Benefits of Jury Research for
Discovery, Mediation, Voir Dire and Trial

Scott D. St. Marie, Esq.
Schnader Harrison Segal & Lewis LLP
140 Broadway
New York, NY 10005

Jill Leibold, Ph.D.
Litigation Insights
9393 W. 110th Street, Suite 400
Overland Park, KS 66210

Charlotte Wiessner, Esq.
Sherman & Howard L.L.C.
633 Seventeenth Street, Suite 3000
Denver, CO 80202

Joseph A. Battipaglia, Esq.
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103

Presented at the 2011 Annual Meeting
Cutting Edge Tools: Advanced Techniques for Construction Practitioners
April 14-16, 2011
Fairmont Scottsdale, Scottsdale, Arizona

©2011 American Bar Association
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Mock Juror Recruitment</td>
<td>3</td>
</tr>
<tr>
<td>The Benefits of Early Research</td>
<td>5</td>
</tr>
<tr>
<td>Research Options</td>
<td>6</td>
</tr>
<tr>
<td>Focus Groups</td>
<td>6</td>
</tr>
<tr>
<td>Focus Group Format</td>
<td>6</td>
</tr>
<tr>
<td>Mock Trials and Deliberation Groups</td>
<td>10</td>
</tr>
<tr>
<td>Deliberation Group Format</td>
<td>11</td>
</tr>
<tr>
<td>Mock Trial Format</td>
<td>11</td>
</tr>
<tr>
<td>Damages</td>
<td>13</td>
</tr>
<tr>
<td>Mediation and Settlement Negotiations</td>
<td>14</td>
</tr>
<tr>
<td>Privilege Issues</td>
<td>15</td>
</tr>
<tr>
<td>Voir Dire</td>
<td>16</td>
</tr>
<tr>
<td>Preparation for Voir Dire</td>
<td>16</td>
</tr>
<tr>
<td>Juror Questionnaires</td>
<td>17</td>
</tr>
<tr>
<td>Court Logistics</td>
<td>17</td>
</tr>
<tr>
<td>Preparing the Questionnaire</td>
<td>18</td>
</tr>
<tr>
<td>The Voir Dire Itself</td>
<td>21</td>
</tr>
<tr>
<td>Conclusion</td>
<td>23</td>
</tr>
<tr>
<td>FOOTNOTES</td>
<td>24</td>
</tr>
</tbody>
</table>
BENEFITS OF JURY RESEARCH FOR DISCOVERY, MEDIATION, VOIR DIRE AND TRIAL

If you have selected your jury, not in order to win the case but to develop in them a tolerance for your cause, I beg of you to believe that’s all you can do in selection of a jury. You can’t win it at that point. You can lose it. You can’t win it. Just let the jury know by your questioning and demeanor that you are a lawyer dedicated to the truth, that you will have an exciting interesting case to present to them, that you will present it to them with the best skill of which you are capable, that you will ask for no verdict not borne out by the evidence, and let it go.

- Moe Levine

Introduction

Taking a complicated construction case to a jury causes many lawyers significant heartburn. Lawyers worry about whether juries, typically composed of individuals with little to no construction experience, can follow and comprehend construction-specific issues – delay damages, design defects, loss of productivity claims – just to mention a few.

The makeup of a jury, however, can heavily influence the outcome of a case. Jury research can help the lawyer assess the riskiest attitudes and background characteristics of potential jurors so those jurors with pro-plaintiff and pro-defense leanings can be identified before trial. It can also assist the lawyer in identifying problematic responses to case-specific issues and getting reactions to the testimony of key witnesses. It can identify those issues jurors give little weight to and those the lawyer might not have considered that are important to a jury. Finally, it can help the lawyer develop themes and sub-themes that will make the case more understandable to a jury.

There are, broadly speaking, two primary benefits which the construction lawyer derives from jury research. One is issue identification and the development and refinement of themes
which the lawyer will use to present her case. The other is the identification of individual juror characteristics which will be used to assess individual jurors during the voir dire process.

The savvy trial lawyer wants to know every way she can lose her case. Jury research can help identify the land mines which can lead to an adverse verdict. Armed with that knowledge, she can shape her themes, and her voir dire, to address those issues. The goal for the construction lawyer, properly armed with jury research, is to end up with a jury where no member is prejudiced and each has a “tolerance for your cause.”

A variety of jury research methods is available to the trial attorney in a construction case. Not every case requires the full court press. Even limited jury research can help the lawyer present her case with added confidence. Every case, even the smaller case with a limited budget, can benefit from some form of jury research. The timing and choice of method, from a small focus group to a full-blown mock trial with videotaped or even live testimony, is dictated by several factors, including the nature of the case, the amount at stake, the case budget, client attitudes and prior experience with research. Choice of method may also depend on timing. An informal (and inexpensive) focus group may be called for in the early stages of a case, while more extensive and sophisticated methods, such as deliberation groups or mock trials, may be in order once issues are fully defined and the facts fully developed.

The various types of pre-trial jury research can be tailored to fit most budgets. There are several factors that can affect the cost of the project. Although not an all-inclusive list, the primary factors are: 1) the number of jurors who participate in the project; 2) the number of jury panels used (e.g., three groups versus two); 3) the number of days the test spans (e.g., one day versus one and one-half days or two full days); 4) the type of facility engaged (e.g., market research facility versus hotel); and 5) an executive report versus a full bound report. Smaller
venues often do not have market research facilities available, so the costs are often higher when a hotel, caterers and audio-visual professionals have to be retained for the project. It is important to remember, however, that the often substantial lawyer preparation that goes into preparing for jury research is required work. It may force the lawyer to focus on issues earlier than she might otherwise do, but it does not create more work.

While there are a number of goals to conducting pre-trial jury research, the type of project one designs should be based on the proximity to trial and what questions need to be answered. The project format guides the type of information that jurors will provide. The main categories of pre-trial research are focus groups and deliberation groups or mock trials. Each is discussed in this paper.

Effective jury research typically yields valuable information for development of themes and identification of favorable and unfavorable characteristics or traits. To maximize effectiveness, both theme development and trait identification need to be married to a third area of jury research, the accumulation of personal data about each potential juror. While there are invariably some barriers to the accumulation of such data, the creative jury consultant can typically develop a useful snapshot of potential jurors, which promotes intelligent evaluations of individual jurors by the trial team at voir dire. Depending on the case, a jury consultant can assist in developing voir dire questions, help create jury questionnaires and even assist the trial team in “deselecting” those jurors with unfavorable traits during jury selection.

Mock Juror Recruitment

Mock juror recruitment is one of the most important features of good jury research. If the mock jurors are not representative of actual jurors, the feedback received loses validity. Recruiting from unemployment agencies, Craigslist, Facebook, personal circles of friends, and the like, is the least valid form of recruitment and inserts a substantial risk of bias and error. The
goal of any research is to reconstruct as closely as possible the trial venire, demographically and attitudinally, anticipating as accurately as possible the effects of hardship excuses and cause strikes on the composition of the jury. The "cleanest" recruits are via a combination of random-digit dialing and "virgin" referrals (versus database, newspaper or telephone directory recruiting). This provides a more representative sample of jurors, and, from a methodological standpoint, more confidence in generalizing results to the larger jury pool.

Participants also need to be rigorously screened prior to attending the research project to:

1) preserve the project confidentiality, and 2) ensure a representative panel of jury eligibles.

Screening procedures anticipate case-specific screening, such as reducing the number of self-employed or unemployed for cases in which local counsel anticipates liberal hardship excuses. To protect project confidentiality further, jurors upon arrival are given a written confidentiality agreement to review and sign, and then consultants discuss the terms of the agreement with the mock jurors before and after the research project. In cases venued in small towns or with heightened security (e.g., protective orders, etc.), checking juror cell phones and any other potential recording devices becomes necessary. Often, with very small venues, a surrogate location is identified that has the same demographic, political, and community profile in order to better protect the confidentiality of the case.

In any research, when mock jurors arrive they complete a long background questionnaire that collects information about their past experiences, their attitudes and demographic information. At the start of any project, this is used as a check-and-balance system to ensure confidentiality and to eliminate any jurors who may have a heightened interest in the case. At the back end, this data is entered into a database and submitted to a quantitative analysis that distinguishes the strongest plaintiff supporters from their defense counterparts. This analysis and
report drives the key issues to address in voir dire and highlights the riskiest responses on jury questionnaires at trial.

**The Benefits of Early Research**

Experienced construction lawyers are accustomed to the practice of developing themes as the case progresses. These themes are typically brief summaries of entire stories. Case themes are developed as part of the process of issue identification, a process which typically begins immediately upon retention by the client.

Many trial lawyers suggest that jury research begin as early as possible in a case. Early research has some obvious benefits. It fosters early identification of potential problem areas, gives broad-based feedback to developing issues, and helps the lawyer develop case strategy for discovery, particularly depositions.

In any serious construction case, being able to give the deposition witness a road map of hazardous issues is strategically important. Early jury research and articulation of themes enables the trial lawyer to prepare her witnesses more thoroughly. A witness who is well acquainted with the party’s positions on a variety of issues is better able to respond to questions informed by the context, and less likely to stumble into a damaging answer.

A substantial collateral benefit of early research is the aspect of self-discipline. It forces the lawyer to articulate issues, arguments and themes that might otherwise remain undeveloped. Many of us have sat at lengthy depositions in construction cases with deposing counsel who has neither asked himself nor answered the question, “Why am I taking this deposition?” The result is inane questions such as, “Is that your signature on the third page of exhibit 78?”
Research Options

Options to choose from generally come down to focus groups, deliberation groups or mock trials, although telephone surveys may be an economical approach to research where budget concerns exist. Another option is a brainstorming session with a jury consultant.

Focus Groups

The focus group format is often more helpful before the close of discovery or while the trial team is still fleshing out the major themes and storylines. Because this format encourages repeated and prolonged juror commentary on case issues, it often provides insights into what information jurors need to see in trial (and therefore what may need to be addressed in discovery), what witnesses need to deliver, and the most compelling storyline for the case. Jury researchers frequently recommend a concept focus group during the early stages of a case. The group can be small to keep costs down. What the lawyer is looking for is to gauge general reaction and feedback to his themes. The fine tuning will come later, after facts and issues have been developed through discovery.

Focus Group Format

Focus groups are a type of “inductive” jury research. In the early stages of the litigation, several positive and negative facts have been accumulated in discovery. The challenge is to distill these facts into appealing themes that comport with jurors’ predispositions and experiences and to develop trial strategies that maximize the effectiveness of themes and evidentiary strategies. A focus group format elicits juror reactions and questions in response to broad-brush presentations.

Focus groups identify the questions, issues and themes most important to jurors who arrive with some knowledge (and many opinions), while, at the same time, exploring the reasons (including personal experiences and anxieties) why these questions are important, discovering
juror expectations regarding these questions, and testing juror reaction to alternative answers to
their questions. This type of research is designed to discover what is important to jurors absent
assumptions about what jurors know or think (from a social psychology perspective), and before
committing to themes in ways that blind the lawyer to juror-initiated themes.

In general, the focus group format is designed to achieve three overlapping goals. Mock
jurors respond to case facts by reporting what questions they need answered in order to decide
who is “right” and who is “wrong,” and why each question and each potential answer is
important. Additionally, in their own words, jurors offer case themes and a case story that rely
heavily on their experiences and inferences to say what “really happened.” Finally, jurors offer
insights into how these research-based findings may be incorporated into the lawyer’s case
strategies moving forward.

The focus is on the emotional and cognitive reactions of group participants to the key
strengths and vulnerabilities of each side’s case in a quasi-adversarial setting that anticipates the
basic emotional and cognitive demands on jurors. In some focus group formats – either because
it is a very complex case or because the lawyers may want to test a potential opening statement –
the overview of the case issues will be presented to the panel of mock jurors via adversarial
opening statements by counsel. In more traditional focus group formats, the point/counterpoint
presentations of case stimuli and facilitation of individual and group responses to these stimuli
are conducted by the consultants, which offers more neutral ground for jurors and an overall
atmosphere that encourages discussion. Focus group participants are typically informed at the
start of the process that the research is being conducted in a real case, is being put on by both
sides, is a form of alternative dispute resolution and that they are “real” mock jurors whose
decisions will affect the direction of the case. This disinformation eliminates the tendency of participants' responses to be skewed in favor of the sponsoring party.

To test the case, it is broken up into key elements. First, a brief and bare-bones case overview is presented to jurors to assess their initial reactions, what they believe they will need to hear from each side to prove their cases and what their a priori predispositions to the case stories may be. The lawyer typically prepares written submissions which describe each party’s positions on an issue. These submissions incorporate expected testimony from witnesses and excerpts from key documentary evidence. Then three to five of the most important case issues are presented in separate "modules," with a plenary discussion with jurors after each one to dive further into their reactions and views on the issues. Jurors’ confusion about facts and issues, unexpected reactions and questions tend to be very helpful in ascertaining the vulnerabilities and strengths of each core issue. The groups are then asked to respond to a verdict-type questionnaire, typically developed jointly by the jury consultant and the trial team. From this questionnaire, along with "post-verdict" interviews, an understanding of personal characteristics of potential jurors can begin to be formed. An alternative to this typical format is to present the case in stages, getting feedback from the group before moving to the next stage.

Careful preparation of the focus group submissions is critical. Care must be taken to present each party’s positions with a clinically objective view of the evidence to support that position. It is inevitably more difficult to give voice to the adversary’s position, since the writer has endeavored to destroy that position for months or years. But an accurate, balanced presentation is critical to obtaining the objective information that can be relied on as the case moves forward to trial.
Focus groups are a flexible tool. Multiple groups can be convened at the same time, providing a broader range of analysis of group reactions and interactions. Groups can be convened consecutively, allowing adjustments to theme presentations in response to feedback from prior groups. Throughout the research, the mock jurors respond to the alternative factual claims via open-ended questionnaire responses and by participating in plenary facilitated discussions that: 1) encourage them to pose the questions they would want answered; 2) ask them why each question is important; and 3) encourage them to explore the significance of alternative answers to their questions. The qualitative data is then analyzed and compiled into a comprehensive report in which jurors’ responses are divided based on their pro-plaintiff or pro-defense leanings. This offers rich insights into jurors’ own versions of the case stories, as well as potential thematic issues that resonate with jurors in the venue.

Ideally, at least two mock focus groups are recruited. For much of the day, they hear presentations and conduct discussions as a larger group (a total of approximately 20-24 mock jurors). One to two times during the day, they break out into smaller juries of 10 to 12, for small group debriefings and even quasi-deliberations if desired. It is important to keep this type of research to no more than 24 jurors because it becomes difficult for jurors to find their voices in a larger group and it becomes difficult to hold small-group discussions with more jurors.

Given that a major goal of any pre-trial jury research is to discover a case’s vulnerabilities – areas in which your adversary may gain more traction with jurors in trial – sometimes it can be helpful to conduct more than one jury research session over the course of weeks or months to revise themes and the storyline in an attempt to reduce those vulnerabilities. The effects of these changes to your case or to new evidence can be tested with a new mock jury panel, providing the trial team with a before-and-after snapshot of the effectiveness of their
themes and changes over time. More often than not, however, the second stage of jury research develops into a deliberation group or mock trial format to more formally test the updated themes and storyline based on prior juror responses.

Mock Trials and Deliberation Groups

With discovery complete, facts and issues have been fully developed. At this point, the experienced lawyer has developed themes tailored to his case. Jury research can refine those themes, test potential juror reaction to them, and help develop a body of information about favorable and unfavorable juror characteristics. After discovery, emphasis can begin to shift to potential juror attitudes, traits, values and other characteristics.

Mock trials or deliberation groups are the most frequently used alternatives to focus groups. Closer to trial, the lawyer typically will have a sense of the evidence that jurors will hear in trial, the story he wants to tell, and the major themes and sub-themes that will carry the case and the witnesses through trial. Because more quantitative data is collected in a deliberation group or mock trial format, a statistically-derived jury profile of the strongest pro-plaintiff and pro-defense jurors can be created to aid in the development of voir dire questions and a juror questionnaire. A deliberation group or mock trial research format is often best suited to testing jurors’ reactions to the evidence, assessing how well the case themes resonate, and providing a verdict-driven result. In this type of research, two to three jury panels are convened together, openings and closings are made, attorneys and witnesses give (abbreviated) testimony and present key documentary evidence to the jury, attorneys give closing arguments and jurors are read relevant jury instructions before breaking into two to three deliberating panels. Then, each jury deliberates, provides a verdict, and participates in moderated post-verdict interviews. Two different forms of this deductive test are outlined below. With any type of study, however, the
insights derived from jurors are invaluable, as they often offer ideas, themes and storylines that had not yet been considered.

**Deliberation Group Format**

A deliberation group is a form of “deductive” jury research. The deliberation group resembles closely the more traditional models of jury research. It differs from the mock trial in that its emphasis is more on thematic development and less on witness evaluations. Lawyer presenters first give short, informational openings. Then each side is allocated a balanced amount of time to present its “case in chief.” This presentation typically includes presentation of key documents and, where appropriate, short excerpts of actual or surrogate witness testimony regarding the integral issues. Following the defense presentation, the lawyers have a short opportunity to present closing arguments to summarize their themes. As part of closings, the plaintiff can give a short rebuttal to better simulate the trial structure and to minimize the possibility that the jurors are unduly influenced by the recency effect of hearing from the defense last. At key junctures throughout the test, jurors complete interim questionnaires indicating their leanings and the underlying rationale. After the lawyer presentations, jurors are read a truncated set of jury instructions, are divided into 10 to 12-person juries (two to three juries, as the budget allows), and deliberate in response to verdict-form questions. Following these deliberations, each group is debriefed by a consultant to gain additional insights into jurors’ reasoning. The addition of a deliberation segment, prior to a consultant-facilitated debriefing, assists in determining how group interaction and jury room advocacy affects jurors’ decision-making.

**Mock Trial Format**

The mock trial design is also a form of “deductive” jury research. It differs from the deliberation group in that it reflects more closely the information-giving style of trial. The most pronounced benefit to a mock jury trial is verisimilitude. It is very much like the real thing.
In a case where there are potentially explosive issues, mock trials can provide critical feedback. How best to handle presentation of evidence that the president of the lawyer’s client was convicted of a felony? What can the lawyer expect a juror’s reaction to be to an important but colorless witness? A young man in an important position on a large scale project? A mock trial can provide helpful insight on witnesses and many other issues. The mock trial also allows the lawyer to test reactions to key exhibits or demonstrative exhibits he is considering using at trial.

For longer test designs (e.g., one and one-half to two day formats), a mini voir dire can be conducted in the beginning to practice the questioning process and determine some of the more effective lines of questioning. Then jurors hear a brief opening statement from each side. In contrast to the deliberation group format, instead of a summarized case via the lawyers, jurors hear the evidence and the case themes and storyline through witnesses. Witnesses can be presented in video, as surrogates or in person. For the opposition, witnesses are typically presented in video from depositions or via surrogates. Jurors hear closing arguments, are given jury instructions and deliberate based on a verdict form. Just as in the deliberation group design, a consultant follows up each group’s deliberations with a moderated discussion to further explore issues that were raised or to clarify other issues. Mock trials at market research facilities typically benefit from rooms with one-way mirrors, allowing the lawyers to actually be “flies on the wall” as the juries deliberate. In venues other than research facilities, a closed-circuit viewing room allows attorneys and clients to watch all the groups deliberate simultaneously on separate televisions while wearing headphones that allow them to flip between each group at will.
**Damages**

Whatever methodology is used – focus group, deliberation group or mock trial – the process typically yields some type of decision on damages, in addition to the variety of information and reactions to themes discussed above. Frequently, the damage awards are stated in ranges, with mock jurors voting their preferred category. There is a tendency among clients and some trial lawyers to regard a damages decision by a mock jury as predictive of the likely result after a jury trial. This predictive factor is a matter of significant controversy among jury consultants, with most taking the position that it is dangerous to rely on damage awards obtained in research as an actual predictor of results at trial.

It is important to remember that the jury research medium is not a real jury trial. Complex construction cases often take several weeks or even months to try. Frequently, one side’s position is simpler to understand, or superficially appealing compared to the other side’s. But over weeks or months, flaws in the position may become apparent, which were less obvious in the first few days of trial, and which cannot be effectively presented in the abbreviated format of a focus group or a mock trial.

The primary benefits of jury research are to be derived from an understanding of attitudes, biases and other individual characteristics and how they affect issues in the case.

> [In] a focus group or mock trial, the goal needs to be to test the strength of the opposition, more than to see what the range of damages is or whether you will “win” at the end of a three week trial. This is small group research, and it should not be considered predictive of a full jury trial.\(^iv\)

The main focus of jury research should properly be on what process the jurors used to reach the result – how do jurors process the key issues in the case? Jury research should not be done with the primary goal of predicting what verdict the client is likely to receive.
Mediation and Settlement Negotiations

Few large construction cases, whether jury or non-jury, reach trial today without at least one mediation being conducted. Even if the parties do not seek mediation, it is likely to be ordered by the court.

A critical part of any careful preparation for mediation is the assessment of the case by the lawyer and the client. The influence of information derived from jury research on that case assessment can be substantial.

Pretrial research can enable attorneys to be more confident about the possibility of winning a case (and thus approach settlement with different expectations) or be more soberly realistic about the chance of losing (and thus decide to change a settlement demand or increase an offer)."n

Jury research can be a wake-up call for the lawyer who is too enamored with his case, themes and strategies. The same holds true for clients. The overconfident CEO who has assumed the obvious justice of her company’s position may dramatically reassess the case after a focus group’s hostile reaction to the company’s presentation.

An emerging trend in recent years is the express reference to jury research results in mediation and settlement discussions, where lawyers are increasingly using jury research as part of their presentations. There is a tendency, given the standard format of mediation, to focus on the predictive aspect of jury research, such as the verdict ranges chosen by members of a focus group. To be persuasive, the presenting lawyer must be prepared to demonstrate that the results of the jury research were based on a fair and accurate presentation of his opponent’s position.

One prominent researcher has observed, in noting that jury research has evolved from identification of jury biases to the growing use of jury research to influence mediations:

A sea change in the very nature of jury research has thus occurred. . . .
Now, the researchers are not only interested in identifying jury attitudes and assessing their impact. During mediation and settlement negotiations, they are also using research to show what will most likely happen during the reward phase of the case, based on predictable jury attitudes. In other words, the research itself is now materially relevant to the negotiations and deliberations at hand.\textsuperscript{vii}

Even unsuccessful mediation produces certain benefits for subsequent jury research. Mediation typically requires the parties to marshal the facts and expose their positions, providing an added layer of confidence to the statement of those positions in subsequent presentations to a focus group or a mock jury.

Finally, mediation inevitably provides the client with a more detailed understanding of the case, especially the adversary’s case. A focus group or mock trial, which incorporates learning gained in mediation, often results in a client who is more practical about the realities of trial and the benefits of settlement.

\textit{Privilege Issues}

Issues can arise about privilege and waiver of privilege with respect to jury research and the use of jury consultants as part of the trial team. These issues have been largely put to rest by the widely-followed decision of the Third Circuit Court of Appeals in \textit{In re Cendant Corporate Securities Litigation}, 343 F.3d 658 (3d Cir. 2003). \textit{In re Cendant} held that a trial consultant’s work product is protected by the attorney work product doctrine. It is nevertheless advisable to obtain a signed confidentiality agreement from any jury consultant retained by the trial team. As mentioned, it is also standard practice to obtain signed confidentiality commitments from each of the individual participants and vendors used (e.g., videographers, recruiters) in the focus group or mock trial.
**Voir Dire**

It is critical to know all that you can about the voir dire rules in your court as far in advance as possible. For example, who questions the jurors – the lawyer or the judge? Will the judge allow a written questionnaire? Those rules will determine the extent to which you can use information about individual jurors to make intelligent decisions about who to keep and who to strike. Examples of possible pre-voir dire questions for the court clerk are attached as an appendix to this paper.

**Preparation for Voir Dire**

Generally, trial lawyers are a confident breed, comfortable in the application of common sense and instinct to the selection of a jury. But empirical research on jurors in recent years has demonstrated that many of the claims lawyers have traditionally made about jury behavior are suspect. It is common for jury research to turn up a surprise or two about potential jury bias which contradicts common-sense expectations or lawyers’ rules of thumb.

The traditional focus of the lawyer during voir dire has been on what may broadly be called juror demographics. The more modern view among jury researchers is that demographics are but one aspect of the picture and reveal little reliable information regarding a juror’s beliefs and life experiences.

Voir dire focused only on juror demographics offers very little insight into potential jurors’ inherent biases, deeply-held prejudices, and overall world views. Knowing what individuals believe, how they interpret life, and the filters through which they make judgments is of far greater value than knowing where they live and what they do.

Jury research has grown increasingly sophisticated in recent years, and increasingly successful in revealing implicit bias in potential jurors. The goal should be to learn as much as possible as early as possible about the individuals who may be chosen to decide the case.
Juror Questionnaires

Voir dire has the dual purpose of facilitating the selection of a fair and impartial jury and aiding the informed exercise of the parties’ peremptory and cause challenges to prospective jurors. Courts have recognized the general rule that investigation into prospective jurors’ backgrounds should be permitted, to enable parties to exercise their challenges intelligently. The juror questionnaire is key to collecting information for voir dire.

Prior to submission of any proposed questionnaire to potential jurors, the court will typically screen the proposed questions to determine which should be submitted and which excluded. The parties are then notified and given a chance to demonstrate relevance to the court. Decisions regarding the content of jury questionnaires rest within the sound discretion of the trial court.

The content of the questionnaire should be drafted with the goals of uncovering a juror’s beliefs and life experiences, and learning about a juror’s demographic information. From the responses to the questionnaires, the jury researcher can match answers to the assortment of favorable and unfavorable characteristics developed during earlier research. The researcher can then create a profile of the potential jurors, and a corresponding assessment, or ranking, for each juror. This ranking facilitates quick reference during voir dire, when time is invariably short.

Questionnaires are useful too because they tend to elicit more candid information from the individual, than would be provided by that same individual at voir dire. Questionnaires “have been shown to reveal juror biases which are not usually discovered during oral voir dire.”

Court Logistics

Most courts today are receptive to the use of juror questionnaires. In fact, many courts have standard questionnaires which are used in every jury case. Where a standard questionnaire
is in use, the trial lawyer will normally seek to have questions added by way of a supplemental questionnaire. If a standard questionnaire does not exist, the lawyer and his consultant will need to prepare one from scratch.

Court approval needs to be obtained for both the distribution of the questionnaire and its content. This is typically a housekeeping matter raised at a pretrial conference. It is preferable to discuss the logistics with one's opponent first, and obtain his consent before presenting the matter to the judge. Given the likelihood in any significant case that both sides want juror information, agreement on the matter of sending out questionnaires is typical. Agreement on content of the questionnaires is less so. It frequently happens that each side submits a proposed questionnaire to the court, which selects questions from the proposals.

There are advantages to the court in the use of juror questionnaires, which may need to be pointed out to the judge who resists their use. Questionnaires serve an important pre-screening function and can save significant time for the court and the parties during voir dire. A judge who is convinced that questionnaires will provide information helpful to deciding for-cause challenges is likely to be more inclined to allow juror questionnaires. Construction cases generally tend to last significantly longer than many other civil cases and hardship issues due to predicted trial duration are inevitable. Questionnaires can target jurors who are unlikely candidates for long trials.

Preparing the Questionnaire

The jury questionnaire is typically the joint work product of the trial lawyer and the jury research expert. The questions must be designed to elicit information about the personal characteristics of the potential juror, characteristics which were identified as important in jury research. A sample supplemental juror questionnaire is attached as an appendix to this paper.
Typically, by the point at which the jury questionnaire is prepared, the trial lawyer has received and analyzed the findings of the jury research expert. Those findings may have pointed out traits with a high probability of positive or negative impact to your case. Let's say, for instance, that jury research has identified a college degree and computer proficiency as two items which favor the trial lawyer's case, both unrelated directly to the issues in the case. A question regarding education level achieved will probably be approved for the questionnaire, while a question about computer proficiency may not. But the information may be gleaned indirectly by other questions, such as how the individual gets his news. The experienced jury research expert can be expected to provide substantial assistance in composing questions which will provide important information for assessing jurors.

There is also a strategic facet to the preparation of the questionnaire. Proposed questions which target areas of bias identified in jury research can inadvertently reveal aspects of the proposer's jury selection strategy. The proposing lawyer will normally prefer to have that strategy remain confidential. It is advisable to keep the issue in mind when drafting the questionnaire, and perhaps camouflage the direction of certain questions.

In some jurisdictions, questionnaires are sent to potential jurors in advance of trial. In others, jurors are asked to complete the questionnaires when they arrive for jury selection. If they have been sent in advance, someone from the trial team needs to monitor their return, and arrange to obtain copies from the court clerk on an expedited basis. If questionnaires are not distributed until trial, there is obviously less time to evaluate them. But in any event, once the questionnaires are obtained, the jury researcher can begin the process of evaluating and profiling potential jurors. This typically involves establishing a ranking of each potential juror, using a
system which assigns a numerical rank indicating the probability of favorable or unfavorable predisposition for that juror.

Do not ignore other sources of information about the individuals on the voir dire panel. Internet research is a valuable tool, which is useful even where little prior information has been obtained. Does the juror own a home? Where is it located? Has she made political donations, and to whom? Jury research experts are typically familiar with specialized databases which allow rapid retrieval of a broad array of information about individuals. Social media such as Facebook and Twitter provide another fruitful resource for juror information, much of it informal and candid. And because courtrooms today are increasingly laptop and internet friendly, the research can often be conducted in the courtroom. An internet search of each juror can sometimes provide enlightening information. Even though infrequent, finding a blog, twitter, articles, etc. online that contradict a juror’s responses in voir dire or on the questionnaire can be very useful in challenging a juror for cause. For example, a juror may attempt to appear neutral or positive about his views on corporations in order to get on a panel, but his MySpace page links to his blog where he promotes strong views on socialism and governmental control of “evil corporations.” Especially when voir dire is very limited, any extra information can be helpful in assessing a juror’s personality or world view.

The construction lawyer’s client may also have access to useful information. If the trial lawyer is representing an electrical power company in a delay claim case arising from power plant construction, the client has a huge database of customer information which can be useful. (The trial lawyer who represents the contractor should consider moving the court for an appropriate order limiting use of such information, or mandating sharing.)
The Voir Dire Itself

The most important goal of voir dire is to remove unfavorable jurors by the exercise of challenges, preferably for cause but, if necessary, by peremptory challenge. This goal is typically described by jury researchers as “deselection.” “In order to do this, you must develop profiles of the jurors who will be favorable and unfavorable and develop voir dire questions which will provide you with the information you need to identify those jurors during voir dire.”

Effective deselection of jurors is based on a psychological approach to conducting voir dire, designed to target jurors whose beliefs prevent them from an open and fair hearing of the lawyer’s case.

The trial lawyer’s questioning at voir dire is intended to complete, as nearly as possible, the process of gathering personal information about jurors, initiated in the questionnaires. Like the juror questionnaire, questions at voir dire are directed to juror beliefs and life experiences, and, to the extent not made available in questionnaire responses, demographic information. At voir dire, the lawyer also begins to explore key evidence and themes.

We stated earlier that it is important to learn everything possible about the voir dire itself long before it takes place. That knowledge is put to use once the voir dire starts.

It sometimes seems that there are as many different approaches to voir dire as there are different courts, at least on the state court level. In New York, attorneys typically conduct voir dire without court supervision. In California, attorneys conduct voir dire in open court, with the judge present. In Connecticut, attorneys conduct wide-ranging individual voir dire outside the presence of the court. In most Federal courts, the court conducts voir dire, although the court is typically open to suggested questions from the lawyers. A recent survey found that in nearly
70% of federal district courts, voir dire is conducted predominantly or exclusively by the court, while more than half of state courts leave voir dire to the lawyers.\textsuperscript{xxiv}

Commentators have increasingly noted that court-conducted summary voir dire does not begin to target the pervasive influence of implicit biases in jury selection.\textsuperscript{xxv} Today, support is growing for more extensive voir dire than the rapid, perfunctory questioning directed to obtaining the juror’s commitment simply to follow the law, favoring instead lawyer-conducted questioning and individual voir dire.\textsuperscript{xxvi} Principle 11 of the ABA’s Principles for Juries and Jury Trials, while falling short of express endorsement of lawyer-conducted voir dire, declares, “Courts should ensure that the process used to empanel jurors effectively serves the goal of assembling a fair and impartial jury.”\textsuperscript{xxvii,xxviii} All of which is to say that the construction lawyer faced with judge-conducted voir dire should consider moving the court to allow individual questioning by the lawyers.

Unless budget or other considerations preclude it, it is wise to have the jury research expert at the voir dire. She is experienced in assessing positive and negative traits, has established the profiles of favorable and unfavorable jurors, and can be expected to provide concrete insights about which jurors should be passed and which dismissed. She can also efficiently sort information in jurors’ answers to update previously prepared juror profiles. This allows the lawyer to concentrate on the voir dire questioning.

It is imperative that the relevant juror information be at the trial team’s fingertips for ready reference. It is of little use to accumulate extensive data on individual jurors if that information cannot be put to good use in deciding, during what is frequently an all-too-brief period, whether to keep a juror or exercise a strike.
Conversely, if the voir dire is a more relaxed affair, juror responses to lawyers’ questions, body language and attitude can be assessed, with a corresponding adjustment being made to the previously determined ranking for that jury. Dramatic swings in ranking of jurors during voir dire are not uncommon; after all, the pre-voir dire rankings are entirely based on extraneous information provided by the questionnaire and other sources.

Just as it is critical to know the court rules regarding voir dire, it is just as important to know the rules regarding selection of the jury itself. Is the selection via the struck jury method? Modified struck jury? How many alternates? If a juror is passed by both parties, is he then seated or may a party thereafter exercise a strike regarding that juror? Knowledge of all the details is critical to intelligent and efficient employment of the jury research which the trial team has accumulated by dint of much effort and great expense.

Most important of all, do not lose sight of the ultimate goal of jury research -- to choose a jury with tolerance for your cause. This means using the available means to discover, isolate and dismiss those jurors with biases that can sink your case.

Conclusion

Jury research today should be a standard practice for the construction lawyer who faces a jury trial. Jury research comes in all types and sizes and fits a variety of budgets. The advantages of research are substantial, both in the area of theme development and issue identification, as well as the targeting of individual juror characteristics and their effect on specific case issues.

Most important of all, do not lose sight of the ultimate goal of jury research -- to choose a jury with tolerance for your cause. This means using the available means to discover, isolate and dismiss those jurors with biases that can sink your case.
FOOTNOTES


3. Dan K. Webb & J. David Reich, Jury Research, NATIONAL LAW JOURNAL, Sept 24, 2007, at 19, col. 1. “Telephone surveys are relatively easy to conduct once the themes of the case are clear. These surveys enable counsel to gain insight into the participants’ reactions to important aspects of a case well before trial begins.”


12. United States v. $94,000 in U.S. Currency, 2 F.3d 778 (7th Cir. 1993).


15. Matthew Ferrara, Psychology of Voir Dire, THE JURY EXPERT, Nov. 2010, at 33, 34 (hereafter “Ferrara”). Although Ferrara’s article concerns voir dire, the noted topics are at least equally suited to juror questionnaires.

16. DECISION BY TRIAL, at 92.
17. Judge Barbara M. G. Lynn (USDJ) conducts an informative review of juror questionnaire logistics in her court, while endorsing juror questionnaires generally, in A Case for Jury Questionnaires, Litigation, Summer 2007, at 3.


19. Decision by Trial, at 19.

It is useful for the trial lawyer to keep in mind that internet resources are available to veniremen and jurors too. Whatever the court may say to jurors about not consulting references, it would be naïve to assume that jurors are not googling the lawyers, the judge, and witnesses, particularly during the course of an extended trial.

21. Decision by Trial, at 93.

22. Ferrara, at 34. Ferrara describes voir dire as “the process of identifying jurors with beliefs that prevent them from a fair hearing of your case.”


25. Id, at 50; Mark Bennett (USDJ), Unraveling the Gordian Knot of Implicit Bias Jury Selection, Voir Dire, Summer, 2010, at 4.


STATE OF SOUTH CAROLINA  
COUNTY OF   

Construction, Inc.,  
Plaintiff,  

vs.  

Electric & Gas Company,  
Defendants.  

Civil Action No.  
(Action No. 1)  

PROPOSED  
SUPPLEMENTAL JUROR QUESTIONNAIRE
This questionnaire is to be used for court-related purposes in this case, and will be held in confidence. Only the parties involved and court personnel will have access to this information.

1. Juror Name: ____________________________________________
   Address: _______________________________________________
   City/State/Zip: ___________________________________________
   Home Phone: _____________________________________________
   Work Phone: _____________________________________________

2. Do you rent or own your home? Rent _____ Own _____

3. How long have you lived at this address: ________________________

4. How old are you? __________________________________________

5. What is your educational background? Please check highest level of education.
   _____ Less than high school
   _____ High school diploma/GED
   _____ Technical, business, or two-year degree
   _____ Some college, but no degree
   _____ College degree in __________________________
   _____ Post-graduate work or degree in __________________________

6. How would you describe your health? ____________________________

7. Do you have any health problems that would make jury service difficult or which would need special accommodation? If yes, please describe briefly.
   ________________________________________________________

8. What is your current job status and occupation?
   _____ Full-time employed as a _________________________________
   _____ Part-time employed as a _________________________________
   _____ Unemployed (formerly a _________________________________)
   _____ Retired (formerly a _________________________________)
   _____ Homemaker (formerly a _________________________________)
   _____ Full-time student in _________________________________

9. Who is your current (or most recent) employer and what is (was) your job title?
   Employer _____________________________________________
   Job Title ______________________________________________
10. Have you ever had any special training or work experience in the following:

Engineering: Yes ______ No (please specify area, e.g., civil, structural mechanical, electrical, etc.)

Resident or Commercial Construction or Construction Management: 
Yes ______ No (please specify location and nature of experience)

Science: Yes ______ No (please specify area, e.g., chemistry, physics)

Commission Sales: Yes ______ No

Non-Commission Sales: Yes ______ No

11. Please list other jobs you have had in your adult life.

________________________________________________________________________

________________________________________________________________________

12. Who is your electric company? 

Have you ever had a bad experience involving billing or service with your electric company?

Yes, bad experience with billing ______

Yes, bad experience with service ______

No bad experiences ______

Please explain the circumstances of your bad experiences, and how satisfied or dissatisfied you were with the outcome: ____________________________

________________________________________________________________________

13. Have you ever served in the military? Yes ______ No ______

Branch of service ______ Rank at discharge ______

Years of service ______ Honorable Discharge? Yes ______ No ______

14. Marital status:

Never married _____ Divorced _____

Married (____ years) _____ Widowed _____ Other ______
15. If currently married, please provide the following information:

Spouse's education: ____________________________
Spouse's employment status: ________________________
Spouse's employer and occupation: ____________________________
Other jobs held by your spouse: ____________________________

16. Do you have children?  ____ Yes  ____ No

If yes, please list the names, ages and occupations of your children.

____________________________________________________
____________________________________________________
____________________________________________________

17. What professional or job-related organizations, if any, do you belong to (e.g., union, etc.)

____________________________________________________

18. What is your opinion regarding paper mills?

____________________________________________________

19. What is your opinion regarding the Electric and Gas company and

____________________________________________________

20. What are your hobbies, special interests, recreational pastimes and other spare-time activities, including sports?

____________________________________________________

21. What is/are your primary source(s) of news:

____ TV  ____ Newspaper  ____ Radio

____ Magazines  ____ Other

What magazines and newspapers do you regularly read?
22. Have you ever been a member of a professional or job-related organization 
(including labor unions)?  _____ Yes  _____ No  
If yes, identify the organization(s): ____________________________________________ 
_________________________________________________________________________ 
_________________________________________________________________________ 
23. What social, political, civic, religious, and other organizations do you belong to or 
are you associated with? __________________________________________________________ 
_________________________________________________________________________ 
_________________________________________________________________________ 
24. Have you displayed any bumper stickers on your automobile in the last twelve 
months?  _____ Yes  _____ No. If yes, please describe each bumper sticker: 
_________________________________________________________________________ 
_________________________________________________________________________ 
25. Have you ever felt that an employer has taken advantage of you? 
_____ Yes  _____ No. If yes, please describe: ______________________________________ 
_________________________________________________________________________ 
_________________________________________________________________________ 
26. Have you ever had any other bad experiences with an employer? 
_____ Yes  _____ No. If yes, please describe: ______________________________________ 
_________________________________________________________________________ 
_________________________________________________________________________ 
27. Have you ever had any experiences drafting or negotiating contracts? 
_____ Yes  _____ No. If yes, please describe: ______________________________________ 
_________________________________________________________________________ 
_________________________________________________________________________ 
28. Have you ever had any experience in soliciting competitive bids for a project? 
_____ Yes  _____ No. If yes, please describe: ______________________________________ 
_________________________________________________________________________ 
_________________________________________________________________________ 
29. Have you ever had any experience in submitting competitive bids for a project? 
_____ Yes  _____ No. If yes, please describe: ______________________________________ 
_________________________________________________________________________ 
_________________________________________________________________________
30. Have you ever had a home built for you by a contractor or subcontractor?
   _____ Yes   _____ No. If yes, how satisfied were you with your experience:
   
31. Have you ever had your house remodeled by a contractor or subcontractor?
   _____ Yes   _____ No. If yes, how satisfied were you with your experience:
   
32. Other than what you described above, have you ever hired a contractor or subcontractor to do any other type of work for you either personally or through your employment?   _____ Yes   _____ No
   If yes, please describe the type of work and how satisfied or dissatisfied you were with that experience.
   
33. Have you ever had a client/customer dissatisfied with the work you provided on a contract basis?   _____ Yes   _____ No
   Please describe the circumstances and outcome.
   
34. What social, political, civic, religions or other organizations do you belong to?
   
35. Do you hold a leadership role in any of these organizations?   _____ Yes   _____ No
   Please describe your role and the organization.
36. Have you served on a jury?  Yes _____ No _____
   On what kind of a case did you serve?  Civil Trial  _____ Criminal Trial  _____
   Did the jury reach a verdict?  Yes _____ No _____
   What was the verdict?  ____________________________________________________________

37. Have you or any family member ever been convicted of a crime other than a traffic offense?  Yes _____ No _____
   If yes, please briefly explain who was convicted, and what the charges were:
   ____________________________________________________________

38. Have you or anyone in your family ever worked for the following:

<table>
<thead>
<tr>
<th>Circle One</th>
<th>Family Member and Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyer or law firm?</td>
<td>Yes</td>
</tr>
<tr>
<td>Insurance company?</td>
<td>Yes</td>
</tr>
<tr>
<td>Court system?</td>
<td>Yes</td>
</tr>
<tr>
<td>Large corporation?</td>
<td>Yes</td>
</tr>
<tr>
<td>Doctor, hospital or health care organization?</td>
<td>Yes</td>
</tr>
</tbody>
</table>

39. Have you or anyone in your family ever been involved in a lawsuit or a worker's compensation claim?  Yes _____ No _____
   Family member involved (i.e., self, sister, etc.):  ____________________________________________
   Was that person the plaintiff (the person who sued) or the defendant?  __________
   What was the nature of the suit (e.g., auto accident, contract dispute, etc.)
   ____________________________________________
   Who was your family member's lawyer in the suit?  ____________________________________________
   What was the outcome of the suit and how satisfied or dissatisfied were you (or your family members) with the outcome?  ____________________________________________

40. Other than what you described above, have you or anyone close to you ever been involved in a business dispute?  Yes _____ No _____
   If yes, describe the circumstances and outcome:  ____________________________________________
41. Other than what you described above, have you ever felt that someone broke a contract or business agreement with you? Yes No
If yes, please describe the circumstances and outcome:

42. Other than what you described above, have you ever been accused of breaking a contract or business agreement with someone? Yes No
If yes, please describe the circumstances and outcome:

43. Other than what you described above, have you ever been accused of misleading someone regarding a product or service you sold or provided? Yes No. If yes, please briefly explain the situation and the outcome:

44. What is your opinion about the environment?

45. Which statement best describes your feelings regarding large scale construction projects? (Circle A, B or C below).

A. Construction companies frequently underbid a project expecting the owners to make up the difference.

B. Construction companies generally bid the project accurately and owners change the scope or design of the project resulting in cost overruns.

C. Construction companies typically do their best in bidding the project, but unforeseen problems in the project cause cost overruns.

46. Do you recognize any of the following parties:

Yes No
Yes No
Yes No
Yes No

The parties in this suit are
This case involves the construction of a cogeneration plant to provide steam and electricity. was retained by to engineer and construct the project. Can you be an impartial juror in this case?

_____ Yes, I can be impartial.  _____ No, I cannot be impartial.

If you cannot be impartial, please explain why: ________________________________

________________________________________

________________________________________

________________________________________

Juror's Signature
PRE-VOIR DIRE QUESTIONS FOR THE COURT CLERK:

- How will jurors be seated in the box? Consecutive by juror number (so the first 24 people have juror numbers 1-24) or by random order? The answer to this is very important to how we go about the coding the questionnaires.

- How many people does the judge sit in the box for attorneys to voir dire at one time? How many jurors will be called? How many alternates?
  - Are alternates selected separately (and pre-determined) or are they determined by random drawing just before the jury enters deliberations?
  - How many strikes for the alternate(s)?

- When will the judge handle hardship excuses?
  - Will the judge address hardships to all of the prospective jurors or just to the ones in the box? Are most jurors pre-screened for hardship before entering the courtroom?

- If the judge allows a questionnaire, how much time will we have beforehand with the questionnaires (days vs. hours)?
  - If we have a questionnaire, when will the judge handle cause strikes (before VD, after VD)? Again, will the judge handle only the cause strikes for those in the box or will she do the entire panel?

- How many peremptory strikes will each side have?

- How many peremptory strikes will each defendant have, and what is the arrangement between defendants to conduct the strikes?

- How will the peremptory strikes be used -- that is, do the parties need to determine their strikes simultaneously (such that one juror could potentially be struck by two parties) or will the judge hear strikes consecutively (plaintiff uses a strike, defense strikes, then plaintiff strikes again)? Does she allow time to confer?
  - Does the judge allow backstriking? (That is, if Juror 5 is struck, are Jurors 1-4 still available to strike?)

- How will the judge replace a juror that she dismisses? That is, will she move jurors up a seat (e.g., if number 2 is struck, will number 13 take that empty spot?) or will she pull a new juror from the random list?
  - Are attorneys allowed a copy of the random list?

- How much time is given to attorney conducted voir dire?

- What kind of voir dire does the judge usually conduct herself, if any?

- Will she allow a consultant at the table? We suggest a motion in limine or agreement with the other side that the jurors are not aware of who we are.

- Is there a meeting facility (war room) nearby/next door?