

CONSTRUCTION SUPERCONFERENCE

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ARTBA American Road & Transportation Builders Association

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WELCOME

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Jury Selection of a Construction Case in the Era of Social Media: What Can I Do and When Can I Do It?

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Moderator:

Jim Landgraf,
Former Co-Chair, ABA Section of Litigation
Construction Litigation Committee
Of Counsel
Dilworth Paxson LLP
Cherry Hill, New Jersey

Speakers:

Karen P. Lisko, PhD
Senior Litigation
Consultant
Perkins Coie
Phoenix, Arizona

Joel Robbins, Esq.,
Senior Partner,
Robbins and Curtin
Phoenix, Arizona

Melissa Beutler, Esq.,
Vice President/General Counsel,
Big-D Construction,
Salt Lake City, Utah

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The HYPOTHETICAL

- **OWNER** – Commercial Developer of high-rise mixed use buildings
- **CONTRACTOR** – Large multi-state general contractor
- **OWNER'S CLAIMS**
 - Contractor finished 8 months after scheduled completion
 - Contractor has not returned to complete punch list
 - Already experiencing problems with systems and leaks
- **CONTRACTOR'S CLAIMS**
 - Has not been paid balance due on base contract
 - Has numerous extra work and delay claims

Why would I want a Jury?

- Arbitration

Does the Contract require it?

Does the case require significant discovery?

Have I analyzed time and cost considerations?

Are there related claims against other parties?

Why Would I want a Jury?

- Bench Trial

- Who is my assigned Judge?
- Does my case largely fall on legal interpretations?
- Does the Case require significant contract or plan and specification interpretations?
- Are the damages largely economic loss based?
- Are the “equities” generally equal?
- Will it take me more than a minute or two to explain my theories and claims?
- Was anyone injured?

Why Would I want a Jury?

■ JURY TRIAL

- I can present a set of unbalanced equities
- The other side is “guilty” of doing something “wrong”
- My overall claims can be explained in a minute or two
- My claims are relatable to a lay person
- There was significant property damage or a personal injury
- The other side is a contractor
- The other side is an architect or engineer
- The other side is an insurer, bonding company or bank
- My client is a public entity - or better yet – a school district or homeowner

For the Owner My Juror Considerations Are

- Is the juror a homeowner or business owner?
- Has the juror had any issues with contractors or design professionals?
- How does the juror feel about the court system as an avenue to resolve disputes?
- Where is the juror on the conservative to liberal spectrum?
- What relationship, if any with trade unions?
- Is the juror “handy” or a “do-it-yourself’er”

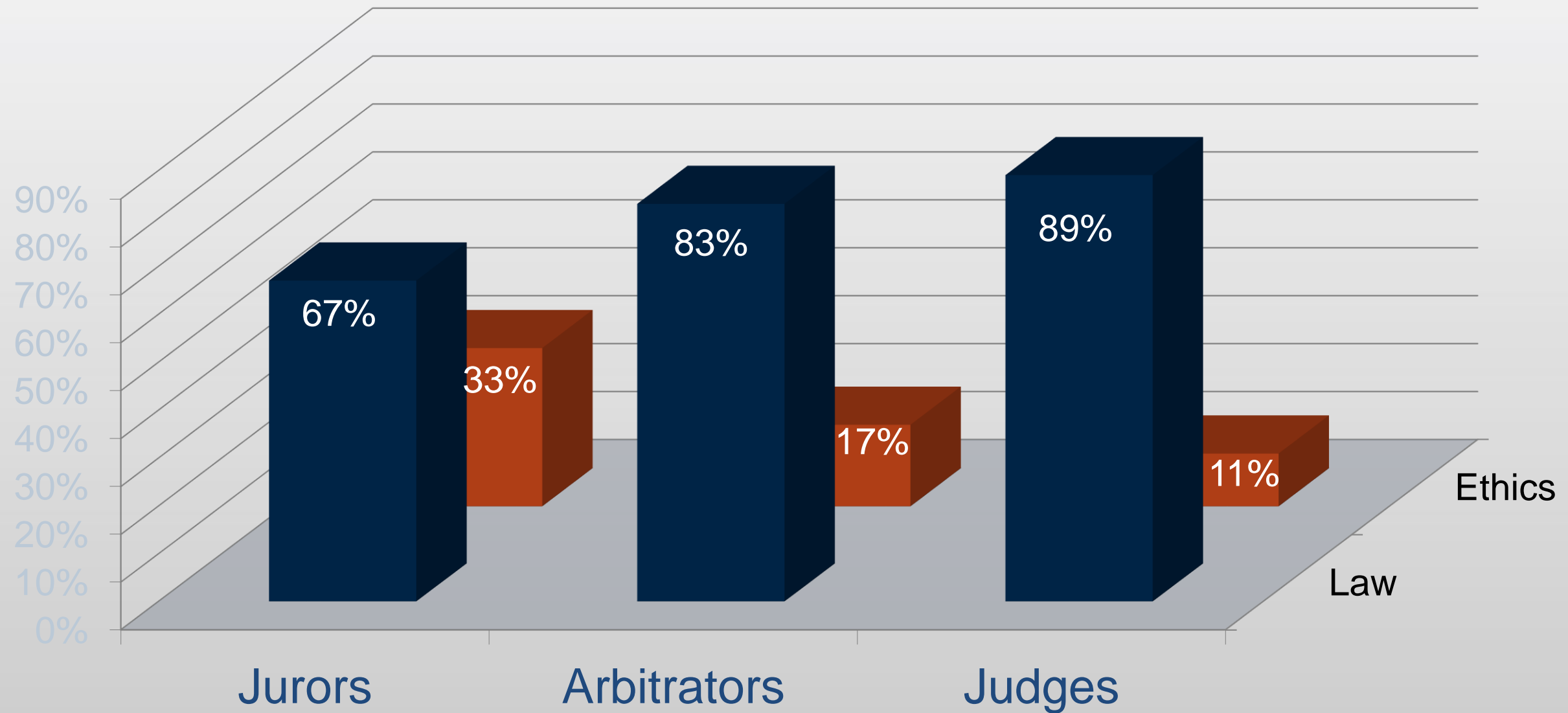
For the Owner My Juror Considerations Are

- Are they employed as workers/laborers?
- Have they ever worked in construction?
- Will they see “big guy” v. “little guy”
- Do they have contract experience – applying contract terms

For the Owner My Juror Considerations Are (Part 2)

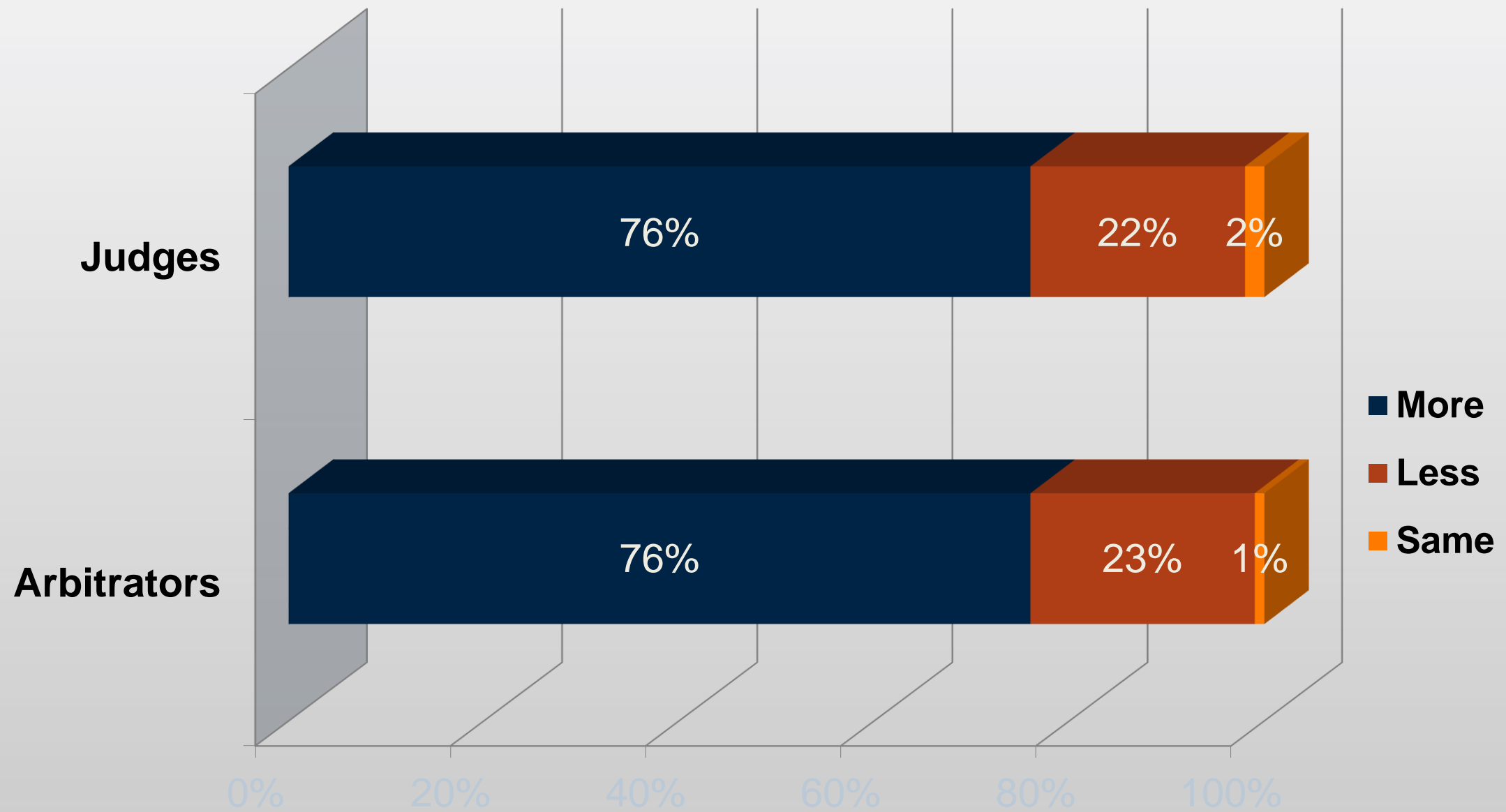
- What juror will respond favorably to my witnesses?
- What juror might respond favorably to my adversary's witnesses?
- What juror will respond favorably to my demonstrative evidence and the media that I use?
- What juror will respond favorably to my experts or to my adversary's experts?
- What are the juror's feeling with respect to the government, or professionals?

When personal ethics and the law conflict, which would you follow?



Persuasion Strategies National Arbitrator Survey (2007)
Federal Judge Survey (2008)

Compared to what you see in your courtroom,
attorneys need to formulate evidence into stories . . .



Persuasion Strategies National Arbitrator Survey (2007)
Federal Judge Survey (2008)

2X



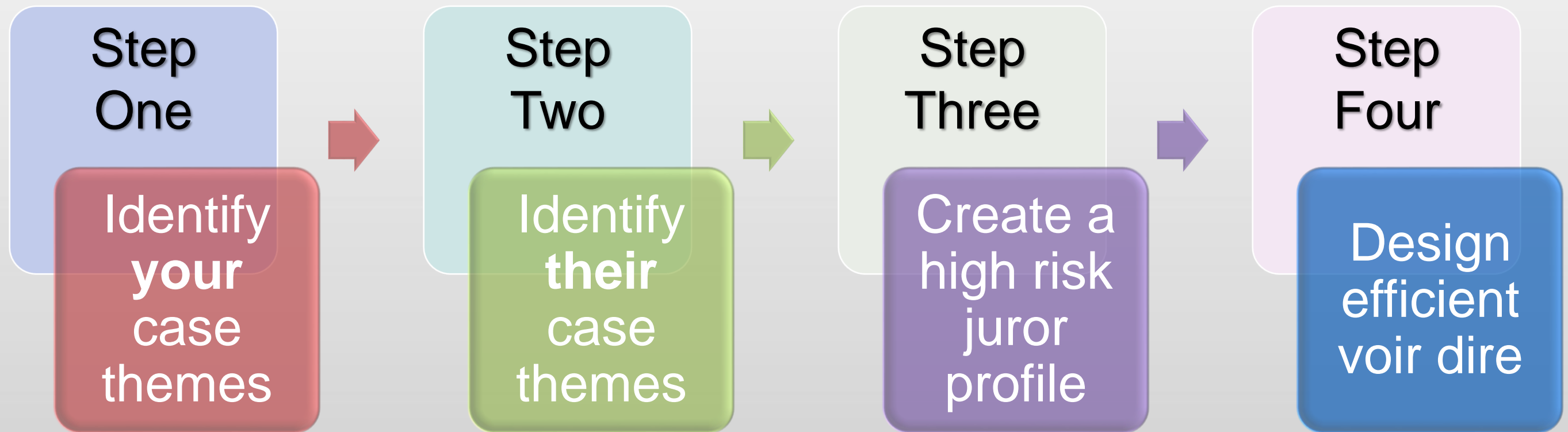
When Judges Ask Questions of Jurors

Jones (1987)



Where Most Jury Selection Begins and Ends

Steps to Effective Jury Selection





Step 3: Create High-Risk Juror Profile

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High Risk Juror Profile: General Contractor

Anti-General Contractor

- Believes general contractors are greed mongering talkers
- Believes if a case has made it to trial, it must have some merit
- Has been or knows someone well who has been unfairly cheated by a contractor
- Has done own construction projects, largely out of frustration
- Is a status inconsistent (combo of less educated/high level job)



High Risk Juror Profile: General Contractor

Pro-Developer

- Believes developers are largely responsible for having advanced the American real estate industry
- Empathizes with developers having to wrangle with contractors
- Is pro-capitalist/politically conservative



High Risk Juror Profile: General Contractor

Rules Driven in Contract Evaluation

- Believes the law is more important than ethics in evaluating business dealings
- Has tried to recover monetary damages in legal action





Step 4: Design Voir Dire Questions

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1

PLEASE COMPLETE THIS FORM ON BOTH SIDES AND RETURN WITH YOUR COMPLETED JUROR QUALIFICATION QUESTIONNAIRE IN THE ENVELOPE PROVIDED. IF YOU ARE A JUROR, PLEASE BRING THIS WITH YOU WHEN REPORTING FOR SERVICE. COMPLETE IN BLACK OR BLUE PEN ON THIS FORM.

JUROR QUESTIONNAIRE

First _____ MI _____ Age: _____
 Work Phone: _____ Cell: _____
 Where you reside: _____ How long? _____
 Where did you grow up? _____ How long? _____

4. Do you (circle one) Own Rent or Live with your parents?
 5. Are you (circle one) Married Widowed Divorced Separated Or Single?
 6. How far did you go in school (circle the number of years)? 6 7 8 9 10 11 12 13 14 15 16 17
 7. Occupation, or if retired, former occupation: _____
 Employer: _____ How long? _____
 Have you ever had supervisory or managerial responsibilities with your job? YES NO
 8. Does your spouse work outside of the home? YES NO
 If yes, doing what and for whom: _____

9. If you have children, list their gender, age, and occupation:
 1. M/F age: _____ Occupation: _____
 2. M/F age: _____ Occupation: _____
 3. M/F age: _____ Occupation: _____
 4. M/F age: _____ Occupation: _____

10. If you are a member of a trade union or professional organization, list the name: _____

11. To which civic, community, fraternal, political, or religious organization are you a member? _____

2

All Counsel Listed on Signature Page

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF CALIFORNIA

Case No. 00-CV-00000 CCC (NNN)
JOINT [PROPOSED] VOIR DIRE QUESTIONS
 Trial Date: December 1, 2016
 Time: 9:00 A.M.
 Place: Courtroom 4C
 Judge: Hon. Brown

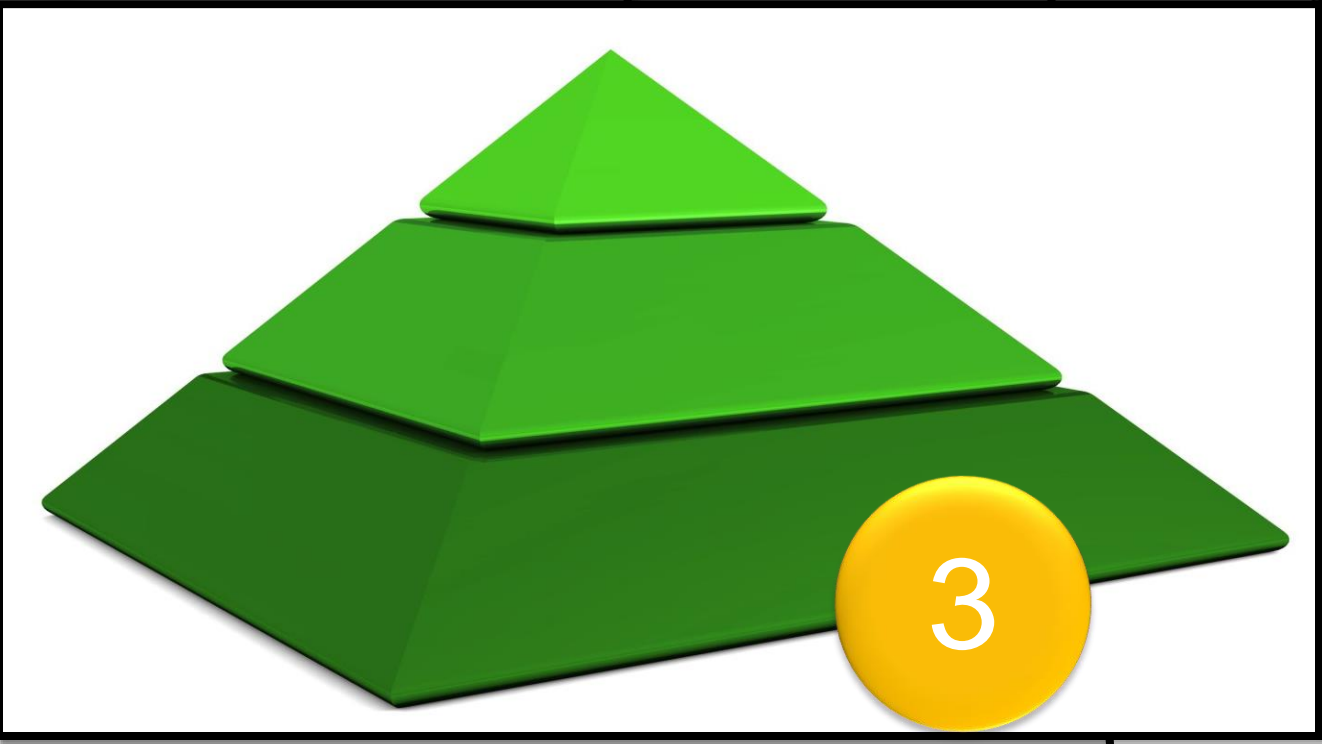
SMITH CO., LTD.,
 Plaintiff and Counterclaim
 Defendant,
 v.
 JONES CO., LTD., et al.
 Counterclaim

JURY TRIAL DEMANDED

... Civil Local Rule 16.1(9)(b), and the Court's guidance at the August 1, 2016 Conference (D.I. 305 at 38:8-13), Plaintiff Smith Co., Ltd. ("Smith") and Jones Co., Ltd. ("Jones"), Jones, Inc. ("Jones"), and Jones, LLC ("Jones") jointly submit their proposed voir dire questions with this filing:

1. What is your last level of education completed?
 2. If you have attended college, what was (is) your area of specialization in undergraduate or technical school?

_____/s/_____
 John Q. Public



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Rules Driven in Contract Evaluation

- Believes the law is more important than ethics in evaluation
- Has tried to recover monetary damages in legal action



Juror Questionnaire



Judge Oral Voir Dire



Attorney Conducted Voir Dire

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Juror Questionnaire



Judge Oral Voir Dire



Attorney Conducted Voir Dire

Layer Three:

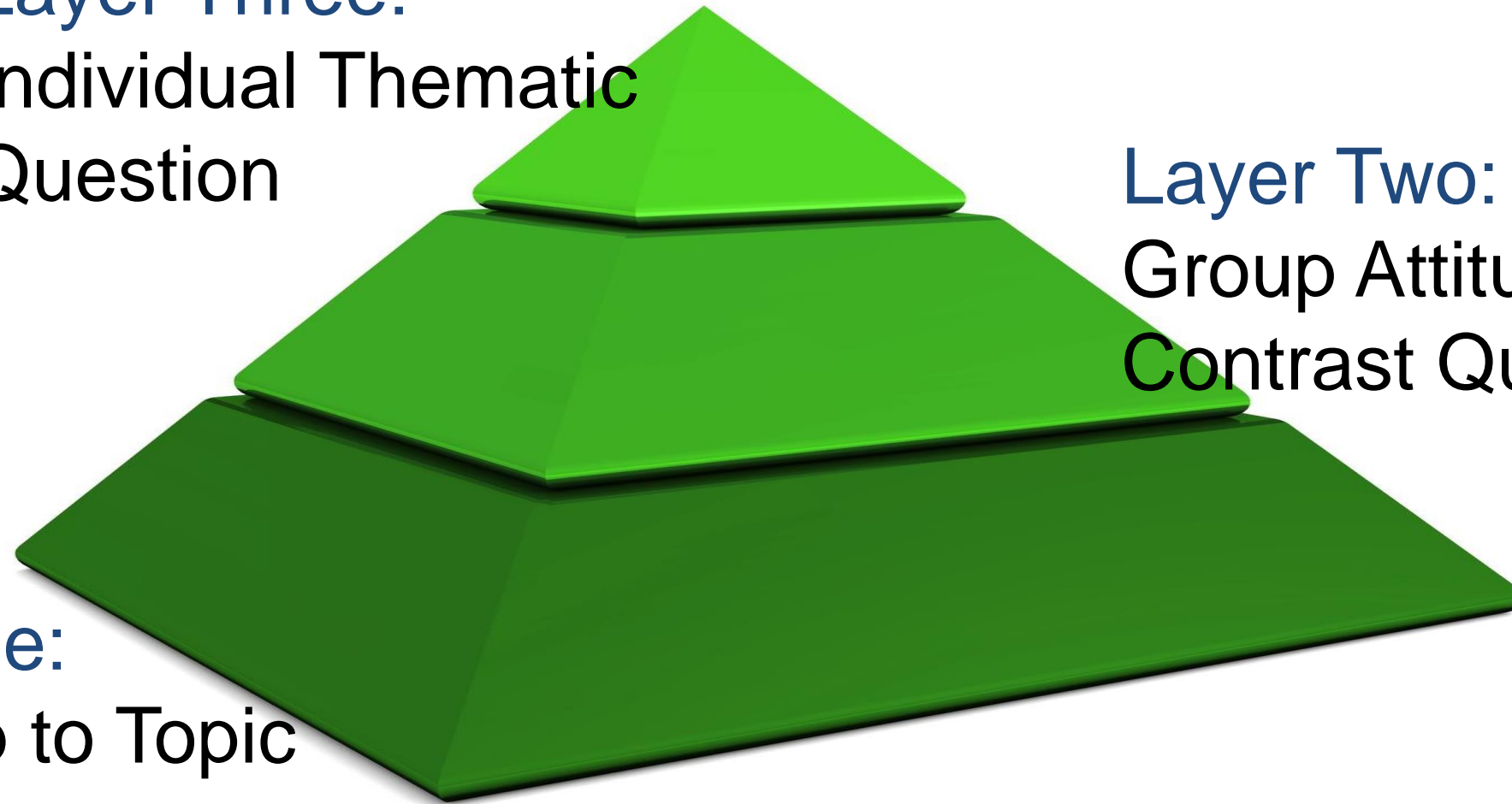
Individual Thematic
Question

Layer Two:

Group Attitudinal
Contrast Question

Layer One:

Warm Up to Topic



Triple Layered Oral Voir Dire

Lisko, K.O. (2012). *Proven Jury Arguments and Evidence*

Layer Three:

Ms. S, why would you say “B”?

Layer Two:

Some might think “A”
Others might think “B”

Layer One:

Mr. X, have you ever had the experience where . . . ?

Triple Layered Oral Voir Dire

Lisko, K.O. (2012). *Proven Jury Arguments and Evidence*



More Bad Jurors Than Strikes

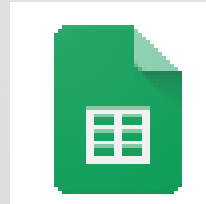
Your Honor

I AM TIRED OF SPENDING DAY AFTER DAY
WASTING MY TIME LISTENING TO THIS BULLCRAP,
THIS IS CRUEL AND UNUSUAL PUNISHMENT. THE
PLANTIFF IS AN IDIOT. HE HAS NO CASE. WHY
ARE WE HERE? I THINK MY CAT COULD BETTER
ANSWER THESE QUESTIONS... AND HE WOULDN'T
KEEP ~~ASKING~~ ASKING TO SEE A DOCUMENT. I'VE
BEEN PATIENT. I'VE SAT IN THESE CHAIRS FOR
7 DAYS NOW. IF I BELIEVED FOR A SECOND THIS
WAS GOING TO END ON THURSDAY I MIGHT NOT
GO CRAZY. THIS IS GOING TO LAST FOR ANOTHER
4 WEEKS. I CANNOT TAKE THIS, I HATE THESE
LAWYERS AND PRAYED ONE WOULD DIE SO
THE CASE WOULD END. ~~SPENDING TIME~~
I SHOULDN'T BE ON THIS JURY. I WANT TO DIE.
I DON'T WANT TO BE THANKED FOR MY PATIENCE.
I WANT TO DIE!; WELL NOT DIE FOR REAL BUT
THAT IS HOW I FEEL SITTING HERE. I AM THE

Game On: Using Technology and Social Media in your Voir Dire



Communication with your team in the Courtroom



Google
Sheets



Sources for Jury Social Media Research:

- Facebook
- LinkedIn
- Google
- Voter Information
- Court Cases

Technology and Voir Dire in Action

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THANK YOU

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