The Land of Voodoo, Myths, and Missed Opportunities:
The Art and Science of Jury Selection

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Biographical Information

Dr. Fuentes is a founding partner of R&D Strategic Solutions. He has specialized in jury behavior and decision-making and the evaluation of complex evidence for several decades. Dr. Fuentes has a Master's Degree in Counseling Psychology from the University of Georgia, and a Master's Degree and Ph.D. in Applied Psychology from Texas A&M University. He has worked with trial teams on hundreds of criminal and civil cases involving issues of tort, contracts, anti-trust, intellectual property, product liability, and professional malpractice. Through the use of focus groups, mock trials and surveys he assists trial attorneys and in-house counsel in the development of persuasive jury messages and themes, witness preparation, jury selection and case valuation. He has authored numerous professional articles on the topics of jury behavior and jury decision-making and he has appeared on numerous legal forums including CNN's Talk-Back live, The Phil Donahue Show, and Court Television's series "The Art and Science of Jury Persuasion." Dr. Fuentes is on the University of Montana Law School NITA Faculty where he lectures on jury selection and persuasion. He has delivered dozens of CLE programs around the country and is a regular speaker for the Georgia Institute of Continuing Legal Education, as well as at other local and National Bar Associations.

Jury Selection: A Historical Perspective

There is more voodoo, claptrap, myths, and downright missed opportunities in *voir dire* and jury selection than perhaps in any other aspect of a trial. Let's look at a historical perspective to see how the thinking on the subject has evolved over time. Consider the following list which was printed in the May 1936 issue of Esquire Magazine:

- No Scandinavians—too aloof
- No Mediterraneans—too hot-blooded and emotional
- No wealthy people—too carefree with money
- No poor people—too tightfisted with money
- No women—can't sit on juries

The list goes from the subliminal to the sublime. This list was compiled by one of the most famous litigators of the time—Clarence Darrow (Darrow, Clarence. How to Pick a Jury. (1936, May) Esquire Magazine). Lets move to the 60's which brought in a fascination with body types (ectomorphs, endomorphs, and mesomorphs) and how those body types correlated with personality and how that might translate into an individual's decision-making preference on a jury. Moving to the 70's, a popular approach dealt with body language analysis, including jurors' facial and eye movement responses to *voir dire* questions. While there is clearly some relationship between body language and the way a person feels about a topic, the science and data indicate that body language is unreliable and difficult to interpret, except for the most obvious gestures. Finally, the era of social science began in the 80's. First with clinicians attempting to diagnose individuals based on observable traits and characteristics and then a

quantum leap in evolution to the scientific approach for predicting favorable and unfavorable jurors based on pretrial empirical studies focusing on experiences and attitudes.

A Scientific Approach

Scientific jury selection is based on analyses of surrogate juror data collected through jury research conducted in the actual or a matched venue (e.g., community attitude/profiling surveys and mock trials). Because it is based on sound methodologies, the profiles generated through this technique are more reliable and accurate than stereotypes and myths.

What have we uncovered over the years through scientific jury selection? After analyzing thousands of pre- and post-trial juror data points we have learned that demographics are generally a poor predictor across the board. Some demographics may be predictive in some cases given case specific issues, but generally speaking, age, race, ethnicity, and education are unreliable predictors so why do we tend to focus on these? Because they are the simplest and easiest pieces of information to obtain. Some stereotypes regarding favorable and unfavorable juror demographic characteristics continue to be rampant in jury trials even today. Even in the ideal scenario when using advanced multi-variate statistical techniques, there will always be error and no profile is bullet proof. A good example where race played a significant role is the O.J. Simpson criminal case where it was common knowledge (particularly after the trial) that African-American jurors were supportive of the defense case, but even in that scenario, 30% of the African-American population supported the prosecution's case according to community surveys. The point is that no prediction model is perfect and this is where the art portion of jury selection comes in. It is important to listen to the words jurors use and the hints that jurors divulge about the way they view the world.

So, if demographics don't predict jurors' orientation, what does? Empirical research has demonstrated time and time again that the best category of predictors is attitudes followed by experiences (which often influence our views). If an attitude was formed as a result of a life experience then it is more deeply entrenched and it is more likely to be acted on. For example, if you are defending a toxic tort case and you have two jurors who dislike oil companies, the juror who has reached this conclusion as a result of direct negative experience is probably the more dangerous of the two and he/she should take strike priority. The key to jury selection is to find the attitudes and experiences that jurors come into the courtroom with and through which they will filter the facts of your case.

Scientific jury selection is a process. The first step is to develop your case story and the 4-6 themes that summarize that story. The themes are the key messages jurors must hear and adopt in order to find in your favor. The second step is to identify experiences and attitudes (i.e., domain areas) that will prevent jurors from hearing and adopting your message. Remember that jury selection is actually a process of de-selection—you are trying to identify your most dangerous jurors, not your best jurors so *voir dire* questions should target domain areas that uncover attitudes and biases against your case. The third step is to develop *voir dire* questions that (1) identify your biased jurors and (2) introduce your case themes.

Why is Traditional Jury Selection Ineffective at Identifying Dangerous Jurors?

Many of the strategies employed in traditional jury selection are antithetical to identifying dangerous jurors. As previously mentioned, stereotypes and myths (i.e., I see you the way you

should be) interfere with this ability. Fear of contaminating the panel is also a common source of interference because it makes attorneys reluctant to ask the hard questions necessary to identify bad jurors. Just remember that it is better to know now than later. Indoctrination is commonly used but it does not usually take. Just because a juror makes one commitment early on (and before they hear the facts of the case) does not tether them to that opinion come what may. Asking jurors if they can follow the law is also ineffective. Jury nullification can and does happen. Lastly, it is also counterproductive to ask jurors whether they can award a lot of money or whether they can separate sympathy from decision-making. The fact is that sympathy does not drive large verdicts, anger does. It is important to realize that when any of these strategies are used, significant mistakes are being made and opportunities lost.

We are fascinated with juror selection because we want to believe that we have some insight into what people think as they listen to a case and we believe we should know the battlefield—the client expects it. What we need to remember is that oversimplification is risky and people are complicated. They make decisions for moral, social, psychological, and no reason at all. What we must do is let go of what we know has limited utility and take advantage of tips that are tried and true.

Practical Tips for *Voir Dire* and Jury Selection

The term "jury selection" is actually a misnomer. Jury selection is really the process of de-selection, meaning the primary goal is to identify your most dangerous jurors. This means you should use most of your time identifying these dangerous jurors. How can you best do this (i.e., what should you do and what should you avoid)?

What to avoid:

- Compound questions
- Legal or technical jargon
- Yes/no questions or other fixed choice formats
- Interrupting jurors and/or dismissing their comments
- Treating a potential juror like a witness (i.e., cross-examination)
- Asking questions that reveal your good jurors

What to do:

- Identify 3-4 domain areas in which jurors' attitudes and experiences may influence how jurors process information about your case
- Listen more than you talk
- Focus on attitudes, beliefs, values, and experiences
- Use open-ended questions to encourage jurors to talk
- Ask attitude-based questions versus knowledge based questions (e.g., what is your opinion about chemical companies versus do you know anything about chemical companies?)
- Use simple language a lay person will understand

- Get assistance with note-taking so you can listen, make eye-contact, and interact with jurors
- Show respect and interest in jurors by not interrupting and by acknowledging their responses before moving on
- Prepare, plan, and practice
- Stick to your plan
- Identify your enemies and protect your friends
- Take into account jurors' leadership potential on the jury

Leadership is often an overlooked criterion. A good rule-of-thumb is to use preemptory challenges against jurors who demonstrate high leadership potential unless you are at least eighty percent certain that they will be favorable jurors. You can look for jurors who demonstrate a willingness to talk during *voir dire*, those who are dynamic in their presence, those who dress well, those who are attractive, articulate, and those who are in managerial positions and/or positions of leadership in the community.

Are more strikes always better for the defense? The answer is no, not always. In some jurisdictions the judge will give defense attorneys as many peremptory strikes as they want and generally the thinking is to have as many strikes as possible to make sure you get rid of all your bad jurors. What you must remember is that by that same token, you are arming opposing counsel with as many strikes to get rid of your good jurors. What we often see is that verdict decisions are led by a smaller coalition of opinion leaders rather than the entire panel. Sometimes it just takes one defense juror to rally. So, more strikes is not always better. When should you request more strikes? When you are in a really dangerous venue where research has shown that dangerous attitudes are the rule, not the exception.

Juror Profiles in Environmental Cases

Empirical research has taught us that the psychological factors that drive plaintiff jurors in environmental and toxic tort cases are fear and uncertainty. These are two very powerful emotions that drive the size of jury verdicts. Specifically, fear about their or their family members' vulnerability to toxic exposures, fears/concerns that the government is ineffective at controlling corporations vis-à-vis the environment, fear that they or a loved one may have been exposed to some kind of toxic substance at home or at work, and uncertainty about ambiguous concepts such as dose response and latency periods. Plaintiff jurors typically hold several or more of the attitudes or characteristics below:

1. Jurors who are risk averse and fearful of chemicals: This includes jurors who believe that they or someone close to them may become ill in the future as a result of exposure to a hazardous substance in or around their home or place of work. These jurors believe that exposure to even one molecule of a toxic substance can cause significant health effects and that reported latency periods cannot be trusted because science is ever evolving.
2. Jurors who have idealistic attitudes about safety and/or are pro-government regulation.
3. Jurors who identify with the plaintiff because they too have been victimized in some way.
4. Jurors who have chronic health problems.

5. Jurors who operate on strict liability principles.
6. Jurors who are anti-corporate or critical of employers.

In contrast, defense jurors typically hold several or more of the attitudes or characteristics below:

1. Jurors who are pragmatic about hazardous substances and risks. This includes jurors who have worked with hazardous materials and have no health concerns.
2. Jurors who are pro-corporate.
3. Jurors who are anti-tort or anti-plaintiff.

When to Use and When Not to Use a Supplemental Jury Questionnaire

Jury questionnaires were once a novelty that were rarely put into practice but now they are often justified by the court as a way to streamline the *voir dire* process by (1) making it easier to identify jurors with hardships or bases for cause, and (2) allowing questions in open court to be focused on expressing the court's concerns regarding jurors' roles and responsibilities.

Are juror questionnaires always a good thing? The assumption is that it is because more information is always better, but the reality is there are situations where jury questionnaires can do more harm than good. So, when should you use juror questionnaires? Questionnaires are helpful when:

1. Your case contains inflammatory issues and/or involves domain areas that require jurors to candidly disclose personal information. Jurors are more likely to be candid about personal issues (e.g., health experiences) in a paper and pencil questionnaire than in the context of open court because they are often intimidated by the courtroom environment and they fear public speaking. The net result is that they may not share important attitudes and biases. Supplemental juror questionnaires provide the opportunity to safeguard the privacy of jurors while simultaneously allowing both sides access to important and sensitive experiences and attitudes.
2. You have ample time to review and make sense of the questionnaires before you have to administer peremptory challenges. If you have very limited with which to review the questionnaires the information can be overwhelming and not useful.
3. The questionnaire focuses on your specific domain areas and the information helps you identify your dangerous jurors more than it helps the other side identify your good jurors.

To improve your chances of getting a supplemental juror questionnaire admitted, it is best to approach the judge with a plan that requires little of the court's time or resources. Whenever possible, we recommend working with opposing counsel to draft a joint questionnaire and approaching the judge with a detailed plan for administration, duplication, and distribution.

Jury Decision-Making in Environmental Cases: What Makes or Breaks a Case?

Plaintiff verdicts in toxic tort cases are driven in large part by jurors' fears of exposure and its long term effects. This is true whether or not a juror has actually been exposed and it is true even in cases that do not contain personal injury claims. Some jurors who have been exposed

make the best defense jurors because they don't have underlying health concerns. Other jurors who have never been exposed make the best plaintiff jurors because they are so averse to hazardous substances.

Why does this happen? This happens because many jurors demonstrate a strong emotional component in evaluating the risk posed by potentially harmful chemicals and substances, the terms exposure and contamination automatically invoke thoughts of negligence, and they have unrealistic fears associated with exposure that are not grounded in science. This means that while technical defenses (e.g., fiber type, dose response, latency, state-of-the art arguments, etc.) may get some traction among some jurors, they do not carry the day at trial. It also means that jurors often shift the burden of proof to the defense to prove how the exposure/contamination occurred in the absence of corporate negligence.

Specific causation is important. The quickest path to a defense verdict in environmental cases is almost always through specific causation because it does not require jurors to consider conduct issues—which are usually the most difficult for defendants. Jurors tend to get bogged down when it comes to "the science" so epidemiological studies by themselves generally fall short of convincing jurors to find for the defense. We live in a CSI culture and our experience in recent toxic tort cases shows that if you have a sick plaintiff, jurors automatically look for other factors that might explain plaintiff's illness. While some types of scientific evidence can be compelling, jurors are more facile with non-scientific evidence like the absence of a cluster and alternate sources of exposure/contamination.

When jurors find for the plaintiff in toxic tort cases it is often because the defendants fail to (1) address jurors' safety concerns, (2) explain how the exposure/contamination occurred if the company did everything right, and/or (3) provide an alternative cause for plaintiff's illness or property contamination. Plaintiff verdicts can also occur because the defense fails to capitalize on the level of knowledge (about the hazards) and control (over plaintiff's exposure) demonstrated by parties other than the defendant company (e.g., the plaintiff, unions, plaintiff's employer, etc.). Lastly, subsequent remedial measures, which are often the subject of motions *in limine* by the defense, can prove to be a strategic advantage to the defendant in some circumstances because it addresses jurors' safety concerns and thereby eliminates the need for jurors to "fix" any perceived environmental threats posed by the defendant company. This issue obviously requires thorough *voir dire* in order for the defense to identify jurors who may hold the belief that any fixes or improvements to the operations in question must necessarily indicate that the company was negligent prior to the introduction of the subsequent remedial measure.

What are some of the other implications for jury selection in toxic tort cases:

1. Develop a profile that is both specific to the venue and to the particular case story that you are telling (juror profiles within a venue can change depending on varying approaches to trying the same case).
2. Normalize the bias, meaning make it okay for jurors to admit holding biases that are adverse to your client or position (while this is difficult in our adversarial system it is necessary in order to seat the most favorable jury).
3. Ask questions that tap into jurors' attitudes and perceptions about environmental issues (e.g., are you concerned that you or someone close to you may develop health effects in the future because of known or unknown exposure to toxic substances). Asking jurors

whether they have relevant experiences (e.g., have you ever worked around toxic substances) is insufficient and leaves valuable information on the table.

4. Ask questions that reveal pre-existing biases against corporations (e.g., what is your opinion about whether or not companies know in advance that contamination is going to occur and what is your opinion about whether most companies know how to prevent contamination).
5. Probe jurors about their perceptions of responsible corporate behavior [e.g., do you believe that companies that make changes to their environmental/safety processes are doing it more because they are (a) trying to avoid litigation or (b) truly wanting to be responsible environmental stewards].
6. Identify jurors who believe there needs to be more government regulation—that the EPA and government regulatory authorities are not very effective. Plaintiff jurors are more likely to hold these beliefs.

Conclusion

In sum, effective jury selection is about minimizing risk. Like all other aspects of the trial, it requires a strategic approach that combines social science knowledge with the skills of the trial lawyer. This latter component is "the art" aspect of the practice. Jury selection is understandably a daunting aspect of any trial—it is an effort to predict how a group of human beings is going to solve a complex problem based on often limited information collected over a brief period of time and a handful of questions. As if it is not difficult enough, even the most robust empirical models developed with thousands of data points contain some error. Therefore, one has to bring both "the art" and the science together in order to obtain the best results—and leave the myths, stereotypes, and misconceptions outside the courtroom.