Bad Jurors Are Red, Good Jurors are Blue: Navigating Voir Dire in Our Polarized Society

by Brian L. Salvi

As lawyers, we like to have everything within the boundaries of our control. But there is one element of every trial that is more difficult to predict, and control, than all the rest – the venire. Knowing that success or failure rests on the collective analysis of randomly selected registered voters within the county can place fear in the mind of any trial lawyer. As our country spirals towards unsustainable levels of political polarization, jury selection may seem even more treacherous to navigate than ever before. But instead of fearing the impact that our culture's current climate may have on the ability to pick a plaintiff-friendly jury, I suggest looking at it as an opportunity. First, it's an opportunity to embolden the majority, "reasonable" members of the venire. Remind them that this isn't a CNN panel or Facebook discussion. The courtroom is no place for fake news, disingenuous arguments or opinions without evidence to support them. Analyze the facts and follow the law. That's the responsibility of a jury. Second, as "radical" individuals become more comfortable voicing their opinions, lawyers are provided the opportunity to expose the radicals during direct questioning and moving to strike the radical for cause. With an increased focus on their time spent interacting with the jury during voir dire, lawyers can confidently devalue the traditional data point considerations for a "good" juror and put worries of our polarized society at ease.

In the pages ahead, I propose that lawyers shed many of the long-held beliefs about the standard profile for a plaintiff's juror based on data points like political party, gender, age, race, ethnicity, occupation, religious beliefs, etc. The nature of a jury trial requires lawyers to become consumed with understanding what biases members of the venire bring into the courtroom, but in the process, they may be neglecting their own biases in evaluating potential jurors. Lawyers need to recognize the biases they bring to the courtroom and how it can negatively impact their approach. The focus should be on the individuals in front of them. A good plaintiff's juror displays a genuine interest and understanding in the jury process, makes credible commitments to follow the law, and for the purposes of damages, someone who is just plain nice. There are plenty of individuals who meet these basic standards of a good juror in every county across the state. To find these jurors, lawyers must dive deeper with individual members of the venire during jury selection. This requires significant preparation and a more aggressive approach to how jury selection is conducted. By going further with direct questioning of the venire, you'll not only fully utilize your opportunity to establish a rapport with the jury, but you'll more successfully identify the jurors you want while exposing the radicals you don't.

Data is Informative, Not Determinative

As with any area of trial practice, the more data you have, the better. And this certainly applies to data gathered about potential jurors before and during jury selection. Today, people willingly share loads of personal information online for the consumption of anyone willing to do a Google search. Additionally, lawyers can petition the court to provide the venire with a juror questionnaire to flush out additional background information prior to direct questioning. The data, whether volunteered on the internet or through a juror questionnaire, can provide lawyers with insight into a potential juror's political affiliation, where/how they consume their news, or whether they consider themselves "conservative" or "liberal." These questionnaires give the court and lawyers the ability to narrow the scope of questions asked during jury selection and makes the entire process more efficient and effective.

Proponents commonly assert that questionnaires accomplish much more than clerical efficiency.[1] For instance, the extensive use of questionnaires make jurors more likely to pay attention to, and answer, written rather than oral questions, particularly when the questions are about sensitive personal matters.[2] Additionally, some courts will allow questions normally proffered by lawyers into the questionnaires, thus giving counsel more opportunity to propound their questions.[3] Finally, during direct questioning jurors can choose to give more limited responses and be less engaged in the process, whereas with a questionnaire they must respond.[4] When a lawyer does not need to waste time asking data point questions, they can focus on eliciting information that cut to the core on how a potential juror evaluates facts and makes decisions.

There are, of course, some drawbacks associated with the use of jury questionnaires. The use of

questionnaires may cause courts to impose time limits and restrict the types of questions about questionnaire answers, thus abbreviating the voir dire process all together.[5] Additionally, while collecting data point information is important, one must caution against an overreliance on this data until you have the opportunity to directly speak with a potential juror. Typically, a red X goes next to the baby boomer who watches Sean Hannity and a green + goes next to the millennial who is a self-described "hippy." But in doing so, you're only limiting yourself during jury selection. This hypothetical contains two bits of evidence on the potential jurors. Lawyers certainly would expect jurors to rely on more than just two pieces of evidence before arriving at a verdict, so why do we not hold ourselves to a similar standard?

While they can be helpful, these data points are woefully inadequate if used as the sole basis on making decisions on who to keep or strike from your jury. In an era where perception and reality are growing further apart, lawyers need to be careful not to box someone in before getting a chance to connect with them individually. That is why lawyers need to push to maximize the amount of interaction they have with the venire. While I strongly recommend the use of juror questionnaires, it should not come at the sacrifice of a lawyer's time with the jury. A lack of interaction between lawyer and jurors is significant because it deprives lawyers of the opportunity to observe personal attributes, interact with jurors, and even pick up on idiosyncratic tendencies, leaving the lawyers with a limited view of their audience for trial.[6] So engage each member, even those who do not seem willing to talk. See what topics prompt more engagement. When the fringe types expose themselves, aggressively probe to develop the basis for a cause strike. And most importantly, trust your intuition in speaking with another human being versus the data points provided on a piece of paper or computer screen.

Fight The Perception of Scary Conservative Jurisdictions

Let's be perfectly clear – obviously there are differences among the Illinois jurisdictions and certainly some are more plaintiff-friendly than others. But knowing that conservative jurors exist within a particular jurisdiction doesn't mean that trials are destined for failure. It is consistent to say that there are empathetic, nice, thoughtful, and law-abiding citizens in every county in Illinois while acknowledging different lifestyles and value systems between urban, suburban, and rural areas of the state. Plaintiff's jurors exist everywhere. Lawyers might need a little more luck with the venire depending on the county, but opportunities will present themselves, and then it's up to the lawyers to eliminate the radicals and empanel the jury they want.

If it's necessary to acknowledge that results aren't as large in politically

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conservative jurisdictions, then it's also necessary to acknowledge that the process is cyclical. Often lawyers have placed a cap on a case's value based on the jurisdiction before they have fully assessed liability or damages. This mindset sustains the cycle of lower results. As there is a danger with over reliance on data points, there is also a danger with lawyer's placing too much emphasis on their perception of the registered voters for a particular jurisdiction. Lawyers see a conservative jurisdiction and anchor themselves lower. Even worse, insurance companies know we do it and use it to their advantage. By showing no fear of the jurisdiction, you can change the leverage dynamic. Reducing that fear actually starts by recognizing our own biases and reminding ourselves that every jurisdiction provides the opportunity to eliminate the radicals and end up with a jury of twelve people who will follow the law and fairly evaluate the evidence. This principle holds true in the reverse as well. Lawyers cannot assume they'll get a favorable jury just because they are in Cook County and neglect their preparation or time spent in front of the venire. Finding a good jury comes with engagement during direct questioning. Everything else, including jurisdiction, is supplemental.

Get Them Talking

Part of the reason lawyers should have confidence that they can empanel good jurors throughout different jurisdictions comes from the increased opportunity to strike bad jurors. Our political/societal climate has ushered in an increased willingness of individuals to express their radical views. However, lawyers must realize that despite the polarized world we see on TV, social media, and the internet, the radicals are outnumbered. That's why it's so important for lawyers to get the jurors talking. Remember, while addressing the venire directly lawyers are able to take charge and set the tone for the voir dire.[7] The jury wants to feel that you are a teacher guiding them through the facts and arguments, rather than telling them what to think. Jurors will become suspicious when a lawyer tries to confuse the issues and pin them down before they even know what their options are.[8] Instead, let them have a conversation with each other while you simply encourage each member to participate in the conversation. The panel will more likely believe and remember information shared with them by one of their peers, rather than receiving the same information from a lawyer.[9] Lawyers should use voir dire as an opportunity to facilitate a type of "classroom" discussion that allows a lawyer to educate the jury by placing the lawyer in a position as a teacher.[10] When you facilitate this kind of meaningful discussion and information sharing, potential jurors provide a more honest picture of how they feel about certain topics. This more casual atmosphere will also put you in the best position to elicit radical viewpoints.

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Furthermore, by asking questions and starting a broader conversation, a lawyer can see how the group interacts: who the "talkers" are, who has strong opinions, and how jurors handle disagreement.[11] Open-ended questions will elicit more, and likely, better information.[12] This gives jurors the opportunity to just talk, say what is on their mind, or to reveal attitudes and values.[13] Allowing jurors to speak gives lawyers insight into their "frame of reference," or their experiences and how those experiences have shaped the juror.[14] A juror's frame of reference will determine what the juror listens to, the weight he or she will give the specific facts and the credibility he or she will assign the various witnesses.[15] Discovering this crucial information through data points is impossible. The best way for a lawyer to gauge a juror's frame of reference and expose radical beliefs is to foster this conversation and probe deeper when jurors provide the opportunity.

Find The Radicals and Go For Cause

A study (based on a self-reported questionnaire) published in the journal *Current Biology* analyzed how individuals who were categorized as holding "radical" views processed new information. The study found, in part, that the "more radical participants displayed less insight into the correctness of their choices and reduced updating their confidence when presented with post-decision evidence."[16] Individuals on the "far-left" and "far-right" of the political spectrum present serious risks for trial lawyers and will certainly be part of the venire in every jurisdiction. Based on these risks, lawyers must be cautious in their approach. Knowing that a radical juror(s) could be beneficial to their case might lead lawyers to seek out potential jurors who will become entrenched in biases that *support* their client prior to the presentation of evidence. This is, however, a risky proposition. As mentioned earlier, the data points that lawyers hope to capitalize on can be very misleading. In a medical malpractice case, for example, what if the self-described hippy millennial has family members working in medicine and has become entrenched in the viewpoint that medical providers do the best they can? That philosophy would be fatal to any medical malpractice trial. Unless you specifically ask how a person feels about doctor mistakes, you cannot assume the hippy label means they are on your side.

In order to rid yourself of wrong assumptions (your own biases), it will be important to specifically narrow in on the jurors you believe might hold radical beliefs regardless of how those beliefs would be politically categorized. While facilitating conversation on the various topics relevant to your case, pay close attention to how each juror reacts to one another. When a juror expresses a basic, reasonable concept, ask if everyone else agrees. If you sense dissent among the panel, follow up with the individuals as to why. The radicals on your panel will be quick to express their thoughts if presented with the opportunity. When a potential juror expresses unconventional views about one topic, come back to them on other topics to confirm your suspicions that they might be a radical.

At my last jury trial, I was confronted with the need to push back against my own assumptions. After doing some quick research and sifting through answers in the juror questionnaires, I thought I had identified a "good" juror for my case. I was representing a young woman in a bike versus bike collision on the Chicago lakefront path, and she sustained multiple pelvic fractures. One of the jurors I thought would be a good fit for this case was a retired municipal worker, African-American female who had children around the same age as my client. Michelle Obama was the person she admired the most and our current president was who she admired the least. She described herself as "generous," "liberal," and "pro-consumer." Before direct questioning, she received a green + next to her name. Her questionnaire answers led me to believe she would be a champion for my client's position. She turned out to be very talkative. "She'll be a strong, helpful voice during deliberations" I convinced myself initially. But the more she spoke, the more I realized I had to dig.

It wasn't long until she was discussing how lawsuits make her uneasy because she had been a defendant in a case as a landlord. She apparently had a bad outcome and was not shy about expressing her frustration with that experience. By the end of our discussion on the topic, she had expressed stronger opinions about the law and lawsuits than the law professor also on the panel. From that point on, whenever we got to topics pertinent to the issues in my case, I'd pivot to her for input. Despite telling me early in jury selection that she's totally unfamiliar with Chicago's lakefront path and its rules for bikes, she also "hated all bicyclists" because "they don't obey the bike rules." Ultimately, she had stronger opinions about cycling rules than the bike messenger on the same panel too. The more she spoke, the more I realized she was a radical. All the information I compiled prior to speaking with her told me she was a juror I wanted, but everything I investigated during direct questioning told me the opposite. Had I relied on the data points provided, assumed she would be on my side and left her alone during direct questioning, I would have allowed a problematic and influential voice into the jury room. At the end of the day, she could not be on the jury and was stricken. Though a potential juror might not provide testimony necessary for a cause challenge, direct questioning of potential jurors provides lawyers with the information necessary to make the right decisions

with peremptory challenges.

The nuance that goes into eliciting the information necessary for a cause challenge requires lawyers to put significant preparation into the direct questioning of jurors. Establishing a challenge for cause can be difficult given the broad discretion afforded to the trial judge on striking jurors. To sit on a jury is easy. The legal qualifications to sit on a jury in Illinois include being a U.S. citizen, resident of the county, 18 years of age, free from legal exception, fair character, approved integrity, sound judgment, well informed, and able to understand the English language.[17] This is obviously a low bar. Challenges for cause have been interpreted by the courts by stating that a mere suspicion of bias or partiality is not sufficient to disqualify a juror.[18] This means lawyers need to artfully extract information from potential jurors to establish a basis for cause without being too aggressive as to damage your reputation with other members of the venire. We cannot simply rely on peremptory challenges to provide you with enough insulation from the radicals. An Illinois court in *Schultz v. Gilbert* was careful to distinguish that peremptory challenges are used to exclude jurors, not select them.[19] Getting the best jury possible cannot simply be crafted through the use of peremptory challenges, but rather a well thought-out strategy and careful reading of the jurors throughout jury selection.

Due to the difficulty of striking a juror for cause, lawyers must be specific in eliciting testimony worthy of a cause challenge. This can be achieved in a gentle but pointed way. Some of the broad issues that require time spent on each individual juror include the burden of proof, damages, and individual versus corporate defendants. Eliciting testimony from a juror that it will be more difficult to award significant damages against an individual versus corporate defendant puts you in a position to make persuasive arguments to your judge that the juror will not follow the law as instructed. After you've elicited this type of testimony, then it's your job to make the radical not feel like a radical. Ask them why they feel the way they do. Make them feel proud in their outsider stance. This will empower them to hold onto their radical views after you've sat down, making it far less likely that defense counsel (or the judge) will rehabilitate their prior answers. Ultimately, exposing radicals and getting cause challenges granted requires testimony from direct questioning. You won't be able to establish cause based on the data points, so extracting information from jurors that would serve as a basis for cause requires careful planning and delicate execution. When done successfully, you unquestionably increase your chances of victory.

Conclusion

Over the last five to seven years, we have seen an undeniable rise in populism and anti-establishment sentiment across the country and

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globally. During that same time, jury verdicts have gone up across jurisdictional lines. The climate has also made it easier to spot and exclude radicals from your jury. But spotting the radicals requires more work from the lawyer before and during jury selection. It is not enough to collect simple data points and conclude whether a juror will be good or bad for your case. Jury selection provides a unique opportunity for lawyers to develop a relationship with the jury and often this opportunity goes underutilized. The type of juror you want will be available in the venire - you just need to look closely. By engaging the venire and creating a conversational atmosphere, you will learn how a potential juror will decide your case with far more reliability than basing the decision on who they voted for in 2016.

Endnotes

1 Joseph A. Colquitt, *Using Jury Questionnaires; (Ab)using Jurors*, 40 Conn. L. Rev. 15 (2007-2008).

2 *Id.*

3 *Id.* at 16.

4 *Id.*

5 *Id.* at 20.

6 *Id.*

7 Patricia Clark, *Navigating the Waters of Jury Selection*, 51 Wash. St. B. News. 25, 26 (1997).

8 *Id.*

9 Robert B. Hirschhorn, Stacy Schreiber, *How to Conduct a Meaningful and Effective 30-Minute Voir Dire*, 15 Adovcate (Texas) 102 (1996).

10 John Buckley, *For an Effective Voir Dire, Let the Jury Speak*, 8 TortSource 2 (2005-2006).

11 Clark, *supra* note 7, at 25-26.

12 Patsy Weber, *Jury Selection: Look, Listen, and Learn*, 1 Tenn. J. Prac. & Proc. 34, 35 (1997).

13 *Id.*

14 *Id.* at 36.

15 *Id.*

16 Max Rollwage, Raymond J. Dolan, and Stephen M. Fleming, *Metacognitive Failure as a Feature of Those Holding Radical Beliefs*, Current Biology Report 28, at 4014-4021.

17 705 ILCS 305/2, Petit jurors; selection; qualifications.

18 *People v. Cole*, 54 Ill.2d 401 (1973).

19 *Schultz v. Gilbert*, 300 Ill.App. 417 (4th Dist. 1939).

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Since joining the firm, Mr. Salvi has obtained several noteworthy results at trial, including a $50.3 million jury verdict on behalf of a young boy who suffered a brain injury at birth and a $17.9 million jury verdict on behalf of a 47-year-old Lombard woman who was hit by a truck In addition, Mr. Salvi obtained a number of multi-million dollar settlements on behalf of his clients, including $4.5 million in an institutional negligence case against a mental health facility for their failures in treating a patient.

In recognition of his outstanding legal work, Mr. Salvi has been named a Rising Star by Illinois Super Lawyers and an Emerging Lawyer by Law Bulletin Media every year since 2016. In 2019, the Chicago Daily Law Bulletin named Mr. Salvi to their 40 under 40 list of attorneys to watch.

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