

Voir Dire-What Are They Thinking?

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“Men believe what they prefer.”
Francis Bacon (circa 1600)

“It’s easier to ride a pony in the direction in which it is going.”
Anon. via Howard Nations (circa 2000)

I. Introduction

This presentation will address four voir dire topics as follows: (1) your audience; (2) realistic goals; (3) techniques (4) deselection process. Several books are listed at the end of this article and are strongly recommended for the serious student of voir dire.

Voir Dire is a crucial part of the trial process. It is during voir dire that you must obtain the necessary information to deselect those persons who are most likely to reject your client’s story. Without adequate voir dire, your ability to present a successful case for your client will be handicapped. After all, it is jury members who win or lose the case.

II. The Panel - Know your Audience

The 36 or more people that have been empaneled for you to question are strangers to you, to each other, and to the court system. They are nervous, anxious, and impatient. They are anxious and uncomfortable because they do not understand exactly what they will be asked to do. They have appeared because they were required to appear by a subpoena.

They feel inconvenienced and unfortunate. They may have seen a film that explains the nature of their civic duty to perform jury service. However, the dispute is not theirs. They are being asked to solve someone else’s problem. They do not understand why the people could not work out their problems that they are now being asked to resolve.

They are skeptical. They expect that their time will be wasted. Many have brought books to read while they are shuttled from place to place and told to hurry up and then wait. They have personal, family, financial, and work issues which concern them far more than the strangers in the courthouse.

They are intimidated by the formality of the proceedings and presence of law enforcement officers. They are fearful of speaking in public. They are more nervous than you

about having to speak in front of strangers.

They continually absorb information to get their bearings in the unfamiliar legal surroundings. They see the lawyers dressed in suits with lots of boxes. They see law enforcement officers. They see court personnel. They look, listen and draw differing conclusions about what is occurring around them

They come from all walks of life and they have all had childhood and school experience. They have had family and work experience. They have had health experiences. They come from differing cultural backgrounds. Even if they have had similar lifetime experiences, they have drawn differing conclusions based on these experiences.

They have all listened to the experiences of their friends and family. They have absorbed the lessons learned by their friends and family from these experiences. They have all watched television or listened to the radio personalities. They have voted and so have made political judgments. Some have been chosen for jury duty before, others have always been struck.

The collective conscious and unconscious of the group is vast. They do not know why they feel the way they do about many issues. Many will have a difficult time articulating why they have a particular belief. They have never had to explain the rationales for their beliefs in an in-depth manner.

They talk in cliches and know the code words and phrases that they, their friends, family, and favorite media or political personalities use. They have accepted many ideas without a deep commitment. Yet, they may feel compelled to defend their beliefs with vigor. They are aware of the majority opinions in their cultural group and may or may not be committed to the majority opinion.

The panel presents a vast terrain of conscious and unconscious opinions and prejudices formed by recalled and unrecalled experiences. Most of them can give you a reason to explain their opinions and prejudices even if the reasons given are inaccurate. For the most part, they do not know why they have their particular beliefs and opinions. But they can rationalize their beliefs and opinions.

III. Goal of Voir Dire - Gather Information

The goal of voir dire is to gather as much information as you can about each individual on the panel. With this information, you can make an informed decision about what the individuals “prefer”, in other words, in which direction are they going. By your inquiry, you can increase the probability that you will deselect those persons who will not “prefer” your trial story. Your goal is to have adequate information to make an informed choice.

There is little certainty in this endeavor. There is no perfect jury. Mistakes will be made. However, the more good information you have, the better your probability of deselecting those persons most likely to reject your client’s case. You are in the world of probabilities, not

certainties.

There are two aspects of information gathering. The amount and the quality of the information. Both are important. They both require focused work. Your goal is to obtain as much quality information as possible. There is nearly an infinite amount of information you can obtain on each person. However, some of the information may not be very useful.

The more quality information you can gather, the better. Some lawyers rely exclusively on oral voir dire. Other lawyers use questionnaires. Some lawyers retain local counsel, which is always recommended in an unfamiliar jurisdiction. Some lawyers research each panel member's address and political affiliation. The quantity of information will be limited by time and by how much information you can digest.

Quality of the information is absolutely necessary. The phrase "garbage in, garbage out" applies to the acquisition of quality information. Quality can be gauged by how much the individual panel members are talking. The more candid the panel members are speaking, the better. The more deeply the panel members disclose their thoughts, opinion, and prejudices, the better.

Obtaining the quantity and quality of information you need for informed decisions is paramount to all other goals that are achievable in voir dire. It is paramount to educating the potential jury members or attempting to influence them. Focus on obtaining information.

By presenting your version of the case to the panel, you create the risk of appearing to manipulate. The jury panel resents attempts to manipulate. You tarnish your credibility. Attacking your opponent costs you credibility during voir dire. Anything that creates an appearance of unfairness, costs you. Any attempt to gain an unfair advantage may cost you; so why take the chance.

Your best probability of achieving a favorable first impression with the jury panel is to be abundantly fair, polite, humble, and concise. Each individual in the panel is making decisions about you. Their first impression, because of the importance of primacy, will be very difficult to change. Are you to be a manipulative greedy shyster or a well-meaning honest lawyer they can respect? They are familiar with both types.

IV. Voir Dire Technique - **How to Gather Information**

Get them talking. Easier said than done because of the panel members reticence in the unfamiliar setting with the many strangers in the room. However, let's first discuss logistics.

You will need at least one assistant who will be taking notes. Preprinted forms for the individual juror's name, number, and gender will be helpful. Put at least six persons on a page to make the pages manageable. If there are 36 persons in the panel, then you'll need six sheets. Your assistants are responsible for filling out the forms with the information you are eliciting. You will not take notes. Only your assistants take notes. You are talking and listening. You

must be engaged to “get them talking.”

You will need a list with every panel member’s last name, jury number, and gender. An open manila file folder works well. Arrange the names according to where they are sitting. Now you can address each panel member by their name. Remember, everyone likes to hear their name pronounced correctly.

Now you are organized. The initial jury questionnaires with names, address, marital status, and employment status have been provided to you. Your assistants have made initial notes on their forms. The Court has called on Plaintiffs counsel to begin voir dire. You arise and face 36 strangers who are very suspicious of you and do not want to be your audience.

Now you must plumb the psychological depths of 36 perfect strangers who do not really want to talk to you, much less tell you about their inner most thoughts. You must entice the information from them with your law school training, where psychology was only mentioned in your first year criminal law class. Basically, you are not very well trained in psychoanalysis. However, you do know how to engage people in conversation. Think of yourself as TV talk show host.

Beginning is always the hardest. Tell the panel what you are going to do and what is expected of them. You are familiar with the courtroom; they are not. They will appreciate receiving helpful information from you. By providing them with helpful information, you increase the probability that they will give you helpful information. Here is a suggestion for beginning:

“Hello, my name is John Doe. I’ll be asking you a lot of questions for which there are no wrong answers, to make sure a fair and impartial jury decides this case. Both I and the other lawyer just want to know more about you and how you feel about certain matters that are relevant to this lawsuit. There are no right or wrong answers as long as the answers are truthful and full. Hopefully, you and the other panel members will be doing most of the talking over the next couple of hours. The only way we can be sure to get a fair jury is if you talk to us and tell us how you truly feel about the matters we ask you about. We are not asking you to give us socially popular answers; we want to know your real feelings.

I and the defense lawyer will only ask you questions necessary to get a fair and impartial jury. You may not understand why the question is being asked, but you do not yet know the facts of this particular case and we are not asking you to judge this case before the facts are presented to you. There are lots of different types of lawsuits and I and the other lawyer will be doing our best to only ask relevant questions. The law allows this questioning in an effort for achieving a fair and impartial jury.”

The above introduction informs the panel of the importance of what you both are doing (ie. fair and impartial jury); and what you expect them to do in your joint effort to achieve a fair and impartial jury. Everyone understands the importance of being fair. Fairness may be the only principal that everyone argues with although they may disagree on what is fair.

Fairness, like justice is subjective. Subjective terms, by their inherent nature, are ambiguous because they mean something different to every person in the panel. Now you must get them talking to find out what “fairness” and the issues in your case mean to them.

Jury consultants have recommended different formats and questions for the trial lawyer to entice the panel to talk. Some suggest that general questions be asked, such as “who thinks there are too many lawsuits” and ask for hands to be raised, raising your own hand in the process. From this beginning, the discussion begins and other panel members are pulled into the conversation with, “Mr. Jones, how do you feel about what Mrs. Smith just said.”

Other consultants recommend that you begin with individual in-depth background questions. Questions would include, “What was your job before you retired; What do you do with your time outside of work; what has been your experience with back pain; and what have you heard of people hurt in car wrecks?” Later, start the more general discussion.

All the professional consultants agree that you must get them talking. Investigate their experiences on issues relevant to your case. Also, and most importantly, investigate their beliefs about their experiences. Different people will form different beliefs from the same or similar experiences. Two people in rear end collisions could have totally different experiential beliefs. If these beliefs are relevant to the case issues, then you need that information.

David Ball recommends that at least a third of your voir dire focus on damages issues. Since your job is to obtain a money verdict for your client, you need information on how they feel about damages. You must spend time on beliefs about causation of injury, effects of injury, such as pain and physical impairment, cost of medical treatment, and most importantly, how they feel about awarding money damages.

A discussion about beliefs on awarding money damages for pain and suffering is important for several reasons. Panel members who dislike awarding money damages for general damages are most likely “tort reformers”. They will likely be bad liability jurors too. If their feelings are fixed and unlikely to change, then they may disqualify themselves “for cause”.

Additionally, David Bell recommends voir dire on the burden of proof. Some judges disallow such questioning, because the law has not been charged. You may need to address this issue with the Court beforehand. Questioning on burden of proof can be confusing to jurors, but beliefs on the standard are of utmost importance to all the issues in your case since you must prove each element, including damages, to a probability and not a certainty. This is another area where “tort reformers” may disqualify themselves. The most natural introduction into those issues is to ask who has served on a criminal case where the standard is “beyond a reasonable doubt.” A general discussion can then follow. If a panel member is an engineer or an accountant then they may be best persons to start the discussion since they are more likely to believe that a certainty standard is the most appropriate. You must find out who has a problem, even a small problem, with the probability standard.

Eric Oliver’s recommends a focus on case specific issues. He recommends focus groups

in which the salient issues and beliefs are discovered. Often, these salient issues, which he calls “landmines” will have to be addressed in your case although they are not part of your legal burden. In other words, the jury will be concerned about issues that are not of legal concern but are of practical concern to the jury. In order to be persuasively effective, you will have to address these practical issues in addition to the legal requirements of proof. Oliver recommends that the lawyer chose six to ten of the key issues and discuss them thoroughly with the panel.

Once a panel member gives you an answer, you must drill down. Ask the witness to “tell me more”; or “how do you know that” or “how so”. . Always presuppose that the panel member has more information to give you. You will not fully discover how deep or strong a witness’ beliefs are until you drill down. The first answer will likely be the socially acceptable answer in the person’s particular cultural group. While the first answer may give you the person’s tendency, you need to find out what the belief is based on, if the belief is strongly held and if the stated belief is really his belief or a nervous response he blurted out so that you would leave him alone.

Don’t rely on leading questions to give you any helpful information. Leading questions may cost you credibility because they appear manipulative. Hopefully, your opponent will ask the leading questions in an attempt to prejudice the jury. You, on the other hand, are just trying to discover the prejudices of each individual so that you can help to pick a fair jury.

V. Deselection - **Removing Those Most Probable to Reject Your Client’s Case**

Now you have completed voir dire and taken your seat. Your assistants have made copious notes. You have created friendly and respectful relationships with some jurors who will be acceptable and some who will not be. You know who are the most thoughtful, the most talkative, and the most opinionated panel members.

Deselection is usually a hectic time. So much information and so little time to use it. As a quick organizing technique, you can grade the people with a numerical system to assist you in quick decision making.

Be sure to pay as much attention to those persons at the back of the panel as those at the front. Be ready to strike persons that you personally like if their beliefs are adverse to your client’s case. Do not depend on demographics except as one piece of information among many others that are equally or more important. Be aware of who the leaders most probably will be.

In deselection, your first priority is to strike the leaders with adverse beliefs. The leaders will not probably be the most opinionated, but they can be. The leaders will not probably be the most talkative, but they can be. The leaders will most probably be those with experience most relevant to the case. The leaders are most probably likely be the most educated, thoughtful and articulate. The leaders are most probably those who have organized or managed people in their job or volunteer work. Leaders may have served as forepersons on past juries. Hopefully, the defense will not strike the leaders with beliefs that are helpful for your client.

VI. Conclusion

The bad news is that voir dire is difficult because it is unlike anything you learned in law school. The good news is that you can learn much about conducting a successful voir dire at a cocktail party or the local barbershop. Learn to get people talking. Voir dire is learning about people, their beliefs and the basis of their beliefs. The better you know people, the better you will become at voir dire.

Recommended Reading List:

David Bell, David Bell on Damages (2nd ed.2005)
www.nita.org

Eric Oliver, Facts Can't Speak for Themselves (2005)
www.nita.org

Lisa Blue, Blue's Guide to Jury Selection (2005)
ATLA Press
<http://west.thomson.com>