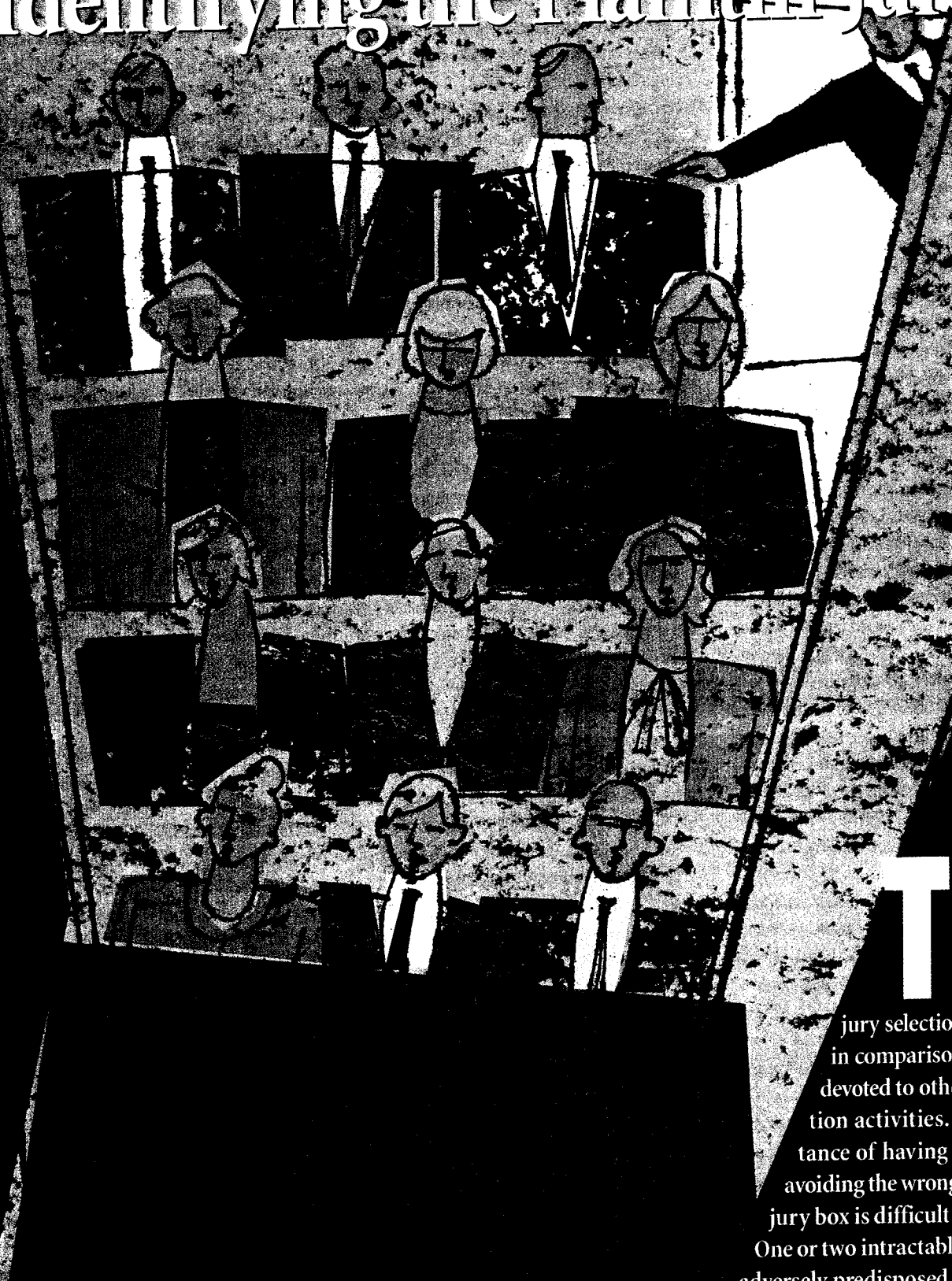


A Psychological Analysis

Identifying the Plaintiff Juror



by George B. Speckart

The amount of pre-trial effort, preparation, and thought that litigators devote to jury selection typically pales in comparison to the amount devoted to other trial preparation activities. Yet, the importance of having the right—and avoiding the wrong—people in the jury box is difficult to overestimate. One or two intractable jurors who are adversely predisposed can nullify millions in expenses and thousands of hours of work devoted to preparing for trial.

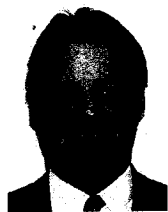
Repeated observations from mock trials and actual jury panels reveal commonalities in psychological characteristics among plaintiff jurors that are robust and persist across case types and venues throughout the country. Identification of these general traits and commonalities can assist defense trial counsel in spotting those who would be desirable jurors and those who would be undesirable. This knowledge will be helpful during jury selection in most types of civil trials.

The optimal strategy to prepare for trial is to design research to investigate particular experiences, lifestyles, and other specific characteristics associated with verdict preferences. Nonetheless, awareness of general personality and temperament characteristics associated with a plaintiff's verdict can aid defense counsel when more explicit indicators are vague, controvertible, or unavailable. This inquiry therefore addresses the general questions of "What are plaintiff jurors like? What are they made of? How are they different?" After we consider the traits of plaintiff jurors that help answer these questions, techniques for inferring such traits in the courtroom environment are considered.

Personality

Personality psychology investigates the stable individual differences that account for consistency in different situations. At the most fundamental level, the characteristics of the plaintiff juror may be the same as basic personality traits that differentiate this juror from others. Reviews of databases for mock trials and actual post-trial interviews have indicated the following personality constructs or traits as "markers" for the plaintiff juror.

- **Cynicism.** A generalized tendency to view the world as sinister, oppressive, or malevolent.



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- **Vulnerability.** A characteristic associated with heightened sensitivity, for example, sensitivity to rejection.
- **Arousability.** A predisposition toward nervousness, distractibility, jitters, hysteria, mania, and other excessively aroused states.
- **Depression.** A trait ranging from mild dysphoria ("the blues") to clinical depression. In the general population, it is usually observed as a sluggish, withdrawn, or sullen demeanor.

These personality traits are often intercorrelated. For example, a correlation between cynicism and depression would appear to be self-evident in many individuals. The present analysis concentrates chiefly on the traits of *cynicism* and *arousability*, although others are also considered.

One way of looking at the psychological make-up of the plaintiff juror is to consider the question, "What is it that makes one receptive to a complaint?" After all, the juror who resonates strongly with the plaintiff's message is in fact, responding to a complaint. Clinical assessment instruments that measure *cynicism* as a personality trait find that cynical people respond strongly to the following statements.

- "People pretend to care about one another more than they really do."
- "Most people make friends only because friends are likely to be useful to them."
- "Given the chance, most people will take advantage of you."

Strong endorsement of these clinical assessment statements is indicative of high degrees of cynicism. Obviously, then, it is not surprising that individuals characterized by this temperament would be biased toward the plaintiff in cases for which claims include fraud, unfair competition, tortious interference, misappropriation, unjust enrichment, sexual harassment, or even product liability in which corporate misconduct is alleged. So, it is more or less self-evident that *cynicism* would be one pivotal characteristic that causes a juror to be sym-

pathetic to a complaint by an allegedly victimized party.

Working with trial counsel in actual jury selection settings, it is apparent that many litigators confuse *skepticism* with *cynicism*. Skepticism is, in many respects, the opposite of cynicism. A *skeptical* individual is hesitant to accept a given proposition and demands proof before adopting a belief or premise. This type of person is typically a defendant juror in a civil case. A *cynical* person, on the other hand, readily accepts the notion that someone has been victimized, since he already views the world as being inherently predatory, and sides quickly with the plaintiff.

The Arousable Juror

A noteworthy characteristic of many plaintiff jurors is the psychological trait of *arousability*. In the courtroom, a high degree of arousability is often linked to a cognitive or information-processing style in which large amounts of evidence are stored in the mind during the plaintiff's case-in-chief, with less and less information being assimilated later when the defendant has a chance to put on evidence. In essence, this juror becomes excessively "heated up" by the plaintiff's case to the point where the juror's cognitive (information-storing) facilities "melt down." Post-trial interviews of such jurors reveal that they have retained only traces of evidence from the defense, later in the case, although their recall of information from early in the case is quite vivid, thorough, and accurate.

A good example of this type of juror can be found in the antitrust case of *ETSI v. Burlington Northern, Inc.*, in which the plaintiffs were suing various railroad companies for preventing the construction of a coal slurry pipeline. See 822 F.2d 518 (5th Cir. 1987). The defendants sought to demonstrate that there was no causation between their actions and the failure to construct the pipeline, since ETSI (Energy Transportation Systems, Inc.) had not even obtained approval for the project from the Interstate Commerce Commission. The former head of the ICC was the last witness in the trial, and spent the entire day on the stand. Notably, however, a handful of jurors—all comparatively energetic and arousable individuals—could not

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support an insurance company if it resists matching, so long as it takes a reasonable approach in fairly estimating the cost to repair or replace the damaged property. Some policies expressly provide that the company is obligated to repair or replace only that *part* of the property damaged, and such language has been upheld by the courts as suggesting the companies do not have an obligation to match. In addition, the cases suggest that if the position taken by the company is a reasonable one, then the insurer will not be required to exactly match the pre-loss condition of the property.

Given the natural inclination of a fact finder, whether judge or jury, to scrutinize any position taken by an insurer, the latter should be able to fully support its position taken on any matching issue. This may require the retention of qualified and objective outside contractors or other experts. Where appropriate, these experts should inspect the loss site as soon as possible after the loss, take numerous photographs, and be fully able to support the insurer's decision. It is recommended that such

experts prepare written reports, and these reports can be furnished to the policyholder.

Although damage to "aesthetic value" does not constitute a direct physical loss, and thus is not a covered peril under most policies, it should be observed that people often take great pride in their homes, and this includes the home's appearance. Many jurors are homeowners, and may have a similar "my home is my castle" attitude. Therefore, insurers may not want to completely disavow the concept of aesthetics. Certain practices may not strictly be required, but still make good business sense: painting all four walls of a room, even though only one was damaged; re-shingling an entire slope of a roof when only several shingles of that slope are damaged; re-siding a complete side of a house, when only several portions of the siding are damaged; or replacing fencing, carpeting, etc. to a logical break-point. These decisions may be what is reasonable under the circumstances. If so, then the insurer may want to consider allowing for such repair or replacement in its estimate.

Consistency in the adjustment of claims involving matching can also be important. In this age of alleged bad faith claims, counsel for policyholders are watching very closely the patterns and practices of insurance companies. Apparent inconsistency or arbitrariness by the company in adjusting this type of claim may invite lawsuits, or make winning them difficult. Counsel for the policyholder can often be heard to cry, "Sure they'll match on the cheap stuff, but not where real dollars are involved!" Hence, insurers may want to develop reasonable and consistent guidelines to deal with some of the more mundane aspects of the property claim, such as paint, wallpaper, roof shingles, bathroom tiles, house siding, and the like.

Finally, it is important that claims professionals are trained to recognize matching issues and know the company guidelines for handling them. In the end, it is the exercise of consistency and reasonable judgment which will allow the claims professional to successfully navigate this troublesome area. **RD**

Identifying the Plaintiff Juror, from page 31 even state, during the post-trial interviews, what the initials ICC signify. By contrast, these jurors recalled, with great clarity, the videotaped depositions of railroad executives that the plaintiffs had presented during their case-in-chief, weeks earlier.

The overt characteristics of the highly arousable juror resemble very closely those of a less sophisticated person with limited information-processing abilities. However, closer examination reveals an individual who is of at least average intelligence, yet fails to store and assimilate later-presented information that would provide alternative explanations or a more refined and detailed fact scenario benefiting the defense.

In short, the propensity of being highly arousable controls the information-processing style of this special class of plaintiff juror. To illuminate the relationship between arousability and "cognitive meltdown," it is helpful to consider "strong" versus "weak" nervous systems in different individuals. Those with strong nervous systems react less intensely to sensory input, and are therefore able to withstand greater amounts of impinging stimulation over long periods of time. A weak nervous system, on the other hand, responds more energetically at the outset, but then quickly exceeds its capacity to absorb or process new

information—the pattern of the plaintiff juror who is subject to cognitive meltdown. In other words, persons with strong nervous systems are less arousable; they tend to remain calm and continue to process incoming information longer. Those with weak nervous systems (highly arousable people) become excited quickly, have more extreme reactions, and block subsequent input after a comparatively short time.

Another point for defense trial lawyers to keep in mind when selecting a jury is the relationship between arousability and "emotional empathic tendency"—the predisposition to empathize on an emotional level with another person. More arousable people are more likely to react in kind to an emotional appeal. They are more likely to store in memory and recall only the emotional portion of a message or communication. As a result, it is clear that the plaintiff message will stand out in the memory of an arousable juror not only as a result of "cognitive meltdown," but also because of a generalized bias toward emotional messages.

There is also a positive correlation between arousability and distractibility, which is in turn positively correlated with neurotic tendencies. High levels of arousability have also been linked to temperament characteristics such as impulsivity, lack of endurance, anxiety, mood disturbance, and sensitivity. These are not the types of characteristics that the

defense trial lawyer typically hopes to find in a panel of jurors. The fact that these traits are intercorrelated helps explain why plaintiff jurors frequently do not even recall evidence from the defense. Anecdotal observations from mock trials and real trials suggest that plaintiff jurors are often more unstable, emotional, sensitive, and selective in their memories than their more defense-oriented counterparts.

How to Spot the Plaintiff Juror

Given that the above-described personality traits should raise a red flag in jury selection for defense litigators, how can this information be utilized? Obviously, one cannot generally administer clinical personality assessment instruments during *voir dire*. How does one move from theory into practice, and put this information to use, such that a tactical advantage can be realized in the courtroom?

The traits common to plaintiff jurors tend to surface in many situations during *voir dire* and selection, particularly when a supplemental juror questionnaire is utilized. Certainly, it makes intuitive sense that these characteristics would manifest in observable conduct. Formal academic research, mock trial research, and trial experience point to overt markers that can be used to identify a risky juror for the defense.

There is abundant research indicating a clear association between high levels of arousability

and various stress-related illnesses, including cardiovascular disease and myocardial infarction. Arousability is also associated with a variety of physical, psychosomatic, and psychological illnesses and symptoms, as well as an increased prevalence of accidents. Illnesses and accidents are certainly events that are detectable during *voir dire*. Moreover, research with mock jurors has demonstrated clearly that reports of poor health and/or frequent accidents are generally predictive of a plaintiff orientation.

The connection between a tendency toward illness/accidents and plaintiff orientation is not restricted to lawsuits involving illness or accidents. *I.e.*, poor health as a marker for a plaintiff juror does not apply only to medical malpractice, pharmaceutical product liability, or toxic torts. Similarly, an accident-prone history does not simply mean that the individual will only vote against automotive and other similar defendants in personal injury cases involving accidents. These life events stem from enduring, generalized personality traits that point to deeper psychological problems that will apply to any type of litigation. Hence, poor health and frequent accidents can indicate the presence of the “archetypal” plaintiff juror—that is, a juror who votes for the plaintiff in virtually any type of case—because they tend to signify the existence of latent, unob-

servable traits such as arousability and its correlates (impulsivity, sensitivity, and anxiety).

During *voir dire*, the defense lawyer should elicit the following types of information: recent or frequent hospitalizations; whether one is currently under the care of a physician; and the continuous taking of prescription medications. Often, such questions can be justified to the court by arguing that they are needed to ensure that the juror can comfortably sit, concentrate, and assimilate complex evidence over an extended period of time. Alternatively, the most unobtrusive means of collecting such information is a well-designed juror questionnaire.

Other observable life events to detect during *voir dire* are connected with arousability, cynicism, impulsivity, and anxiety. Find out about: arrests or incarcerations; financial problems, including bankruptcy and foreclosures; and job and marital instability. Probing many of these areas during *voir dire*—or even within a juror questionnaire—can be a delicate matter. However, one can formulate innocuous questions that tend to elicit this type of information spontaneously from many jurors. For example, the query “Does anyone here have any kind of experience or dealings with the legal system?” often brings forth reports of bankruptcies, arrests and similar events. Of course, asking more specific questions outright can

be justified when the case fact scenario provides a reasonable basis.

One of the most fertile areas of probing for problematic life events during *voir dire* is the employment experience. Research reveals a reliable connection between arousability and lowered performance in the workplace. The track record supporting the value of employment-related questions in mock trials and real trials is overwhelming. Studying mock jurors and real jurors through trial to verdict reveals that the following types of questions sharply discriminate plaintiff versus defendant jurors:

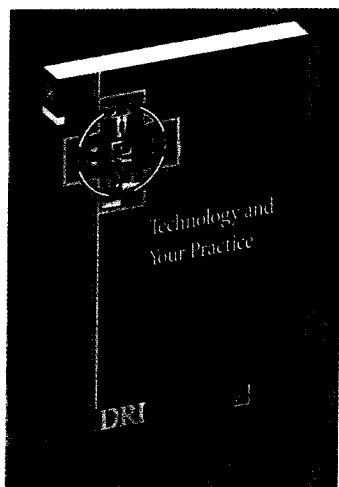
- Have you ever been harassed, discriminated against, or otherwise treated unfairly by a supervisor or manager?
- Have you ever witnessed a cover-up of unethical conduct by a senior employee?
- Have you ever been defrauded or lied to by an employer?
- Have you ever filed a grievance related to working conditions?
- Have you ever been unfairly passed over for a promotion or bonus?

It makes intuitive sense as well that individuals who are anxious, arousable, cynical, or who have mood disturbances would show instability and problems in the work place. Many employment-related questions can comfortably be asked in *voir dire* settings, particularly if the juror is saved from potential embarrassment by being provided with the opportunity to blame the employer or uncontrollable (*e.g.*, economic) events for the problem.

Effective Use of *Voir Dire*

How deeply can one “dig” in *voir dire* is always a sensitive issue, and depends on many factors, including the judge; whether one is in state versus federal court; and one’s own comfort level and skill in phrasing questions and producing a non-threatening, unobtrusive context. The use of a supplemental juror questionnaire to reveal subtleties in jurors’ personalities yields substantial tactical advantages, particularly when one side takes the initiative and poses tactful but revealing questions with response options that are designed to expose only the most risky jurors.

Formulation of effective *voir dire* interrogatories requires deep and painstaking consideration of the mind of the plaintiff juror. Asking jurors to promise that they will “wait and hear our side of the case” is not enough. It is vital that the juror who does not have the temperament to perform this task be revealed using psychological insight and removed from the panel before opening statements are delivered. **FD**



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