

Out with the Old, in with the New — Try an Updated Approach to Jury Selection

By Dr. Noelle Nelson

Times they are a-changing. Jurors are no longer siding with plaintiffs or defense according to readily predictable demographic characteristics.

Take, for example, a focus group assembled to help the plaintiff's attorneys evaluate how jurors would react to different arguments in a medical malpractice case. The plaintiff was claiming negligence by the doctors and hospital resulting in catastrophic damage to her newborn. The plaintiff's attorneys fully expected members of the mock jurors who were mothers with young children to find for the plaintiff. Imagine their surprise when three out of the four moms did not find for the plaintiff, stating that births are difficult and untold complications could occur.

Imagine, also, their further surprise when many conservative older men on the mock jury (individuals traditionally expected to favor those in authority), find for the plaintiff, stating that although the doctors and hospital operated within the strict standard of care, they should have exercised greater caution and tak-



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en into account what the patient (the plaintiff) was trying to tell them.

Getting a Clearer Picture. The truisms used in jury selection can no longer be counted on to provide a clear picture of a juror's beliefs. Understanding the reasons behind this fundamental shift in perceptions is critical if lawyers hope to select jurors to benefit their case.

When selecting jurors, attorneys used to assume life experience was tied closely to one's ethnicity, socioeconomic status, gender, age, and level of education. Such factors restricted the access by individuals to experiences outside their day-to-day lives so it was easier to make assumptions about how they would react when listening to testimony. This is no longer true. Because of mobile phones, online streaming networks, blogs, social media, and the Internet, individuals have access to an incredible diversity of experiences and opinions that have nothing to do with their day-to-day lives — from reality shows of the rich and famous, to the daily lives of those who are destitute or in jail, and to particular takes on world events. Although

ethnicity, socioeconomic status, gender, age, and level of education continue to play a role in an individual's life experience, they are less important in the formation of a person's beliefs and opinions as they once were and therefore less important in what is decided in the jury room.

Culture is now both universally shared and divided. We truly have become globalized in a very real sense but we pick and choose the global village that fits our comfort zone. Mobile phones are ubiquitous. Videos and texts are seen in communities all over the country and all over the globe in a matter of seconds. The public is becoming more aware of subjects that used to be the domain of a select few.

Forensic science, for example, is an area that used to be familiar only to those intimately involved with crime. Forensic science is now detailed on podcasts and cable shows. The same is true of police, emergency room, and courtroom procedures. Everything is out there and impact has been significant. Podcasts such as "Serial," prompt retrials and second looks at convictions because of public pressure. For good or for ill, when it comes to selecting jury members, our opinions are being shaped by others, no matter our status, race, or gender.

The upshot of all this for trial lawyers is they must face the fact that jurors have tremendous knowledge about professions, situations, and circumstances outside their personal lives. Regardless of the accuracy or inaccuracy of this information, it is relied upon as truth.

For example, when observing the deliberation portion of mock trials, it is common to hear jurors say, "Well, on 'Grey's Anatomy,' they said ..." or "Everybody knows the DA can't do that. On 'Law & Order,' they said" "On 'CSI,' just the other night they were saying" Public perception is powerful.

Lawyers cannot assume, for example, that because a juror is 32 years old, blue-collar, with a high school education and married with two children, that his opinions reflect those demographic characteristics. His opinions may, but then again, they may not. Nor can lawyers assume that jurors swallow whole and unreflecting what they absorb online or from the media. It is most prudent to assume that each juror is an individual who has uniquely processed personal life experiences along with the greater life experiences they get through social media and other avenues. With this in mind, what is a lawyer to do when trying to select jurors?

The Value of Open-ended Questions.

When it comes to jury selection, several approaches are recommended. First, it is wise to use as many open-ended questions in voir dire as the judge will allow, probing for underlying beliefs and attitudes. For example, asking, "What do you do in your spare time?" will yield far more useful information than "What are your hobbies?" People may not have specific "hobbies," but everyone has either spare time, or very good reasons why they do not. Both of these are highly revealing of their life experience, and thus of their likely beliefs and opinions.

Similarly, if the judge allows questionnaires, these forms can be very helpful in uncovering juror opinions, especially when open-ended questions are included. Asking potential jurors what they think of certain issues or situations and why can give solid clues as to their underlying beliefs and opinions.

Beyond that, a small focus group (10 to 12 representative jurors) targeting the key issues in the case will help the lawyer learn how jurors are currently viewing issues. The value of such a focus group is not to give the lawyer a sense of how many jurors might be "for" or "against"

the lawyer's position on the case, but rather to give the lawyer a sense of what the mock jurors think and feel about the issues, and why they think and feel as they do. Armed with this information, lawyers can then shape their presentation of the case more successfully.

In addition, as lawyers uncover juror perceptions that are detrimental to their case, they can find out from the focus group how to educate jurors to change their perceptions in a more desired direction. For example, if the focus group participants are dismissing the opinion of an expert witness on the grounds that "Well, they are all hired guns anyway," a lawyer can ask, "What could I say to show you that's not so?"; "What could my expert say to demonstrate his or her credibility to you?"; "What would make you believe my expert isn't

a hired gun?"; or "How could I present that information to you most effectively?." When trial lawyers are willing to engage in such question-discussion sessions with focus group participants, they will gain insights and ideas on how to sway unfavorable juror perceptions to their advantage.

With the constant advances in technology and mass communication, the world keeps changing and with it, the opinions of those who sit on jury panels. It is the job of trial lawyers to resist the temptation to rely on outdated demographic stereotypes when selecting jurors and, instead, use creative approaches during *voir dire* and focus groups to discover the belief systems and opinions that influence today's jurors' decisionmaking.



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