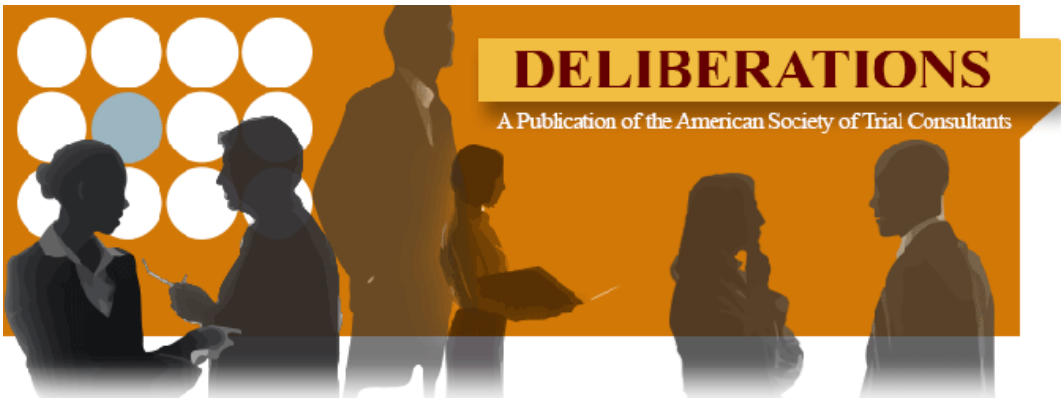

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MINI-OPENINGS SET THE STAGE FOR JURY SELECTION

By Susan Macpherson

Judges tell prospective jurors: *"All we really need to know is whether you can be fair and impartial."* But prospective jurors are often not told what they will have to be fair and impartial about. When jurors don't know what the case is about or what they will be asked to decide, their answers to the most basic question in jury selection may not be very reliable.[1] Yet there are very few jurors who have the nerve or the self- awareness to give the response that I recently heard from the back row of the jury box: *"Depends on what you guys got for me to decide!"* When jurors are told it is a criminal charge, such as possession of a controlled substance, they can make some assumptions as to what the case is about and consider whether they have any relevant experiences or opinions. When jurors are told it is a civil case involving a claim like "tortious interference" or "a violation of the Sherman Act" or "misappropriation of trade secrets" that generally means nothing to them and certainly reveals nothing about the issues that might trigger a predisposition to favor one side. Having each attorney present a mini-opening early in jury selection provides a simple solution to this problem.

A mini-opening is a brief statement – usually in the range of 5-7 minutes – that describes the context of the dispute, provides a quick overview of the key issues in the case, and gives a "50,000 foot" description of what the jurors will be asked to decide. The basic concept is quite simple: when jurors are given a coherent statement about the case at the outset of voir dire they can do a better job of identifying the issues that may make it difficult for them to be impartial and of revealing any prior attitudes or experiences related to the specific issues in dispute. The objective in the mini-opening is **not** for counsel to tell the jurors "this is why we are right" but rather "this is why we are here; this is what the jury will be dealing with." As a result, the follow-up voir dire is more efficient and effective because prospective jurors have a better understanding of why the questions are being asked, and they can do a better job of anticipating what the lawyers and the judge need to know about their opinions and experiences.

In a recent jury selection that began with mini-openings, I heard prospective jurors volunteer information the attorneys had not thought to ask, such as: *"I'm not sure if it matters, but given what you said about the case I thought I should tell you that....."* as well as concerns about their ability to be impartial: *"This situation is just too close to an experience that left a really bad taste in my mouth – I'm already leaning in favor of one side." "I just don't agree with getting compensation in this situation because....."* Giving jurors the ability to "cut to the chase" obviously saved time, as did presenting a condensed description of the case that would normally come out in a series of voir dire questions based on piecemeal descriptions of the critical case issues from each party's perspective. The potentially problematic issues were all put on the table in the 10-12 minutes it took to deliver two mini-openings.

Similar techniques have been utilized over recent years to facilitate the disclosure of juror biases during voir dire. For instance, it is becoming common practice in some jurisdictions for judges to read a statement of the case at the outset of voir dire--this procedure provides some of the advantages of the mini-opening. These statements usually employ plain English to describe what the case is about and each party's main contention. But the utility of this procedure for highlighting potentially problematic or polarizing issues is generally limited by the requirement that the parties negotiate a mutually acceptable statement. That process typically produces a watered down description that has minimal content. In cases where the parties have dramatically different views of what the case is about – which applies to many cases that end up in trial – the requirement to compromise can produce a statement that is just as likely to confuse or mislead as it is to enlighten and inform the prospective jurors. If the objective is to tell the jurors what the case is about and to highlight the key issues, it is best accomplished by allowing each party to make a separate statement.

The mini-opening procedure was mentioned in the ABA's 2005 Principles for Juries and Jury Trials as a technique that enhances juror comprehension, but it is a routine practice in only a handful of states.[2] Judges in other jurisdictions may be persuaded to give this a try for several reasons: it can save time, it can get jurors more interested in serving than in being excused, and it eliminates the need to determine the propriety of each question in which the attorneys are attempting to highlight sources of potential bias or triggers for prejudgment. The judge can give a pre-instruction that distinguishes the mini-opening from evidence and argument and

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explains that the purpose is to help jurors understand and respond to the questions that will follow. Anything that increases the likelihood of identifying jurors who should be removed for cause, and improves the attorneys' ability to make more intelligent use of peremptory challenges, should be worth a try. If nothing else, the jurors will certainly appreciate being told what it is *"you guys got for me to decide!"*

Footnotes

1This is not to suggest that jurors self-diagnosis of bias is ever completely reliable. See recent research: *"The Inability of Jurors to Self-Diagnose Bias,"* Robertson, Christopher; Yokum, David; and Palmer, Matt; http://papers.ssrn.com/so13/papers.cfm?abstract_id=2109894

2Mentioned in Principle 13(G). http://www.americanbar.org/content/dam/aba/migrated/2011_build/american_jury/final_commentary_july_1205.authcheckdam.p Mini-openings now permitted under the rules of procedure in Arizona, California, Indiana, Colorado, and Oregon state courts.

Author Snapshot

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