

Juries and Evidence

To Down a Stealth Juror, Strike First

There are ways to detect a fact-finder who tries to slip through voir dire on a mission to sabotage the case.

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THE "STEALTH juror" is an individual who professes neutrality while concealing bias. From the standpoint of trial counsel representing a client with a negative reputation, the stealth juror attempts to "fly in under the radar" during voir dire. There are several reasons why a biased juror may want to appear neutral; the most significant and obvious is a covert desire to punish one of the parties to a lawsuit.

The juror might not even be aware of a personal prejudice with respect to an issue until it is raised in arguments during trial. For example, a juror's relative may have been injured years earlier in an accident that is similar to the one that gave rise to the suit at hand, but may not have recalled it until observing the trial proceedings from the juror's box. Whether intentionally or unwittingly, a biased juror can sabotage even the most polished and persuasive presentations.

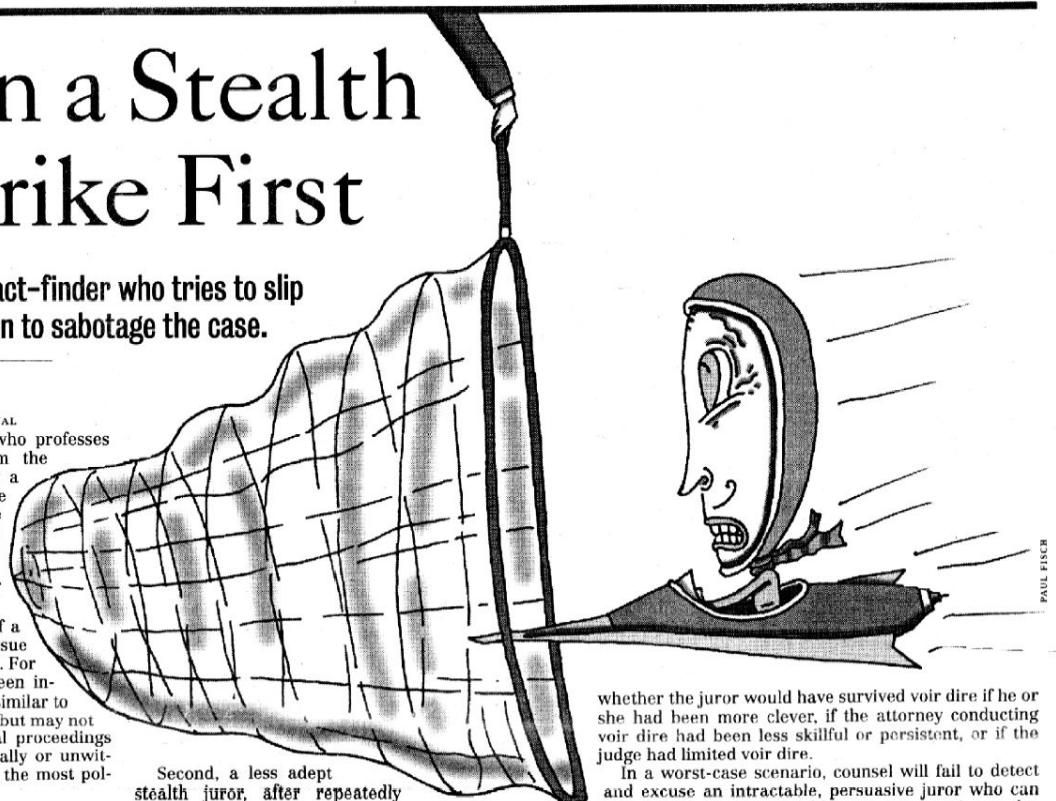
A juror might not even be conscious that he or she harbors prejudice regarding an issue until it is raised in oral arguments.

In "The Runaway Jury," John Grisham's latest best-selling novel, the central character devises and carries out a scheme to get himself placed on the jury in a multimillion-dollar tobacco lawsuit and then extracts huge payments from the tobacco industry in exchange for wielding influence on the panel. To be sure, this is an extreme depiction of a stealth juror.

In reality, however, jurors who distort the truth to avoid being excused during voir dire are not uncommon. From the Dalkon Shield cases in the early 1980s to the Agent Orange cases, a number of prospective jurors have attempted to conceal extremely strong biases. Because their prejudices are not overt, these jurors generally cannot be excused for cause, and thus become the highest priority for peremptory strikes.

A stealth juror most often is uncovered, if at all, in one of two ways. First, post-trial interviews of jurors sometimes reveal that one of them "forgot" to disclose an important source of bias during voir dire. For example, following the recent sexual harassment trial involving Baker & McKenzie,¹ one of the jurors admitted that his wife had been a party to a sexual harassment class action.

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Second, a less adept stealth juror, after repeatedly denying bias, ultimately may concede its existence under unrelenting pressure from a skilled interrogator during prolonged voir dire. In this instance, the admission warrants a dismissal for cause. Nonetheless, such a revelation raises concerns of

whether the juror would have survived voir dire if he or she had been more clever, if the attorney conducting voir dire had been less skillful or persistent, or if the judge had limited voir dire.

In a worst-case scenario, counsel will fail to detect and excuse an intractable, persuasive juror who can sway the panel during deliberations. Detection and a peremptory strike, of course, would be the best possible outcome.

Specific methods for detecting a stealth juror are [SEE 'STEALTH' PAGE B9]

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Stealth Jurors May Be Betrayed by Body Language

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based primarily on more generally applicable methods for establishing juror profiles. For the most part, stealth juror identification is accomplished with rigorously designed survey work and the use of a juror questionnaire derived from that research. Well-planned research aids greatly in detecting jurors who will form biased opinions quickly after opening statements, as well as those who intentionally mask bias during voir dire.

There are three principle methods for detecting stealth jurors: analyzing nonverbal behavior associated with deception; identifying discrepancies between written questionnaire responses and oral voir dire responses; and determining bias indirectly by uncovering "correlates" of bias.

The old-wives'-tale method of lie detection—the failure to maintain eye contact—is actually a weak indicator of lying.

clusion that written questionnaires afford more intimate, candid and uncensored reflections of jurors' attitudes and opinions than do statements made in open court.⁴ Such research strongly suggests that statements made in public are associated with a greater degree of personal accountability than are other forms of communication.

Still other research⁵ reveals that people are less likely to divulge negative or critical opinions when in the presence of individuals who possess a high degree of power or status. An attorney who represents a high-profile corporate client—to whom the disclosure of such opinions is most critical—is perceived as just that sort of status figure. Consequently, such an attorney is ill-advised to rely exclusively on oral voir

dire as the principal indicator of a juror's disposition.

A Slip of the Lip

Because stealth jurors rarely plan or contemplate consistency between their questionnaire and oral voir dire responses, they frequently "slip up" during oral questioning. For example, in an antitrust case against a large oil company, jurors who displayed pro-environmental biases were sought out. A woman in the jury pool wrote in her questionnaire that she joined the Sierra Club because of principles she held. During oral voir dire, when questioned by the oil company's attorney as to her reason for joining, she responded, "I like the hikes."

In another high-profile case, a prospective juror, in response to a questionnaire inquiry about his opinions of the various parties involved in the case, checked "somewhat favorable" for all but the defendant pharmaceutical company, for which he checked "somewhat

unfavorable."

During oral voir dire, when asked by the defense attorney about the basis for his unfavorable opinion, he replied that he in fact held no such opinion and had checked that response in error. Trial counsel did not strike this juror, who eventually became foreman and behaved very negatively during trial, refusing to look at defense counsel and turning away when defense witnesses were on the stand.

One need not be a social psychologist to realize that substantial discrepancies between written and oral responses indicate that things may be amiss. This is, after all, what attorneys attempt to uncover by impeaching witnesses' testimony with earlier deposition responses. Often overlooked, however, are tactical benefits—such as preservation of peremptory strikes—of impeaching a juror.

To use peremptory strikes effectively, counsel must determine what character-

[SEE **'STEALTH'** PAGE B13]

The Eyes Have It

An emerging body of social science research focuses specifically on the issue of deceptive communication, one aspect of which is nonverbal behavior, or "body language," of lying. Relevant indicators in this area include blinking, higher speech tone or pitch, faster speech rate, changes in eye contact and postural cues, and delays in answering, known as "response latency."

Such indicators may be difficult to interpret accurately, however, without knowing an individual's normal, idiosyncratic behavior patterns. For example, failure to maintain eye contact—the old-wives'-tale method of lie detection—is actually a weak indicator of lying, because the characteristic level of eye contact varies widely among individuals. Deception cannot reliably be inferred from a potential juror's degree of eye contact unless his or her typical behavior is known. As an index, blinking is much more reliable.

Another key indicator is what experts in deceptive communication call adapters—unusual body movements designed to vent or relieve stress, such as rubbing hands together or running them through the hair, tapping fingers on the hand or knee, or adjusting clothes. Some social psychologists² assert that people exercise considerably greater control over facial expressions than they do over peripheral parts of the body, and thus when they lie, stress "leaks" to the hands and feet in the form of such repetitive body movements.

Stress, however, is not exclusively a byproduct of lying; it is also a common, natural response to the high-pressure environment of a courtroom. Film and television depictions notwithstanding, the average potential juror is unaccustomed to this setting, and the voir dire process is likely to be his or her first exposure to it.

Being placed in such an alien environment generates a certain level of arousal among jurors, and deceptive communication only enhances this already stimulated state. As a result, adapters deserve attention as promising indicators of misrepresentations during voir dire.

Speak No Evil

Discrepancies between written questionnaire and oral voir dire responses also may be telling.³ Prospective jurors are more candid in written answers, which have an anonymous quality, than in open-court questioning. Jurors commonly offer extemporaneous comments and verbal qualifiers in written responses, but tend to self-censor in voir dire, when—with attorneys, fellow jurors and perhaps a judge bearing down on them—they fear they may be held accountable for, or suffer negative repercussions from, their responses.

Social psychological studies are replete with findings supporting the con-

'Correlates' of Bias Warn of Potential Stealth Jurors

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istics are associated with an adverse predisposition, what types of prior experiences enhance receptivity to opposing counsel's arguments, and how to ascertain crucial attitudes about the litigation without asking jurors to prejudge the case. The best way to address these issues entails the third method of identifying the stealth juror: detecting bias indirectly by uncovering correlates of bias.

Combining for Correlates

Correlates of bias are pre-existing characteristics found to be associated with a prospective juror's adverse predisposition toward a party in a lawsuit. A highly publicized case involving one of the largest Superfund sites illustrates the importance of correlates in jury selection. Given the extensive publicity surrounding the case, it was necessary in pretrial research to understand how certain characteristics of jurors affected their beliefs about the site.

It seemed clear from the outset that if prospective jurors lived near the site or were familiar with media coverage of, or the plaintiffs in, the case, they would be risky for the defense. As the research unfolded and the studies and mock trial exercises produced more empirical data, however, it also became evident that other characteristics favored the defense.

For example, if diseases alleged to have been caused by the site were also present, through unrelated causes, among a juror's relatives or acquaintances, the juror was less sympathetic to the plaintiffs' claims and more receptive to defense arguments that the disease had been caused by factors unrelated to the site. Similarly, because the plaintiffs had scant documentation of their physical ailments, prospective jurors who had frequent medical check-ups were also skeptical of those claims.

Potential jurors often have generally positive or negative characteristics, or a mixture of both. An individual who asserts neutrality, yet lives near the site, has read numerous articles in the paper or knows plaintiffs, but has no favorable characteristics, is exhibiting correlates of adverse bias and should be suspected as a potential stealth juror. Even if counsel could not detect such a juror based on body language or discrepancies between written and oral responses, the correlates of bias in themselves warrant serious consideration of a peremptory strike.

Facsimile Fact-Finders

Among social science researchers, a Q-and-A session at the local mall or random telephone polling usually do not constitute a survey. Rather, "survey" refers to a research method designed to assess naturally occurring characteristics or events in a population. For purposes of pretrial research, this may involve recruiting a group of individuals who mirror the demographics of the venire to participate in the measurement process by viewing videotapes of arguments, witnesses and other evidence.

Generally, paying participants produces a more representative sample, because fewer will drop out for arbitrary or spontaneous reasons, reducing the likelihood of a biased or selected sample. Unfortunately, telephone surveys, even if dialed randomly, are more prone to biased or unrepresentative samples, because only certain types of people will stay on the phone with a stranger long enough to complete the measurement process.

In jury selection research, respondents are not informed of the purpose of the study.⁶ More than 100 questions may be asked about a respondent's experiences, beliefs, values, opinions and attitudes before a final verdict measurement is taken. Many of these pre-verdict questions may appear to have little or nothing to do with the case under study, but they often reveal unexpected characteristics that correlate with bias for or against a party.

After pre-verdict data is collected, a

synopsis of the case—with arguments and evidence, if desired—is presented to the respondents, who render verdict preferences and hypothetical damage awards. Pre-verdict data then can be correlated with verdict and damages measures to obtain empirical risk factors for use in formulating juror profiles for the case.

The strength of these correlations then are used to estimate the magnitudes of various risk factors. Regardless of the venue or type of case involved, such pretrial research exercises can minimize the probability that a stealth juror will remain undetected on the seated panel.

Rigorous Research Required

It is occasionally possible to determine if a juror is being less than truthful

The discovery of correlates of bias in itself warrants consideration by the litigation team of a peremptory strike.

during voir dire, but techniques for making this determination are fallible. In fact, most jurors are truthful, regardless of the specific case profile. Pretrial research that examines risk characteristics of the venire, particularly in high-exposure cases, is vital to effective jury selection.

All of this presumes that jurors' verdict predispositions can be inferred indirectly from correlates of bias. It is important to emphasize that it is impossible to obtain these correlates without a rigorous application of survey methodology.

Jury selection, after all, is most effectively accomplished when an entire constellation of juror characteristics is considered. If this constellation is known to comprise many correlates of bias, the

hostile prospective juror who does not admit to bias—the stealth juror—can be more easily unmasked.

(1) Mark V. Boennighausen and Ariel Sabar, "Transcript Bolsters Baker Claim for Reversal," *The Recorder*, Nov. 9, 1994 at 1.

(2) See, e.g., P. Eckman and W.V. Friesen, "Detecting Deception From the Body or Face," *J. of Personality and Social Psychology* Vol. 29, 3 (March, 1974) at 288-298; G.R. Miller and J.B. Stiff, *Deceptive Communication* (1993).

(3) Whether a written juror questionnaire is desirable is a separate issue. The bench and trial counsel may fundamentally disagree on this question and their views may well depend on the particular circumstances of the case, as well as other factors. This discussion assumes the use of a questionnaire.

(4) K.D. Kaily, *Methods of Social Research* (1978) at 135, 159.

(5) S. Petronio, "Communication boundary management: A theoretical model of managing disclosure of private information between marital couples," *Communication Theory* 1 (1991) at 311-335.

(6) The possibility that the respondent may be able to guess the study's purpose by the time it is completed is not particularly deleterious because the objective is merely to avoid pre-sensitized answers. ■



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