New Approaches to Jury Selection & Voir Dire

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It's no longer news that voir dire should incorporate the story of our clients and the story of their defense. Nor should it be news that we should avoid becoming complacent or set in our ways when it comes to jury selection and voir dire. Let's face it -- we don't live in the same world we did even five or ten years ago. As Bob Dylan put it, "the times, they are a changin'." What do these changin' times have to do with jury selection and voir dire? The times reflect what's going on in our communities and so must our juries reflect those times.

We have what we consider to be a good jury questionnaire from our collaboration a few years ago. Does that mean we can use it today? Perhaps, but not without first considering and evaluating each question for cohesiveness with our case and today's thinking.

Our prior collaboration was in a death penalty case, so, by way of example, we'll discuss a few changes that have happened in that area by way of example -- the changes that translate easily into other areas of criminal defense.

Ten years ago, a debate on the death penalty might have focused more on its deterrent effect (or not) or morality. Today we see more discussion and debate on cost-effectiveness. In state after state there are legislative proposals to abolish the death penalty for no other reason than to save money. New Mexico repealed the death penalty on March 18, 2009 (footnote 1). States like Colorado, Kansas, Maryland, Montana, New Hampshire, Virginia, and Washington report consideration of legislation to get rid of the death penalty because of its expense. Colorado's proposal would move funds formerly dedicated to death penalty prosecution to solving cold-cases. This move combines cost-consciousness with respect for crime victims. Even in states with no pending death penalty legislation there's an increase in public debate – just check out your local opinion pages or today's equivalent, the local blogs. Tough economic times cause reevaluations of all sorts, including reevaluations of public spending. Rest assured that prospective jurors will have made similar reevaluations. It's up to you to take advantage of that new thinking.

How can you utilize the new thinking in both your voir dire of the prospective jurors as well as in your overall case? In one recent capital case we're aware of, Alabama attorney Larry Morgan asked a prospective juror about her understanding of "life without parole." That exchange led directly into a discussion of the cost inefficiency of the death penalty. Attorney Morgan let that juror talk and talk and talk until she got to the point where she voiced the opinion that it did not make sense to pursue a sentencing option when it would cost up to three times the cost (footnote 2) of a true life sentence. Finally, the prosecutor woke up with an objection. In a matter of minutes all of that information and that juror's final conclusion was in that Alabama courtroom for all to think about and for the defense attorneys to use in weaving the fabric of their case (footnote 3).

Who is going to be able to sit on your jury during these difficult economic times? Will they be able to forego their wages or salary for the time your case will take ?(footnote 4) Will they be willing to impose upon their bosses during these times when jobs are scarce and highly valued? Special attention needs to be given these areas during voir dire. Make sure your jurors won't have the extra stress of worrying

whether their job will still be there after your case, or whether they'll still have a roof over their heads and food on the table.

Then there's the matter of innocence. During the past few years scores of those formerly convicted have been set free because they were later proven innocent. Laws have been passed across the country allowing for DNA testing and the like. Recently in Tennessee there was news that the DNA of Paul House, a man who spent more than two decades on death row, does not match the DNA found under the fingernails of his supposed victim. Americans do not favor exacting the ultimate, permanent punishment when there is a chance of innocence. "The exonerated" (those formerly under sentence of death and subsequently shown to be innocent) speak to this. Currently-litigated cases like that of Troy Davis in Georgia speak to this. Transformations like that of Rev. Carroll Pickett of Texas speak to this. What was once theory is now evidence-based experience. People have become aware of these cases and situations and transformations. They are now primed and sensitized to innocence and residual doubt, strengthened by the testimony of honest and reliable witness testimony and scientific testing.

Conventional wisdom about victims has changed as well. It used to be taken for granted that "victims" (however defined) were wholly aligned with the prosecution. Now we've learned that victims, given the opportunity, often have a different voice from that of the prosecution, if only given the chance. Through the dedication and persistence of some of our own as well as some of their own, a death sentence is no longer understood to be the only way victims can have some semblance of "closure." In fact, we see an increasing number of victims who no longer want to relive the events of the crime time and again and instead would choose a quiet resolution short of death. What are the issues that are important to the victims in your case? Chances are they will also be important to the folks on your jury.

And what about the case and client-specific evidence that you'll present to your jury and will want to explore with them during voir dire? Notions of mitigating evidence have changed dramatically, from both legal and social science perspectives. One need only consider the flow from Lockett through Penry and Wiggins, and beyond to realize that mitigation practice is a radically different creature than it was just a few short years ago. Content and packaging – how you tell your client's story, and how consistently you do it – remains fundamental. Another component is what your "average" jurors will be receptive to, what they will want to know, what they will forgive not knowing. How to determine this? Studies, such as those conducted by the Capital Jury Project or a number of other scientists, are invaluable to learning how juries work and what's important to them. And, perhaps too obviously, the local media and blogs are invaluable in finding out what's stirring up the pot in your community and what's settling to the bottom. Again, the times (and attitudes) are a changin'.

We've talked about changing times and the need to adjust plans for voir dire and jury selection both for the case and for the times. That doesn't mean we can forget the perennials: bias, race, gender, sexual orientation, and age. These attitudes are changing also, as are methods for measuring them more accurately.

Methods and techniques for jury selection have also improved. We've discussed questionnaires and voir dire, but other methods are available, one of the more popular being the mock jury. This works particularly well if the judge is reluctant to use questionnaires or is inclined to eviscerate the questionnaire. If funding is available, a survey can also be a source of important information.

As we pointed out, the situation today regarding jury selection has changed considerably in recent years, and these changes can be advantageous for our clients – but only if we're aware of the new developments and modify our approaches accordingly.

1 Although a good portion of the legislative debate on the death penalty repeal bill centered on cost-consciousness, Governor Richardson's signing statement focused on the permanency of death as punishment. He noted that "the system to impose this ultimate penalty must be perfect and can never be wrong. But the reality is the system is not perfect – far from it." Remarks of Gov. Richardson, 3/18/2009, and found at: http://www.governor.state.nm.us/press/2009/march/031809_02.pdf . The bill Richardson signed replaces the death penalty with the sentencing option of life without the possibility of parole.

2 Attorney Morgan used data from the recent Maryland Commission which calculated the cost of a death sentence to be three times that of a true life sentence.

3 The lawyers, Larry Morgan and Alan Mann, have negotiated a life without parole sentence with the prosecutor and the judge in Alabama v Jamal Woods. Jamal Woods killed two men and injured two others in a TGI Friday's restaurant in Madison County, Alabama. The authors thank attorneys Morgan and Mann for their contribution to this article as well as mitigator Cyrus Johnston whose dedication is an inspiration.

4 Excluding or excusing jurors of lower economic status may very well result in a jury lacking minority representation. The Sixth Circuit's grant of habeas relief in Smith v Berghuis, 543 F2d 326 (CA6 2008) is a case in point. Non-statutory excusals, such as childcare of transportation issues, disproportionately impacted African American communities. 543 F2d at 333, 340.

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