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Jury Selection: What Why and How in 2023

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I. The Challenge of Jury Selection Post-Pandemic

Much has been written about the concept of “overcoming jury bias.” In reality, experience teaches trial lawyers that once trial has begun, very little, if anything, can be done to overcome an ingrained bias. This truth may be even more true (i.e., less fake?) twenty-three years into the 21st Century. As America has become increasingly polarized, individuals can receive almost all of their information from sources that agree with and confirm their particular worldview. The idea of deliberations amongst 12 disparate citizens where opposing viewpoints are considered rationally and facts inconsistent with one’s belief system persuade an individual to a different conclusion is frankly quaint in 2023. Trial lawyers should recognize that the trial process is an *appeal* to jury bias, and a trial presentation designed to “overcome” people's belief systems and intuition about the facts of your case is a fool's errand.

This reality raises the importance of the jury selection process in modern trial practice. Jury selection is the only part of trial that “overcomes” bias because it is the only opportunity to discover it, understand it, and dismiss it. Finding jurors with ingrained belief systems that will not accept your party's story and evidence is imperative for modern times. Once twelve people are put into the jury box, the idea that your persuasive advocacy and superior facts will defeat their embedded convictions is a fallacy. Juror research and data collected since 2020 only buttresses this proposition. Much has been written about how the COVID pandemic has impacted belief systems in the jury pool. However, as Jason Bloom and Emily McDonald discuss in their article “More than COVID: How 2020-21 Has Shaped Jury Decision Making,” much more is involved than simply the impact of the COVID pandemic on how jurors may be oriented to a given case at the time of voir dire. See Vol. 98, THE ADVOCATE, Spring 2022, pp. 15-17. As jury consultants, they suggest that before the pandemic, the additional experience of increased polarization, and rationalized acceptance of “alternative facts,” an attorney could count on a reasonable bell curve amongst a venire panel. In the not-so-distant past, one would find a small segment of jurors openly identifiable as acceptable to a party, a small segment of jurors openly identifiable as dangerous and unacceptable for a particular party, and a large collective in between of a rising bell curve of jurors who could be considered as “persuadable.” However, as they describe, focus groups now show that there is a very large segment of jurors identifiable as acceptable to a party's case, a very large segment of jurors identifiable as dangerous to a party's case, leaving a small, narrow collective of prospective jurors in between considered truly neutral or “persuadable.” *Id.* at p. 16.

More data from other sources only confirms this modern experience. David Wenner and Greg Cusimano detail the results of 14 focus groups and seven broad surveys from early 2020 to the fall of 2021 in their article “Communicating with Jurors in an Infected Environment,” Vol. 58, TRIAL, No. 4, April 2022, pp. 18-28. Their research reveals a large break in attitudes for jurors traditionally considered “conservative” whose partisan identification is generally Republican. Inside that group, they identify “tribal” as opposed to “moderate conservative” jurors. Moderates still display a more traditional anti-lawsuit bias against plaintiffs’ personal injury attorneys (in particular) and large damage awards. *Id.* at 20. Tribal jurors, however, are more punitive in their worldview. “They do not trust institutions, science, experts, elites, and government regulations that they perceive impact their freedom.” *Id.*

Their research reveals two interesting concepts to incorporate into modern thoughts about jury selection. First, tribal jurors hold to their beliefs stridently through rationalization and selective acceptance of facts:

It is helpful to understand that while one may disagree with jurors’ worldviews, their beliefs are a matter of survival for them. They have come to such beliefs through considerable time and effort to understand their world. Moreover, these jurors can be pro-plaintiff in cases that conform to their beliefs and are consistent with their tribal goals--such as trials that include corporate or government defendants.

Id. at 21. This leads to the proposition of identifying their biases, testing those beliefs to your party’s case, and then framing the appeal into these biases. While stridently “conservative,” these juror biases may actually serve a personal injury case. The new biases are described as (1) the anti-system bias; (2) the personal freedom bias; and (3) the mistrust bias.

From this, they advocate multiple frames that can resonate with tribal jurors in personal injury matters that this author has advocated for in the past:

- Individual freedom versus government protection
- Punishing opponents
- The system is rigged for certain special interests
- Common people and common sense are superior truth to the elite’s “facts”

Id. at 24. From this data, they discovered something particularly important for medical negligence cases: “The surveys reinforce that being free to choose was so critical that two out of three respondents felt it was more important for doctors to inform patients about all of their treatment options than to provide the best treatment. People want sufficient information to make decisions about their health, the risks they encounter, and what is best for them.” *Id.* These jurors will reach their liability decision based on what makes sense for them, and exemplary academic credentials for a medical expert may actually dissuade them from accepting the proffered opinion. *Id.* at 26.

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