

Jury Selection in Employment Litigation

Preparing for Voir Dire and Selecting the Best Jury for the Case

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WEATHERING THE STORM
TEXAS LAWYERS AND THE ECONOMY

You Can't Judge a Juror by the Recession

BY JASON BLOOM, ALISON K. BENNETT, AND JOHN G. BROWNING

While practitioners differ about the exact extent, virtually everyone agrees that the recession has had a palpable impact on society and, possibly, the jury system. And although Texas juries, like the state as a whole, may have weathered this economic storm better than their counterparts across the country, the recession has affected everything from juror perceptions of litigants to attitudes toward damages awards. With national economic indicators pointing to a slow and, at times, uncertain recovery, and with the state facing a potential \$28 billion budget shortfall, Texas lawyers would do well to remain attuned to current events that shape attitudes and predispositions that jurors bring to the courtroom.

But before you get to the point of analyzing your jury's attitudes in the wake of our recent financial crisis, it's important to assess how the economic downturn has affected the makeup of those individuals who wind up on that jury. Budget cuts in at least 20 states, including California and Florida, have resulted in jury trials being delayed or disrupted. Cash-strapped state governments are dealing with staff layoffs even in the face of

escalating bankruptcies and foreclosures that swell the rolls of pending actions and add to court backlogs. States like New Hampshire have even gone so far as to suspend all jury trials for a month in order to cut costs.¹

The recession has also sparked a greater resistance to serving on a jury due to concerns of financial hardship. Now, more than ever, people are genuinely concerned about the financial toll that jury service represents. While they would like to serve, more citizens feel they cannot afford to miss work or job opportunities in order to serve. There are also more citizens beginning jobs who do not want to serve within the first few weeks at their new employer. Despite laws that protect jurors from being fired for their service, panelmembers are sensitive to the need to be available for every bit of overtime they can get, as well as to the impact that even a few days away from work can have in a company that has gone through multiple rounds of layoffs. Across the country, judges and court administrators report an increasing number of jurors trying to get out of service because of claims of economic hardship.² For many, con-



cerns went beyond the relatively paltry sums paid for jury service (Texas and New York pay \$40 a day, while in California a juror receives only \$15 per day).³ Many employers have ceased compensating their workers for time on jury duty, and for the unemployed, time spent in jury service is time away from the job hunt. Judge Barbara M.G. Lynn of the U.S. District Court for the Northern District of Texas, for example, told *The New York Times* that when gearing up for a lengthy trial in 2009, "I did have more people who had lost their jobs or were looking for a new job, or were relocating for a job."⁴ As a result, many judges, in response to recession-driven financial concerns, have become increasingly lenient in granting hardship requests, which has had an impact not only on the demographics of seated jurors, but also on the judicial process as a whole. Our experience has seen a marked increase in the number of venire members in jury panels, especially at the state court level. In the past, 40 prospective jurors would be an average panel size, whereas now the average is closer to 65. According to Gregory Hurley, an analyst at the Center for Jury Studies at the National Center for State Courts in Williamsburg, Va., anecdotal evidence from across the country indicates that many courts are being forced to increase the numbers of those summoned to jury duty in order to have enough to actually seat a jury, thanks to financial hardship claims winnowing the ranks.⁵

According to the Bureau of Labor Statistics, in June 2010 the median duration of unemployment was 25.5 weeks, meaning that roughly half of the unemployed had been without work for six months or more. As a July 2010 Pew Research Center survey reflects, such long-term unemployment not only strains household finances, but exacts an emotional toll as well. According to this survey, 46 percent of those unemployed for six months or more report the joblessness damaging family relations; 43 percent say they have lost contact with close friends; and 38 percent of respondents express a loss of self-respect.⁶

What does this translate to in terms of juror perceptions and attitudes? Not surprisingly, skepticism and anti-corporate sentiment is on the rise but may not be found in every prospective juror. One study reported that, out of thousands of mock jurors polled across the country, about two-thirds believe that there is a conspiracy in America that the rich keep getting richer while the rest are left behind.⁷ This ever-growing anti-wealth bias can prejudice jurors against wealthy litigants by deepening the psychological divide between them and making it harder for jurors to empathize or sympathize with them. But this has consequences for both sides of the bar. Jurors do not want to give a wealthy individual something he does not deserve, even if a big corporation is the defendant. More impressively, this anti-corporate and anti-wealth sentiment knows no boundaries

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among jurors, with white-collar workers just as likely to have suffered layoffs and cutbacks as blue-collar workers. In fact, some have pointed out that in certain ways, “newly disillusioned white-collar workers may be more dangerous than jurors who are constitutionally anti-corporation because the former are harder to spot in voir dire and [are] stronger advocates against the corporation in the jury room.”⁸

With the atmosphere of vilification of corporations and their leaders, jury consultants and defense attorneys concede that certain types of cases are harder than ever to win, namely employment disputes. One apparent result of the recession is that juries have become more sympathetic to plaintiffs than to management, who are typically faceless, and are beginning to hold employers to higher standards of conduct or award larger verdicts because jurors — especially those who have lost a job themselves or who are faced with the prospect of losing a job — will more readily identify with employees. Yet, this has become predictable, as discovering an experience with an adverse employment action on supplemental juror questionnaires and during voir dire is increasing. As New York management-side lawyer Keith McMurdy bluntly puts it, “I think juries are just going to hammer us.”⁹ In addition, employers who themselves use the economy as a justification for employment decisions need to be mindful of how that defense can be used against them. For example, claiming budget-tightening as a reason for layoffs may be a viable explanation, but it can be undermined when the same books reveal executives receiving obscenely large bonuses and raises (Goldman Sachs, anyone?). Essentially, loyalty and fairness are trumping legitimate business judgment calls.

In general, and across commercial cases, it’s not all doom and gloom for corporate defendants nor all roses for plaintiffs. In fact, the notion of victim mentality has evolved into more of a community dynamic than a personal one, almost an “us-versus-them” sentiment that was not found in the jury box five years ago.

In commercial litigation, the consensus seems to be that the recession has made it tougher on plaintiffs, particularly from a damages standpoint. In an era of multibillion-dollar bailouts and skyrocketing national debt, jurors have simply become numbed or desensitized to large numbers and are less likely to be shocked or impressed by them. Jurors have also become more skeptical, especially when it comes to failed investments and business ventures, as noted by Dallas lawyer Trey Cox, of Lynn, Tillotson, Pinker & Cox, who recounted, “In a trial last year, the jury was convinced that a group of investment bankers did not do their homework and even misrepresented aspects of the investment. But the jury would not punish the investment bankers; instead, they held the investor more responsible for not doing all their homework before investing.” The insight here is that this jury faulted the plaintiff investors for actually trusting the investment bank, a dynamic not commonly seen before the recent flurry of news reports about corporate conduct. Instances like that one are akin to the buyer beware attitude and predisposition.

Yet another explanation is that the collapse or bailouts of once seemingly invincible corporate and financial industry

giants have made jurors more acutely aware of the consequences of large damages awards. Faced with the prospect of crippling or even shutting down a company, jurors may not want to hurt corporate defendants financially for fear of causing further job losses. They are beginning to report more concern with the ramifications of a large verdict on a hometown employer. In other words, the recession has made jurors more likely to think about the real world consequences of awarding a large verdict against a company. This seems to be borne out not only by recent polls (such as a Rasmussen national survey finding that 57 percent of people favor limiting the amount of money a jury can award in a medical malpractice lawsuit), but also by the decrease in extremely large verdicts. Between 1993 and 2006, there was at least one billion-dollar verdict a year, and a total of 26 during that period. In 2007, there was only one (a patent suit against Microsoft), while there were none in 2008 and only a single verdict in 2009 in excess of \$1 billion (again, an intellectual property case). Microsoft’s 2007 verdict was reversed; in fact, 10 of the 12 all-time biggest awards were cut or reversed.¹⁰ While statutory and common law challenges to excessive punitive damages awards account for part of this, the fact remains that punitive damages awards against companies in 2008 were down 63 percent from their 2006 figures.

While no Texas-specific studies have been completed on the impact of the recession on juror perceptions and attitudes, the anecdotal evidence discussed earlier is certainly instructive. Equally valuable is the insight of leading Texas trial attorneys such as Steve Susman of Houston’s Susman Godfrey. Susman notes a “definite shift in attitude” related to the economic downturn, and cites a recent case he tried against Wachovia Bank, which resulted in a hung jury — an outcome he attributes to a number of jurors “willing to cut the bank some slack for outrageous conduct.”

Faced with the challenges of jury pools that exhibit more anger, anxiety, and feelings of disillusionment about the economy than in previous years, as well as no clear-cut consensus as to what a typical jury will do now under the effects of the recession, what can Texas attorneys do? Know your jury better before you start. These sentiments that one might think hurt or help a litigant’s chances at trial just might not, as they are not universal. Charles “Chip” Babcock of Jackson Walker, who represents Oprah Winfrey, Dr. Phil, and many Fortune 500 companies agrees that “the jury represents the commonsense of the community and that is inherently a product of attitudes including the economy. But any jury verdict is still dependent on who is in the box, and not necessarily a larger social issue. You can’t really generalize the effects of an economic recession to every single juror.”

Attorneys on both sides should take care to identify and elicit juror emotions and sympathies in the jury selection process. Everyone knows of the recession and its causes, but not everyone has been impacted in the same manner, which means not everyone shares the same worldviews about corporations and wealth. Thus, it is imperative to craft a voir dire that is more



about listening to the responses than asking questions themselves and to use that time to probe for evidence of recession-driven anger or disillusionment, anti-wealth bias, and anti-corporation bias. Additionally, the trial lawyers need to be aware that anger can be projected in unpredictable ways, leading to counterintuitive jury decisions. Once the jury is impaneled, those representing plaintiffs will want to try to evoke the corporate misconduct and greed that triggered the recession, while taking care to justify in tangible terms the damages that are sought, all the while avoiding juror perceptions of a windfall or a catastrophic result for the defendant that will result in more job losses. Defense attorneys, on the other hand, will want to distinguish their clients from the corporate bad actors, as character and a company's ethos still remain outcome determinative at the jury-level. Only now, that ethos is subjected to more hostile stereotyping. In that regard, defense lawyers should also try to paint the picture of a company that is conscientious and characterized by salt-of-the-earth, hard-working people, people who would be unfairly and adversely impacted by a verdict for the plaintiff; in other words, humanize the company. One important strategy to this end is to carefully select an affable, sincere, and even-keeled corporate representative, and then to make sure that person is present for the trial from start to finish. Microsoft learned the importance of this strategy in the *i4i v. Microsoft* trial, after which one juror lamented, "I think a lot of the jurors all thought if this was that big a deal to Microsoft, they might have had some of their more executive-type people present."¹¹

In conclusion, jury decision-making has not been adversely affected by nor gone awry because of the recession. Instead, the result is that there are different attitudes and predispositions in play, and lawyers on both sides of the bar should be mindful of the importance of knowing your jury and discovering those. It is those life experiences and predispositions that are predictive of verdict orientation and, thus, are critical in jury selection. The recession is just another life experience that must be weighed in determining who to strike; and while it is a very common life experience, its impact is not consistent across the venire, nor found in every juror. Jurors are like icebergs, and trial lawyers must still continue to ascertain and analyze those life experiences and predispositions that reside below the water. Your success with your next jury will be more of a function of who is in the box than the recession.

Notes

1. "Even Jury Hiring is Frozen," *The Los Angeles Times*, Dec. 22, 2008.
2. "Call to Jury Duty Strikes Fear of Financial Ruin," John Schwartz, *The New York Times*, Sept. 2, 2009.
3. "Jury Duty Economics: The High Cost of Justice," Bruce Watson, *Daily Finance*, April 12, 2010.
4. "Call to Jury Duty Strikes Fear of Financial Ruin," John Schwartz, *The New York Times*, Sept. 2, 2009.
5. "More Jurors Nationally Seek Recusal for Financial Hardship," Correy E. Stephenson, *Minnesota Lawyer*, April 13, 2009.
6. "Lost Income, Lost Friends — and Loss of Self-Respect," Rich Morin and Rakesh Kochhar, Pew Research Center, July 22, 2010.
7. *Id.*

8. "Jury Damage Awards in Times of Recession," Edie Greene, *The Jury Expert* (July 2009).
9. "Recession-Era Juries A Hurdle for Business," Tresa Baldas, *The National Law Journal*, Jan. 13, 2009.
10. "Billion-Dollar U.S. Verdicts Vanish After Appeals, New Rulings," Margaret Cronin Fisk, *Bloomberg News* (Jan. 8, 2009).
11. "Patent Litigation Weekly: So What Do E.D. Texas Jurors Really Think?," Joe Mullin, *The Prior Art Blog* (Jan. 11, 2010).



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Preparing for Voir Dire and Selecting the Best Jury for the Case*

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**JURY SELECTION IN EMPLOYMENT CASES:
BEYOND THE BASICS ©**

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I. Introduction: the Importance of Jury Selection in Employment Cases

Most trial lawyers are familiar with the maxim that cases are “won and lost during voir dire.” Jury selection is inarguably high-stakes, but it’s also becoming a lost art. In the age of cost pressure, early settlements, and arbitration—not to speak of the *Iqbal* and *Twombly* “revolution” in federal courts—increasingly fewer cases ever reach the trial stage.

Jury selection brings a set of challenges unique among other parts of the litigation process. Many lawyers are uncomfortable with jury selection because they lack experience with it—and they are generally unused to addressing such large groups at once. Potential jurors make lawyers’ job hard, too. Many of them are terrified of public speaking. Moreover, the pressures of the group dynamic make them unlikely to express what they are really thinking—jurors are inclined to give the “socially acceptable” answer, rather than the most honest answer. So, potential jurors may be harboring invisible, harmful biases.

These invisible biases are crucial to the outcome of any case. Empirical data shows that jurors’ biases shape their views of the evidence more than anything else, including attorney argument. This dilemma is especially acute in employment cases. Studies show that jurors in employment cases are more likely to disregard evidence in favor of their own experience than in any other kind of case.² Most working people consider themselves to be “experts” in workplace dynamics. And empirical studies show that juries in employment cases spend *more than 50% of their time* discussing their personal experiences, rather than the evidence presented.³

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² Richard Waites and Jim Lawrence, *Juror Perceptions and Trial Strategy in Employment Cases*, WWW.THEADVOCATES.COM.

³ Susan G. Fillichio, *Peeling Back the Layers: Exposing Dangerous Jurors in Employment Cases*, 3 LITIG. COMMENTARY & REV. 7 (Jan./Feb. 2010).

Starting with this foundational idea of bias, this paper proceeds in three parts. Part II addresses the fundamentals of jury selection, including the goals of voir dire and a list of “dos and don’ts” for advocates. Part III discusses some contemporary issues with jury selection, including the use of social media to identify bias and the impact of the recession on the juror bias. Part IV advocates for the use of jury questionnaires, and includes a discussion of the advantages of jury questionnaires, some unexpected but reliable predictors of juror affinity, and a sample juror questionnaire.

II. A Toolkit for Jury Selection in Employment Cases and Beyond

A. Goals of Jury Selection/Voir Dire

A lawyer’s central task in jury selection is to identify which experiences and biases may be most harmful to his case. There are no perfect jurors, and jury “selection” is something of a misnomer. Lawyers should focus their efforts instead on “de-selecting” jurors that may hold views or biases harmful to their clients’ interests.⁴ Ideally, if a lawyer has successfully identified a harmful juror bias, he will be able to support a challenge for cause.

This focus on bias—underscored by current research and data—replaces the earlier view that jury selection should rest on demographic considerations.⁵ Indeed, the ideal juror for your client may not be a “peer.” Studies show that a litigant’s demographic peers may judge him more harshly than a member of a non-peer group.⁶ For instance, in employment cases, it is often traditionally thought that women are ideal jurors for female sex-discrimination plaintiffs. This is not necessarily true. Indeed, in a sex-discrimination case, a stay-at-home mother might be unsympathetic to the plaintiff due to divergent values and attitudes on women in the workplace.

A second major goal of jury selection, after de-selecting jurors with biases dangerous to your client’s interests, is to get the jurors to care about your case and your client.⁷ It is important to tell potential jurors that this is an important case. The case may or may not have a larger social importance, but at a minimum, the jurors should understand that this case is of utmost importance to your client. This helps them to take their role and the process seriously.

⁴ See, e.g., Decision Quest, *Voir Dire in Employment Cases*, NATIONAL LAW JOURNAL, June 1993.

⁵ Patrick Mullin, *Preparing for Jury Selection in Employment Cases*, TRIALS AND TRIBULATIONS, Vol. 16, Issue 3 (February 22, 2013).

⁶ Mark A. Drummond, *A Peer May Be Your Client’s Worst Juror*, ABA LITIG. NEWS (Summer 2012).

⁷ See Mark A. Drummond, *Acting Technique for the Courtroom*, ABA LITIG. NEWS (Winter 2012). Drummond talks about the importance of both establishing the importance of your client’s case and also being sincere, as jurors are adept at detecting insincerity.

A related goal of the voir dire process is to build rapport with the potential jurors—to persuade them to like and trust *you*. As we will discuss in depth later, identifying bias does not mean taking the role of inquisitor. Rather, it involves having an open, honest conversation with the jury pool in which they can feel comfortable sharing their true views. At this phase (and, really, throughout the trial), you should be on your best, calmest, and most professional behavior.

A final goal of voir dire is to educate potential jurors about the case. Prospective jurors want and expect the lawyers to give them an idea during voir dire of what the case is about. Studies show that lawyers who fail to provide context during voir dire may be viewed by jurors as incompetent, or as wasting the jurors' time. That said, because the importance of identifying bias cannot be overstated, you should limit the "juror education" to no more than 20% of your voir dire at the absolute most.⁸ Some ways that lawyers can educate jurors during voir dire include:

- **Giving them a broad overview of the case in one or two sentences:** "This is a case about an employee who didn't like her employer's reasons for firing her, so she responded by filing a discrimination lawsuit."
- **Identifying one or two of your key themes**
- **Introducing a bad fact to "remove the sting"**

One way to combine the dual goals of juror de-selection and education is to frame your questions in a way that assumes your version of the facts. For example, in a case in which the plaintiff alleges that the employer's reasons for firing the employee have "morphed" over time, the plaintiff's lawyer might ask, "Have you ever known an employer to give a dishonest reason for disciplining or firing someone?"

Finally, as when working toward these voir dire goals, lawyers should be sure to observe the "last juror" rule. This means never wasting time questioning jurors who cannot feasibly be sat on the jury. The general rule of thumb is that the "last juror" can be determined by adding the number of jurors to be selected, plus the number of the plaintiff's peremptory challenges, plus the number of the defendant's peremptory challenges, plus a couple extra in case of unforeseen circumstances (*e.g.*, people that may be dismissed for hardship reasons or because of illness). The "equation" looks like this:

"Last juror" = number of jurors + P's peremptory challenges + D's peremptory challenges + 2

⁸ Leonard Bucklin, *Jury Selection: Voir Dire Tips*, in BUILDING TRIAL NOTEBOOKS, available at JAMESPUBLISHING.COM.

One may need to increase the “last juror” calculation in real time if it becomes clear that one or more members of the jury pool may become vulnerable to a challenge for cause.

B. **“Dos” and “Don’ts” For Identifying Juror Bias**

When conducting voir dire, you should:

- **Use a jury questionnaire if possible.** See Part V for more discussion of the advantages of using a jury questionnaire, and for a sample questionnaire.
- **Let the jurors do most of the talking.**
- **Address jurors by their proper name.** Jury consultants insist that far too many trial attorneys refer to jurors as “You there in the back” in voir dire process. Such references convey to jurors that the attorney is not as concerned about who they are as much as he is in how their answers can fit into the attorney’s own agenda. For most jurors, the courtroom is an alien environment in which they often feel uncomfortable and intimidated. To make jurors comfortable enough to be as honest as possible, counsel should make maximum effort to allow jurors to feel welcome, respected, and ultimately important. Addressing them by their proper name is a critical first step. This effort must be sincere; jurors are usually more adept at sniffing out insincerity than they are at grasping arguments in a case presentation, and they do not take kindly to unwelcome or insincere familiarity. Unless jurors extend the invitation to “Call me Mike” and address them informally, you should address each potential ally formally as “Mr. Jones” and “Ms. Smith.”⁹
- **Identify in advance the life experiences, values, and biases** that may be helpful or damaging to your case. The process of identifying bias is improvisational, but you can and should prepare for it thoroughly.
- **Think not only about the subject matter of your case,** but also about the persona of your witnesses and client. Could a juror have experiences and

⁹ Darren Johnson, *What’s in a Name?*, DECISION POINTS, Decision Quest, March 2013. Mr. Johnson also points out that the proper use of “Ms.” or “Mrs.” can be a source of controversy for some jurors and warns counsel to tread carefully when addressing a female (“While Ms. is the more socially accepted, there are jurors who may be offended by that or by Mrs. It may be a minor point to everyone else, but the distinction could be fundamental to that juror’s identity, and an attorney seeking both information and approval from that juror should respect that.”). When in doubt, Mr. Johnson recommends that the attorney simply ask, “Do you prefer Ms. or Mrs?”

attitudes that could bias her against your client, even if she is not biased with respect to the subject matter of your case?

- **Ask open-ended questions.** Remember, identifying bias in voir dire is not akin to cross-examination. Studies show that people will rarely admit bias in response to leading questions.
- **Normalize bias.** Explain to the jury pool that everyone has preconceived notions, and that there is nothing wrong with expressing them. You might try to avoid using the term “bias” altogether, which carries negative connotations. It may be helpful to give an example of a bias of your own that might make you ill-suited for a particular type of jury (e.g., “I have young children, so I might not be well-suited to be a juror in a case involving injury to a child.”)
- **Praise jurors for their honesty when they admit bias.** This can be difficult, especially if a juror has articulated a bias that is harmful to your client. Resist the urge to contradict or argue with the juror. Praising him for admitting bias makes it more likely that others will follow suit.
- **Explain that one’s duty as a juror and citizen is to be honest,** not to give the “right answer” or try to get selected for the jury. Stress that there are no right and wrong answers.
- **Let the jurors know they may want to talk privately about certain answers and that they should let you know if so.** Some jurors may be reluctant to admit certain kinds of bias in front of the rest of the prospective jurors.
- **Dispel the myth that jurors who don’t talk won’t get selected.** Some jurors have heard that if they don’t speak up during voir dire, they won’t get picked for the jury. Explain that this is not true, and that in fact, the opposite is often true.
- **Have a colleague take notes for you.** You should focus on listening actively and watching the jurors’ nonverbal cues—*how* they say things can be as important as *what* they say in terms of identifying bias.
- **Ask non-judgmental, open-ended follow-ups.** You might consider saying, “Would you mind telling us more about that” or “What do you mean by ___?” When a juror points to or suggests a bias that is harmful to your client’s interests, your goal is to get her to say as much as possible in

hopes of propounding a successful challenge for cause for neutralizing favorable statements of bias.

- **Follow up on admissions of bias to identify others who share the same bias.** An example of appropriate follow-up might be, “Who else agrees with Ms. Smith that most lawsuits are frivolous?”
- **Seek to rehabilitate or neutralize statements of bias that favor your client.** If a juror is biased in your *favor*, you hope he/she won’t be the target of a successful challenge for cause. See the box below on “value-laden language” for specific suggestions.

When conducting voir dire, there are some things you should **not** do:

- **Don’t tell the pool that you are looking for “fair and impartial jurors.”** No one wants to see themselves as “unfair” or “partial,” so jurors that hear this phrase will automatically give you the answers they *think* you want, rather than the most honest answers.
- **Don’t forget about your damages case.** Often lawyers get so focused on liability-related bias that they forget to probe people’s views on damages. You might ask about people’s feelings on punitive damages, for instance, or on mental-anguish damages.
- **Don’t get bogged down with paper.** As you conduct your voir dire, have no more with you than a juror seating chart, a pad to jot down notes, and a skeletal outline of your questions.
- **Don’t worry that admissions of bias will “rub off” on the rest of the pool.** Empirical research shows that bias is not contagious. The bias of a “bad apple” will not poison the rest of the pool.

Value-laden language

Jurors may not explicitly admit bias, but often they will reveal bias in their choices of words, which jury consultant Carolyn Koch calls “colorful language,” or “value-laden language.” She offers the following examples in her article, *Making the Most of Group Jury Selection*:

- “You hear people cry discrimination.”
- “I’m just not a law-suit type.”
- “Employers try to act like they care, but all they really care about is the bottom line.”

As Koch notes, it’s important to follow up on this value-laden language in a non-judgmental way. The more fully a potential juror articulates a given bias, the more likely that her words will support a challenge for cause. If you’re worried about potential jurors recanting or backpedaling in response to your follow-up, Koch suggests that you ask a leading question: “When you say that people ‘cry discrimination,’ I hear you saying that people use discrimination as an excuse for other things. Is that a fair summary of your point?”

Likewise, if a juror has used colorful language that reveals a bias *favorable* to you, use a leading follow-up question to rehabilitate him: “You said that people ‘cry discrimination,’ but you’re not saying that discrimination claims are *never* legitimate, are you?”

III. Contemporary Issues in Jury Selection

A. Using Social Media to Identify Potential Juror Bias

Social media is an ever more powerful tool lawyers can marshal to identify juror bias.¹⁰ Researching prospective jurors on social media sites offers several advantages over traditional voir dire questioning. For one, people are arguably more honest and less likely to self-censor online than in the courtroom during jury selection. By the same token, people are also less likely in an online forum to feel pressured to say the “right thing” or express the socially acceptable view.

Even if social media does not uncover directly relevant bias, it may reveal other highly useful information. To name a few examples, social media can reveal:

¹⁰ See, e.g., Kashmir Hill, *Make Sure Your Lawyer Knows How to Use Facebook*, FORBES.COM (Feb. 23, 2011); Ana Campoy and Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury*, WALL STREET J. (Feb. 22, 2011), available at WWW.ONLINE.WSJ.COM.

- Basic demographic information that might be time-consuming to collect during the voir dire process;
- Whether a person is strident or overtly opinionated;
- Whether a person loves legal dramas and movies (and thus may consider himself a “legal expert” and try to inject that “expertise” into the deliberation process);
- Whether a person is simply crazy (for example, a potential juror who posted on blogs about his attempts to contact aliens);
- Whether someone is devoutly religious; and
- Whether someone has previously been involved with the legal system (as a plaintiff, defendant, or witness).

All of this information bears on a person’s desirability as a potential juror and may not be available through the traditional voir dire process, due to time and subject-matter constraints.

Recent media reports are rife with examples of lawyers successfully using social media during the jury-selection process. Some examples include:

- In a products-liability case, a jury consultant for the defendant discovered on a juror’s Facebook page that her hero was Erin Brokovich.
- In a products-liability case against the food conglomerate ConAgra, the defendant discovered on a juror’s Facebook page links to various websites that were highly critical of large corporations. These websites included a link to the juror’s own blog, on which he had written:

“F--- McDonald’s. I hate your commercials. I’m not ‘lovin’ it.”

At the defense’s motion, the judge removed the juror from jury (which had already been empaneled and sworn). The jury eventually found in ConAgra’s favor, 9-3.

- In a criminal trial for sexual assault against a black male defendant, defense counsel fought to seat a white female juror on the jury. While the traditional demographic view of jury selection might have counseled

against her as a defense juror, her Facebook revealed numerous pictures of herself with black male friends.

Lawyers may wonder which social media sites they should search in researching potential jurors. The answer: “Ask your kids.” That’s a joke, but it contains a kernel of truth—social media, by its very nature, changes rapidly. The sites that are popular now may not be in a few years, so it is important to stay current with social-media trends. The following is a current, non-exhaustive list of recommended sites to consider:

- **Google:** Lawyers should search potential jurors’ names in Google or another general search engine. Such a search can lead to profiles on other social-media sites, blog posts, and articles a juror may have written, to name a few.
- **Facebook:** Facebook is the current king of social-media sites, with over 1 billion active users as of this writing—a staggering 1/7 of the world’s population. Users may post everything from basic demographic information, to information about their families, marital status, education, occupation, politics, and entertainment preferences.
- **MySpace:** Just five or so years ago, Myspace was the social-networking site of choice. Though Facebook has surpassed it, Myspace still has an active user base and should be included in your juror-research lineup.
- **Twitter:** Twitter is a so-called “micro-blogging” site, in which users post “tweets,” or messages of 140 characters or fewer. Rapidly growing in popularity, Twitter has 500 million registered users who post some 340 million tweets each day. Twitter may be especially relevant for trial research, as users post tweets around certain “trending” topics, including current events and politics—subjects of great interest for identifying bias. Moreover, people tend to tweet far more publicly than they post to Facebook or other sites, so there may be more information here to draw from.
- **Public records databases:** These searches may be less instantaneous than Twitter or Facebook searches, but they are no less crucial. For example, one jury consultant reported in a fraud case that she found via public-records searching that a venire member had been disbarred in two states for defrauding clients.

There are, of course, issues to be aware of in using social media to identify juror bias. One is that some judges may find the practice improper. Indeed, in a New Jersey medical malpractice case, the trial judge stopped the plaintiff’s lawyer from using the

internet to research jurors during voir dire. The jury ultimately returned a defense verdict. On appeal, the New Jersey Appellate Division held that “[d]espite the deference we normally show a judge’s discretion in controlling the courtroom, we are constrained in this case to conclude that the judge acted unreasonably in preventing use of the internet by Joseph’s counsel.”¹¹ However, the Court ultimately determined that the plaintiff was not prejudiced by the judge’s ruling and affirmed the defense verdict.

Another issue with using the internet to research potential jurors is that jurors may remove content from their pages or make them private as jury selection or the trial progresses. Thus, lawyers are well-advised to make a “screen shot” of any relevant pages they uncover in their juror research, in case the pages are unavailable later.

The issue of private-versus-public information raises another dilemma in using social media to research potential jurors. As more and more people come to use and understand social media, people are increasingly savvy about keeping their online profiles and information private. Lawyers can and should use publicly posted information to vet potential jurors. The question remains, though, what use can (or should) an attorney make of a prospective juror’s private information? The emerging consensus appears to be that it is unethical – or, at a minimum, unwise – for lawyers to attempt to “friend” potential jurors in attempt to gain access to their non-public information.

Finally, monitoring jurors via social media remains useful even after the jury has been seated. In the ConAgra case mentioned above, the lawyers did not discover the juror’s bias until *after* the jury had already been seated. The judge was still willing to remove the juror from the panel. Moreover, lawyers should monitor jurors’ online posting and tweets – recent legal news is rife with stories of mistrials resulting from jurors posting about the cases online.

B. The Impact of the Economy on the Jury-Selection Process

Jury experts Jason Bloom, Alison Bennett, and John Browning recently published a fascinating article on the impact of the recent recession on “everything from juror perceptions of litigants to attitudes toward damages awards.”¹² Bloom et al. report that the recession has created a number of identifiable trends of which advocates need to be aware:

- The first of these trends is a general **anti-corporate sentiment**, spurred largely by jurors’ experiences with unemployment. Jurors are more likely now than ever to believe that corporations have laid off workers to increase shareholder profits,

¹¹ *Carino v. Muenzen*, A-5491-08T1, 2010 WL 3448071, at *10 (N.J. App. Aug. 30, 2010).

¹² Jason Bloom, Alison K. Bennett, and John G. Browning, *You Can’t Judge a Juror by the Recession*, TEXAS BAR JOURNAL at 128 (Feb. 2011).

rather than out of economic necessity. Surprisingly, this anti-corporate sentiment seems to extend even to white-collar workers, who have traditionally been viewed as favorable jurors for corporate litigants.

- Next, the current recession seems to have resulted in jurors being **more sympathetic to employment plaintiffs** overall. Bloom et al. attribute this phenomenon to the overall “atmosphere of vilification of corporations,” as discussed above.
- All that being said, the recession also seems to have yielded **fewer large plaintiffs’ verdicts in commercial cases**. This is somewhat counter-intuitive in light of the overall climate of anti-corporate sentiment. But this finding is corroborated by prominent trial lawyers such as Steve Susman of Susman Godfrey. Bloom et al. identify a few potential reasons for this trend away from large verdicts in commercial cases. One is a sort of “buyer beware” attitude in cases like securities cases—a feeling that investors should have been more informed before investing. Another reason they cite is a fear that a crippling verdict against a large company, particularly a hometown company, might spur further layoffs and unemployment.

In general, there is a sense that recession-era juries are more unpredictable in general and that traditional indicators have become less reliable. Bloom et al. observed that lawyers are increasingly “[f]aced with the challenges of jury pools that exhibit more anger, anxiety, and feelings of disillusionment about the economy than in previous years, as well as no clear-cut consensus as to what a typical jury will do now under the effects of the recession.” Bloom et al. say that advocates on either side of the aisle can use these feelings of anger and anxiety to their advantage. Advocates on either side must “probe for evidence of recession-driven anger or disillusionment, anti-wealth bias, and anti-corporation bias.” Plaintiffs’ lawyers will want to try to tap into these feelings to “evoke the corporate misconduct and greed that triggered the recession,” while defense attorneys will “want to distinguish their clients from the corporate bad actors.”

Anti-Wealth Bias and Lawyers’ Courtroom Appearance

Bloom et al.’s research about the impact of the recession underscores the importance of another well-worn practice pointer: lawyers must consider their personal appearance and the impact *their* perceived wealth might have on juries. Lawyers should avoid wearing designer labels in the courtroom, or identifiably expensive shoes, handbags, and the like. Jewelry that may be perceived as expensive or “flashy” should also be avoided. Of course, most lawyers know that the law is no ticket to fame and fortune, but the average juror might have preconceived ideas about the income level and overall wealth of attorneys.

IV. Using Jury Questionnaires in Employment Cases

A. The Advantages of Jury Questionnaires

In selecting a jury in an employment case—or really, in any case—lawyers are well-advised to consider using a jury questionnaire, if possible. Many judges are amenable to the use of jury questionnaires, especially where both parties agree to the proposed questionnaire. A well-crafted questionnaire should be as short as possible—ideally no more than ten pages in a very complex employment case.

The advantages of a jury questionnaire are many. Most importantly, the questionnaire allows jurors to reveal more than they might be comfortable doing in a group setting. This is doubly true in employment cases, as people are all the more reticent to publicly reveal bias related to a particular ethnic or gender group. Questionnaires also allow lawyers to quickly collect basic, uncontroversial demographic information and maximize the short time they have to talk directly with jurors.

B. Some Unexpected But Reliable Predictors of Juror Affinity

Veteran trial lawyer Mikal Watts offers insight into an unexpected source for identifying juror experience and bias: media and personal consumption.¹³ He cites a Nielson statistic that Americans spend a staggering 34 hours a week watching television. This reinforces what we know on an anecdotal level: much can be learned about a person based on her personal consumption habits. Watts goes so far as to say that “the question of what kind of information is being gathered from television watching is the key question to learn from a potential juror in attempting to learn how his or her values are being formulated.” Watts offers some fascinating advice for what advocates might glean from statements about media preferences on a jury questionnaire, summary excerpts of which appear below.

¹³ Mikal Watts, *Building the Bridge from the Living Room to the Courtroom*, White Paper from the State Bar of Texas Seminar on Choosing and Charting a Jury Course (March 8, 2013).

Media/Consumption Question	Potential Information to Be Gleaned
Television Shows	<ul style="list-style-type: none"> • If a juror states that his favorite show is “60 Minutes,” or another news show, this might show that he is inquisitive or up-to-date in current events. • If a juror responds with a legal drama like “Law and Order,” this may indicate that the juror considers herself an “expert” in the law and could be a dangerous juror to have in the jury room.
News Outlets	<ul style="list-style-type: none"> • Watts cites research indicating that jurors identifying as conservative or Republican are likely to get their news from Fox News, and programs like Glenn Beck and Sean Hannity. They are likely to read news blogs like the Drudge Report or the Wall Street Journal. According to Watts, these jurors are more likely to believe that the “government does too much” and that “individuals should ensure their own safety.” They also are traditionally much more likely to return a defense verdict. • By contrast, jurors identifying as liberal, progressive, or Democrats are likely to get their news from CNN or MSNBC, and to prefer programs like Hardball and the Rachel Maddow Show. They are also more likely to enjoy comedy news programs like the Daily Show or the Colbert Report. They are more likely to read news magazines and the New York Times. According to Watts, these individuals are more likely to believe that the “government should do more to solve problems” and that “the government should ensure our safety.” They also are traditionally much more likely to return a plaintiff’s verdict.

Media/Consumption Question	Potential Information to Be Gleaned
Purchasing Goods and Services	<p>According to Watts, this question can be a good proxy for a potential juror's economic status. For instance, a juror who buys all of his groceries at Whole Foods, versus HEB or Walmart, is more likely to have a higher level disposable income. Watts cautions that this question should only be asked in juror questionnaires, though, as jurors may be embarrassed to answer in a group setting.</p> <p>Another option is to ask about favorite or most-frequented restaurants, another useful proxy for income levels. Potential jurors that express a preference for fast-food restaurants, versus big-box chain restaurants, versus more expensive restaurants, might reveal much about their level of disposable income.</p>

These examples are just a few of the categories that Watts discusses in his insightful article. These categories of juror questions are useful because they are helpful proxies for more "hot-button" issues like political affiliation or income level. They are useful because a judge might not allow questions about such issues, or jurors might be reluctant to share this kind of information.

Sample Juror Questionnaire

Juror # _____

The information provided in your answers to this questionnaire will be held confidential and will only be used during jury selection in this case. If you want to address a question further in private with the Court, please so note on your questionnaire. Please do not write on the back of any page. If you need more room to answer a question, continue on the bottom or at the side of the page or on the blank sheet attached at the end of the Questionnaire.

1. Full Name: _____ Age: _____

2. Please tell us where you work and how long you have worked there, and describe your job duties [if unemployed/retired, please tell us about your last job]:

Employer: _____

Length of employment: _____

Duties: _____

3. Please provide the following information for your four (4) previous jobs:

DATE(S)	EMPLOYER	POSITION	REASON FOR LEAVING

4. Have you or anyone close to you ever worked in a 'start-up' company? Yes No
If yes, what company? _____

5. Have you or anyone close to you ever worked for a company that was 'bought out' or acquired by larger company? Yes No

6. Have you ever been responsible for hiring, firing or promoting employees?
 Yes No If yes, please explain. _____

7. Please tell us where your spouse works and how long he/she has worked there, and describe his/her job duties [if unemployed/retired, please tell us about his/her last job]:

Employer: _____

Length of employment: _____

Duties: _____

8. Please provide the following information for your spouse's two (2) previous jobs:

DATE(S)	EMPLOYER	POSITION	REASON FOR LEAVING

9. What is your current marital status? _____

If married, for how long? _____ How many times have you been married? _____

10. Education:

Name	Graduate	Type of Degree
High School: _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	_____
College: _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	_____
Post-College: _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	_____

11. Please list the sex, age and occupation for each of your children and step-children:

SEX	AGE	OCCUPATION	SEX	AGE	OCCUPATION

12. Have you ever attended any lectures, seminars, courses---or have any special training, experience or knowledge of---any of the following [please check (v) all that apply]:

- Employment law Employee rights Contracts
- Employment agreement Human resources Psychology
- Corporations or corporate management
- [Telecommunications or the telecommunications] industry

13. Have you ever served on a jury? Yes No

If yes, was the case a civil lawsuit or criminal case? Civil Criminal

Were you the presiding juror or foreperson? Yes No

What was the outcome/verdict of each case? _____

14. Have you ever been involved in a civil lawsuit? Yes No

If yes, what was your involvement? Plaintiff (person suing) Defendant (person being sued) Witness at trial Gave a deposition

What was the nature of the case and outcome/verdict? _____

15. Have you, a close friend, or a family member ever been involved in a business dispute that ended up with a lawsuit being filed? Yes No If yes, please explain: _____

16. Have you or family member ever wanted to file a lawsuit but did not for some reason? Yes No If yes, please explain: _____

17. Have you or anyone in your family ever owned a business? Yes No
If yes, who and what type of business? _____

If the business is no longer open, why was it sold or closed? _____

18. Have you or any family member ever worked for a large corporation(s)?

Yes No If yes:

a. Who worked for the large corporation? _____

b. What corporation(s)? _____

c. What was this person's job(s)? _____

d. Is this person still employed at the corporation(s)? Yes No
If No, under what circumstances did this person leave the corporation(s)? _____

19. In your opinion, what duties or obligations does an employee owe to his/her employer? _____

20. In your opinion, what duties or obligations does an employer owe to the employees? _____

21. Have you ever been terminated, dismissed, fired, laid off, or asked to resign from a job? Yes No If yes, please explain: _____

22. Has any family member ever been terminated, dismissed, fired, laid off, or asked to resign from a job? Yes No If yes, please explain: _____

23. Have you or any family member ever been discriminated against or witness any discrimination by an employer because of age, sex, race, disability or national origin?
 Yes No If yes, please explain: _____

24. Have you or any family member ever had a dispute with an employer after leaving that employment whether you quit or were fired/laid-off? Yes No
If yes, please explain: _____

25. Do you think it's too hard to fire people? Why or why not? _____

26. Have you ever worked with someone who you thought should have been fired, but wasn't? _____

27. Have you ever signed any type of employment contract or agreement? Yes No
If yes, please explain: _____

28. In your opinion, can you think of any reasons why an employer would fail to honor an employment contract or severance agreement with an employee? _____

29. Has a subordinate or co-worker ever complained to you that he or she was treated unfairly when in reality, they were just performing poorly? _____

30. Have you ever worked for a supervisor that treated you unfairly? _____

31. How should an employer handle a problem employee? _____

32. Do you have any religious or other beliefs that would make it difficult for you to sit in judgment with regard to another person? Yes No
If yes, please explain: _____

33. What types of investments have you made (alone or with your spouse) (*check all that apply*): CD/certificate of deposit / money market Government bonds
 Corporate bonds Corporate stocks Mutual funds Bond funds
 Commodities Real estate (own home) Real estate (second home / land)
 Commercial real estate Other (*specify*): _____
34. In a lawsuit between a corporation and an individual, do you believe that you might hold one of them to a higher standard of proof than the other? Yes No
 If yes, please explain: _____

35. The Defendant in this case is a foreign corporation. What is your perception of foreign corporations doing business in the U.S? Positive Negative No opinion
36. Generally speaking, do you feel jury verdicts in [Dallas] County are:
 Too high About right Too Low
 Please explain your answer: _____

37. Which of the following best describes you? Please check (v) all that apply:
 Analytical Assertive Business-minded Careful Competitive
 Compulsive Creative Decisive Detailed Emotional
 Entrepreneur Impulsive Intelligent Judgmental Leader
 Logical Loyal Old-fashioned Open-minded Opinionated
 Outspoken Patient Pro-business Pro-employee Skeptical
 Snap-decision Strict Technical Thoughtful Trusting
 Visual Other _____
38. Which radio or T.V. news programs do you listen to or watch most often? _____

39. What newspapers, magazines or trade publications do you read? _____

40. Who makes the day-to-day financial decision in your home? _____
41. Are you: Very conservative Conservative Moderate Liberal Very liberal
42. Please list all unions and civic, social, political, professional, and religious organizations to which you now belong or have belonged: _____

43. Is there anything in your personal or business experiences, or anything about your beliefs or values, that have not been covered in this questionnaire but which might affect your ability to judge the facts and provide a verdict in a dispute between a business and a former employee? _____

44. Is there anything else you feel the parties in this case should know about you? Yes
 No If yes, please explain: _____

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