

COVER STORY

BE CAUTIOUS OF THE QUIET ONES

Jurors who are initially silent during jury selection could be detrimental to your case. A judge underlines the importance of pursuing a careful, information-oriented jury selection process.

By Gregory E. Mize

Place yourself in the following scene. After suffering a losing verdict in a personal injury case, you and your client learn in post-trial interviews with jurors that one of them, silent during *voir dire*, was treated by the same doctors as the winning party. Moreover, it is learned that the juror, during deliberations, expressed a preconception that his former doctors would have rendered the same satisfactory treatment to the opposing party as the juror himself previously received. Are you fuming over the lost opportunity to have learned about the juror's proclivities during the jury selection process?

I write to share research about a jury selection procedure that I have used in my courtroom during my last five years as an active trial judge. Using that discipline, the citizen prejudgment described above was actually learned during *voir dire*. That discovery led to the pretrial strike of the prospective juror, by

consensus of the parties. What follows is a demonstration of how important it is to be cautious with citizens who are initially silent during *voir dire*.

In March 1998, a collaboration of judges, trial lawyers, former jurors, and civic leaders released the "Juries for the Year 2000 and Beyond — Proposals to Improve the Jury Systems in Washington, D.C." The text can be downloaded from www.courtexcellence.org. The 32 recommendations cover a wide spectrum. Some are completely practical, suggesting nuts and bolts steps for jury commissioners to obtain more accurate juror source lists. Others express simple, common-sense guides to promoting citizen comfort, pride and security. Another, Recommendation 19, urges major revisions in the jury selection process.

Judge Gregory E. Mize, retired, was a trial judge on the Superior Court of the District of Columbia from 1990-2002. In 1997 Judge Mize was the co-chair of the D.C. Jury Project, which produced "Juries for the Year 200 and Beyond — Proposals to Improve the Jury Systems in Washington, D.C." He is currently a consultant to the National Center for State Courts' Center for Jury Studies. Judge Mize has spoken frequently at public forums on the topics of jury trial renovations and jury selection procedures. He is a leader in the effort to establish a National Program to Increase Citizen Participation in Jury Service Through Jury Innovations. This article appeared in Voir Dire magazine, Summer 2003, Volume 10, Issue 2. Reprinted with permission.

Recommendation 19 states:

The D.C. Jury Project recommends that the fairness, efficiency and utility of the *voir dire* process in the trial courts of the District of Columbia be enhanced by:

- a. Increasing relevant information about jurors available to the Court and parties by use of a written jury questionnaire completed by all jurors and given to the Court and parties upon the jury panel's arrival in the courtroom
- b. Improving the ability of parties to ascertain grounds for strikes of jurors for cause by requiring that each juror be examined during the *voir dire* process and by giving attorneys a meaningful opportunity to ask follow-up questions of each juror
- c. Assuring to the extent possible that prospective jurors who may be biased or partial are stricken for cause by establishing that when a prospective juror's demeanor or substantive response to a question during *voir dire* presents any reasonable doubt as to whether the juror can be fair and impartial, the trial judge shall strike the juror for cause at the request of any party, or on the court's own motion
- d. Reducing improper discrimination against jurors, unnecessary inconvenience to them, needless delays in the trials, and excessive costs by eliminating, or drastically reducing the number of peremptory strikes.

The D.C. Jury Project members firmly believed that subsections a. through c. must be accomplished before undertaking subsection d. In particular, they thought the courtroom practice described in subsection b. would promote a more informative jury selection process by

requiring that each prospective juror be individually examined at least once during the *voir dire*. I took that recommendation to heart, trying to implement subsection b. in my courtroom during the last nine months of 1998. When I recorded my efforts, I obtained some remarkably useful results.

Pre-innovation *voir dire* practice

At the time the "Juries for the Year 2000 and Beyond Report" was released, I was assigned to the felony branch of the Criminal Division of our general jurisdiction trial court. My cases typically required that I call at least a 60-citizen *venire* panel from the jury lounge into my courtroom. Prior to the seating of prospective jurors in the courtroom, I asked counsel for the prosecution and defense to review my standard *voir dire* questions that are posed in open court. I also invited counsel to suggest additions or deletions to the proposed questions. I customarily opened each *voir dire* with a greeting and a plain explanation of the purpose of the *voir dire* part of a trial. I emphasized the importance of the oath to tell the truth in response to each question I was about to ask in open court. The *venire* panel was told that if the answer to any of the questions is "yes for you" then place the stated number of that question on a sheet of paper that was previously distributed by courtroom staff. The entire open-court questioning procedure usually consumed 10 to 15 minutes. Thereafter only prospective jurors who had affirmative answers to the en masse questions were called individually to the jury deliberation room to explain their responses.

Lessons first arose in criminal trials

In my first jury trial after the "Juries

for the Year 2000 and Beyond" recommendations were released, I started to individually interview every potential juror in the jury room, after all general *voir dire* questions were posed to the *venire* panel, regardless of whether they had an affirmative response to the battery of open-court *voir dire* questions. During the individual interview, I would ask the jurors who had not responded to any of the general questions, "I notice you did not respond to any of my questions. I just wondered why. Could you explain?" If I did not get much of a response, I would say, "Is it because the questions did not apply to you?" Most citizens simply said that the questions did not apply but others said they should have responded or that they had something else they wanted to share.

I was testing whether the individual questioning of all panelists indeed revealed information that would be important for making sound decisions to strike and whether this new approach significantly affected the time it took for jury selection to be completed. In a capsule, I found the individual *voir dire* of all citizens to be an indispensable way of ferreting out otherwise unknown juror qualities. Minimal questioning of each prospective juror has exposed problematic UFO's, so to speak, without any significant increase in time consumption. I will now recount a few of the more illuminating responses that occurred and some statistical analysis. (My more detailed analysis is set forth in "On Better Jury Selection — Spotting UFO Jurors Before They Enter the Jury Room," *Court Review Magazine*, Vol., 31, No. 1, Spring 1999.)

Responses from silent jurors who were excused immediately for cause

The information received by the following prospective jurors was so illuminating that they were promptly excused by agreement of all parties.

- I am afraid to answer questions and cannot remember dates very well.
- I definitely don't want to be here. I'd be resentful if I'm to stay here.
- [In a gun case] I can't stand to talk about guns. My grandson was killed with a gun so the topic of guns makes my blood pressure go up.
- [In a gun case] We should not waste time prosecuting people just for gun possession charges. I was on a hung jury before. I don't know if I can follow instructions of the court for gun possession. That was the problem in my other trial.
- I don't want to be a juror. I've lied already. My mom was a juror and died on Christmas day. My back hurts and I am supposed to be in therapy at noon.
- [In a narcotics case] Eight years ago I was a juror but I was excused because my brother committed suicide as a heroin and cocaine addict. He got drugs easily. Therefore I was and am angry. I'd start out with a bias in this case.
- I was frightened to raise my hand. I have taken high blood pressure medications for 20 years. I am afraid I'll do what others tell me to do in the jury room.
- [In a narcotics case] I have been in a Narcotics Anonymous Program for the last four years. My past drug use may affect me. I am incapable of giving clear answers or making up my mind about drug charges. I feel uncomfortable about talking about drugs.
- I know the defendant. He's a

member of my church. I did not understand some of the questions.

- I have been harassed by police often. So there is a cloud over police officers. The hard part for me is what cops have to say. [All five prosecution witnesses were police officers.]
- [In a drug case, a middle aged woman said she did not understand any of the questions asked in open court. She appeared to be mentally impaired by virtue of her speech pattern and unusual facial expressions.]
- I don't want to be here. I don't judge anyone without knowing everything that is outside of the paper. [indictment?]
- [The ultimate discovery:] I'm the defendant's fiancée.

Responses from silent jurors who were not excused for cause

Other jurors, who ultimately were not excused, gave informative responses that provided the court and the parties with important background information about these jurors. Provided below are some typical responses. Several of the following interviewees were not struck for cause but were removed by a party through a peremptory strike.

- I live 20 blocks away from the scene of the crime.
- [In a gun case] I have some discomfort about people holding guns.
- [In a gun case] My son was shot in the face six months ago. He's fine now but no one was ever apprehended. I have no problem judging.
- I have presumptions about drugs, such as that it is stupid to sell to anyone and that anyone found

with drug paraphernalia would surely be a user or seller.

- I plan to travel Thursday night. I'd be resentful if I was still here but I'd do my job correctly.
- I should have answered two questions. I was an investigator for the D.C. Public Defender Service from January 1998 to May 1998 while I was in my last semester of law school. At PDS, I worked on cases like this one — assault with intent to kill.
- I have multiple sclerosis. It does not affect me currently but heat affects me badly. I hope the courtroom is cool. I also have pressure from my boss, in a two-person office, to get back to work soon. But I want to serve in this case [an assault with intent to kill charge]. It appears very interesting. I'll serve anyway.

These samplings are derived from the 30 felony trials that I presided over in the last nine months of 1998. In those 30 cases, 28 percent of every *venire* panel, on average, did not respond affirmatively to the questions posed in open court. Put another way, slightly over 16 persons in an average size *venire* panel of 59 citizens remained unresponsive. As I repeatedly brought the silent ones into the jury deliberation room for a brief and friendly “why so?” interview, three persons on average (or 17.5 percent of the quiet ones) per trial had relevant personal information to share. This resulted in at least one and as many as four persons being promptly struck for cause by consensus of the parties in 27 trials (90 percent of the cases studied)!

The lessons continued in civil jury trials

The foregoing data compelled me [and many other judges on our court]

to begin the practice of interviewing all silent *venire* members in every kind of jury trial held after 1998. Many felt that even if additional interviews took up significant amounts of time (which it has not for me), it was well worth expending the effort in order to avoid juror UFO's and the consequent dangers of impaneling biased or enfeebled decision-makers.

I do not believe these results are especially attributable to my mannerisms or style of interviewing. The method I have used and described herein is really quite simple and not difficult. These kinds of revelations await any judge or attorney who wants to take an extra moment to ask a citizen, in a calmly neutral way, why he or she did not respond to any of the general questions posed in the beginning of *voir dire*.

My experience presiding over civil jury trials from 1999 to 2002 demonstrated yet again the gold mine of information to be obtained from these interview practices.

During my last three and one-half years in the Civil Division, I applied these jury selection practices in 88 trials. Out of a total 1,539 citizens called to my courtroom for selection, 427 persons failed to indicate an affirmative response to the open-court questions. This amounted to a silent percentage [28 percent] that was identical to the criminal cases analyzed above. However, in contrast to the criminal cases, 44 individuals out of 427 disclosed something of legal significance during their individual interview. That translates into one significant disclosure for every two jury trials. Besides the scenario that opened this article, a representative sampling of meaningful disclosures follows.

Responses from silent jurors who were excused immediately for cause

- [In an auto personal injury case] I don't want to be here at all. I am losing money from my jobs [handyman work] that I lined up for today and tomorrow. I don't like to sit around.
- I'll tell you straight up, I am an alcoholic. I'm starting to shake already today. [His breath clearly smelled of alcohol.]
- [In a medical malpractice case] I do not speak English well. So I may be confused by legal and medical terms.
- I cannot be fair in this case. The plaintiff's attorney represented me in a personal injury case some years ago.
- In a personal injury case, an elderly man appeared to be unusually shy and fearful of speaking up. He refused to answer my repeated questions about whether he would speak up during final deliberations. He eventually stammered, "Yes, I guess I would. I am no expert about anything. I... I..."
- [In an auto accident case] I was in an auto accident last month. I was a driver, rear-ended, have a sore back still. I have treatment scheduled this afternoon.
- In a slip and fall case, the silent juror reported that, while she was waiting for her individual interview to begin, three other citizens in her seating row were discussing their views about frivolous law suits and how people tend to avoid assuming personal responsibility and file suits too soon. [I granted plaintiff's motion to strike the entire panel and start anew with a new group of citizens.]
- [In an auto collision case] I feel

there is too much litigation in society. So I may start with a bias against the plaintiff.

- A citizen came in to the interview unable to read her juror badge number or speak any English.

Responses from silent jurors who were not excused for cause

- [In an assault and battery case] I am a Secret Service agent and I teach self-protection classes at the training academy.
- [In a breach of contract, university tenure case] I am a college professor [not at the defendant school] and I got tenure in an unusual situation after being on faculty for only two years. [He was struck peremptorily.]
- [In a personal injury case] I was a juror in a civil case that lasted six weeks. I had to quit before it ended because I was robbed and beat up. [He was peremptorily struck by defendant whose counsel later disclosed that he thought the citizen would have too much sympathy for plaintiff's injuries.]

Are these not remarkable results? This study underlines the importance of pursuing a careful, information-oriented jury selection process. The data also supports the larger dimensions of Recommendation 19 of the "Juries for the Year 2000 and Beyond Report" insofar as it urges greater reliance on reason-based, for-cause elimination of biased jurors rather than on the intuitional use of peremptories.

I invite reader comments or recommendations regarding the above findings, their implications, and the prospects for follow-up research. ■