"Making the Most of Your First Impression"

By: Matthew J. Kelly, Esq.: Roemer Wallens Gold & Mineaux, LLP; Albany, NY
Matthew J. Kelly Jr., Esq.: Schnader Harrison Segal & Lewis, LLP; New York, NY

All the world's a stage, and all the men and women merely players.[1] The same can be said of the courthouse and its surroundings. Jurors lined up at the security desk awaiting their turn at the metal detector can size up the players pretty easily – they are the ones dressed professionally and carrying what appears to be a suitcase on wheels. The curtain has already lifted and the audience is all around. You may not have noticed them but they notice you.

By the time you are situated in the courtroom the jury has already had its first peek at you and become curious as to what you might say. Do not waste this opportunity with the time-worn questions about whether a juror can be "fair." It is far more important to establish in the limited time that you do have who are the right jurors for your case and who are, more importantly, the wrong jurors for your case.

Once you have established, through either juror questionnaires or the judge's questions, the pedigree of the juror as to occupation and municipality of residence and family members, you can then proceed to channel your case to the juror's mindset to determine whether there are any prejudices that must be exposed. In many instances, this determination can incorporate facts from beyond the courthouse walls with research on the internet: social media, Google, LinkedIn, and other resources abound. This will be discussed later. For the moment we will remain focused on the intimate confines of the courtroom.

When I am a plaintiff's attorney I come right at the jurors to ask them a scenario that they can be familiar with. If you are in a jurisdiction where many of the jurors have drivers' licenses then it is appropriate to ask them whether or not they have had the instance of someone running a stop sign and hitting them. If they did, would that person who hit you be at fault? If they were at fault, should you be able to sue them? Conversely if you ran the stop sign and hit someone, would you be at fault, and if so, should they be able to sue you?

This simple fact pattern can allow you to determine the jurors who will be objective and evenhanded and those who are a little too anxious to say they do not believe in suing. Moreover, when I am the plaintiff's attorney I believe it is critically important to ask questions which expose the fact that jurors could rule against you. In this fashion I believe you build an impression of objectivity for yourself. In over 100 jury trials conducted in both urban and rural counties, and everything in between, I have found jurors who are both anti-plaintiff as well as those who are just as strong against defendants. These positions however do not readily present themselves and must be ferreted out by presenting simple questions and then proceeding into a more lengthy analysis. Indeed, it is not unusual to have someone who believes that there is too much suing going on to concede that if they suffered an injury because a supermarket had left liquid on the floor which they fell on, they would want to be compensated for that. That of course would be a lawsuit and you can see, on occasion, their eyes open at that point.

All of this takes time and time is a valuable commodity that, more often than not, judges feel possessive of. Indeed, as more and more judges have less and less trial experience before they take the bench, it is that much more important for lawyers to stand firm on their demand for a

---

[1] William Shakespeare, *As You Like It.* Monologue of Jaques, Act II, Scene VII.

reasonable time frame for *voir dire*. While I have heard of and been before judges who think you should just take the first six jurors in the box, I am well aware that that would be a deviation from any standard of care for any trial lawyer – and if a lawyer thinks a time limit is too restricting, this will be one of the first opportunities for that lawyer to make an objection on the record.

In a New York State appellate level case several years ago,[2] the court addressed a *voir dire* issue like this. In the case, the jury had awarded $149,000 for special damages but zero for past pain and suffering and future pain and suffering. However, liability had been conceded, and there were multiple medical witnesses who testified to the myriad serious neck, back and other injuries. The plaintiff had been presented by the court with a limit of fifteen minutes for each round of *voir dire*. He made a record of his objection and the Appellate Court found that the plaintiff was prejudiced "by the extremely short time" permitted for *voir dire* and sent the matter back for a new trial.

In January 2009 the New York Court System had addressed civil *voir dire* and had determined that rather than setting time limits, the recommended practice is for the court "to set only a general time period after which counsel should report on the progress of *voir dire*." The court further stated that "in a routine case a reasonable time period to report on the progress of *voir dire* is after about two or three hours of actual *voir dire*."[3]

The utilization of the time you are permitted however cannot be done without a checklist of important questions to ask. In another New York State mid-level opinion a plaintiff who suffered a defense verdict complained that the jurors were not truthful during *voir dire*.[4] One of the jurors was a probation officer for one of the plaintiff's sons and did not disclose that. Of course the occupation of the jurors should be established and any potential connection between your client and any members of his family should be explored particularly when there is something that could be inherently prejudicial. In the instant case, however, the court did not set aside the defense verdict because of the lack of a record made by the plaintiff with regard to those inquiries.

In Federal court the goals are something different. In the Federal court *voir dire* questions are submitted. This is a critical opportunity for both attorneys to submit *voir dire* questions that go to the heart of their case so that there will be no doubt that relevant questions were sought to be asked of the jury members. A review of the questions asked in the *US v. Clemens*[5] case reflects the significant analysis that went into the questions and the fashion in which all of the potential negative affects to Roger Clemens were outlined. In addition to the more general questions about fairness, outside knowledge of the case, and the presumption of innocence, the questions went into particular facets of the case. For example:

> (20) Are you familiar with the science of chemical analysis, or have you received any training on this science?

---

2 *Zgrodek v. McInerary*, 61 A.D.3d 1106 (3d Dep't 2009)

3 *Implementing Civil Voir Dire Law and Rules*, New York State Unified Court System (January 2009) at 5-6. Available at http://www.courts.state.ny.us/publications/pdfs/ImplementingVoirDire2009.pdf.

4 *Remillard v. Louis Williams, Inc.*, 59 A.D.3d 764 (3d Dep't 2009)

5 (US District Court DC, Crim. Action #10-223) (RBW); a copy of the questionnaire is available at http://s3.documentcloud.org/documents/336716/voir-dire-panel-questions.pdf.

(27) Do you personally know any current or former professional athletes?

(30) Have you or has someone close to you ever used anabolic steriods or human growth hormones?

(46) Do you have any feelings or opinions, whether positive or negative, about the United States Congress or any particular members of Congress that might affect your ability to be a fair and impartial juror in this case?

(66) Do you believe that it is absolutely impossible for a person to believe very strongly that he has certain memories about something, even though it is later determined that those memories may be inaccurate?

The manner in which a juror responds to these questions may be just as important as the answer. For instance, a juror responding that a former brother-in-law played minor league baseball may betray signs of animosity towards that individual personally, or all baseball players, even if the response itself is mundane. This is therefore an example of how the questions and answers themselves are important, but so can be the reactions to them – much like the example earlier in this article of the litigation-averse potential juror who shows signs that she herself may even sue if injured in an accident.

Although there are studies that suggest the jurors make up their minds in many cases by the end of opening statements,[6] it is far too difficult to change perceptions of jurors if they are deeply held. Those are the jurors you should challenge for cause or use the preemptory. It is the far greater number of jurors who are in the middle and are prepared to be open-minded whom your target audience is. You should attempt to provide them reason to trust you in the *voir dire* process and that begins the moment you walk into the courthouse.

The first impression that you make on the jury, and that the jury makes upon you, can take on another digital form in the age of handheld access to the wealth of information (and mis-information) on the internet. The concept of *Googling* a person you have just met or are about to meet has been part of the popular lexicon for some time now. The legal world is no exception. This brings us to the use of a little extra help in selecting (and de-selecting) jurors.

Not too long ago, the ability to independently research your potential jury pool would have been confined to only the largest of cases where the client had deep pockets for additional legal staff or jury consultants, and the jurisdiction offered an advance list of potential jurors. But now, given the quick and easy access to the internet from almost anywhere, lawyers can conceivably research a potential juror in real time. Before taking this option, a trial lawyer needs to consider (1) the technological tools available; (2) how the Court will react; and (3) the practical consequence of the approach.

First, consider the tools available. The attorney will require the proper hardware: a laptop or iPad or similar tablet, or even a smart phone; and, preferably, another attorney or assistant who can devote their energies to the task.[7] Then the attorney will need to make sure that the internet will

---

[6] The seminal example of a study of jurors and juries is HARRY KALVEN JR. and HANS ZEISEL, *The American Jury*. Boston: Little, Brown, 1966. *The American Jury* emerged from the work of the University of Chicago's Jury Project.

[7] It bears mentioning that there are, of course, "apps for that", or smart phone and tablet software applications to assist in jury selection. Two examples are iJury (http://dynamislaw.com/ijury/)

…Continued

be accessible from the potential jury selection locations: high hopes for internet research of potential jurors is of no use if jury selection takes place in an interior room where you cannot get a wireless signal.

Most importantly will be a game plan for research. There is a better chance than not that the jurors will have an account with Facebook, LinkedIn, or Twitter, or at the least will come up with a cursory search on Google or similar search engines.[8] Instead of legal legends of sending investigators to the homes of potential jurors to photograph bumper stickers and political signs, one can now acquire that information from their Facebook page or the "Interests" section of their online resume. Given an accurate name, a lawyer can acquire this type of information in seconds.

This leads to a strategic suggestion. Just as you can investigate a potential juror from your smart phone, check on your own client, corporate or individual. Does your client appear less than attractive online? If it is a corporation, is their unfavorable news and information out there that could slant a juror's understanding and perceptions? While the importance of clear admonishments from the Court to the jury regarding outside communications and research of a case should not be understated, you as the lawyer have a certain amount of control over your client's impression on the jury. Just as you would advise your client's representative on attire in the courtroom and respectful but friendly eye-contact with the jury, you should also ensure that if a juror searches for the client online, they do not see anything you do not want them to see.[9]

The next consideration is the reaction of the Court. How will the Court react to your use of a computer, a tablet, and the internet during jury selection? An instructive case emerged from the New Jersey Appellate Division, *Carino v. Muenzen*.[10] In that case, the plaintiff's counsel began using his laptop computer to Google search the potential jurors. Defense counsel objected, and the presiding Judge decided it was improper because, *inter alia*, had not given the Court and defense counsel notice of his intent to utilize the Court's WiFi connection for that purpose. While the Appellate Division recognized that trial judges have wide discretion over conduct in their courtroom, here there was no disruption of the proceedings, no prejudice because both sides *could have* used the internet, and no express rule prevented it. While this is only one example from one state, it leads to the idea that a court would in theory allow it. Of course, best practice would be to notify the Judge before opening your laptop, given the discretion normally reserved

---

Continued from previous page

and Jury Duty, reviewed at http://www.persuasivelitigator.com/2011/06/tracking-information-in-voir-dire.html.

8 For a review of the extent of social media usage, and its consequent effect on the jury pool, please see AMY J. ST. EVE and MICHAEL A. ZUCKERMAN, *Ensuring an Impartial Jury in the Age of Social Media*, 11 Duke Law & Technology Review 1 (2012).

9 Understanding, of course, that the search results for "Roger Clemens" around the time of his trials was beyond Rusty Hardin's control. However, there are other ways to control it: making sure the company has a friendly home page, or checking to see that your star witness's Facebook page would look professional to a juror or prospective juror. For a proper analysis of the legal and ethical implications of jurors' use of the internet, *see e.g.* Hon. St. Eve's article at footnote 7; *see also* MARCY ZORA, *The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights*, 2012 U. Ill. L. Rev. 577.

10 *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010), *cert. denied*, 205 N.J. 100 (2011). Reviewed in DUNCAN STARK, *Juror Investigation: Is In-Courtroom Internet Research Going Too Far?*, 7 Wash J.L. Tech. & Arts 93 (2011).

for the trial court.

The final consideration is a practical one. As anyone who uses the internet to research knows, a search can quickly disintegrate into a jumble of useless information. The last thing a trial lawyer wants during *voir dire* is to be distracted by misspelled names or information that can be just as easily gleaned from asking the jurors themselves. Moreover, many prospective jurors will feel as if they themselves are on trial if it is apparent that you are investigating their alma mater, job history, or family vacations online and then peppering them with questions.

That leads us back to the beginning. *Voir dire* is your first impression. If using the internet or any other resource distracts you from the task at hand, leave your iPad at the office. Focus instead on understanding the men and women in front of you, and making the personal connections with the individuals who will decide your case's fate.