VOIR DIRE- Fact or Fiction?

This paper discusses whether psychological principles may be useful in selecting jurors. The main focus centers on nonverbal behavior and assessing anxiety and deception. Techniques used by trial consultants to assess who may or may not be an appropriate juror are explored. A second issue is the increased intrusiveness into a potential juror’s personal lives. With the advent of the Internet, attorneys and trial consultants are now accessing Social Media during jury selection.

CHALLENGES

As is well known, when selecting jurors in voir dire, jurors can be deselected, so to speak, for cause or based on a peremptory challenge. If a juror is excused for cause, it is generally due to outright bias, conflict of interest or other reasons. This paper will examine juror selection from the lens of self-disclosure. In attempting to determine the veracity of a potential juror, nonverbal behavior looms as an important factor.

In a 1981 article, Suggs & and Sales (1981) “Juror Self-Disclosure in Voir Dire: A Social Science Analysis,” the implication appears to be the more you know about a potential juror, the better able one is to either choose or not choose them to be on a jury panel.

A very insightful jury study was presented by Judge Gregory E. Mize (1999) “On better jury Selection: Spotting UFO Jurors Before They Enter the Jury Room”. At the beginning of the voir dire process, the jury panel is asked a number of questions, such as whether they know any of the other jury members or any of the parties in the case. They may be asked if they ever
served on a jury before. As it turned out, Judge Mize found that there were a number of jurors that really didn’t answer any of the questions and were fairly silent.

When individually questioned further, there were a number of problems that occurred. For example, some of the jurors stated that they didn’t really understand the questions or remember the past very well.

Obviously, if there is a cognitive problem, they would be excused. A significant part of the juror selection process at times is to individually speak with the potential jurors. In a group setting, they may be reticent and reluctant to disclose certain information in open court. For example, if a juror has problems with their memory, maybe they were diagnosed with a certain ailment or whatever, they do not want to mention it, even in a written form, but sometimes in an individual session outside the courtroom, generally in the judge’s office, they may be more willing to be forthcoming. Thus, even at the initial stage it is important to explore whether there is some critical reason to exclude a potential juror for cause.

Thus, in terms of self-disclosure, further probing appears necessary. In a large group, jurors may be too embarrassed to mention critical details. Even on a questionnaire, jurors may be reluctant to disclose vital information. Hence, individual questioning can play a crucial part in detecting possible bias.

In the peremptory challenge arena more intense scrutiny may occur. Peremptory challenges allow the attorney to excuse a juror based on what they think may be a relevant reason. They are not permitted to excuse jurors based on race or gender. Batson vs. Kentucky, 476 U.S. 79 (1986). A law review (Hans & Jehle, 2003) is somewhat jokingly entitled “Avoid bald men and people with green socks? Other ways to improve the voir dire process in jury selection."
Hans and Jehle agree with Judge Mize that a limited voir dire is less effective in determining or ascertaining juror bias. In the instance of limited voir dire (little or no attorney questioning, for example), there may be over reliance on stereotypes. (Hans & Jehle 2003.)

THE PATH TO SELF-DISCLOSURE

In assessing self-disclosure on the part of jurors, one of the elements that may be important to examine has to do with anxiety. Many observers in the litigation arena believe that evidence of anxiety can bring forth indicators of deception. If a potential juror is being deceptive and/or untruthful, it could be that they would not be helpful to the examining attorney.

Signs of anxiety and deception can be detected in some respects by analyzing non-verbal behaviors. In an article by Jeffrey Frederick (2012), he describes various forms of non-verbal communication.

There are a number of visual clues that are helpful, including body movement, body posture, body orientation, inadvertent emblems, shrugs, facial expressions and micro expressions. Body movement can include fidgeting or squirming as an indication of anxiety or nervousness. Other signs of anxiety may include scratching one’s head or touching or adjusting one’s hair.

With respect to body posture, anxiety may be seen in body rigidity. The thought is the more rigid the body, the more anxiety may be present. Body orientation includes whether a juror is directly facing the questioner or are they at a slight angle. It is thought if there is a so-called open orientation, this may reflect a lack of anxiety and positive feelings toward the speaker.

Emblems refer to gestures and not words. For example, there could be a nod of a head. An example of an emblem could be a clenched fist, which could reflect hostility or anger. A
classic example appears to have occurred in the Jodi Arias trial. The expert witness, Dr. Richard Samuels held a clenched fist next to his chin while being cross-examined by the prosecutor. It should be noted that, at times, a potential juror may feel as if they are being interrogated.

With respect to shrugs of the shoulder, this can reflect a lack of confidence based on nervousness. The implication may be that a juror is demonstrating deception or embarrassment.

With respect to eye contact, it is viewed that as nervousness increases, the jurors will tend to break eye contact. This could be either from not looking at the questioner or by more blinking. Thus, when asking certain critical questions, or sensitive ones, there may be more or less eye contact. With a general baseline, this could be indicative of whether the juror is more anxious and/or being deceptive. On the other hand, it is possible that potential jurors may tend to stare and maintain eye contact due to an underlying hostility to the questioner. This should be taken into account since this certainly could change the opinion as to whether this will be a useful juror. When looking at eye contact, cultural factors need to be taken into account since in some cultures they find it inappropriate to stare or maintain eye contact at another.

Another area to assess nonverbal behavior with respect to anxiety and anger or deception has to do with facial expressions. As noted by Frederick (2012), various facial expressions can generally be controlled. On the other hand, there may be some clues as to what the juror is feeling. It is noted that an extended smile may reveal deception. This is based on the notion that the jurors are smiling to mask other feelings.

Campagna (2009), presents a chart can be used to assess a potential juror’s non-verbal behavior. There is a nonverbal behavior rating grid that is presented in the article, which covers eye contact, facial cues, body orientation, body posture, hand movements, speech disturbances,
pauses in the latency of a response to a question. There is a column for judge questioning, plaintiff attorney questioning and defense attorney questioning.

There are several caveats that should be noted with respect to analyzing or examining non-verbal behavior. Firstly, the attorney himself or herself cannot easily mark this grid. In many instances, the attorney may be standing and not have access to a grid. The attorney would need at least one, perhaps two, trial consultants or attorneys in order to complete the grid.

Secondly, there can there be alternative explanations for a given behavior. Thus, caution is needed in interpreting a single type of response. What may appear to be negativity or deception may be simply be the nature of the questions. The questions may be mildly objectionable or seem too private, and the potential juror could have varying reactions to these questions. This is especially so, when potential juror is being asked these personal questions in front of a large group of strangers.

Thirdly as noted, there can be cultural variations where some individuals may, in general, avoid eye contact. Thus, the examiner would be misinterpreting this factor.

Next, there could be an artifact in terms of some body posture and eye contact, This may occur if the jurors are attempting to glance around the courtroom to see who is writing or otherwise responding to their answers.

**INCREASED INTRUSIVENESS**

It is becoming more common now for attorneys to conduct Internet searches at the time of voir dire. It may be done discreetly, or more openly, particularly if the courts and/or the attorneys announce that it is being done.

However there may be problems for jurors who are asked certain personal or even general questions. In an interesting case, *Johnson v. McCulloch*, 306 Southwest 3d 551, it was
determined that a juror who was asked in a civil case if they were ever involved in litigation, apparently did not correctly characterize her involvement. The case was appealed and, based on the apparent lie, the Court declared a mistrial in the matter.

Use of Internet technology, including smartphones, laptops and so on, is a relatively new phenomenon and various courts are grappling with the matter. It appears that the trend is to allow such searches. It is felt that the use of such technology may enhance jury selection. (See Stark 2011) So, the issue is whether a potential juror might be more forthcoming, knowing that a lot of their life is going to be open for scrutiny. There is a tremendous amount of information on Facebook, blogs and so on. On the other hand, could this be a potential land mine where an attorney may be trapping a potential juror into perhaps a misstatement or misunderstanding and later, upon having an adverse verdict, initiate an appeal. (e.g. Johnson v. McCulloch.) Perhaps the juror misconstrues the word “litigation” as meaning only a criminal matter but not an administrative one such as in Worker’s Compensation. The attorney on the other side in a civil matter for example, could also have the same information and if there is an adverse verdict could initiate an appeal. But the problems are that the juror just misunderstood the question.

There could be some negatives to using Internet searches. There may be erroneous or inaccurate information found on the Internet search. Furthermore jurors may become more reluctant to answering many questions. (Ramasstry, 2010.) A question could be misconstrued, and afterwards the juror could be charged with perjury. Also, as noted above an artifact may be created in that the jurors may watch how much Googling is going on during voir dire, and become more and more apprehensive. Thus, there could be increased latency of response based on the prospective juror ruminating about their answer.
INCREASING SELF-CLOSURE

There are some positive measures than may increase juror’s self-disclosure. Suggs and Sales (1980) and Hans and Jehle (2003) have several recommendations with respect to improving the voir dire process and enhancing self-disclosure. Tailored questionnaires can hone in on the specific issues of the case. Secondly, the prospective jurors should be questioned individually. Thirdly, attorneys should be allowed ample opportunity to ask questions next, the interviewer should ask the questions from between 3-6 feet. Lastly, the questions should be done in smaller room, presumably not in the courtroom, but in a side room.

CONCLUSION

Each party attempts to select the most favorable jurors to their side. One of the main approaches is to assess nonverbal behavior in an attempt to ascertain anxiety and deception. A number of caveats were mentioned including artifacts such as looking aside at the person writing down information, or cultural factors, resistance to intrusive questions. With the advent of the internet the search for juror’s backgrounds proclivities is intensifying. It may be that a more favorable venue such as a separate room, as well as individually questioning jurors will enhance self-disclosure.

REFERENCES


Frederick, J., “Understanding jurors nonverbal communication,” http://www.americanbar.org/publications/gpsolo_ereport/2012/August_2012 understanding... (also, Mastering voir dire and jury selection, chapter 3)

Johnson v. McCulloch, 306 Southwest 3d 551


Stark, D., “Juror Investigation: Is in-courtroom Internet research going too far?” 7 Wash JLTech. and Arts 93 (2011)