

STATE OF THE ART VOIR DIRE

GARY HILL
HILL AND BLEIBERG
ATLANTA, GEORGIA

TABLE OF CONTENTS

Introduction

What the juror brings to the courtroom: Core beliefs, attitudes and life experience

How Jurors think and decide: Inductive Reasoning

What the lawyer brings to the courtroom: The Story with a Theme

Voir Dire: Interrogation

Conclusion

Introduction

85 to 90 percent of jurors do not alter their decision after the end of opening statements.¹ Something very important occurs before the jury hears the first witness or sees the first piece of evidence.

Psychological, behavioral, and cognitive research have spawned a wealth of data, science and pseudo-science on human decision making and information processing. This research is relevant to the fields of politics, marketing, sales, public opinion and jury trials. Faced with the reality of choosing and persuading a jury many lawyers find the available information is complex, overwhelming, expensive to use and often wrong.

This is an effort to provide the trial lawyer with a practical guide to a successful voir dire based upon current research. The process demands an understanding and synthesis of four elements: 1) What the juror brings to the courtroom: Juror Beliefs; 2) How jurors process information: Inductive Reasoning, 3) What the lawyer brings to the courtroom: The Story; and, 4) How to Obtain the information you need: Juror Interrogation.

1. What the juror brings to the courtroom: Core beliefs, attitudes and life experience.

By nature and training lawyers and judges are deductive reasoners. They gather facts and evidence, weigh those facts in light of the law and build a conclusion from the bottom up.. Mastery of the facts are important both for trial and creating a record; however, they are not sufficient to understand the decision making process of the jury.

The juror is an inductive thinker. They form a conclusion from the top down. They will adopt a framework of understanding based upon limited information and their own beliefs and experiences and then fit the facts to their frame of reference.

Core beliefs, attitudes and experiences are the canvass on which they will draw the picture of the case presented for their decision. They begin to create a frame of reference very early in the process based on initial impressions and information filtered through and limited by their core psychology. The most important thing to understand is that jurors will change the facts and issues in a case before they ever alter their own beliefs. Information that betrays their beliefs, attitudes and experiences must be elicited to appreciate the way in which the available jurors will frame the case, process information and make a judgement.

Some examples of core beliefs: attitudes towards personal responsibility; authority, social justice, money damages, tort reform, lawyers, corporations and business, or safety. It is important to identify the core beliefs that may be central to your case before voir dire in order to probe for clues and insights to these juror beliefs.

2. How Jurors think and decide: Inductive Reasoning

Framing. As inductive reasoners jurors will begin to develop a view or frame of the case from the moment they enter the courtroom. Their view will depend greatly on their own beliefs and experiences but will be constructed on limited information available through the end of

¹ IBAJ No.72 (Oct. 1985), Vincent D.; Trial Diplomacy, U. of Chi. (1979) Morrill, A.

opening statements..

The concept of framing in human decision making and information processing has been known and used extensively in political marketing for the last 25 years. Think about the tag line: “It’s the Economy Stupid.” which was a recognition that the electorate had already framed the 1992 presidential race as a referendum on the domestic economy. Youth, inexperience, marital infidelity and a successful Gulf war were insufficient to overcome the electorates’ established frame of reference. Likewise, “Change You Can Believe In” trumped “Experience” as a recognition of the frame of reference of the American people in the 2008 election. The voters willingness to ignore race, relative inexperience, and style over specifics powerfully demonstrated that they had framed the central issue of the election as “Change”.

Once they have framed the case the juror will then scrutinize the evidence against the frame they have already adopted based on this very limited information. This is the part of the process where information processing is taking place. There are certain principles at work that affect this phase of decision making.

Primacy. This principle means that the first information received is more persuasive.

The principle and power of primacy is demonstrated in a simple experiment conducted by social psychologists². The participant is presented with two statements and then asked to rate their impression of the subject as positive or negative on a scale of one to ten.

Steve is intelligent, industrious, impulsive, critical, stubborn and envious.

Steve is envious, stubborn, critical, impulsive, industrious and intelligent.

Each statement is the same except that the word order is reversed. Yet the subject is rated significantly and consistently more positively in the first statement.

Hindsight.

Fact-Norm Mutation

Information availability.

Prototype

monocausality

3. What the lawyer brings to the courtroom: The Story with a Theme

The case presentation will put witnesses and evidence before a jury that may be complex, contradictory and technical. The court will charge on the law of the case which the juror is unlikely to understand or appreciate. The narrative that the advocate puts before them at the

²Forming Impressions of Personality, 41 J. Abnormal and Social Psychology 258 (1946), Asch, Solomon E.

beginning of the trial will be the most powerful opportunity to influence and persuade. It is the story of the client's case that most affects the juror in adopting their own frame of reference during the early moments of the trial when they are most receptive to persuasion.

The development of the story is most easily understood as a process that focuses on a direct, brief, dramatic and effective communication of the case that resonates with the juror's own belief system. There are two parts to the story presented to the jury: the theme and the narrative.

Choosing a Case Theme: The case theme is shorthand to identify to the jury the *essence* of your client's case. It works as a hook or headline to grab the jury's attention and interest. Think of how you skim a newspaper for headlines that draw your attention to the story. An effective theme aids in framing the issues for the jury and acts as an organizing principal for them to receive and process facts and evidence. The theme may be a word or phrase but should be no longer and will be used in the opening statement and revisited in the closing argument. To paraphrase the military, the use of an effective theme is a "force multiplier".

The principles for developing a case theme are: a) The case theme grows from your client's unique experience; b) The case theme must have integrity; c) The case theme should fit like a glove. For example, "This case is about, "Trust/ Greed/ Personal Responsibility/ Selfishness"; or, This is a case about "Profits over safety/ Do unto others/ An ounce of prevention".

Developing your narrative. Any good story has a beginning, middle and end. The goals of the story are to influence the jury in the early framing of their view of the case with the power and integrity of your narrative.

Answer four simple questions: Who, what, how, and why

Get to the point / The test is whether the jury would find in your favor if they heard nothing more than the first four minutes of the opening statement

Defendants Conduct: The case is always about the conduct of the defendant: The jury will focus on the actions of the defendant in framing and judging the case. Their perception of the defendant's choices will lead to their conclusions on both liability and size of damages. The more choices the defendant made

Simplify your language and avoid lawyer talk. Continue to simplify your story during preparation. Shorten sentences and paragraphs. Remove qualifying phrases. Substitute concise and common words. Dumb down legal and technical language.

Verbal pictures: Language must evoke images through common experiences and impact words.

Humanize your client.

Undermine your opponent's defenses.

An example of an effective opening narrative paragraph might be: “ This is a case about going home. Mary was a working mom driving from the airport after three days on a job out of town. Now she was only 20 minutes from her husband Bob and their children Sam and little Sue. What Mary didn’t know was that 12 hours earlier a tractor trailer had left the Big Wheels Shipping Company in Minnesota without any inspection of the tires. As she neared her exit she was completely unaware that the truck ahead of her with a badly worn tire and a sleepy driver would be responsible for her never going home again. In the blink of an eye the tire exploded , the driver failed to control the vehicle causing it to suddenly jackknife across her lane of travel and her car was engulfed in flames. The temperatures reached 900 degrees while she burned and suffocated from smoke inhalation..”

Knowing your story is essential to voir dire and juror interrogation because you are seeking jurors who will be favorably disposed to the narrative you know they are about to hear. The jurors beliefs about tractor trailers, safety precautions, working mothers, the importance of family life, corporate responsibility, defensive driving and damages will all play a part in what they hear and the impressions they form from listening to this narrative.

4. Voir Dire: Interrogation³

Interrogation is the art of eliciting truthful information. Unlike the criminal interrogation it is not directed at obtaining or forcing a confession. In jury selection particularly, the goal of the interrogation is to probe and mine the core beliefs of the potential juror. Principles of successful interrogation are vital to successfully obtaining personal information the subject juror is naturally resistant to share while under stress in a formal setting before a group of strangers.

Lose the lawyer

Building Rapport: likeability (smile); good manners (introductions and good morning); respect for others (place them at ease) ;.

Conversation: Experiences, interests and attitudes. How, what and why; sense impressions.

mirroring; empathy

Listen, see and hear

Examples

complimenting their candor

³Educing Information: Interrogation, Science and Art; National Defense Intelligence College, December 2006.

Conclusion

The art of trial persuasion is a lifetimes work. We all bring our own styles, talents, strengths and weakness to the task. Understanding the decision making process of jurors and tailoring voir dire to their perceptions is critical to maximizing success.