



Potential Pitfalls to Successful Jury Selection: Do Jurors Hold Back Important Information During Voir Dire?

Following a month long trial, a jury of seven men and two women read its verdict to a packed San Jose courtroom after two and a half days of deliberations. The jury found that Samsung infringed on six of Apple's utility and design patents, awarding \$1.05 billion in damages, the largest patent verdict in history. However, Apple's huge victory has been called into question. Samsung filed a motion to have the verdict thrown out after it discovered that jury foreman Velvin Hogan failed to disclose his involvement in litigation with a former employer during jury selection.

This story fits comfortably within a large body of research indicating that prospective jurors are not always forthright during jury selection. Consider these statistics. Bush (1976) reported that **33%** of the veniremen in the Camden 28 trial lied under oath. Marshall (1983) interviewed 277 ex-jurors, **18%** of which admitted to withholding information during *voir dire*. Seltzer (1991) interviewed 191 jurors in 31 trials. He found that **39%** of jurors failed to disclose that they had a connection to law enforcement, or had been a victim of a crime.

In a recent mock trial conducted by this author, a number of participants failed to report personal experiences with cancer during a simulated jury selection. These experiences later surfaced when discussing the key issues of the case in deliberations.

Eighteen percent of jurors admitted to withholding information during voir dire.

THE ICING ON THE CAKE: Some of the most interesting insight into this subject comes from Judge Gregory Mize (1999). Judge Mize expanded his *voir dire* procedure in 30 trials during a nine-month period to include individual interviews with every citizen in the venire who failed to respond to his generic opening questions. This additional step led to a remarkable finding. About **28%** of members of each panel failed to respond to the dozens of questions posed in open court, an average of about **16** people per trial. When Judge Mize questioned them in private, **one in five** of these silent jurors disclosed personal information that was relevant



to the case. In fact, an average of one juror and as **many as four** expressed bias that led to their removal for cause. Some of the responses that were withheld during open court but disclosed in private included:

- *I am the defendant's fiancé.*
- *My son was shot in the face six months ago and no one was apprehended.*
- *I was frightened to raise my hand. I have taken high blood pressure medications for twenty years. I am afraid I'll do what others tell me to do in the jury room.*
- *I should have raised my hand. My grandfather was an FBI agent. Therefore I tend to believe cops.*
- *I know the defendant. He's a member of my church. I did not understand some of the questions.*

Why do jurors withhold information?

When attempting to understand this phenomenon, try to put yourself into the shoes of jurors and view the world through their eyes. For most, jury selection marks the first time they have ever stepped foot inside a courtroom. Jurors are immediately greeted by an authoritative figure seated behind a raised desk and dressed in a black robe. The judge then gives a preamble that explains the rules of the game, extolls the importance of jury service, and teaches prospective jurors that “good citizens are fair and impartial.” After a few questions a juror raises his hand, describes a personal experience, and expresses reservations about serving. This poor fellow becomes the subject of a public inquiry in which he is either forced to admit that he cannot be fair—i.e., he is a “bad” citizen—in front of his fellow jurors, or give the socially desirable response and promise to follow the law. And what does this experience teach the rest of the jurors? If one does not want to disclose private experiences, or admit bias in front of a group of strangers, it is best to keep your hands down and remain silent.



Public speaking ranks second among Americans as one of the most commonly identified fears.

The psychology

The nature of the courtroom experience creates a heightened awareness of what has been coined the “public self.” When this occurs jurors are motivated to create a favorable impression of themselves in the eyes of others, especially the judge. Thus, loaded questions about the ability to be fair and impartial or follow the law lend themselves to socially desirable responses. In short, under these conditions, jurors may tell you what they think you want to hear. This is exactly what the social science



research tells us. For example, Moran and Cutler (1991) conducted a community survey in a high profile case. They found that **62%** of jury eligible residents reported they could be fair and impartial and decide the case solely on the basis of the evidence presented. Yet, **61%** also said they would have trouble putting knowledge of the media out of his or her mind. How can a juror be fair and impartial if they have trouble ignoring what they learned about the case through the media?

And there is more!

Not only do jurors try to avoid the spotlight and give socially desirable responses, but they may also misinterpret the meaning of your question and think it does not apply to them. I recently came across a former juror who blogged about his experience. He succinctly described the anxiety provoking experience of *voir dire* and the desire to avoid being singled out for questioning: “I don’t do bumper stickers, so I was safe from individual questioning on that one.” The blogger also illustrated how what appears to be a simple, straightforward question can be misinterpreted so that it does not apply:

“Another of the questions was ‘Do you listen to talk radio?’ Some of the people who did raise their hands said they listened to NPR, so I reluctantly raised my hand after the fact and said that I do too...but I don’t consider NPR to be ‘talk radio’ as I understand it, I think it’s news.”

What should you do?

The goal of *voir dire* is to identify jurors who harbor biases which may be detrimental to your case. As described above, there are a number of potential roadblocks that can undermine your ability to do so. Thus, even the most carefully crafted list of *voir dire* questions can

be all for naught if the questioner fails to address the pitfalls in the courtroom that influence honest disclosure. Therefore, your first challenge is to create a comfortable environment that disarms jurors and encourages candor. The following section provides

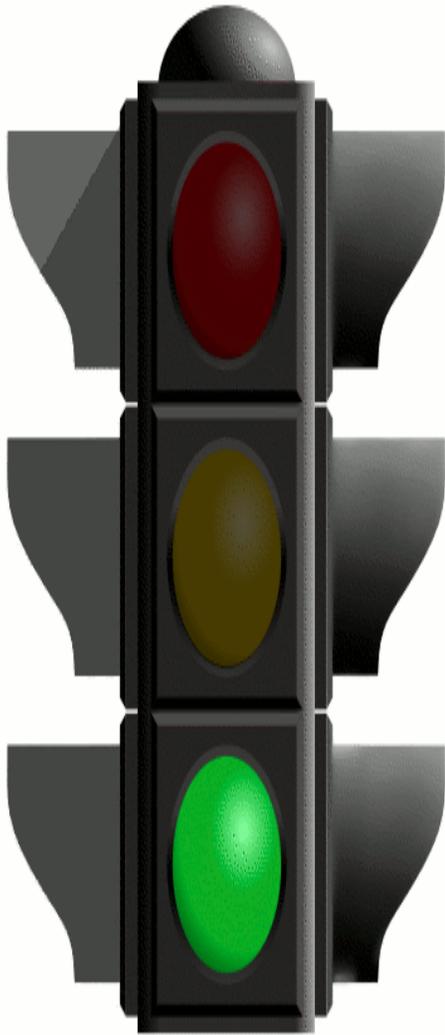
a brief checklist for maximizing the quality of the information elicited from jurors during *voir dire*.

Judge Missy Medary was forced to declare a mistrial in Mathew Stebbins’ murder trial after discovering that Juror No. 1 failed to disclose that she “had lost three children; one shot in the head” during jury selection. When asked to explain, the woman told the judge she did not think it was going to be an issue at the time.

Thirty-nine percent of jurors failed to disclose that they had a connection to law enforcement or had been the victim of a crime.



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Here are a few measures designed to help create an environment that is more conducive to honest disclosure:

- ✓ Pre-instruct the jury about the importance of honesty
- ✓ Use an informal questioning approach
- ✓ Disclose something about yourself to the jury (the reciprocity effect)
- ✓ Build a rapport with jurors
- ✓ Thank jurors who share a personal experience or admit bias

Jurors are more likely to disclose sensitive information on a questionnaire than they are in a public forum. They are also less likely to give socially desirable responses when questioned by an attorney than by a judge. Whenever possible, you should:

- ✓ Request expanded attorney conducted *voir dire*
- ✓ Use a juror questionnaire
- ✓ Request individual sequestered *voir dire* when discussing sensitive topics

When crafting questions it is important to avoid loaded language and references to fairness, the law, or the ability to be fair and impartial. It is also important to make sure there are not multiple interpretations to the question. When conducting your oral *voir dire* it is important to:

- ✓ Talk to every juror
- ✓ Ask open-ended questions
- ✓ Avoid loaded language and requests to follow the law

For more information on successful *voir dire* strategies, complimentary MCLE presentations, or any of the services we provide, please do not hesitate to contact us.



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Dr. Cannon is co-founder of Trial Innovations and is based in the Los Angeles area. Dr. Cannon has been the lead trial consultant in cases across the country, ranging from insurance defense and corporate litigation, to capital cases and white collar crime. His principal activities involve witness workshops; focus groups and mock trials; online juror surveys; continuing legal education presentations; voir dire and jury selection consultation; and post-trial juror interviews.

Dr. Cannon began consulting and conducting research on the consulting field in 1998. He has authored articles on voir dire and jury selection in bar journals across the country. He has also conducted research on attorney voir dire style and its effect on jury verdicts. Dr. Cannon is a board member and treasurer of the American Society of Trial Consultants. He is also a member of the American Psychological Association. Dr. Cannon regularly gives presentations throughout the country and has recently appeared on KNBC and NPR in Los Angeles.

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