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Questionnaire questioner

A handy "how to" for effective use of jury questionnaires. Details, details…


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By Miles B. Cooper

The lawyer thought about the case. Gay marriage. Chronic opioid use. A waiver. And an impending trial in a conservative county. A few hurdles there. Why try it? Because what the defendants had done was awful, because they weren't offering anything significant, and because it was the right thing to do. Getting a decent jury was of import, and giving people the opportunity to be forthcoming without embarrassment was essential. Time for a jury questionnaire.

Preparing an agreed questionnaire

Preparing a questionnaire requires work up front. While there's a tension between costs and client net outcome, trial is not the time to scrimp. If it is worth trying, it is worth consulting. One cost-effective way to do this is to purchase 3-4 hours of time. Send the mediation briefs and notes on any key evidentiary issues. Then ask for a questionnaire that will divulge defense biases. Questions can be worded carefully. For example: "Do you have any feelings regarding gay marriage?" Supporters divulge only that they will follow the law. People who don't – for personal, religious, or bigoted reasons – are cause challenges.

Thus begins the dance. Competent defense counsel will have done the same and will have questions divulging plaintiff biases. Start a dialog with the defense and send a draft over early. Then negotiate what additions get made or deletions occur. Keep the deleted bits for oral voir dire.

Questionnaires as a right, and the reality

Patterns emerge in practice. Clogged courts lead to judicial pressure to truncate cases, particularly jury selection. There were periods where some judges would say, "You have 15 minutes to conduct your questioning." As a result, every ten years or so the defense and plaintiffs' bars work together to push through civil procedure rules attempting to mandate unfettered jury selection. The most recent iteration of this includes provisions for jury questionnaires. C.C.P. section 222.5 states, "A court shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires…" Despite this, courts still don't like them. To overcome anti-questionnaire bias, have an agreed-upon questionnaire and a plan.

Questionnaire logistics

First, "hardship" the panel while those not claiming hardship fill out the questionnaire. Jurors are then instructed to return the next morning. Then have a same-day copy service make two copies. The original is the court's, the copies go to counsel. Counsel then review them that afternoon/evening and return the next morning. Having the panel arrive an hour or two after counsel helps. The questionnaires with obvious bias can then be discussed. A critical point: Don't leave the courthouse without the random jury list. This list helps identify what is coming up next, and how to approach peremptory strategy.

Questionnaire shucking

Digesting 50-75 questionnaires in one evening can be daunting. Time for a shucking party. Invite 5-10 folks to the office. Note: those who help others tend to get more volunteers. Confirm one has a complete copy set by comparing the questionnaires in alphabetical order to the alphabetical jury list, noting those already "hardshipped." Next, order them following the random list order. Then number them in the top middle with a wider marker and circle around the number and three-hole punch them. They'll eventually end up in a binder.

Shuckers should then be given key issues and key questions. Shuckers are then given yellow highlighters and post-its. The shuckers write details from the questionnaire down on the post-its. Questionnaire #, last name, first name, identified sex, age, town or neighborhood, marital status, occupation, and then specific questions to follow up on. Example, where question 26 is gay marriage: "#26 – not against but religion does not support." The shucker then highlights the questionnaire in yellow. The trial lawyer then uses a green highlighter to differentiate.

There should be space for two boxes on the top right of the first Post-It. The furthest left will contain the initial shucker's rating and initials. The other box is for the trial lawyer's final rating. The rating will be from 1- (worst) to 5+. Other notations: L for leader, S for sheep, DC for likely defense cause, PC for plaintiff cause, DP for likely defense peremptory, and PP for likely plaintiff peremptory.

Once the questionnaires are shucked and the trial lawyer review completed, the questionnaires are then put back in the random list order and placed in the binder. The final rating and codes are written by the person's name on the random list for easy review of what's coming up. The names and ratings are then laid out on an 18-pack sheet in the same order as the court numbers the seats. One then sleeps a bit and readies for some interesting conversations.

Outro

The lawyer reached an agreement with the defense, and both recommended a large panel given the issues in the case. The court agreed. Fifty-one sustained cause challenges later, a jury was empaneled, and trial began…

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