

# Litigation News



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## A Case for the Expanded Use of Supplemental Juror Questionnaires

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The goal of a jury trial is the evaluation of facts and evidence of a case, an application of the law, and an engagement by jurors in a rational process of judgment and group decision-making, free from sympathy, emotions, and other extra-evidentiary and extra-legal factors. But in order to approach this ideal, appropriate jury selection procedures and techniques are critical.

This article argues for the expanded use of supplemental juror questionnaires (SJQs). It does so based on an understanding of jury behavior, reasoning, and cognition. It is time to bring our understanding of jury behavior and its implications to jury selection into the 21<sup>st</sup> Century. By understanding the implication of human decision-making, cognition, and the role of attitudes and experiences that influence judgment and expression, we can approach jury selection in a manner that will better ensure that parties are evaluated by more open-minded and thoughtful jurors.

It must be made clear that the jury system is an amazing American institution. It is the practice of small group democracy where the views and votes of citizens matter. Verdicts are the product of hard work and sincere commitment by jurors. This system that allows ordinary people the ability to deliberate issues of significance is sacrosanct. But that does not mean that we should not improve the process of jury selection in order to heighten the inherent benefits of the jury trial and ameliorate the potential for extra-evidentiary and extra-legal influences in verdicts. There is little need to revisit

horror stories of jury misconduct and costly retrials. These are salient concerns, but concerns with a solution.

The American Bar Association's *Principles for Juries and Jury Trials* makes the importance of adequate voir dire and supplemental jury questionnaires clear. The preamble states that "each principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints." American Bar Association, *Principles for Juries and Jury Trials*, at 2 (2005), available at <http://www.abanet.org/juryprojectstandards/>. Principle 11 concerns the right of parties to a "Fair and Impartial Jury" *Id.* at 13. To that end, the principle states: "In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire." *Id.*

### What is an "Appropriate Case"?

This article does not endeavor to answer the question in detail, as the particularities and eccentricities of every case need to be evaluated. But, as the Honorable Judge Robert Alsdorf (ret.) has opined, difficult cultural, social or personal issues, controversial and personal issues that jurors may wish kept private (*e.g.*, views on sexual abuse, race and racial politics, immigration, sexual discrimination or harassment) are potential cases for supplemental juror questionnaires. "A view from the bench": An interview with the Honorable Robert Alsdorf (ret.), *The Advantage*, 4 (2), September 2007, p. 1. Cases that overlap

with contemporary "hot" social issues or concerns (*e.g.*, attitudes toward crime and police practices, insurance and bad faith, anti-wealth bias following economic downturns) are all good cases for SJQs. Any issue which could be described as a potentially polarizing social or political issue could impact the way in which a potential juror evaluates facts, evidence, and even the law.

In order to support the general case for the increased utility and appropriateness of using a supplemental juror questionnaire, we need to become more sophisticated in our understanding of human reasoning and decision-making. These processes are also products of peoples' values, attitudes, emotions, and experiences.

### What is a Fair and Impartial Juror?

There is no such thing as a *tabula rasa* juror. People interpret facts, evidence, and the law through lenses influenced by their attitudes, beliefs, commitments, and experiences. This notion of the importance of values in persuasion goes all the way back to Aristotle, who argued that one must endeavor to find common ground with an audience before one can attempt to persuade that audience to accept more controversial issues. Bizzell & Herzberg, *The Rhetorical Tradition: Readings from the Classical Times to the Present*, 2d ed., Aristotle's *Rhetoric*, (Bedford/St. Martin's Press; Boston, MA., 2001), pp. 179-240. Stemming from the early work on cognitive dissonance, the understanding of how attitudes and views influence decision-making, is a ripe area of inquiry. Western, *et al.*, "Neural

Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election.” *Journal of Cognitive Neuroscience* 18 (11), 2006, pp. 1947-1958; Western, *et al.*, “Motivation, Decision Making, and Consciousness: From Psychodynamics to Subliminal Priming and Emotional Constraint Satisfaction.” *Cambridge Handbook of Consciousness* (Cambridge, England: Cambridge University Press, 2007), pp. 673-702.

What is known as “motivational” or “bounded” rationality is a keystone to understanding why certain people accept or reject, selectively interpret (or even remember) evidence, facts, themes, principles, or other forms of information. In other words, based on a set of beliefs and attitudes derived partly through experiences, people are motivated to approach their decision-making in certain ways, to believe and accept certain things, and to reject data or information inconsistent with their beliefs. Kunda, “The Case for Motivated Reasoning.” *Psychological Bulletin*, 108 (3), 1990, pp. 480-498. Ziva Kunda argues that “motivation may affect reasoning through reliance on a biased set of cognitive processes: strategies for accessing, constructing, and evaluating beliefs.” *Id.* at 480. These phenomena can be seen daily in peoples’ reactions to political communication. It happens in juries too.

Motivated reasoning comes through two general categories, one motivated by a desire for “accurate conclusion” and the other motivated by a “particular, directional conclusion,” that is to say, one where the end-state drives the rationalizations. *Id.* The “cool” cognition that the court and most parties would prefer is not always what dominates deliberations. Rather, it can be the “hot” cognitive processes, driven by preexisting view or beliefs, heavily influencing a particular juror’s interpretation of case facts. This is not to suggest that we must give up hope that parties can receive a fair trial. On the contrary, it is faith in the jury system that encourages a means to improve practices to further the effort to have open-minded and thoughtful jurors as triers of fact. The issue points

toward the increased importance of being able to assess the degrees of impartiality and fairness in a more sophisticated fashion. The thing that is perhaps the most troubling is the false dichotomy that people are either fair and impartial, or hopelessly biased. Prediction and assessment of human behavior lies in the realm of probability and possibility.

When it comes to a juror’s motivation to express views in deliberation, a lesson in the social significance of gossip is instructive. One may think that gossip is about the person who is the subject of the gossip, but it is also about the person who is gossiping. They are telling others what values they stand for, and which values, actions, and choices they abhor. They are impelled to talk because they want to express what is important to them. A juror can be motivated to do the same thing in deliberation. People are roused to fight for certain interpretations because a verdict is about values, principles, and justice, and which party they feel is right and which is wrong. The role of deliberation, using the terminology above, can quickly become a “hot” cognitive effort, even if people are doing their best to focus on the “objective” evidence and the law as provided to them by the judge.

For these reasons, adequate assessments of potential jurors’ views, attitudes, experiences, etc., is critical to making an informed judgment about a particular person’s appropriateness to sit as a juror. A key means of accomplishing that is through the use of SJQs.

### Supplemental Juror Questionnaires

Questionnaires are powerful information-gathering tools. With appropriate application of social science methods of survey questioning, a great deal of information can be collected in relatively efficient and short questionnaires. Parties can assess a juror’s system of beliefs and attitudes, and consider which jurors may be more likely to have “hot” cognition trump “cool” reasoning, based on their patterns of answers. The attorney can delve below the false generalizations based on demographics, and even help avoid constitutionally questionable preemptory

strikes, by focusing on what people believe and have experienced, rather than what they look like.

The prospective juror’s potential biases, the “boundaries” of their bounded rationality, in a sense, can be assessed and their relative risk can be considered. Voir dire can be targeted and efficient. Understanding and clarity is enhanced. Hardship, potential cause issues, and red flags for peremptory challenges can become so much clearer to all parties and the court.

It is important to consider the system of germane attitudes and experiences available in SJQs because judge-conducted and attorney-conducted voir dire may be inadequate to really eliminate those jurors with high potential for bias.

We have all been in court when jurors expressed concerns about an inability to be fair to one party or the other. Often what happens is the rehabilitation of that juror by the court. Judges exert great authority in a courtroom, and rightly so. Their questions (and the implications from those questions) carry great weight for jurors. So, when a judge asks if a juror can be fair, after the juror has expressed hesitation in evaluating elements of the case or parties in an “objective” manner, it follows that their answer will most likely be “yes” or “I will do my best.” The danger is that *even if* this is the express desire of that individual, he or she may still evaluate the evidence and law through a troublesome extra-evidentiary lens. As evinced above, when it comes to “hot” cognitive efforts, the biases or influences may be implicit factors in memory, expression, and judgment. So, if one is earnest enough at expressing a potential for bias, but then affirmatively states that he or she will *try* to be “fair,” the question remains whether he or she really can or will be.

Judges often encourage open participation in voir dire, but such efforts still do not ensure that a juror with bias will speak up. The courtroom is an intimidating place for many jurors. The mystery and formality of the setting can easily silence earnest expression. Being

asked to speak publicly in voir dire, given that the fear of public speaking is close to the fear of death for many Americans, presents an additional impediment to honest and open answers to either judge or attorney-conducted voir dire.

Allowing potential jurors to document their experiences and express their views on a questionnaire increases the chance that they will more honestly answer the questions. In addition, each question calls for an answer. Thus, the response rate to germane questions is considerably higher, if not absolute.

Many judges and attorneys feel that simply providing the law, as delivered by the court, will resolve concerns stemming from a potential juror's expressed hesitation to be *fair* to the parties. But Kunda's work reminds us that, "one should not assume, however, that accuracy goals will always eliminate biases and improve reasoning." Kunda, "The Case for Motivated Reasoning." *Psychological Bulletin*, 108 (3), 1990, pp. 480. Once again, expressions of bias are not always conscious. If one is motivated to arrive at a particular conclusion, they try and act rationally as they strive to support that conclusion. This "illusion" of rationality goes beyond rationalization, but may also involve such fundamental "process(es) of memory search and belief construction biased by directional goals." *Id.* at 483.

There are practical considerations to implementing an adequate SJQ process. The ABA Principles make clear that "all completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination." American Bar Association, *Principles for Juries and Jury Trials*, at 13 (2005), available at <http://www.abanet.org/juryprojectstandards/>. A good questionnaire without adequate time to evaluate the answers may be useless. The goal is still efficient and fair jury selection.

In terms of efficiency, attorneys can conduct targeted voir dire. This can make better use of limited voir dire time. Rather than asking general questions to a

group, which can be, in some cases, met with the tumbleweeds and critics instead of engaging conversation, the attorney can follow up with specific individuals based on the answers on their SJQ.

Hardship can be dealt with on the questionnaires. Their hardship answers on a questionnaire can be more effectively and efficiently explored, rather than dealing with the multiple rounds of hardship requests. The court can avoid the evolution of hardship claims as the "learning curve" of the venire increases. Jurors unmotivated by civic duty often learn how to manufacture effective hardship cases by witnessing what others have expressed in open court.

Special draws of jurors can be used, which may take more work up front by the court and the parties, but it will secure the venire for jury selection rather than competing with other trials over a limited group of jurors when several significant cases begin on the same day.

Evaluation of the questionnaires can be conducted over the weekend if it is a Friday special draw, or evaluated over more time if the questionnaire is mailed to the members of the venire in advance. If the questionnaire is administered in the morning of trial, copies can be made, and a member of the trial team can assess the questionnaires while another member or members of the team deal with other procedural matters of the court (*e.g.*, motion practice, evidentiary issues related to opening statements, etc.). The questionnaires can be assessed over the lunch break, and oral voir dire can, in most cases, result in a jury selected by the close of the afternoon.

The trial team can shoulder the bulk of the effort in crafting and negotiating the questionnaire's content. Expenses, which are relatively low, can be handled by the parties. If there is a concern with copy machine adequacy, one of the trial teams can volunteer to pay and produce multiple copies of the questionnaires.

### Conclusion

Our legal system is adversarial in nature. It is through such a system that

a jury can arrive at the best decisions. Jury selection is actually a misnomer. It is really jury "de-selection." SJQs are not about "stacking" a favorable jury, since lawyers do not get to pick jurors they want. The goal of jury selection is to use limited opportunities to identify those jurors who pose the most relative risk and to attempt to de-select them from the pool. It is up to the other side to identify jurors who may be high-risk for them and use their opportunities to de-select them. The goal is to have an open-minded and thoughtful jury.

Well-designed and analyzed questionnaires that allow a look into the patterns and system of attitudes, beliefs, and experiences can help the court assess those individuals who may lie toward the "wrong" end of the "objective"/"biased" continuum. As Paul Thagard wrote in "Why wasn't O.J. convicted?," jury deliberations will still be driven, at least partly, by emotional coherence. Thagard, Paul, "Why wasn't O.J. convicted? Emotional coherence in legal inference." *Cognition and Emotion* 17 (3), 2003, pp. 361-383. But, effective jury selection mechanisms can better encourage a situation where "cool" reason prevails over the emotional or "hot" cognition. *Id.* at 380. It is important to encourage attorneys to approach jury selection in a manner most advantageous to their duty of zealous advocacy to their client. A judge's acceptance of the use of SJQs does not preclude efficiency. Even if some additional time is spent up front, the risk of juror misconduct and retrials is greatly reduced. It is time to modify the approach to jury selection by allowing wider use of supplemental questionnaires in order to meet that goal.

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