury that this is perhaps the kind of case which should not be prosecuted, depending on your side of the case, is not uncommon in today's criminal justice system. Justice Frankfurter admonished against such extrajudicial manipulations saying:

To have the prosecutor himself feed the press with evidence that no self restrained press ought to publish in anticipation of a trial is to make the State itself, through the prosecutors who wield the power, a conscious participant in trial by newspapers, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice.

Stroble v. California, 343 U.S. 181, 201 (1952)(Frankfurter, J. dissenting).

Today, the United States Department of Justice has strict guidelines on what can and cannot be said to the media.

Extrajudicial statements by DOJ personnel cannot be made for the purpose of influencing the outcome of a criminal trial, must be limited to matters of public record that do not impinge on the defendant's rights to a fair trial and uncontroverted facts, and should be strenuously avoided when possible during the period approaching and during trial.

28 C.F.R. Sec. 50.2 (1989).

If jurors are exposed to pretrial publicity, the court must make an inquiry to determine the extent of such exposure. Mere exposure to publicity about an accused is not sufficient to have a juror removed for cause unless it can be shown that the publicity actually prejudiced that individual,

Murphy v. Florida, 421 U.S. 794, (1975), or so pervaded the proceedings that it raised a presumption of prejudice. *Sheppard v. Maxwell*, 384 U.S. 333, 355-57 (1966); *Estes v. Texas*, 381 U.S. 532, 544 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963). If the court finds that there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, it can grant a continuance until the threat has abated or allow a change of venue. During the trial, courts often sequester juries and provide cautionary instructions to safeguard against prejudice. See your circuit's Pattern Instructions.

The Sixth Amendment's requirement of impartial jurors does not preclude selecting individuals who have prior knowledge of the facts and issues in the case. The real issue is whether this pretrial information has given the jurors such a fixed opinion that they cannot impartially decide the facts in determining guilt. *Patton v. Yount*, 467 U.S. 1025 (1984). At least according to the case law, jurors are required to put aside impressions or opinions formed by pretrial exposure to the media and render a verdict based solely on the evidence presented during trial. See *Irvin v. Dowd*, 366 U.S. 717 (1961), and *Murphy v. Florida*, 421 U.S. 794 (1975).

Unlike English law, there is no United States equivalent in the power of the court to "gag" the press. Media coverage of criminal cases does not end once formal charges are brought and the potential periods of publicity are therefore increased. Consequently, lawyers involved in a criminal case will need to define a strategy in dealing with the media.

Once the matter is before a court, however, a trial judge may take a range of measures to safeguard a trial from possible pretrial prejudice. Under some circumstances, the judge can even close the proceedings to the public if he finds that there is a "substantial probability" that publicity will prejudice the defendant's right to a fair trial and reasonable alternatives to closure cannot adequately protect that right. 478 U.S. 1,14 (1986). This should require, of course, the defendant's agreement to waive his right to a public trial under the Sixth Amendment though a defendant does not have a constitutional right to a closed trial. *Singer v. United States*, 380 U.S. 24,

34 (1965). Therefore, closure of trial proceedings to the public is extremely rare, especially in comparison to the number of cases exposed to pretrial publicity.

Georgetown Law Journal has documented a gentler and kinder way of avoiding a complete public ban:

- limiting the number of reporters in the courtroom and regulating their conduct, *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966);
- insulating witnesses from exposure to the media, *Sheppard* at 359;
- controlling the release of information of police officers, witnesses and counsel, *In Re Application of Dow Jones & Co.*, 842 F.2d 603, 610-12 (2d Cir. 1988); *United States v. Norris*, 780 F.2d 1207, 1212 (5th Cir. 1986);
- proscribing extrajudicial statements of any lawyer, party, witness or court official, *Sheppard* at 361;
- warning the media of the impropriety of publishing material not introduced at trial, *Sheppard* at 362.

If none of these is sufficient, and prejudicial publicity continues during the trial, the judge may order a new trial. *Sheppard* at 363. See generally, Volume 86, Number 5, *The Georgetown Law Journal*, 1653-1659 (June 1998).

Conclusion

The English reluctance to introduce an American system of jury inquiry is grounded on the combination of their respect for individual privacy and their adherence to the notion of fair play. Williams Forsyth, *History of Trial by Jury*: p. 415 London (John W. Parker & Son 1852). This concept of fairness is inextricably associated with the idea that a jury must be indiscriminately chosen from the general population of citizens whose call to public duty will override their individual interest in seeking justice. This trust can be relied upon by

the public because “the citizen who from time to time is summoned from the round of his usual avocations to the judgement-seat, must feel himself honored and elevated by the trust proposed in him.” *Id.* at 433.

There are several reasons to believe this trust is well placed. As pointed out earlier, studies both in the United States and in England have similarly concluded the juries and judges agree on the verdict a vast majority of the time. Significantly, the complexity of the case did not alter the result. M. Zander and P. Henderson, *Crown Court Study*, Royal Commission of Justice Research Study No. 1993. Furthermore, when judges and barristers in England were asked the question, “What do you think of the jury system in terms of generally getting a sensible result?” The vast majority responding, 79% of the judges, 82% of the prosecution barristers and 91% of defense barristers thought the system was a “good” or “very good system.” Their view was matched by the jurors, 79% of whom rated the jury system “good” or “very good.” Michael Zander, *Cases and Materials in the English Legal System* (7th Edition, 1996) p. 392.

Secondly, most studies indicate that jurors comprehend instructions and are willing to follow them. More importantly, as a general rule, verdicts were based more on the “integrity of the evidence” than on extraneous or irrelevant factors. Martha A. Myers, *Rule Departure and Making Law-Juries and their Verdicts “in” In the Jury Box-Controversies in the Courtroom*, 95-113 (Lawrence S. Wrightsman, Saul M. Kassim and Cynthia E. Willis eds.). This latter conclusion should be of little surprise to experienced judges and trial lawyers who realize that a jury is only as good as the communicated facts it receives.

Research further suggests that neither prejudice nor sympathy play a dominant role in jury deliberations. The suggestion that juror impartiality is disrupted by appeals to juror sympathy or prejudice is more myth than fact. Valerie P. Hans and Neil Vidmar, *Judging the Jury*, 148 (Plenum Press, New York 1986).

Attorneys who have better communicative skills, whether a result of some innate talent, studious pretrial preparation or a combination of both, will have the advantage over their opponents

whether voir dire exists or not, as the jurors will appreciate their skill in the presentation of their case. Perhaps, as part of a pretrial preparation in the United States, the use of focus groups, community attitude surveys and mock trials assist the attorney in focusing his or her skills to particular strengths and weaknesses in the case. On balance, lawyers sometimes make a difference, but research shows that this may occur approximately 1% of the time. *Id.* Nevertheless, adding hours, days or weeks of voir dire time to the trial will not alter the most important consideration in determining jury verdicts, that is, the integrity of the evidence.

Thirdly, while millions of dollars are spent annually by trial attorneys employing the services of jury consultants to profile jurors, there is no scientific evidence to support the value of this practice. Even if one can unveil a particular juror’s prejudice, it does not follow that this prejudice will impede their ability to be an impartial finder of the facts. As stated earlier, the public trust placed upon the juror to take his oath seriously and render an impartial verdict is justified.

Moreover, the use of voir dire to learn about the existing prejudices on the part of prospective jurors, while at times valuable, is not without its drawbacks. Citizens of the community who have been excluded from jury service based upon the voir dire information can find themselves humiliated by this rejection. Thoughts from Edwin Kennebeck, *Social Scientists Can’t Rig Juries “in” In the Jury Box - Controversies in the Courtroom* 238 (Lawrence S. Wrightsman, Saul M. Kassim and Cynthia E. Willis eds.). Others lose respect for the justice system altogether. Nevertheless, in preparing to pick a jury, good information about the juror’s background and attitudes can assist in formulating a trial strategy. However, it is no substitute for gathering good evidence and making a strong, organized presentation.

~ **ABOUT THE AUTHOR**

Constantine D. Georges has been an AUSA since 1983 and has held the position of Violent Crime and Drug Unit Coordinator for the Eastern District of Louisiana since 1994. In his current position, he is primarily concerned with the development and implementation of anti-violent crime strategies. Mr. Georges was a 1997-98 Atlantic Fellow in Public Policy sponsored by the British Foreign Office where he researched English Jury Selection and gave lectures at Oxford, London School of Economics, Queen Mary and Westfield College and Westminster University. He has recently given lectures in Romania, sponsored by OPDAT, on police corruption. He is the recipient of The John Marshall Award. 

Voir Dire Tip: Pick Former Juror¹

NLJ-DecisionQuest '99 survey offers this and other lessons.

By **Bob Van Voris**
NATIONAL LAW JOURNAL STAFF REPORTER

Jury selection may be a little like picking a brain surgeon: All things being equal, the smart thing to do is to get someone who's done it before.

The impact of prior jury service on juror attitudes is one key revelation of the 1999 National Law Journal/DecisionQuest Juror Outlook Survey, which uncovered many surprising assumptions, attitudes and biases that people bring with them if asked to serve on a jury.

For example, based on survey results, potential jurors are startlingly ignorant even about well-publicized cases, presenting trial lawyers with a stiff challenge in juror education. Litigators also appear to face an uphill battle in weeding out socially unacceptable prejudices.

The good news is that if a lawyer picks a juror who has served, the person is likely to be less prejudiced, less skeptical about the jury system, and more willing to be fair than those who have not served.

For example, only 31% of those respondents who had served on juries agreed that when a defendant in a criminal case does not testify, the defendant "probably has something to hide." But 41% who had not served agreed with the statement.

And although half of respondents who had not served on juries said that the Columbine High and other recent school shootings would make them "more likely to convict a juvenile charged as an adult," only 32% of former jurors said that. Former jurors are more likely to give police a fair hearing, too. Only 15% said that in light of recent news of police brutality and racial profiling, they would be less likely to believe a police officer. In contrast, 25% of those who have not served said that they would be less likely to believe the police.

Litigators often worry about jurors' being swayed by headlines. In some cases, the opposite

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appears true. For example, when asked who is at fault for damage from the Y2K bug, the largest number of people would blame not the software manufacturer or the computer maker but —go figure—the user.

And more than six in 10 potential jurors said that they are unfamiliar with the Justice Department’s well-publicized antitrust lawsuit against Microsoft.

Jurors are asked to be impartial, but some said that’s something they just can’t do in some cases. Significant pockets of respondents said that they could not be fair based on the race, sexual orientation, political beliefs or other characteristics of potential parties:

- # More than three in 10 said that they could not be fair if one of the parties were a white supremacist.
- # One in five said that they could not be fair if one of the parties were a computer hacker.
- # Twelve percent of respondents said that they could not be fair if one of the parties were homosexual.

Some other striking poll results were:

- # Fifteen percent said that they could not be fair if one of the parties were a tobacco company or a gun manufacturer, and 14% if a party were an asbestos manufacturer.

Faring slightly better were health maintenance organizations and breast implant manufacturers (12%), the United States government (10%), hospitals (7%) and car makers (6%).

- # Just 3% said that they could not be fair if a party were black, Asian, American Indian or white, and 4% if a party were Hispanic.
- # Seven percent said that they could not be fair in a case involving a person expressing strong religious beliefs.

- # Twelve percent said that they could not be fair if one of the parties were a politician, 9% if a lawyer, 8% if a corporate executive, 7% if a police officer, 5% if a doctor.

David Davis, who supervised the study for the litigation consulting company DecisionQuest, says that the survey answers reveal a dismaying bias in jury selection toward white, affluent, educated Americans. Fifty-five percent of the population has been summoned for jury duty. White people (57%), homeowners (61%) and people with college degrees (69%) are most likely to be summoned for service.

Among potential jurors, African-Americans (33%), people with incomes under \$20,000 (30%) and young people 18 to 24 years old (36%) are much more likely than average to believe that juries “often fail to do what’s just and fair.” Only 22% of the total pool reported this degree of skepticism.

The Impact of Prior Service

It’s unclear why respondents who had served on juries are more likely to believe they could be fair. It may just be that lawyers and judges are having some success excluding closed-minded jurors during voir dire. But Larry S. Pozner, a Denver lawyer who is a past president of the National Association of Criminal Defense Lawyers, believes that jury service may also change people for the better.

“When the juror takes the oath, something magic happens,” he says. “You can take a person who is right-wing or left-wing—or any wing—and they don’t have a leaning in that case.”

Older respondents are the least willing to set aside prejudices against particular groups. While the number of respondents is not enough to be statistically significant, in almost every category, more seniors than those in other age groups said that they could not be fair jurors.

The prejudices of respondents 18 to 24 years old, though also not statistically significant, were more often directed at corporations, the government and police.

There were responses in the survey to provide comfort to both sides of the tort reform debate. Slightly more respondents (45%) said that jury awards “are out of control” than those who said they “are generally reasonable” (43%). A similar division emerged on whether Congress should pass laws limiting the liability of corporations, with 44% in favor and 43% opposed.

Older respondents—who can presumably remember the days when a million dollars was a lot of money—are more likely than younger respondents to think that jury awards are excessive. High-income respondents also think that awards are too high.

Tort reform advocate Victor Schwartz, a partner at Washington, D.C.’s Crowell & Moring L.L.P., believes that the \$246 billion in settlements between the states and the tobacco industry has had a spillover effect into jury verdicts in other areas. “That is the well out of which big verdicts are born,” he says.

Both jurors and those who have never served can be skeptical about the players on all sides of the process. More than four out of five respondents agreed that “[w]hen executives of big companies

do something wrong, they usually try to cover it up.” Almost three-fifths believe that paid expert witnesses give the testimony they are paid for, rather than saying what they believe. More than half of all respondents—and six in 10 of those who have actually served on juries—believe that large jury awards usually get thrown out or are reversed on appeal, possibly making it easier for jurors to “send a message” to defendants while distancing themselves from responsibility for any economic harm a big award may cause. Plaintiffs’ lawyer Brian Panish, of Santa Monica, Calif.’s Greene, Broillet, Taylor, Wheeler & Panish L.L.P., says he does not believe jurors are that sophisticated. Mr. Panish, who won a record \$4.9 billion verdict from General Motors Corp. this summer—later reduced to \$1.2 billion by the judge—says the jurors were surprised and angry to learn that the judge had thrown out an award they considered to be fair.

The National Law Journal/DecisionQuest Juror Outlook Survey was conducted by DecisionQuest in mid-September. Just over a thousand adults 18 and older (566 women, 436 men) were randomly selected from households throughout the continental United States and asked a series of 43 questions. (The complete responses, which are broken down by region, age, income, gender, race, home ownership, marital status, employment and education, can be found on The National Law Journal’s Web site, at www.nlj.com.)

The Lost Art: An Advocate’s Guide to Effective Closing Argument

Joseph F. Anderson, Jr.
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The United States Attorney’s Bulletin is pleased to offer the following excerpts from United States District Judge Joseph F. Anderson, Jr.’s book *THE LOST ART: AN ADVOCATE’S GUIDE TO EFFECTIVE CLOSING ARGUMENT*. Judge Anderson’s book was recently recognized as one of the three best publications for 1998 by the

American Continuing Legal Education Association. The book is a three-part composition: Part One deals with the craft of advocacy — practical pointers on preparing and delivering closing argument; Part Two is a comprehensive survey of the law of closing argument — the cases that define the boundaries beyond which a lawyer may not venture when arguing to a jury; and Part Three is intended to be a resource for lawyers to draw upon when composing a summation. This part consists of 225 closing argument segments in

civil and criminal cases that have been carefully selected from trials around the country and represent what Judge Anderson considers to be the best examples of courtroom advocacy. Part Three also includes a compendium of quotations from various sources that may be used to establish a theme or drive home a point during closing argument. What follows are brief excerpts from Parts One and Three.

Introduction

In 1763, in a small brick courthouse in Hanover County, Virginia, a young lawyer named Patrick Henry began his career in a celebrated case that came to be known as the Parson's Cause. In winning that case, Henry took the first step toward building a reputation as an orator and defender of colonial rights — a reputation that would propel him into the spotlight in Williamsburg and beyond. According to Henry's biographers, his summation (or "jury speech" as it was known in those days) so enthralled the audience that, immediately upon its conclusion, the spectators stormed over the courtroom rail, hoisted Henry to their shoulders, and triumphantly paraded him across the courtyard to Shelton's Tavern, "where they celebrated long into the night."

Regardless of whether this story is true, it provides a good point of reference for the theme of this book. Closing argument was once viewed as one of the most important parts of a common law trial. In my view, it is still an important part — and perhaps the most neglected part — of any judicial proceeding. A strong argument can be made that the complexity of modern trials necessitates an even higher order of skill than was formerly necessary.

Debunking the Myth

Most lawyers prepare for trial on the basis of a widely shared set of misperceptions. The first is that over 80% of the time jurors reach their ultimate verdict during or after the opening statements. This leads to the second misperception — that closing argument is, therefore, unimportant.

The notion that the opening statement determines the verdict is firmly embedded in the legal literature. The authority usually cited for the 80% effect is the University of Chicago Law School Jury Project, a comprehensive study of the American jury conducted in the 1950s. In fact, as Professors Williams L. Burke, Ronald L. Poulson, and Michael J. Brondino have pointed out, the Chicago Jury Project "never addressed the effect of the opening," but for some unexplained reason, "the 80% effect has been cited so frequently that it has risen to the level of a legal axiom even referenced by leading trial advocacy teachers." *Fact or Fiction: The Effect of the Opening Statement*, 18 J. Contemp. L. 195, 196 (1992). After carefully reviewing the literature and conducting their own jury study, Professors Burke et al. concluded that the notion that 80% of jurors make up their minds after the opening statement is a myth.

Don't Blow the Introduction

Most lawyers waste time patronizing the jury by "thanking" them for their service and then, in an obvious attempt to curry favor by appearing to be the good guy, reminding them that "what I say is not evidence."

I suggest that you not begin by thanking the jury for simply coming to the trial. After all, they are there because they received a summons. It is much more effective, I think, to observe that all participants in the trial agree that they have taken their responsibility seriously, worked hard, and paid close attention to the evidence.

I also suggest you not remind the jurors that what you say is not evidence. The judge will tell them that. To include such a disclaimer at the outset of your argument is tantamount to suggesting that the jury tune you out.

Your introduction should be relatively short. Jurors are apt to give their most serious attention to the first part of your speech. Don't squander the opportunity to reach the jurors before their interest dissipates.

Preparation

[Preparation] is the be-all of good trial work. Everything else — felicity of expression, improvisational brilliance — is a satellite around the sun. Thorough preparation is that sun.

— Louis Nizer
Newsweek, December 11, 1973.

In my work as a trial judge, it is not unusual for me to see attorneys working through lunch on the last day of a trial, frantically scribbling out notes on the back of a legal pad. What are these people doing? They appear to be committing the unpardonable sin of trial advocacy: inadequate preparation for closing argument.

In some ways these attorneys may be attempting to flaunt their forensic abilities. After all, didn't Abraham Lincoln write his most famous speech on the back of an envelope as he rode the train to the cemetery at Gettysburg? And didn't Douglas MacArthur speak extemporaneously when he delivered his celebrated "duty-honor-country" address to the cadets at West Point in 1962?

Well, no they didn't. While still in Washington, Lincoln went through numerous drafts of the Gettysburg address, painstakingly choosing each word. Gary Willis, *Lincoln at Gettysburg: The Words That Remade America*, 27-28, (1992). And MacArthur did not speak "off the cuff." In *American Caesar*, the definitive biography of MacArthur, William Manchester wrote that:

[t]he awed cadets thought that he was coining the phrases as he trod the platform . . . but what they had actually witnessed was the last performance of a consummate actor who always wrote his own lines beforehand, honed and polished them, and then committed them to memory.

William Manchester, *American Caesar: Douglas MacArthur*, 669 (1978).

Irving Younger, one of the giants of our profession and a master orator said that he

routinely spent two to three hours preparing for a ten minute speech. As a law clerk, I saw Terrell Glenn, another fine speechmaker, carefully write out his closing argument, then prepare an outline from what he had written, then commit the outline to memory.

The point is — good closing argument requires preparation. Very few lawyers are so gifted that they can carry the day by the sheer force of their innate abilities.

I am a great believer in carefully planned outlines. If you drop a sentence or two from your speech to the Rotary Club, no one will care. But forget to mention mitigation of damages, or the deposition in which a witness contradicted himself, and your case will suffer. There's no shame associated with walking to the lectern with an outline in your hand.

I am also a big believer in rehearsal — in front of a mirror, your spouse, your law partners — anyone who will listen and critique you.

Discuss the Burden of Proof

Regardless of the type of case (civil or criminal) and regardless of which side you are on, it is usually a good idea to discuss the applicable burden of proof. If you represent the plaintiff in a civil case, it is especially important to disabuse the jury of the reasonable doubt standard — that is the one most jurors have heard about before becoming a juror, and, according to some studies, the one that jurors continue to adhere to even after hearing the judge's "preponderance of the evidence" instruction.

Review the Evidence

Closing argument allows the attorney to present his or her case to the jury as a cohesive, logical, and understandable story. Don't simply summarize what the jury has heard. You must marshal the evidence for the jury: take the patchwork of testimony, documents and other evidence, and weave it into something the jury can understand. Emphasize the high spots. Draw inferences. Reach conclusions. Tell the jury why your conclusions make sense. Don't ignore the weaknesses of your case.

Humor

As a young lawyer in Illinois, Abraham Lincoln was pleading a case before a jury when he became convinced he was losing, even though right was on his side. So he told the jury this story:

A farmer back home was sitting on his front porch, when suddenly his six-year-old son came running from the barn saying "Father, father, the hired man is in the hayloft with big sister. The hired man is pulling down his pants and big sister is lifting up her skirts, and I fear they are going to pee on the hay?" "Now son," the father said calmly, "You have the facts right but you have reached the wrong conclusion."

Lincoln may have gotten away with it, but most lawyers run a grave risk when they attempt to inject humor into their jury summations. I once tried a case involving a crash of a major commercial airliner that resulted in the death or serious injury for fifty-seven passengers. During summation, the defense attorney tried to weave in a cute story about the poor quality of the airline's food. The jury received his remarks with icy stares, the comment having fueled plaintiff's theme that the airline's attitude toward safety was, itself, rather flippant.

It appears to me that lawyers sometimes become desensitized to the attitudes jurors bring with them to court. To most jurors, a trial is an important and solemn event. They have been summoned to the courthouse to participate in the administration of justice, not to be entertained.

There are, of course, occasions during trial when something humorous occurs. On those occasions, a smile — or even a lighthearted observation — by the attorney is usually harmless and may even help your case. It shows the jury that you are human. When it comes to summation, however, attorneys should be wary of the use of humor in any form, lest it be seen by the jury as making light of your opponent's situation or the seriousness of the case to your client. The same is generally true regarding efforts to write a poem about the case.

Dealing with Credibility

Depending upon the circumstances of your case, it is generally preferable to suggest to a jury that a witness is mistaken or has a faulty memory instead of stating that the witness is "a liar." The term "liar" itself is offensive to many. A number of people go through life avoiding occasions where they have to gauge the credibility of people who tell different stories. When seated on a jury, these people are uncomfortable at the prospect of indirectly branding someone a perjurer.

There are, of course, occasions when tip-toeing around the credibility issue will not suffice. In those instances, the litigator must go for the jugular. Here's an example from a summation by Lewis Unglesby in a criminal case:

Ladies and gentlemen, let me tell you something about immunized witnesses. They are not new to this society. In colonial days, the hangman was a murderer who escaped the gallows and the penitentiary by agreeing to do the dirty work and to hang others. Immunized witnesses are not new. The judge will tell you . . . and the law is that their testimony is considered differently from any other witness, because it, unlike any other witness, must be examined with greater caution and care. The jury must determine and weigh the evidence in light of the fact that these individuals, unlike ordinary witnesses, would not and did not agree to testify until they themselves were guaranteed that nothing would happen to them. Their story, which they want to sell, is one which the government must want to buy.

Consequently, the credibility of such people, the believability of such people, as you will hear it from the court and have already heard it, is called into question. That is what we have here in this courtroom today.

Forensic Misconduct

A fairly comprehensive body of common law has developed regarding permissible and impermissible closing argument. The consummate trial lawyer needs a firm grasp of these limits to be

able to compose a summation that does not draw an objection (or a *sua sponte* rebuke from the court) as well as to be able to object to improper argument by opposing counsel.

In my court, two violations are by far the most frequent: asserting the attorney's personal belief in the merits of the case ("I've been practicing law for twenty years and this is the worst case of fraud I have ever seen"); and making the so-called "golden rule" argument ("Ladies and gentlemen, treat my client as you would want to be treated if you had been injured in this fashion"). Both types of arguments are clearly over the line and will, in most instances, get you in serious trouble with the trial judge.

A lesser used — but more egregious — form of forensic misconduct is comment on judicial rulings. It should go without saying that summation is never the time to take issue with, or comment favorably upon, the various procedural and evidentiary rulings that occurred during the trial. Nothing that I know of will provoke the ire of a trial judge more than an attorney standing before a jury and attempting to evoke sympathy by suggesting that evidence was improperly excluded or that a litigant has not been treated fairly by the judge. The same goes for gratuitous comments about rulings in your favor, which are usually nothing more than thinly-veiled attempts to suggest that the judge thinks you should prevail. Attorneys who seek to take advantage of rulings in this fashion deserve the spontaneous eruption from the judge that is sure to follow. Save those arguments for the appellate court where they belong.

Another and perhaps more important reason to avoid negative comments on the proceedings and rulings is that you probably offend the jury if you take issue with the judge's rulings when addressing them. Jurors generally view themselves as being allied with the judge in a search for the truth. My sense is that jurors often rebel when an attorney is disrespectful to the judge at any stage of the trial. In short, attorneys who criticize judicial rulings usually pay a price with both the judge and jury.

Attack your Opponent's Case (In the Right Way)

Orienting the jury to your theory of the case should always come first. Unlike voters in an election campaign (where studies show that negative ads actually work), jurors generally prefer to hear positive, rather than negative, arguments.

Once you have argued the positives of your case, you must occasionally attack the strengths of your opponent's case. The secret is to do so in the most effective way. If you think the other side's witnesses are lying, it is sometimes better to suggest that they have faulty memories rather than branding them liars.

Often counsel's most daunting task is challenging the opinions of the other side's experts. The natural inclination is to suggest that they are being paid and are, therefore, "hired guns." The problem, of course, is that yours are too.

Occasionally, it is possible to challenge an expert's conclusion by pointing out when the expert was designated by your opponent relative to when the expert formed his or her opinions. Sometimes an attorney will designate an expert in response to discovery requests or court imposed disclosure requirements *before* formally retaining the expert or before receiving even a tentative report from the expert about his or her conclusions. If this is the case, a fairly strong inference can be drawn that the expert was hired to give a predetermined opinion and is, therefore, truly a "hired gun." A similar inference might be drawn from an opinion given before the expert had time to adequately review the facts of the case. I have seen this tactic used only a few times, but in one of the cases, a juror told me that this was the basis for the jury's rejection of an expert's opinion.

Another effective way to challenge an expert is to suggest that the opinion is faulty because the attorneys have not given the expert all of the information the expert needs to formulate an opinion. Suggesting that something has been held back from the expert may be your only approach when the other side's expert has sterling credentials.

Leaving Questions for Your Opponent

One tactic that I have seen used on occasion, usually with great success, is for an attorney to conclude the summation with a list of questions on the board for his or her opponent to answer during rebuttal. It is usually preferable to have the questions written out before your summation, but covered so that you can uncover and discuss them with the jury one at a time.

List eight or ten questions with answers that you think are inconsistent with your opponent's case, reserving the more difficult questions for last. After posing these questions for your opponent, challenge him or her to answer each of them on rebuttal. Tell the jury that if your opponent ignores the questions, or even *some* of the questions, then he or she has conceded vital points to your side of the case.

This technique generally works best for the defense side of a criminal case. By skillfully posing questions that are difficult for the prosecutor to answer, you may plant the seed of reasonable doubt, or at least bait the prosecutor into spending valuable rebuttal time attempting to frame answers for your questions. The same principle is true, to a lesser extent, on the defense side of civil cases. The plaintiff is going to get the last crack at the jury and anything you can do to sidetrack the rebuttal argument will inure to your benefit.

What should your approach be if you are the one faced with the choice of answering the questions left by your opponent? It depends on the questions and the case. If you've already answered them, say so. Rephrase the questions if your opponent has distorted them. If there are two or three for which you have a quick convincing answer, respond to those, then erase the rest off the

board with a comment like "Let's not get distracted from the real issues in this case, which are"

If you don't want to (or can't) respond to any of the questions, it is best to say something like "I'm not going to let my opponent tell me how to try my case" or categorically redefine the question: "Opposing counsel would like you to focus on these ten questions — a very clever idea because these are just red herrings to distract you from the real question which is . . ." Then proceed with your argument. Whatever you do, erase the questions or turn the board away from the jury — you don't

want them staring at a litany of unanswered questions as you deliver your rebuttal.

Sample Closing Excerpts:

1. Anticipating Criminal Defendants' Argument

Now, when I finish you are going to hear from the defendants, then at the end I am going to be able to come back and make some response. I expect that the defendants' attorneys will attack the prosecution's case in several ways. They will say that the State's witnesses are testifying falsely in order to save themselves, or Mr. Saleeby's "rat" theory, as I call it.

They will say that the State's witnesses are drug dealers and users who can't be trusted.

They will say there are inconsistencies in the testimony of the State's witnesses, and surely there are. If there were not, it would have been as though they were programmed to be put up on the stand to say the same thing each time.

They will say we tortured these witnesses to make them say these things so that we can indict and put innocent people on trial.

They will say, I think, we are outsiders . . . coming in and just accusing honest citizens.

They will say we should have made audio and video recordings of the transactions with each of the defendants if we expect you to find them guilty.

They will say that the State Grand Jury tramples on individual rights and freedoms.

They will say we don't trust our own witnesses because they haven't been sentenced yet.

They will say that witness testimony alone is never sufficient to convict anyone in Darlington County.

They will say it is only guilt by association.

Then they will say if you convict these people, who knows, you may be next or your own family may be next.

And, finally, they will argue that the punishment is simply too great, the law is too severe.

Their purpose is to get you to believe that there is something wrong, something dirty about the State's case.

— Cameron McGowan Currie

If you know the main points your opponent will use in summation, it is frequently effective to predict them before you sit down. Diffusing the arguments by mentioning them in advance can lessen their impact on the jury.

2. Character Witnesses

So much about this case is extraordinary The defendant, ladies and gentlemen, has called nineteen character witnesses — more than one third the number of his total witnesses and they have testified to Hiss’s reputation for integrity, for loyalty, for honesty, and veracity. They told you what the gossip is that they have heard. The accumulation of gossip over the years that they have known him and what that is and all of them said that his reputation is good.

Well, ladies and gentlemen, the charge in this case is technically perjury but underlining the charge of perjury is the government’s claim that Alger Hiss participated in the commission of espionage — that he was a spy for the Soviet Union. And I ask you: What kind of reputation does a good spy have? Of course, it must be good. The fox barks not when he goes to steal the lamb. No, the spy’s reputation must be good. We are here on a search for truth. We are not concerned with reputations. Reputation — poppycock.

Just think how many people could call good reputation witnesses — just think. Benedict Arnold. A major general in our army. He sold out West Point to the enemy and before they caught Major Andre, right up there in Tarrytown, don’t you believe that Major General Benedict Arnold could have called George Washington as a character witness? And Brutus before he stabbed Caesar. Don’t you think he could have stood in front of the Roman Senate and called upon the great Augustus and said “Tell them what kind of a man I am.” And lastly, the devil himself. You remember that play that Mr. Milton wrote. The devil is a fallen angel and before he was thrown out of heaven, he was in the sight of God. He could have called upon the Almighty himself as a character witness.

But ladies and gentlemen, character witnesses belong to another era. This is the age of reason —

this is the age of common people and what we want — are facts. We are here — you are here — Judge Goddard is here to ascertain the facts. We don’t want — gossip.

— Thomas F. Murphy

This is taken from the summation of federal prosecutor, Thomas F. Murphy in the second trial of Alger Hiss for perjury.

3. Credibility

You folks have a real problem, as a jury, with the testimony of Mrs. Norman. You will remember her. She was the very pleasant appearing woman who just simply turned out to be wrong in some of her testimony. Well, I know you do not have any difficulty with disposing of her mistakes and misstatements. The problem is what should you do with the rest of her testimony. Accept it, reject it, or what?

You know, since my mother was called away (Vermont talk for “passed away”) we usually take my father out for Sunday dinner. And there is a restaurant here in town that we like to go to.

It is interesting how people will always order their favorites. Dad’s favorite is beef stew — has been for as long as I can remember. Mother fixed it for him when I was a boy. No matter what is on the menu, if they have beef stew, when the waitress asks for his order, he says, “I guess I’ll try your beef stew.”

The other weekend we took Dad out to a new place not far out of town — they call it an “inn” — that advertised home cooking. When Dad saw beef stew on the menu, his mind was made up.

When they brought out his plate of stew, it looked terrific. But the very first bite he took, the meat was spoiled — rancid.

Now what did he do? Did he pick all through that plate, looking for a good piece of meat? Or was he entitled to call the waitress over and ask her please to take it back because it was rancid?

What are you entitled to do with the testimony of Mrs. Norman?

— John Burgess

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4. Diversions

Now, Mr. Stuckey is the defendant's attorney. He is a defense attorney, and defense attorneys have always reminded me of magicians. You know how magicians will put like a puff or smoke or a flash of light at the corner of the stage in order to draw your attention away from what's really going on. That's what they do.

For instance, the opiates. Remember the opiates were brought out in the trial. Mr. Stuckey brought that out in his opening statement that this victim had opiates in her system. Well, ladies and gentlemen, then they showed to you that it's not heroin or morphine, but codeine from a Phenaphen III tablet that was given her for the extraction of a wisdom tooth. That was the opiate in this case.

Remember the argument in the opening about underage and that he asked Laura was she underage and he asked her about taking birth control pills and living with a — having a roommate named Scott earlier. All of those are puffs of smoke and flashes of light, ladies and gentlemen. Those don't have anything to do with whether or not this victim deserved to be raped and assaulted. It's a puff of smoke to draw your attention away from what's really going on.

— Barbara Heape Tiffin

Discuss Relevant Legal Principles

In my view, the weakest link in a common law trial is the court's jury instructions. Jurors are routinely expected to comprehend complex legal principles, like proximate cause, comparative negligence, or reduction of damages to present value, after one (usually oral) brief discussion by the trial judge.

Summation is an appropriate time to use simple examples to explain the law in a way that the judge may not. If you know the precise language the court will use, using those exact words in your explanations can be very effective.

Educate the Jury

Summation may be the only opportunity for the lawyer to educate the jury about things they may wonder about later during deliberations. For example, in a civil case, plaintiff's counsel may want to point out that if they find against the defendant, no one will go to jail or be punished criminally. I know from experience that civil juries occasionally assume wrongly that criminal penalties will ensue as a matter of course from a plaintiff's verdict.

Also, you might want to tell the jury that this is your client's only day in court. Regardless of future deterioration in health or other consequences of the injury, you client will never be able to increase their damage award.

Empower the Jury

Jurors should harbor no doubts about their authority to do what you want them to do. It is sometimes essential to reassure jurors that, under our system of justice, they are authorized to give you the verdict you seek. Here's how Stephen Jones closed his argument to the jury in the 1997 Oklahoma City federal building bombing trial:

One time I heard someone say that communism fell not because of brilliant leadership but because of a Moscow-trained lawyer, a Polish priest, a shipyard electrician, and a retired Hollywood actor. And so it was. And ultimately, justice will be done in this case by the men and women from ordinary lives who have been summoned here and empowered to make the decision.

Peter Pearlman, of Lexington, Kentucky frequently closes his summations thusly:

When you serve on a jury, in many respects you have as much power as you may ever have in your lifetime. For example, when you vote

you're one of thousands, when you attend a meeting of the school board, you may be one of hundreds. When you serve on a jury to administer the process of justice, you are only one of twelve. As one of twelve, you have the power to set the proper standards for safety that must be followed in this community.

Review the Verdict Form

If your case is one in which the judge has decided to use a verdict form with special interrogatories for the jury to answer, it is imperative that you go through the verdict form with the jury, suggesting how the questions must be answered in order for your client to prevail. I personally have great faith in the jury system, but I have seen more than one intelligent-looking jury exhibit confusion over relatively straightforward questions on a special verdict form.

The Do's and Don'ts of Closing Argument — A Quick Checklist

Do's

- Choose your words carefully
- Use repetition
- Stick to your argument — don't rearrange your structure just to meet your opponent
- Discuss the burden of proof
- Discuss and explain the verdict form
- Demonstrate conviction in your position
- Use pattern or boilerplate arguments where appropriate
- Lead jurors to make their own conclusions
- Use visual aids and blow-ups of testimony
- Wear comfortable, conservative clothing and avoid excessive or distracting jewelry
- Establish a theme
- Study the body language of jurors
- Remind the jury of promises your opponent made during opening statement but did not keep
- Use rhetorical questions
- Keep it simple
- Observe time limits set by the court
- Rehearse in front of a mirror or with a friend or spouse
- Strike a balance between reason and emotion
- Make eye contact with each juror at least once

- For defendants, attack the weakest part of the plaintiff's case first
- Moderate the volume of your speech
- Look for ways to connect emotionally with those jurors you think will be leaders
- Exude fairness
- Know the limits of proper argument
- Tell the jury what you want
- Use rhetorical techniques appropriate for your case
 - Analogies
 - Humor (cautiously, if at all)
 - Understatement
 - Theme
 - Rule of three (points are easier to remember when grouped together in threes)
 - Leaving questions for your opponent

Don'ts

- Don't "thank" the jurors for serving; instead, commend them for their hard work and careful attention
- Don't merely recite what each witness said
- Don't shout, point your finger at the jury, or pound on the lectern
- Don't become unnerved or untracked by an objection by your opponent or by the judge's ruling on the objection
- Don't use inappropriate humor
- Don't apologize
- Don't argue against a patently obvious fact or conclusion. You don't make a strong argument stronger by adding a weak argument to it — you only dilute your stronger argument.
- Don't use legal terms not understood by the jury
- Don't go outside the record or misstate the facts
- Don't waste time telling the jury "What I say is not evidence."
- Don't end on a weak note
- Don't refer to evidentiary or procedural rulings by the judge
- Don't tell the jury "This is a complicated case."
- Don't parade back and forth ~

ABOUT THE AUTHOR

Judge Joseph F. Anderson Jr. was appointed United States District Judge by President Ronald Reagan in October 1986. Prior to that, he practiced law in Edgefield, South Carolina and served as a member of the South Carolina House of Representatives representing Edgefield and Aiken counties. Judge Anderson is a graduate of Clemson University and the University of South Carolina School of Law. He currently serves as a member of the Committee on Criminal Law of the United States Judicial Conference and a member of the American Law Institute. As a lawyer, he was an active member of the South Carolina Trial Lawyers Association. [a](#)

The Little Known Rules of Evidence - Sequestration of Witnesses

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Fed. R. Evid. 615. Exclusion of Witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Where shall I begin, please your Majesty? he asked. Begin at the beginning, the King said, gravely, and go on till you come to the end: then stop.

Lewis Carroll, **Alice in Wonderland.**

More than one of you may have noticed the similarities between venturing down the rabbit hole in Wonderland and cracking open a copy of the Federal Rules of Evidence. Still, it seems the King's advice is sound. Whenever confronted with a rule of evidence problem, the best advice is to start at the beginning, that is the text of the rule itself, and labor onward until you come to the end; then stop.

What is sequestration? Rule 615 states that "witnesses" may be excluded from the courtroom during a hearing or trial. In addition, a trial court may order witnesses not to discuss their testimony *outside* the courtroom; and sequestration order generally must be granted if requested. *United States v. Arias-Santana*, 964 F.2d 1262, 1266 (1st Cir. 1992).

Does sequestration apply to pre-trial hearings? Yes. See *United States v. Brewer*, 947 F.2d 404, 410 (9th Cir. 1991).

Why do we have this rule? The text of the rule gives the reason for the rule: "so that [witnesses] cannot hear the testimony of other

witnesses.” The commentary to the rule provides the rationale: “it is a means of discouraging and exposing fabrication, inaccuracy and collusion.” From the perspective of common sense, it seems a logical precaution. Honest witnesses who listen to trial testimony might be swayed to tailor their testimony and dishonest witnesses would be empowered to construct false testimony. In short, a trial judge may exclude any witness from the courtroom.

What about the case agent? It is clearly proper for a case agent to assist an AUSA throughout trial and testify as a witness. See *United States v. Crabtree*, 979 F.2d 1261, 1270 (7th Cir. 1992); *United States v. Pulley*, 922 F.2d 1283, 1285 (6th Cir. 1991); *United States v. Martin*, 920 F.2d 393, 397 (6th Cir. 1990); *United States v. Gonzales*, 918 F.2d 1129, 1138 (3rd Cir. 1990); *United States v. Shurn*, 849 F.2d 1090, 1094 (8th Cir. 1988). The text of the rule clearly provides an exception for one assisting case agent.

Can I have two or more case agents assisting at counsel table? Some courts read Rule 615(2) as limiting an AUSA to one assisting law enforcement agent. *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir. 1991); *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986). Other courts have held that the trial court has “discretion” to allow “more than one agent” under Rule 615(2). *United States v. Jackson*, 60 F.3d 128, 134 (2nd Cir. 1995); *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993) (prosecution justified in having two “assisting” agents in lengthy trial with complex evidence.).

Can “case agent” be a state law enforcement officer? Yes. Courts have interpreted Rule 615 to apply to non-federal law enforcement agents who assist AUSAs. *United States v. Simpkins*, 953 F.2d 443, 445 (8th Cir. 1992).

What about expert witnesses and sequestration? Clearly you should notify the trial court if you feel you need to have your expert witness present in the courtroom after a sequestration order is entered. Under the provisions of Rule 615(3) experts are allowed despite the

sequestration order. See *United States v. Conners*, 894 F.2d 987, 991 (8th Cir. 1990) (proper for AUSA to have case agent under 615(2) and bank examiner under 615(3) to assist during trial.).

When is a witness a witness? Clearly, both sides to the litigation are expected to use common sense and good faith in determining who will be a witness in the case. If you have some concern, raise it with the court. In *United States v. Blanche*, 149 F.3d 763, 769-70 (8th Cir. 1998), the trial court was held to have acted within its authority to exclude persons who might become witnesses, even though defense counsel stated he did not “intend” to call a girlfriend as a witness

When does sequestration begin? It generally begins with the start of the hearing or the trial. We know that because the Seventh Circuit refused a defense attorney’s attempt to obtain pretrial sequestration to prevent an AUSA from interviewing witnesses. See *United States v. Aguilar*, 948 F.2d 392, 397 n. 6 (7th Cir. 1991).

It may be broader in the First Circuit, which held that trial courts have the “power to sequester witnesses before, during, and after their testimony.” *United States v. Magana*, 127 F.3d 1, 5 (1st Cir. 1997).

How far does sequestration extend? For many jurisdictions, it simply means that one witness may not observe another witness’ testimony; however, not all judges agree. In the Eighth Circuit, AUSAs are allowed to prepare witnesses to testify, even after the start of the trial. See *United States v. Stewart*, 878 F.2d 256, 259 (8th Cir. 1989). This is a practice that probably exists in most Circuits, even if it has not been expressly recognized by case law. At least one judge has held that an AUSA may not even speak with a witness during a recess in the witness’ cross-examination. *United States v. Magana*, 127 F.3d 1, 5 (1st Cir. 1997) (“... while the Court must grant a request for sequestration, the scope of sequestration is discretionary.”). Yet, that same Circuit has held, “We are aware of no rule or ethical principle suggesting, in the absence of a court order, that prosecutor should refrain from conferring with a government witness before the

start of cross-examination." *United States v. DeJongh*, 937 F.2d 1, 3 (1st Cir. 1991).

Sequestration may extend from the Courthouse to the jail. Two Circuits have suggested that AUSAs should remind incarcerated prisoners not to discuss trial testimony once the trial begins. See *United States v. Covington*, 133 F.3d 639, 645 (8th Cir. 1998); *United States v. Eyster*, 948 F.2d 1196, 1211 (11th Cir. 1991).

Is sequestration automatic? Generally, no. See *United States v. Williams*, 136 F.3d 1166 (7th Cir. 1998). In that case, the failure to ask for a formal sequestration order made it impossible to seek relief for violations. The court suggested that attorneys treat the rule "cavalierly," holding "There's one teensy, weensy problem with this argument — no sequestration order was ever entered." *Id.* at 1167.

Can I appeal an adverse sequestration order? Probably not. The government may not seek an interlocutory appeal of trial court's granting of sequestration order excluding victim/witnesses. *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997) (The opinion stated that a "patently unauthorized and pernicious" sequestration order may be subject to mandamus review.).

What if one of my witnesses violates a sequestration order? Ask for leniency, this is an area of great discretion for a trial court. Isolated and limited contacts in violation of sequestration order need *not* require exclusion of witness testimony. *United States v. Kindle*, 925 F.2d 272, 276 (8th Cir. 1991). If it happens, be sure to argue that the violation did not involve a substantive testimonial issue and that there was no prejudice to the defendant. See *United States v. Posada-Rios*, 158 F.3d 832, 871-72 (5th Cir. 1998); *United States v. Wylie*, 919 F.2d 969, 976-77 (5th Cir. 1990).

What if one of the defendant's witnesses violates a sequestration order? There are a range of responses available to the trial court: contempt, additional cross-examination, disallowing testimony and striking testimony. See *United*

States v. Eyster, 948 F.2d 1196, 1211 (11th Cir. 1991); *Holder v. United States*, 150 U.S. 91, 92 (1893). It is very unusual for a trial court to strike/disallow testimony. Before such a drastic remedy can be taken, the court must find "some indication the witness was in court with the consent, connivance, procurement or knowledge of the [defendant] or his counsel." *Taylor v. United States*, 388 F.2d 786, 788 (9th Cir. 1967). In very rare cases, a violation of a sequestration order can lead to a mistrial order being granted. *United States v. Magana*, 127 F.3d 1, 5 (1st Cir. 1997).

What if I have to defend a violation of a sequestration order on appeal? The case law strongly holds that the trial court's decision on a sequestration matter is only subject to an "abuse of discretion" review. *United States v. Covington*, 133 F.3d 639, 645 (8th Cir. 1998); *United States v. Magana*, 127 F.3d 1, 5 (1st Cir. 1997); *United States v. Eyster*, 948 F.2d 1196, 1211 (11th Cir. 1991) and *United States v. Avila-Macias*, 577 F.2d 1384, 1389 (9th Cir. 1978). As a practical matter, that means you need to win at the trial court level or else. For the defendant to win on appeal, he must demonstrate specific prejudice. *United States v. Hickman*, 151 F.3d 446 (5th Cir. 1998) (error was found harmless).

ABOUT THE AUTHOR

Michael MacDonald has been an Assistant United States Attorney for sixteen years and currently handles white collar crime in the Criminal Section of the United States Attorney's Office for the Western District of Michigan. Mr. MacDonald has been an instructor at the Office of Legal Education course "Evidence for Experienced Criminal Litigators" since 1989. 

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