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Voir Dire: Jury De-Selection

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VOIR DIRE: JURY DE-SELECTION

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The term “jury selection” may overstate the attorney’s role in the process. Attorneys do not select jurors—they *remove* jurors from preselected panels. This filtering process results in a jury of people not removed by the court or parties. The actual history of the term “voir dire” reflects its true purpose in a trial. Its Anglo-Norman antecedent meant “to speak the truth,” and its Latin forbear meant “to say.”¹ These early definitions reflect the true purpose of voir dire, which is to get prospective jurors to reveal enough information about themselves so the trial lawyer can identify jurors who are biased against a client and should be removed. Attaining this goal is integral to the adversarial process but not always well executed.

Conducted properly, voir dire affords the lawyer an opportunity to dismiss dangerous jurors, make a good impression on the jury, and perhaps even to get the jury to understand his theory of the case from the very beginning.² It is the foundation for using peremptory challenges and challenges for cause.

I. THREE GOALS OF VOIR DIRE

Voir dire has three major goals: (1) education, (2) information gathering, and (3) building rapport.

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¹ BLACK’S LAW DICTIONARY 1605 (8th ed. 2004); THE AMERICAN HERITAGE COLLEGE DICTIONARY 1512 (3d ed. 1993).

² Dan Christensen, *Select the Right Jury for Your Case*, 40 APR TRIAL 58 (2004) (citing Thomas K. Srull *et al.*, *Associative Storage and Retrieval Processes and Person Memory*, 11 J. EXPERIMENTAL PSYCHOL.: LEARNING MEMORY & COGNITION 316 (1985), finding that many jurors decide immediately what they think happened, then search for evidence to support that notion and disregard evidence to the contrary).

A. EDUCATION

When jurors arrive for jury service they are unfamiliar with what will occur, their roles, and their duties. They are also unfamiliar with legal terminology such as "preponderance of the evidence." Jurors also frequently hold opinions that are contrary to recognized legal principles.

Lawyers must determine whether these opinions, which are contrary to legal principles, are simply misunderstandings of the law or reflect deeply held biases. The latter may give rise to a challenge for cause or may require use of a peremptory challenge. The former can be corrected by education.

Further, jurors process information as the trial proceeds. This occurs in the context of the jurors' expectation and belief regarding their roles and duties. While jurors now receive general jury instructions when the trial starts and after being sworn, that is too late in the process to identify bias. Waiting until after the evidence to educate jurors about the law of the case may result in jurors treating the case in a manner different from the way they would if they were aware of the relevant legal issues before hearing the evidence. Thus, voir dire is the appropriate time to acquaint and educate jurors with the relevant legal concepts and trial procedures relative to their role as the impartial finders of fact. Both lawyers and judges participate in this educational process by explaining the jurors' roles and duties in language they can understand and avoiding, where possible, overly complex and confusing legal jargon.

B. INFORMATION GATHERING

The most important goal of voir dire is to glean information from potential jurors to enable lawyers to intelligently use either peremptory challenges or challenges for cause. Achieving this goal requires careful consideration of what information is actually needed and then asking questions aimed at revealing that information while promoting forthright and honest communication. The manner in which voir dire is conducted in some forums impedes effective information gathering. However, in Indiana's state courts the process is left in the hands of the lawyers and the court.

C. BUILDING RAPPORT

Lawyers can develop a positive rapport with jurors by using a conversational style, treating jurors with respect, showing an interest in them as individuals, showing empathy, and working to make the jurors feel comfortable in what is essentially a conversation. Without rapport, jurors are unlikely to be candid. Nor are they likely to accept and trust the lawyer, which is crucial to the effectiveness of an advocate. It is hard to overstate the importance of building rapport with prospective jurors.

This is your first opportunity to speak with the jurors and you will leave a lasting impression. If you offend a potential juror and that person is not dismissed, you have seriously damaged your case. Even if that juror is dis-

missed, other members of the venire may sympathize with him and hold it against you. Remember, you can probably hurt your case more than you can help it in voir dire, so err on the side of caution.

One way to alienate potential a juror is to cut him off when he is talking. This is delicate because the lawyer wants to get the juror to open up and talk, and the lawyer must be a good attentive listener—but at the same time the clock is ticking. Wait for an appropriate break in the commentary and then regain control. Thank that person for his candid, thoughtful comments and explain that the judge has given a limited amount of time for voir dire. Tell him you want to be sure everyone has a chance to be heard, and you are likely to have other discussions with that juror.

Never cross-examine a prospective juror. When pursuing a challenge for cause, be firm and leading but not argumentative. If the juror doesn't go as far as you think he might, move on gracefully. If other members of the venire feel you are pushing a juror too hard, they may resent you for it. You might even ask the judge to inquire on a topic if you think there is a "for cause" issue lurking behind an incomplete answer.

These three goals of voir dire unquestionably affect an advocate's effectiveness. As the old adage states: "There is no second chance to make a first impression." While the best voir dire will not win the case for you, a poor performance could lose it. If you accomplish nothing else in voir dire besides leaving a good impression, then at least you have done no harm. However, to fully capitalize on voir dire, you must get the jurors to openly discuss their thoughts and feelings, which is not easy for people to do in a courtroom full of strangers. The challenge for the trial lawyer is to make it easier for them.

II. PREPARE FOR VOIR DIRE

While each case is different, it is possible to apply a basic structure that allows the collection of information in an organized fashion. One proposed structure consists of the following:

1. Introduction
2. Knowledge of the relevant entities and parties
3. Background information and relevant experiences
4. Statement of the contentions in the case
5. Opinions and beliefs
6. Legal opinions and beliefs
7. Jury behavior issues
8. Closing issues

Some of these topics take very little time, while others are at the heart of the exercise. With this outline in mind, the key to a successful voir dire and jury selection, as with any other part of the trial, is preparation. The goal

is to take the time necessary to develop questions and strategies that will make the optimal use of what is available in the voir dire process.

The two basic steps in the preparation of voir dire are the careful analysis of the particular case and then development of the relevant questions. However, it frequently appears that too little effort is put into the voir dire process, when it should be a compilation of all the work that led up to the trial.

The first step for preparing a voir dire is to conduct an in-depth analysis of the case including the following items:

1. Strengths and weaknesses of the case
2. Proposed theme of the case
3. Opinions and attitudes of the prospective jurors the lawyer deems important
4. Experiences and reference groups of jurors that you deem important
5. What would serve as a basis of a challenge for cause for prospective jurors
6. What are the parties' statements of contentions
7. On what will opposing counsel's voir dire topics and questions focus

Working through this topical outline and case analysis will allow a lawyer to develop a plan for conducting the voir dire.

Get the jury questionnaires as soon as possible and read them thoroughly. They will provide much needed basic information and will allow the lawyer to accomplish more in the time allotted. Be certain you understand the judge's practice with respect to voir dire. There is great discretion on how the process is conducted, particularly in regard to when challenges must be made.

The next step in preparing for voir dire should center on development of specific questions arising from the case analysis. The goals of voir dire as initially outlined, will influence the form and content of the questions as will the nature of the case. If the most critical goal of voir dire is information gathering, then the questions need to foster a willingness on the part of jurors to reveal information on topics that are obvious to the case. Once those topics are identified, follow-up questions can be prepared in advance, but be flexible in asking those questions as the dialog develops.

III. THE QUESTIONING

There are essentially three methods by which questions are asked of prospective jurors: (1) individual questions, (2) group questions, and (3) combined questions. The individual method involves questioning one juror at a time. The group method involves questioning jurors as a collective body; the size of the group can range from those in the jury box to the entire

venire. The combined method incorporates the above two methods. Prospective jurors are questioned in a group where both individual and group questioning occurs. Questioning individual jurors is not contingent upon the responses made to group questions but may be pursued at appropriate times. While this might state the obvious, there are some questions and topics that are better suited for each style of questioning. That choice should be made knowingly.

A. ASK, DO NOT TELL

A lawyer who talks too much in voir dire is not getting the information he needs. As one practitioner noted, if you do more than ten percent of the talking in voir dire, you are talking too much.³ You must look the jurors in the eye, listen to what they are saying, and respond with appropriate verbal reinforcement and follow-up questions.

To do this effectively, do not take notes as you listen—let someone else do that. You will not achieve your goals in voir dire by looking at a note pad. As in any conversation, there is much to learn by observing how the prospective juror delivers his information. Facial expressions, gestures, inflections all need to be observed. Writing notes as the person speaks removes you from the conversation, and is likely to make you seem impersonal and rude. If you asked a question and the person has summoned the courage to answer, then the lawyer had better listen. If you must make a note, jot it down quickly after that person has finished speaking.

While the lawyer should not talk too much, he must say enough to keep the venire talking. Reciprocal disclosure is a good tool to employ here. As an example, tell the jurors something about yourself to encourage them to feel more comfortable discussing their own personal beliefs and experiences. This is especially important when asking sensitive or personal questions.

Use open-ended questions. Think of it as direct examination where you don't care what the answer is—just let the jurors open up and say what they want. Many jurors will be uncomfortable in this setting, and if you give them a chance to answer yes or no, they will often take it. Instead, ask the jurors to tell you how they feel about a particular subject. Learning how they feel will give you the best opportunity to evaluate them.

Finally, use positive reinforcement as a tool to elicit information. When a juror provides candid information—good or bad—remember to thank that juror and acknowledge the importance of honest, forthright answers. This will encourage that juror and the rest of the panel to speak candidly.

³ David A. Ball, *Advocacy Track: Jury Selection: Your Case in Court—The Critical Beginning*, ATLA WINTER CONVENTION REFERENCE MATERIALS (Feb. 2004).

B. MAKE IT EASY FOR JURORS TO DISCUSS BIAS

A frequent ineffective technique in voir dire is asking questions where the socially appropriate answer is almost mandatory. For example, asking potential jurors if they can be fair and impartial and decide the case based on the evidence and the law. This question is so frequently asked that attorneys seem to believe that it has value. It does not. You will almost always get a "yes" answer, and that answer will not necessarily help your evaluation of that prospective juror. Unless someone is determined to get out of jury duty, they are going to say "yes," regardless of their true feelings. Psychologists call this the "social desirability effect."⁴ Some jurors may even perceive such an inquiry as questioning their integrity.

To get jurors to expose a specific bias the lawyer must frame the questions so as to avoid the social desirability effect. For example, assume you encounter a potential juror whose mother is a doctor, and one of the arguments in the case is that your co-defendant doctor is at fault. Some trial lawyers would simply ask that person whether her mother's profession may affect her ability to be impartial. This closed-ended question will usually get the socially appropriate answer because people want to say the right thing. The lawyer's job is to make it easy—and socially acceptable—for jurors to reveal their biases.

In this example, you could start with open-ended questions about how that person views her mother's work. Ask her to explain why she is proud of her mother. Have her tell you about any particularly memorable moments in her mother's career that she has witnessed or been a part of. Now that juror has gone down that path, the lawyer can address the bias issue—but delicately. One might say, "you know, if my mother were a doctor I think I might have a tough time pinning blame on another doctor because I would just have such a soft spot in my heart for doctors and the noble work they perform. Do you feel that way perhaps?" If the answer is yes, go ahead and tie it up. "Perhaps then, given the soft spot you have for doctors, you might make a better juror on a case that does not involve a doctor. Would you agree with that? You might find it difficult, if not impossible, to put aside your life experiences in this topic?"

By approaching it in this fashion, you have alleviated her concerns about expressing her bias. You have admitted that you might feel the same way and that it is perfectly natural. And more important, you have couched her admission of bias as the socially responsible thing to do. This is a typical example of establishing the removal of a juror for cause.

⁴ Hazel Markus & R.B. Zajonc, *The Cognitive Perspective in Social Psychology*, in Gardner Lindzey and Elliot Aronson, eds, 1 HANDBOOK OF SOCIAL PSYCHOLOGY 137, 184 (Random House 3d ed 1985).

C. LEARN ABOUT THE PERSON, NOT JUST HIS BACKGROUND

You will not have time to explore potential bias with each member of the venire, so you need to make your time count. Remember, the lawyer does not "select" a jury, that has been done already. The lawyer is trying to spot the bad apples and dismiss them.

So how can you spot the type of juror who could burn you? Sometimes you won't be able to, but your best bet is to learn as much as you can about the *person*—not necessarily his life experiences. You want people on your jury that you might enjoy having lunch with. Again, it is the person you really need to know, not just his experiences.

To learn about the jurors themselves, you must get them to talk about their lives and interests. Ask them to tell you about things they enjoy—hobbies, books, anything. Find out what irritates them the most. This will allow them to open up and share more of themselves with you. While the lawyer generally shouldn't care what television shows they enjoy, the lawyer does want to interact with them and get a feel for who they are. If they are hostile or rude, then you know you must get rid of them. They don't like you and they could poison the jury. They may not like your opposition either but don't let this sway you; it is far too risky to keep them.

D. PICK YOUR BATTLES

Given that you will have limited challenges, you must go after only those jurors you really don't like. If you have only one challenge left and you must choose between a juror who might be biased and a juror you don't like as a person, strike the one you don't like—every time. Many trial lawyers may strike the one they think is biased. While jurors can overcome past experiences, they can't change who they are. Your clients pay you to represent them because they trust your instincts—and so you must trust your instincts as well.

When making tough decisions about whom to strike, keep the following rules in mind. If you definitely don't like a potential juror, strike him at all costs, ahead of all others. If you are undecided about a potential juror, keep him. If your opposition really likes one juror and you think you can live with him, keep him, too. Remember, the next juror may be much worse than the one you struck, which leads to the next point.

E. LEAVE NO JUROR BEHIND

Given the importance of weeding out hostile jurors, you simply must have some conversation with each member of the venire. That sweet-looking lady who reminds you of your grandmother may be the most bitter person on the venire. You must discover this, and your time is limited. So you must find ways to ensure you speak to everyone within your allotted time.

To help you work your way through the entire venire, start with questions aimed at all potential jurors. You may try setting forth a statement

and ask the jurors to raise their hands if they agree with one particular statement, then proceed to follow-up questioning with individual jurors who raised their hands. Once you have followed up with each juror who raised his hand, ask the others who did not raise their hands "why." This is a good way to flesh out biases, and learn about each potential juror in a relatively short time. It also gets each juror engaged early on.

IV. CONCLUSION

Voir dire is about getting to know people as best you can in a short period of time. So set aside your lawyerly need to speak; instead focus on being a good listener. As one advocate put it:

Ask, do not Tell.
Listen, do not Talk.
Find out how they feel,
Not What they Think.⁵

⁵ JAMES W. JEANS, *MASTERING THE CRAFT OF TRIAL ADVOCACY* (1989).