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How Important is Jury Selection to Your Case?

By Jan Mills Spaeth, Ph.D., Arizona Jury Research

A short while back a civil defense attorney shared with me his view of jury screening. "As far as I'm concerned, I could take the first eight people through the door." He was not convinced jury selection made much difference in case outcome. His viewpoint is one largely contested these days by national trial consultants. Some swear the evidence, testimony, and presentations determine the jury's decision, not the panel itself. Others insist the panel make-up has a major influence on the verdict. Further disagreement lies in the effectiveness of analyzing jurors' reactions in voir dire.

Personally, I believe all factors are intertwined to produce a result. The evidence for this lies largely in hung or non-unanimous juries, and disagreement during deliberation. In these scenarios, all jurors see the same evidence, hear the same testimony and arguments, and are given the same instructions. Yet all don't agree. Why? Largely because of "framing," the psychological phenomena of individuals having different cognitive and physical reactions when faced with the same set of data, based on their experiences and attitudes. Emotions

such as fear, anger, curiosity, sadness, disgust, and suspicion are common to all humans, but they will manifest to different degrees under varying conditions, affecting objectivity and reason. What triggers fear in one person, can arouse anger in another.

When evidence is strong and clear-cut, and presentations are effective, the panel make-up matters less than when issues and evidence are complex and less defined. The more room for interpretation, the more diversity jurors are likely to make when "framing". And determining a jurors "frame of mind" becomes crucial under these circumstances.

It is estimated that 60% or more of all communication is nonverbal, conveyed by facial and body expression, and voice inflection. In many cases, 40% or less is actually accomplished through words. If you listen only to the words your jurors are speaking, you may be missing a large share of what they are telling you, including their frame of mind.

This is especially true if there is incongruity between the words, voice



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inflection, and gestures. And the more nervous, angry, fearful or disturbed a juror is, the more likely incongruity will occur. For example, an angry juror may attempt to laugh off suggestions that he or she is not impartial, but the laugh will not sound right. It could be stifled, hollow, or overdone. Neck muscles may be tight and fists clenched. Incongruity has just occurred; the words do not match the tone or body posture. You could be overlooking some very important clues if you disregard the physical reactions of your panel.

Behavior is usually more revealing than words, as a person can more successfully watch and control what is said than how it is said. Psychological and communication research indicate that verbal behavior is used to communicate external events, while nonverbal cues are used to communicate attitudes and emotions. Words describe how someone feels or thinks, physical responses express these. Gestures, like words, are difficult to analyze when taken out of context. When understood and assimilated in patterns, they form sentences, which have meaning.

I have often been asked by attorneys for tips in jury selection based on jurors' physical responses and appearance. In this article, I will briefly cover four characteristics important in jury selection; dominance, flexibility, fears, and

thinking patterns, and some behaviors that can reveal these. The last category, thinking patterns, will be broken down into areas of certainty, interest, and comprehension.

DOMINANCE

Firmness, assurance, and decisiveness, carried to extreme, result in an overly dominant or domineering personality who can overpower your panel. One of these types is more than enough in most cases, two can hang a jury. Whether you want one or more dominant persons on your panel is an important decision to make prior to trial because chances are good you will be forced to make that choice during voir dire. In deliberations, dominant people prevent or ignore interruptions, discourage input from others, monopolize conversations, and often rely heavily on facts, figures, and specifics when reaching verdicts. Depending upon your position, they can make or break your case.

What would you look for during voir dire to recognize dominant types? A brisk, definite walk, taking a chair with decisiveness, hands on hip, and a wide stance are some of the first clues. Dominant types use formal, full names, force enduring eye contact, are direct, and usually avoid qualifiers, such as "You know, perhaps, maybe". They may also point or "steeple", which is pressing fingertips together in an upward, tent position when thinking or speaking.

Dominant types often show up in strictly business apparel, uniforms and dress indicating authority, pins or accessories stating memberships in organizations, and polished shoes. They are likely to carry books on management, finances, business or politics. They will often sport briefcases, or newspapers and magazines such as Time, Forbes, and the Wall Street Journal.

In contrast, what would you expect to see in people who are passive, agreeable types? Look for soft-spoken, hesitant speech, along with qualifiers at the beginning or end of

Contents

How Important is Jury Selection to Your Case?.....	1
Bridging the Gap	3
Arizona Advance Reports	17
Jury and Bench Trial Results	18

Continued on page 11

Bridging the Gap

A Practical Guide to Civil-Defender Collaboration

By McGregor Smyth, Project Director and Supervising Attorney, Civil Action Project, The Bronx Defenders

Vicky G. received a Section 8 Existing Housing Voucher for ten years. The prosecutor and local public housing authority now allege that over a six-year period she failed to report that her boyfriend was living in the apartment and that she underreported her income. She is charged with grand larceny and filing a false instrument.

Adam R. is 16 years old. He lives in a public housing apartment with his grandmother and three young brothers and sisters. He is arrested four blocks from home for possession of a small amount of marijuana. The local housing authority brings an eviction proceeding against his entire family.

Lilly A. has two small children. She is arrested in her apartment for passing bad checks—a felony. The police call the local child welfare office, which takes the children into custody. Because of the circumstances of the case, Lilly is likely to spend eighteen to twenty-four months in prison.

At first glance, these clients present daunting problems. They have fallen into an alarming gap between criminal and civil legal aid, a gap that both criminal defense attorneys and civil legal aid lawyers are usually loath to cross. Most public defenders do not think beyond the termination of the pending criminal case. Many civil legal aid attorneys would like to think that their client population has little contact with the criminal justice system. And never the twain shall meet.

Both sides of this divide can and should endeavor to bridge it, but in this article I specifically address civil legal services organizations and their staff. By widening your focus—looking at the whole client and the client’s community—you can see that the same systemic problems inextricably

connect low-income clients, regardless of whether their most immediate legal problem is civil or criminal. The criminal justice system inflicts damage on low-income communities generally, not just on the individuals charged with crimes. Those who pass through it have, as a result, limited access to employment, housing, and benefits and thus a reduced ability to contribute to their families and communities. Indeed, over 28 percent of adults in the United States have a criminal record.¹ No data are available on the corresponding percentage of low-income adults who have criminal records. The number is almost certainly higher than in the general population; 62 percent of all state felony arrests are of poor people who will be convicted of a crime.² Consider how many families are affected as a result of this statistic. You might find that your client communities overlap to a much greater extent than you ever knew.

I. Breaking the Cycle Defined by Poverty, Race, and Despair

Initiating a criminal proceeding is the state’s most powerful means of exerting authority over an individual, and entire families can be swept away by the consequences. The resulting harms are often far-reaching and unforeseen, leading to lost homes, lost jobs, and broken families. For many clients, their children, and their families, these hardships are more severe than the immediate criminal charges. Being accused of a crime frequently causes the loss of a hard-earned job for a person who has striven to establish self sufficiency.

Being sentenced to even a short prison term can result in a dramatic loss of income from work or public benefits. Accepting certain plea bargains

leads to immediate eviction, termination of employment, loss of benefits, or deportation.³ In such circumstances, clients and their families, already living in poverty, face countless threats to their tenuous livelihoods regardless of guilt or innocence.

Conversely, complications such as a loss of benefits, a job, or a home often serve as the catalyst for entry into the criminal justice system. Indeed, most clients cycle through the criminal justice system as a result of deep and interrelated social problems that existing social services have failed to address.⁴ These social problems, which include unemployment, mental health issues, addiction, and homelessness, disproportionately haunt low-income and disadvantaged communities—communities of poverty and communities of color.⁵ At the same time, these communities are vastly underresourced and suffer from extensive breakdowns in social services. This fateful lack of parity between social problems and social services often culminates in a crisis point—being charged with a crime. Yet this crisis is only a single point in what is often a vicious cycle of crime and poverty defined by racial and economic disparity.

The criminal justice system magnifies and aggravates problems of race and poverty. In 1996, the most recent year in which national data are available, court-appointed lawyers represented 82 percent of felony defendants in large state courts because these defendants could not afford an attorney.⁶ Although no national numbers exist on the race of these indigent defendants, 91 percent of indigent criminal defendants in the Bronx, New York, are African American or Latino.⁷

These indigent defendants suffer disproportionately harsher consequences at every stage of the criminal justice system, including the collateral civil consequences that fall within traditional legal services practice areas. The disparities within the criminal justice system, from targeted police interdiction to biased bail

orders to disproportionate incarceration rates and sentencing, are well documented.⁸ At the end of the criminal justice process, “reentry” into the community awaits, but here the same disparities predominate, and the ex-offender is set up to fail. For example, about three-quarters of reentering prisoners have a history of substance abuse, and approximately 16 percent suffer from mental illness, but fewer than one-third receive treatment while incarcerated.⁹ Nonetheless, ex-offenders are released into the same service-deficient environment after having received little or no rehabilitation or training while incarcerated, and they now have a new gift from the system—the scarlet letter “C” of a criminal conviction.

Most inmates, in fact, are released with little more than carfare and a short list of referral agencies. Once released, their conviction likely bars them from staying with family members who are living in any form of public housing, and for the same reasons they are not eligible for subsidized housing themselves.¹⁰ They have serious difficulties finding jobs because most employers ask questions about arrest records or discriminate based on a conviction that is often irrelevant to the job in question. Indeed, a survey of employers in five large cities found that 65 percent would not knowingly hire an ex-offender.¹¹ Perhaps the most insidious consequence of involvement with the criminal justice system is felony disenfranchisement, literally denying a large population the right to vote and thereby to have a voice in government.¹² Given the current rates of incarceration, three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime.¹³

In short, involvement with the criminal justice system sets off a domino effect of collateral consequences. Regardless of the specific charges or conviction, this fallout is much more likely to hurt extremely disadvantaged communities of poverty and color. These communities are both much more likely to have contact with the criminal justice system in the first place, and to suffer disproportionately from the

rolling consequences—loss of income, loss of employment, eviction, ineligibility for publicly subsidized housing—that have far less effect on wealthier ex-offenders.

II. Bridging the Gap

Confronted with these barriers, the current gap in services for the poor who are touched by the criminal justice system is alarming. While the national focus on crime in the 1990s swept unprecedented numbers of people into the system, a dramatic decrease in government spending for civil legal services and the imposition of restrictions on representation of prisoners by programs funded by the Legal Services Corporation (LSC) caused many traditional civil legal assistance organizations to avoid representing anyone involved with the criminal justice system.¹⁴ One study found that no more than 14 percent of the legal needs of New York's poor were being met.¹⁵ Criminal defense offices face their own high caseloads and lack of personnel and are forced to overlook the noncriminal difficulties that lead to or result from involvement with the criminal justice system.

With a few concrete steps, however, lawyers for the poor can work together to begin to bridge this gap. This endeavor fits within a larger movement that encourages the pursuit of interdisciplinary and community-oriented solutions to our clients' problems.¹⁶ When defenders and legal services attorneys collaborate, we can address root problems that often manifest themselves in offender behavior.

A few models exist for integrated criminal and civil representation of the poor—The Bronx Defenders, Neighborhood Defender Service of Harlem, and Public Defender Service for Washington, D.C., are all public defender offices with civil attorneys on staff. In my office—The Bronx Defenders—the Civil Action Project offers comprehensive legal and social services to minimize the severe and often unforeseen fallout from criminal proceedings and facilitate the reentry of our clients into the community. The

project's three attorneys collaborate closely with the office's criminal defense teams—which consist of defense attorneys, social workers, and investigators—and represent and advise clients on the full range of legal issues, including housing, public benefits, employment, civil rights, immigration, forfeiture, and family law. By engaging the community, the project also seeks to identify pervasive issues that confront our clients and empower them to effect change. In the next year, the Civil Action Project will launch the Community Defender Resource Center, a training and resource center that will provide practical, legal, and technical support to criminal defense attorneys in New York State on strategies to overcome the collateral consequences of criminal proceedings.

Of course, many viable and useful models short of full integration of services still recognize our common organizational mission—effective advocacy for those who live in poverty. In this article I focus on the feasible steps that civil legal services organizations can take to cooperate with defender agencies and attorneys.

III. Taking Practical Steps

Legal services organizations, including those restricted by LSC funding, can take a number of concrete and realistic steps toward bridging this divide.

First, educate yourself on the issues that arise at the nexus of the criminal justice system and civil legal services. Contact organizations such as the Legal Action Center or the Civil Action Project at The Bronx Defenders for helpful materials, background, and advice.¹⁷ Organize a roundtable meeting with the local public defender or indigent criminal defense bar. What are the most common civil legal issues raised by their clients? Do they have suggestions for fruitful collaboration? If an institutional public defender serves your area, can they track any data that would be useful to you?

Then educate one another. At a minimum, most LSC-funded programs can make available a large set of crucial client-oriented materials

ranging from pamphlets to *pro se* guides. Supply the defender office lobby or arraignment courtroom with a steady stream of your standard pamphlets on subjects such as housing, public benefits, family law, and disability. If your meeting with the defenders unearths unusual issues, consider publishing new client pamphlets targeting those needs.

Conduct continuing legal education training for public defenders and panel attorneys on relevant issues. Such training can cover eligibility requirements for public assistance and subsidized housing, including the most likely scenarios in which the relevant agency will suspect fraud, common mistakes made by the agencies, and how to interpret the paperwork. For each practice group within your office (e.g., housing, disability, benefits, HIV/AIDS, immigration), survey the local and federal law to determine the collateral consequences of criminal proceedings or convictions. In particular, educate both defense attorneys and the larger community on the criminal conviction eligibility bars for the local public housing, Section 8, Temporary Assistance for Needy Families, and food stamp programs and the consequences of a criminal conviction in the immigration context. You may be surprised how little criminal defense attorneys know about these consequences, particularly when they result from convictions for minor offenses. Emphasize that many defenders have been successful in obtaining more favorable dispositions when they educate judges and prosecutors about the myriad collateral consequences. You need not start from scratch: contact the Legal Action Center (or The Bronx Defenders in New York State) for an overview of your state's law.

Conduct client workshops at the local criminal defense provider. Have “Know Your Rights” clinics on the important issues identified above. The question-and-answer sessions with the criminal defendants and their families will be incredibly informative for you as well. Find a service provider who can run workshops on writing a résumé, job interviewing,

finding housing, and filling out benefit applications. In return, ask defense attorneys to conduct “Know Your Rights” clinics at your offices on interactions with the police and navigating the criminal justice system. Reach out to local law schools for free labor to launch some of these programs.

Consider establishing a formal referral arrangement with the local defense providers. Indeed, a streamlined referral process may enable you to intervene much earlier, and consequently more effectively, in a client's civil legal problem —public defenders are often the first to hear about difficulties such as an eviction or loss of benefits. Moreover, the client's experience during her time of crisis will be more positive if she is not referred blindly across town for assistance. In turn, these experiences build trust with clients and the communities that you serve. At the very least, teach the defense attorneys about your intake process so that they can tell their clients what to expect. Many clients, when simply given a phone number or address for a referral, give up if they encounter a single barrier.

The legal services office could designate the public defender as an outreach site. You could staff a table in the office at scheduled times to provide brief advice and consider cases for intake. If no local institutional criminal defense provider exists, ask the criminal court for permission to set up an outreach site, or at least an information table. Also, consider assigning an attorney or paralegal to be “on call” during certain periods to give quick advice. If LSC restrictions apply, you can formally limit the type of advice and representation that you provide to ensure compliance.

Although each organization must perform its own assessment, careful planning will ensure that these collaborations do not violate LSC restrictions. Particular attention should be paid to 45 C.F.R. Part 1613 (representation in criminal proceedings), Part 1615 (habeas corpus collateral attacks on criminal convictions), Part 1637 (representation of prisoners in civil

litigation), Part 1633 (representation in certain drug-related eviction proceedings), and Part 1612 (conducting training programs for restricted activities).¹⁸ While some of the training, advice, and representation detailed above may prove unfeasible under the restrictions, many rich opportunities for cooperation remain.

Potential conflicts of interest, particularly within the context of domestic violence, can also be addressed through planning. Although some might fear that conflicts would arise more often in these collaborations with defenders, the same conflict checks used for any outreach site that gives brief advice should prove sufficient.

IV. Seeing It in Practice

The three scenarios outlined at the beginning of the article illustrate how these collaborations can work in practice to benefit our clients.

The advice of a legal services attorney could prove invaluable to Vicky G. First, the civil attorney could make a list of all relevant documents and printouts produced by the local Section 8 authority and advise the defense attorney how to obtain them. Through training or individual advice, the legal services attorney could teach defense attorneys how to interpret these documents, which are often quite arcane and indecipherable. In particular, notations from housing assistants or other workers can be crucial in undermining fraudulent intent.

Moreover, reviewing the eligibility and subsidy calculations could reveal fundamental errors. (The agencies' computations are frequently incorrect for legal services clients, and it is no different in criminal cases.) If the landlord has failed to make repairs, Vicky may have a warranty- of-habitability issue that would entitle her to rent abatement. Section 8 payments may have been suspended for failure to meet housing quality standards, and the prosecutor's computation may not reflect

this. Careful recalculation can reduce the amount by which the subsidy was allegedly overpaid. Not only can this exercise reduce an offense from a felony to a misdemeanor; it also will reduce the amount of restitution that Vicky G. will have to pay. The defense attorney must also understand the importance of determining whether Vicky G. was receiving any other public benefits during the time in question. If so, a careless plea or factual allocution could establish further criminal or civil liability related to those benefits.

Adam R.'s family faces a tough battle after last term's U.S. Supreme Court decision in *HUD v. Rucker*, which allowed public housing authorities to evict entire families for drug-related activity even if the tenant did not know, could not foresee, or could not control behavior by other occupants or guests.¹⁹ Because the primary tenant is the grandmother, rather than Adam R., who is the person charged with the crime, the LSC restriction on drug-related evictions does not apply. Therefore an LSC-funded office may represent Adam R.'s family in the eviction proceeding.²⁰ You can work closely with the defense attorney to ensure that Adam enters a relevant treatment or rehabilitation program immediately—mitigation evidence that could prove crucial to the eviction case. Collaboration with the defense attorney may also expose factual or legal defenses with which you are unfamiliar, such as the details of standard narcotics interdiction and lines of attack for cross-examination of the police officers involved.

On a broader level, collaboration with the local defense bar may help you effect a policy change through tactics that should meet even LSC restrictions. Ask the defenders to refer to you all defendants who live in public housing or have Section 8 vouchers. If your office can commit to taking every eligible "*Rucker*" case to trial, the local PHA may reconsider its policy.²¹

Finally, Lilly A. must receive help and advice to prevent her from permanently losing her children. The Adoption and Safe Families Act of 1997 requires the state to petition to terminate

parental rights when a child has been in foster care for fifteen of the last twenty-two months.²² When a parent is incarcerated, those fifteen months expire quickly. Maintaining family contact during incarceration and securing family reunification afterward are critical to successful reentry into the community.

Help or advice with a simple form may keep Lilly's family intact. Depending on your state's laws, you can develop a *pro se* packet on informal custody arrangements for incarcerated parents—usually placement with relatives—that do not qualify as “foster care” under the Act. Of course, LSC-funded offices may not represent anyone who is currently incarcerated, but no restrictions apply in Lilly's situation to those who are released on bail or bond and anticipate being reincarcerated.²³ Any *pro se* materials would be universally useful to all in similar situations.

V. Conclusion

The criminal justice system is not simply a forum for affixing blame and assigning punishment. It also highlights a population most in need of help. Being arrested and charged with a crime is a unique and horrible moment of crisis for anyone, even more so for people whom the system has failed. Our responsibility is to fight to ensure that the deep and embedded injustices of race and poverty do not trap entire communities. We must break the cycle of punitive measures and unforeseen consequences that prevent our clients from establishing any semblance of stability.

Because of the gap in services, however, this population as a whole simply is not being served. By focusing on the needs of “whole” clients—assisting their families, advocating for their communities, and addressing the underlying issues that have caused their involvement with the criminal justice system—we empower individuals, strengthen families, and help communities prosper.

Holistic advocacy is not simply an ideal; it

is a necessity. To those living in poverty, the margin of survival is precariously narrow. Each lives in a house of cards, and one adverse action may send the structure tumbling down. The fact of the matter is that these issues are already interrelated, and they require an interdisciplinary set of tools to attack them. We need to adjust ourselves, our practice, and our organizations to this reality. We must challenge traditional legal services organizations and public defenders to expand the vision of their mission, integrate, collaborate, and concentrate on their clients' full set of needs.

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Endnotes

1 BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE (2001) (finding that by December 31, 1999, over 59.065 million individuals had state criminal histories); U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (finding that adult, 18 and over, population of the United States in 2000 was 209,128,094). An additional 43 million criminal records are maintained on the federal database, but no data exist on how many duplicate the above state records. See Bureau of Justice Statistics Report.

2 Eighty-two percent of felony defendants are poor enough to be eligible for assigned counsel, and convictions are obtained in some three-quarters of these cases. See CAROLINE WOLF HARLOW, U.S. DEPT OF JUSTICE, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES (2000).

3 E.g., a plea to simple drug possession results in

ineligibility for or termination of federal student loans, *see* 20 U.S.C. § 1091(r)(1) (2003), most public housing, *see* 42 USC § 13661 (2003), TANF (Temporary Assistance for Needy Families) benefits in most states, *see* 21 U.S.C. § 862a (2003), and, for noncitizens, probable deportation or removal, *see* 8 U.S.C. § 1227(a)(2)(B)(i) (2003).

4 *See, e.g.*, the following Bureau of Justice Statistics reports: CAROLINE WOLF HARLOW, U.S. DEPT OF JUSTICE, NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS (2003); PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEPT OF JUSTICE, NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002); CHRISTOPHER J. MUMOLA, U.S. DEPT OF JUSTICE, NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN (200); Doris James Wilson, U.S. Dep't of Justice, NCJ 179999, Drug Use, Testing, and Treatment in Jails (2000).

5 *See, e.g.*, U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SUPPLEMENT (2001 POVERTY), tbl. 3: Program Participation Status of Household—Poverty Status of People in 2001 (Mar. 2002) (comparing recipients of various means-tested benefits—including cash assistance, food stamps, and public housing—by age, gender, income, and race); tbl. 7: Years of School Completed by People 25 Years and Over, by Age, Race, Household Relationship, and Poverty Status: 2001 (Mar. 2002) (comparing by race and age); tbl. 10: Work Experience During Year by Selected Characteristics and Poverty Status in 2001 of People 16 Years Old and Over (Mar. 2002); tbl. 22: Age, Gender, Household Relationship, Race, and Hispanic Origin—Poverty Status of People and Families by Selected Characteristics in 2001 (Mar. 2002); tbl. 24: Health Insurance Coverage Status and Type of Coverage by Selected Characteristics for All People in Poverty Universe: 2001 (Mar. 2002), *available at* <http://ferret.bls.census.gov/macro/032002/pov/toc.htm>.

6 *See* CAROLINE WOLF HARLOW, U.S. DEPT OF JUSTICE, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES (2000).

7 This calculation is derived from case data from The Bronx Defenders.

8 *See, e.g.*, N.Y. ATTORNEY GEN., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL (1999), *available at* www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html; Harlow, *supra* note 2, at 3, 5.

9 *See* ALLEN J. BECK, U.S. DEPT OF JUSTICE, STATE AND FEDERAL PRISONERS RETURNING TO THE COMMUNITY: FINDINGS FROM THE BUREAU OF JUSTICE STATISTICS 4 (2000), *available at* www.ojp.usdoj.gov/bjs/pub/pdf/sfprc.pdf.

10 *See, e.g.*, 42 U.S.C. § 13661 (2003).

11 *See* JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31 (2001) (citing HENRY HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS (1996)).

12 *See, e.g.*, N.Y. ELEC. L. § 5-106(2)-(5) (McKinney 2003); CAL. ELEC. CODE § 2101 (West 2003); FLA. STAT. § 97.041 (2003).

13 *See* THE SENTENCING PROJECT, FELONY DISFRANCHISEMENT LAWS IN THE UNITED STATES (2003), *available at* www.sentencingproject.org/brief/pub1046.pdf.

14 *See, e.g.*, 45 C.F.R. pts. 1613, 1637.

15 *See* Evan A. Davis, A Lawyer Has an Obligation: Pro Bono and the Legal Profession (Otto L. Walter Lecture, New York Law School, 2001), *available at* www.abcny.org/currentarticle/otto_walter_lecture.html.

16 *See, e.g.*, Robert Lennon, *After Years of Incubating in the Public Interest Sector, the "Holistic" Pro Bono Movement Gains a Foothold in Big Firms*, AM. LAW. (Dec. 5, 2002), *available at* www.lawschoolconsortium.net/holistic%20pro%20bono.htm; PENDA D. HAIR, LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE (Rockefeller Found. 2001); Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401 (2001); Alan M. Lerner, *Law and Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107 (1999); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119 (1997); Tanya Neiman, *From Triage to Changing Clients' Lives*, MGMT. INFO. EXCH. J. (Nov. 1995).

17 The Legal Action Center is a law and policy orga-

nization that specializes in issues related to criminal justice, alcoholism and substance abuse, and HIV/AIDS. See www.lac.org.

18 See Alan W. Houseman & Linda E. Perle, Ctr. for Law & Soc. Pol'y, *Representing Individuals with Criminal Records Under the LSC Act and Regulations* (2002) (on file with McGregor Smyth).

19 See *HUD v. Rucker*, 535 U.S. 125 (2002).

20 Entities funded by the Legal Services Corporation (LSC) are prohibited from defending any person in a public housing eviction proceeding if that person has been criminally charged with or has been convicted of the illegal sale, distribution, or manufacture of a controlled substance, or of possession of a controlled substance with the intent to sell or distribute. See 45 C.F.R. § 1633.3 (2003). The prohibition does not apply when a charge has been dismissed or the person has been acquitted of the illegal drug activity. See 45 C.F.R. § 1633.2 (2003).

21 See *supra* note 5. Also, LSC restrictions prevent grantees from representing currently incarcerated persons. See 45 C.F.R. § 1637.3.

22 See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 675).

23 See 45 C.F.R. §§ 1637.3, 1637.4.

Continued from How Important is Jury Selection to Your Case, page 2

sentences, such as “I think”, or “What do you think?”. Tentative gestures, frequent nodding and signs of agreement are also indications of non-dominant people. These types are usually unwilling to disagree or confront situations. While you may want some of these on your panel simply to ensure a verdict, how many could be an important question in jury selection.

FLEXIBILITY

Whether you want jurors who are flexible and open (to both giving and receiving information) again depends on your case. This is another important decision to make in advance when possible. Those who are flexible usually relate easily and quickly with others, so watch for jurors who readily interact with other jurors. Open jurors are more likely to be candid when asked questions, and will offer information about themselves, their feelings, and their experiences. In addition to overt friendliness, expressiveness, and a sense of humor, look for unbuttoned coats, casual dress, a relaxed posture, freely moving arms and gestures, visible facial expressions, occasional nodding, spontaneous reactions, and a curious, questioning look.

Even more important than recognizing those who are flexible is determining those jurors who are closed, guarded, and defensive. Look for rigid and tense body movements, sideways positions (facing away from you), overly serious countenances, and hands held tightly in laps or behind the back (which prohibits gestures). Outright rejection cues can include tightly folded arms, tightly crossed legs, (tightly is the clue here) tilting the head forward and looking over glasses, and frequent nose rubbing (excluding allergies or colds!). Overly conservative and set individuals tend to have perfectly matching clothing and accessories, overly careful grooming, and tightly buttoned or fastened clothing.

How can you tell if you are dealing with a truly defensive or angry juror? Look for a tightened, thrust-out jaw, frowns, a shake of the head (meaning no), and clenched hands and fists. Sudden, forceful gestures are also clues, such as quickly taking off glasses and setting them down decisively. While sometimes people will reveal their anger through overt expressions, others will go to the opposite extreme, tightly controlling their face, giving few expressions. Eye contact may increase noticeably, with pupils dilating. Aggressive or hostile persons tend to stare or glare. Also look for short breaths or “snorts.”

Another thing to look for is people who feel the need to admonish others. They will roll their eyes, or take deep sighs and long breaths, sometimes making “tsk” sounds, indicating disgust. “How many times do I have to tell you....” These types can be self-righteous and overly critical of others, forgiving little.

FEARS

People bring their fears, phobias, and concerns into the courtroom; they don’t leave them at home. And regardless of promises to the judge to set them aside to ensure impartiality, they remain intact. So it is very important to first recognize jurors who are more fearful than normal, then decide whether or not you want to keep them. A courtroom can be an especially threatening place for fearful persons, so their discomfort is often readily visible. Look for frequent blinking, tics, wringing of hands, rubbing hands on clothes, and jerky movements. The hands will often grip something: purses, chairs, clothes, books, papers, pens, or themselves.

Eyes may shift frequently, looking often to the judge or bailiff (or prosecutor!) for reassurance. Fearful people may appear frantic or disoriented, they may rush, or shuffle. Their breathing is frequently tight and their pitch high, with upward inflections at the end of sentences. They may make frequent attempts at starting sentences, they may not finish sentences,

they may stammer or swallow. And they may completely avoid looking at your client, or take only quick, nervous glances. Fearful people can be far from timid when it comes to expressing themselves or taking a stand, however, and in their insistence and irrationality, they can sway or hang a jury.

THINKING PATTERNS

Based on your case strategy, do you want intelligent jurors who analyze, investigate, comprehend, and retain well? Do you want independent thinkers or followers? Thought processes are another category to be considered prior to trial. Three areas to look at here include certainty, interest, and comprehension.

Certainty

People can be certain in some areas, and unsure of themselves in others. Watching others closely can alert you to areas where decisiveness is lacking, or where deliberate untruthfulness is occurring. When uncertain or misleading, people are likely to use more hand to mouth gestures, more stammering, less eye contact, long pauses, and fidgeting. They may clear their throat frequently, begin to play with their glasses, pens, jewelry, or clothes, and swallow repeatedly. They may blush, and their voice may take on a higher edge. People who are anxious often make disjointed, awkward movements, and may look downward or away. In addition, they may be evasive and indirect in their answers.

It is important to note here that anxiety alone can cause the above traits, and may not indicate untruthfulness or indecisiveness at all, although it can often be misinterpreted as such. A clue here is changes in normal behavior. If a juror has been answering all questions to that point in a direct, assured manner, and suddenly shifts to the uncertain movements, then it is likely some sensitive area has been touched and more probing is needed. Or, if the juror has been acting nervous since first entering the courtroom, before questioning is initiated, this suggests the person is simply an anxious sort

overall, at least in the courtroom.

As expected, certainty is indicated by the opposite responses. Movements will be purposeful, decisive, and fluent. There are few hand to face gestures, and answers are direct, uncomplicated, and accompanied by good eye contact. You will note a lack of hedges, qualifiers, or evasiveness in people who are truly comfortable with their opinions.

Interest

People who are interested may ask questions, respond with expression to your comments, remember what you have said, and offer information on themselves and their ideas.

Those who are indifferent will look around the room, doodle, drum pens and fingers, fidget, and not listen carefully. They may yawn, doze, or stare blankly, showing few expressions or responses to the proceedings. They may need questions repeated, or may give only half answers. If they are not listening closely, they may give inappropriate answers. If bored, they may begin talking with others.

Comprehension

Slow, weak thinking patterns are indicated by the inability to quickly recall dates, names, and circumstances, to readily respond to queries, and to follow instructions. These may be accompanied by inappropriate answers and nodding, requests for explanations and repeated questions, and looks of puzzlement. Excessive note taking can also be a clue here. Jurors who fall into this category may be inattentive on the panel and prone to misperceptions. They may also comprehend slowly, retain poorly, and show poor organizational skills.

Stronger, more effective thought processes are indicated by the opposite of weak thinking, along with the ability to express self clearly and easily, organized and logical responses, enduring attentiveness, and changing facial expressions as subject matter changes.

Volumes have been written on nonverbal communication, as well as framing, so it is understandably impossible to cover everything in a short article. But the above are some of the most readily recognizable and revealing responses. Identifying some of these will alert you to attitudes and reactions you might otherwise have missed. This in turn can make you an even better judge of people when it comes to selecting jurors. And unless your case is “cut and dried,” jury selection is crucial to your verdict.

This article was first published in THE WRIT, the official publication of the Pima County Bar Association. Permission to reprint granted by the author.

Jan Mills Spaeth, Ph.D., litigation consultant, has been assisting attorneys locally and nationally since 1980. If you have questions or want assistance, call (520) 297-4131, fax (520) 797-4213, e-mail jms@azjury.com, or write Arizona Jury Research, P.O. Box 91410, Tucson, AZ, 85752-1410.

FEAR INDICATORS

Mannerisms indicating Fear or Anxiety:
 Clutching purse/belongings tight to the body
 Averting eyes frequently; avoidance of eye contact
 Looking down when talking; failure to look at client
 Frequent blinking, lies
 Jerky, disjointed, awkward movements
 Wringing of hands, rubbing hands on clothes
 Hands tightly gripped on something
 Concealing hand under arms, pockets, behind back
 Frantic, rushed walk or gestures, or shuffling
 Calling unnecessary attention to self
 Tight breathing
 High pitch, changes in pitch or upward inflection
 Unfinished sentences, frequent attempted sentence starts
 Stammering, swallowing
 Tugging at clothes, ears, hair jewelry

Mannerisms indicating Confidence:
 Few hand to face gestures
 Sustained, open eye contact showing expression
 Good posture, but not tense
 Energy combined with self-control
 Direct, uncomplicated answers and responses
 Lack of hedges, qualifiers, or evasiveness
 Willingness to look at all persons in courtroom

Dress & Appearance indicating Fear or Anxiety:
 Fears and anxieties are found in all types, but look for extremes, such as:
 Overly formal dress
 Overly conservative dress
 Overly neat or tidy dress
 Overly flashy dress
 Overly fashionable dress

Chart provided by Jury Research, Inc.

DOMINANT INDICATORS

Dominant Mannerisms
 Direct eye contact when speaking;
 unblinking glare
 Definite walk, gestures, responses
 Loud or easily audible voice; lack
 of qualifiers
 Frequent, sometimes lengthy
 responses (definite)
 Concise, to the point
 communication
 Prevents or ignores interruptions
 Use of facts, figures, statistics,
 specifics
 Use of formal, full names
 Attentive, active listening, note
 taking
 Sleeping of fingers or arms;
 pointing of fingers
 Hands on hips; wide stance
 Brisk, definite walk and gestures
 Dropping eye glasses to bridge of
 nose

Mannerisms Lacking
 Dominance
 Blank Expression
 Yawns
 Talking softly
 Qualifiers at the beginning of
 sentences
 Qualifiers at the end of
 sentences
 Frequent nodding to all attorneys
 and court personnel
 Tentative hand raising, or raising
 only halfway
 Few responses to questions
 asking for opposing answers

**Dominant Dress and
 Appearance**
 Business dress
 Military clothing, uniform
 indicating authority
 Well-shined shoes
 Pins, jewelry accessories
 indicating authority
 Books on management,
 finances, business politics
 Newspapers, especially such
 as Wall Street Journal
 Magazines such as Time,
 Forbes, and those dealing
 with finances, business,
 politics
 Briefcases

FLEXIBILITY INDICATORS

Mannerisms Indicating Flexibility

Relaxed posture
 Legs, arms uncrossed or crossed
 casually
 Freely moving arms, gestures
 Frequent, relaxed smile
 Visible, open facial expressions
 Occasional nodding
 Willingness to look at all clients and
 attorneys
 Spontaneous reactions
 Sense of humor
 Curious manner, questioning,
 interested look

Mannerisms Indicating Inflexibility

Tightened, thrust-out, yawns
 Rolling of the eyes, deep sighs
 Face or body turned to the side
 Shake of head indicating "no"
 Legs crossed, leaning away
 Arms crossed or folded in, rigid, set
 manner
 Tight, close body movements
 Clenched hands, fists
 Very straight body posture
 Little facial expression
 Hands in pockets, hand behind neck,
 tilting head backward

Inflexible Unwear & Accessories

Formal as opposed to casual
 clothing, shoes
 Perfectly matching clothing and
 accessories
 Overly careful grooming
 Tightly buttoned or fastened clothing
 Overly conservative
 Sometimes a very nonconformal
 dress and appearance can indicate
 inflexibility as well

Chart provided by Jury Research, Inc.

JUROR TRAIT CHARACTERISTICS

Dominance

domineering vs. compliant
 aggressive vs. passive
 outspoken vs. quiet
 defiant vs. respects authority
 relentless vs. quite easily
 commitment vs. avoidance
 independence vs. dependence
 ambitious vs. complacent
 need for attention vs. modest
 interest vs. disinterest

Reliability

"the end justifies the means" vs. righteous
 tolerant vs. critical
 flexible vs. rigid
 sympathetic vs. judgmental
 open vs. skeptical
 liberal vs. conservative
 forgiving vs. resentful
 humility vs. arrogance
 generalized vs. specialized
 progressive vs. traditional

Fears

possessiveness vs. generosity
 insecurity vs. confidence
 caution vs. progressiveness
 timid vs. assertive
 protective vs. unconcerned
 suspicious vs. trusting
 reclusive vs. outgoing
 anxious vs. relaxed
 jealousy vs. no jealousy
 depression vs. energy

Thinking Patterns

humorous vs. serious
 analytical vs. accepting
 investigative vs. lax
 quick comprehension vs. slow
 good retention vs. poor
 patient vs. impatient
 organized vs. scattered
 detailed vs. skimmer
 logical vs. illogical
 candid vs. evasive/deceitful

Chart provided by Jury Research, Inc.

THINKING PATTERN INDICATORS

Mannerisms for Strong Thinking Patterns

Enduring attentiveness
 Showing facial expression
 Changing facial expression as subject matter changes
 Taking notes
 Organized, logical responses to questions
 Appropriate responses
 Ability to recall past dates, circumstances, outcomes
 Ability to comprehend and follow instructions
 Ability to express self well and easily
 Little reliance on others for explanations

Mannerisms for Weak Thinking Patterns

Inappropriate nodding
 Inappropriate answers to questions
 Inability to respond quickly and concisely
 Inability to remember past dates, circumstances, outcomes
 Inability to comprehend or follow instructions
 Frequent looks of puzzlement
 Asking persons next to them for repetition or explanations
 Excessive note taking

Mannerisms for Evaded Less Than Candid Thinking Patterns

Long pauses
 Fillers such as "Um," "Er," "Well..."
 Frequent hand-to-face contact
 Frequent throat clearing
 Pulling glasses, pen, or finger in mouth
 Blushing, especially when with pauses or stammering

Mannerisms indicating Lack of Interest

Looking around the courtroom continually
 Dozing
 Drumming of pen, fingers
 Rocking or swinging body parts
 Droopy eyelids, nodding off
 Hesitant to ask if questions be repeated
 Fidgeting, faking

One or 2 Appearance cues indicating Strong Thinking Patterns

Reasonably well-coordinated outfit
 Practical vs. highly fashionable clothing
 Appropriate attire for the courtroom
 Reasonably well-groomed, neat, and clean
 Mature, thought-provoking reading material
 Briefcases
 Avoidance of extremes

Chart provided by Jury Research, Inc.



Arizona Advance Reports

By Terry Adams, Defender Attorney - Appeals

Editor's Note:

for The Defense is changing. This month's *Arizona Advanced Reports* summaries are shorter and begin with Volume 400. Most practitioners are well aware of decisions long before our newsletter can summarize them. Our future goal is to provide one or two sentence summaries of recent cases, but longer analysis of significant cases when they occur.

State v. Gallagher, 400 Ariz. Adv. Rep. 44 (CA 1, 5/29/03)

The defendant was convicted of both possession of drugs and paraphernalia. The paraphernalia was the container the drugs were in. The trial judge treated the paraphernalia as a second strike for Prop 200 purposes and sentenced the defendant to jail as a term of probation. The court of appeals set the jail time aside holding this was a single conviction.

State v. Henry, 400 Ariz. Adv. Rep. 15 (CA 2, 5/29/03)

The defendant was convicted of fraudulent scheme and artifice. This case entails a detailed analysis of both "defraud" and "benefit." The conviction was upheld, the court determining that sexual gratification can be a benefit of a fraud scheme.

State v. Hickman, 400 Ariz. Adv. Rep. 19 SC, 5/19/03)

This case overrules *State v. Huerta* that required automatic reversal of a conviction when a defendant uses a peremptory strike to remove a prospective juror whom the trial court should have removed for cause. Now prejudice must be shown and the court can use harmless error analysis.

State v. Sanders, 400 Ariz. Adv. Rep. 3 (CA 1, 5/22/03)

This case addresses the interplay between the notice requirement of the Sixth Amendment and rule 13.5(b) governing amendments to an indictment. The court held that it was error to

allow the state to amend an assault indictment from "knowing touching" to "reasonable apprehension" after the state presented its evidence. Double jeopardy does not bar a retrial on the "reasonable apprehension" allegation.

State v. Sullivan, 400 Ariz. Adv. Rep. 41 (CA 1, 5/29/03)

The failure of the trial court to give the exact reasonable doubt instruction outlined in *State v. Portillo*, is error, but subject to harmless error analysis. Here it was harmless. The court also discusses "intent to defraud" in a forgery case.

State v. Beasley, 401 Ariz. Adv. Rep. 24 (CA 1, 6/12/03)

The defendant was charged with aggravated assault and attempted murder. The court held: Swabbing of the defendant's hands for gunshot residue is a search but was reasonable here. Admission of defendant's statement that he had just been released from jail was not error. The court abused its discretion in allowing the state to impeach the defendant with the nature of his prior seven felonies, but it was harmless. A witness statement was an excited utterance thirty minutes after he had been shot. Vacated the additional two years added to the sentence because defendant was on release. That finding had to be made by a jury not the judge.

State v. Siner, 401 Ariz. Adv. Rep. 3 (CA1, 6/5/03)

Defendant's conviction for drive-by shooting was set aside because the court erroneously instructed the jury on transferred intent. Transferred intent does not apply to drive-by shooting because drive-by shooting does not require intentionally causing a particular result as an element of the offense.

Jury and Bench Trial Results July 2003

Due to conversion problems, the Trial Results for this issue are not included in this electronic version. If you would like to view the Trial Results for this issue of for The Defense, please contact the Public Defender Training Division.



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