



International Association of Defense Counsel

Trial Academy

Voir Dire: The Rejection Process

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VOIR DIRE: THE REJECTION PROCESS

I. FIRST IMPRESSIONS:

It has been stated on numerous occasions by many successful trial attorneys that the voir dire examination of a jury panel is the most critical stage of a trial. It is easy to understand why this is true due to the fact that this is the first exposure by the panel to you and your client, and further it is the stage of the trial where first impressions are formed and the theme of your case is presented.

A significant amount of common sense is a useful tool in conducting an effective voir dire examination.

The voir dire examination is the engine that starts the vehicle. It is the act, if you will, that gets the show off the ground, and it is the first and best opportunity for the lawyer to perform and to sell himself and his product.

The first impressions that a jury forms of you and your client will stick with them, and will be hard to overcome if they are negative ones. Such areas of concern should include your appearance and that of your clients, how you act and how you talk, as well as the relationship that you appear to have with your client throughout the trial. Jurors are most probably strangers to you and your client, and you must present a human and likeable approach, and further you must be a good host for your client. The objective is for the jury to feel comfortable with you and with your client not only at this initial stage, but throughout the trial.

An effective trial lawyer must be a good salesman. The jury panel's first impression must be strong and favorable, because the lawyer as well as his client is on display and under

close scrutiny. Most probably this is the juror's first time in court and they are strangers to the process. It is certainly appropriate for the effective defense attorney to educate the jurors as to the procedures that they will see throughout the trial and to present the case to the lowest common denominator on the panel. Effective language skills are of course critical, and legalese should be eliminated from use or difficult terms should be explained as used.

II. GOALS OF JURY SELECTION: (Find and Evaluate the Leaders)

1. To select a jury that is totally biased toward your case;
2. To reject potential plaintiffs' jurors;

It is essential to remember that you do not want an impartial jury, you want a jury which will tend to think like you, understand your arguments, be sympathetic to those arguments and render a verdict in favor of your client. Your job is not to pick an impartial jury, but instead to find which jurors will not think like you, will not understand your argument, and will not support your client, and to reject them. Trial Lawyers pay lip service to the phrase "all we want is an impartial jury". However, if you base your selection or rejection on those words, then the outcome could easily be adverse.

Jurors who are potentially neutral during your evaluation may be acceptable, however, the most important decision is to pick the potential leaders from the jury pool who could sway the final jury. In evaluating the potential leaders, you must reject any of those that appear to be hostile to your part of the case. Body language will be your first indicator.

3. Corporations;

Defending a corporation in a case where the plaintiff is a person visible in the courtroom poses additional responsibilities. Most jurors are biased against large corporations who make

huge sums of money and in particular insurance companies where they have had problems in the past.

You must remind the jurors that a corporation is made up of a collection of individuals that work under a corporate name. These individuals could be both employees and stockholders.

Certainly corporate greed has been much publicized and this issue must be met head-on.

III. JUROR QUESTIONNAIRE/JUROR PROFILE:

In most jurisdictions, on the first day of the first week of a juror's service, he/she is furnished with a juror questionnaire. This questionnaire only asks very basic information about the following: name, address, previous jury service, education, employment, crimes, marital status, etc.

It is from this very basic information that you must develop the juror profile that you want to utilize during the voir dire examination. You must decide prior to the voir dire process the description of the typical juror that you want to have on your jury. This would include the factors of age, gender, race, education and employment.

You should know from experience of your partners or other lawyers as to the juror's tendencies in a particular county or jurisdiction area. If your budget allows, a jury research firm should be obtained to determine such, however, you should be well aware as to how people in your jurisdiction think about the issues of real life. You need to leave your impressions of "political correctness" at home.

IV. CREDIBILITY OF YOU AND YOUR CLIENT:

An important objective is to convince the jury to feel comfortable with you as an advocate, and that they feel that they can trust you as someone to help lead them to the right

decision (yours). The power of the jury is great. This question of being likeable, being real and being someone that the jury can trust is - credibility.

The credibility of you, your client and your case is under examination with each word, each gesture and each document that is presented throughout the trial. Jurors are very much in tune with one's personality and certainly an attorney should be aware of his every move.

Eye contact with each juror during the voir dire process is most essential. An effective technique is to call out each juror's name and look him in the eye during the initial stage of your voir dire examination. This lets the juror know that you now know who he or she is, and further you have established that essential eye contact which hopefully leads him to believe that you are talking one on one with him.

During the questioning process, continually maintain eye contact with the panel by moving from row to row, and if you have located an individual who is not paying attention, talk directly to that individual until such time as eye contact is re-established. Seek visible responses from each juror by asking for a nod of the head or a raising of a hand. Usually this can be accomplished where questions can be asked to the panel and then asked for a response row by row.

The jury must see you as a professional advocate. Your appearance, demeanor and conduct are all persuasive elements of your case.

Keep in mind that very probably you will be the third questioner to the jury pool. The Court, depending upon the venue, will have questions followed by the plaintiff's lawyer. By the time the defense lawyer stands in front of the panel, they could easily be bored with the entire process. Your salesmanship at this juncture of the trial must awake them to pay attention to your

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questions.

In our state, the questions are asked to the group and each juror must respond individually.

V. DO'S AND DON'TS:

As noted above, an attorney is a salesman trying to sell his case to a jury. The following list of Do's and Don'ts is certainly applicable to every trial.

1) Use a seating chart:

You should know the judge that is to try your case very well and his tendencies in the conduct of a typical trial. You should also know, prior to arriving at the courthouse, as to how he seats the initial jury panel. Prior to your voir dire examination, prepare a seating chart with sufficient space in each blank to write down pertinent information about your impressions as you are asking the questions to the entire panel. It also is helpful to have an associate or clerk and/or your client at the table to watch the jurors' responses to each of your questions. Notes should be taken by those at your table and by yourself as to your immediate impressions.

During the recess for jury selection these notes will be invaluable.

2) Never embarrass a prospective juror:

Questions which could in any way embarrass or humiliate a prospective juror should be avoided and in particular, never ask questions which would highlight a juror's ignorance or inexperience. Such questions can anger the juror involved as well as the total panel. Remember that you are dealing with emotional human beings who have specific feelings and who will respond to those feelings.

3) Be courteous:

Utilize the manners that your mother taught you in a courtroom which will leave the panel with a better impression of you. However, you should not fawn or be too solicitous.

4) Use jurors' names:

It is an effective technique to utilize jurors' names during the course of the voir dire examination. If a name is difficult to pronounce, ask the juror

to state it correctly and it is a recommendation to never use only the first or last name of a juror.

5) Prepare your voir direct examination in outline form:

The use of a written outline for voir dire examination is of course elementary because in my opinion, it then frees your mind to study and evaluate the jurors as you are questioning them. It is also essential not only to ask the proper questions, but to listen to the responses given by a prospective juror and observe their demeanor when they are doing so. Be flexible in your outline and certainly you will be able to determine additional questions from the responses received from the panel. I have found it helpful to involve one's client in this process and I always ask the client to observe the jurors during the voir dire process and to write down any thoughts that he might have about a prospective juror. I usually request an associate to take notes of his thoughts and responses as the rejection process is underway.

6) Use basic English:

The point of the voir dire examination is not to demonstrate your own verbal skills, but to direct basic questions designed to elicit responses from the panel members. If you utilize a legal term, then explain it to the panel since you may be dealing with someone that has a minimal education.

7) Advise jurors about personal questions:

It is always advisable for an effective defense attorney to tell the jury panel members that in order to properly represent his client, he will need to ask certain personal questions about the juror's business or affairs. It needs to be emphasized that such questions are not designed to embarrass anyone and that you are not attempting to be nosy, but that it is important for you to know about their experiences, occupations, beliefs, and personal feelings.

8) Trial objections:

It is important to discuss with the jury what an objection is and that it will be necessary for you to make such objections in order to properly represent your client. Also explain that once an objection is made the judge will rule on it.

9) Admit problem areas:

If there are problem areas in your case which you know will be brought out by the plaintiff, then it is much more effective for you to present them to the jury panel during voir dire. If your client has been drinking and this will be an issue in the trial, then present it to the jury at that time.

VI. JUROR BIAS:

It is an essential element of court room survival that an effective trial attorney understands that jurors come to the court room burdened with prejudices which they do not want to publicly confirm. Every potential juror is biased since each of us has a pattern of beliefs and attitudes which will influence the way we think. The standard presumption that a juror will come into a court room with a totally open mind is simply not true. To overcome a juror's preconceived ideas, it is necessary that the effective trial attorney convince the prospective jurors that they have the capacity and must utilize that capacity to reach a decision solely on the basis of the admissible evidence. Further, the attorney must obtain a commitment from each juror to ignore their particular feelings that they might have about the character of one or both of the parties and their own personal feelings about what the law should be.

It has been noted in other research that jurors make up their minds early in the proceedings. Remember that each individual has beliefs, values and opinions and is biased in some way or another. The purpose of voir dire is to attempt to uncover as much information as possible about each prospective juror to determine what those biases are, and whether they make each person more desirable or less desirable as a juror. Remember, this is a process of elimination and rejection.

VII. OBTAINING A COMMITMENT:

When defending a corporation, an insurance company, a doctor or lawyer, you must obtain a commitment from the jury that they will treat the corporation, insurance company,

doctor or lawyer with the same degree of fairness that they would treat the individual plaintiff. People are generally predisposed to favor individuals over corporations. Instead of lightly dancing around the issue of prejudice or hoping that the corporate representative or physician will be liked, it is a better technique to meet this issue with decisiveness. Voir dire is the initial platform to raise the issue of prejudice against such individuals. I generally do not like to ask the question as to whether or not a juror can be fair to both the plaintiff and the defendant, because I want each juror to be totally in my favor from the opening gun. However, I have found that it is effective to attempt to put the corporation, insurance company, doctor or lawyer on the same level as the individual plaintiff and require the same treatment from the juror. It is my belief that jurors are basically honest, and if they make the kind of commitment that you are seeking at this stage of the trial, then I feel that they will honor that commitment throughout the trial, and they can be reminded of their commitment during closing argument.

The voir dire examination generally is utilized to set up the closing argument. You obviously will have a very strong idea as to the principal points of your case that you are attempting to prove that will be raised in the closing argument. I have found that obtaining these commitments from the jurors as to equal treatment, the burden of proof, the preponderance of the evidence, the charges made by the plaintiff against your defendant, as well as the strong points of your own case, can be effectively utilized during the closing argument

VIII. EXCESSIVE AD DAMNUM:

In some courts it is a common practice for the plaintiff's attorneys to ask for

exorbitant damages which in most cases bear minimal relationship to the actual damages incurred by the plaintiff as a result of a particular incident.

Generally most plaintiff's counsel in their closing arguments set forth a specific demand which may be more reasonable than the amount claimed in the prayer of the Complaint. The effective defense counsel can turn the exorbitant request for damages into a defense tool during the voir dire examination. An effective series of questions could be as follows:

I have previously stated to you, and you have agreed, that you will base your decision solely upon the evidence that comes to you through the witnesses in this trial, and upon the instructions of law which will be read to you by the judge at the conclusion of the trial. The court will tell you that your verdict must be based upon these two things and these two things alone. Certainly, we all have sympathy for one who has been injured, but on your oaths as jurors can you tell me that you will disregard the sympathy that you feel for one who has been injured and not to permit it to influence your verdict in this case. Can each of you do that?

Another question could be as follows:

Sympathy for an injured person is a normal human reaction. The law does not expect you to be free from such feelings, but it does expect you to return a verdict which is based upon the facts and evidence and not upon sympathy.

Another approaching could be as follows:

In this state, our court procedure allows anyone to file a lawsuit against anyone else for any reason at any time. Just because that the plaintiff has filed a lawsuit against Dr. Jones, do you feel that the plaintiff should automatically recover on that basis alone?

Another sample question would be as follows:

The plaintiff in this case is asking for damages in the sum of ten

million dollars. Do any of you believe on your oath as a juror in this case that you are obligated to award that sum of money or any sum of money? Are each of you willing to award in damages only that sum of money which you believe would adequately compensate the plaintiff for the injuries sustained without regard to the amount of the prayer even if you find that a just amount is only a fraction of what the plaintiff has demanded?

If there is a good chance that the case can be won on the liability issue, then be sure to tell the jury. A sample question that could be utilized would be as follows:

We expect that the evidence will prove that any injuries sustained by the plaintiff in this accident were the result of the plaintiff's own negligence, that the plaintiff is not entitled to recover anything from the defendant. If, in the exercise of your own independent judgment, you are persuaded by the law and the evidence that a verdict should be rendered in favor of the defendant, could each of you reject the plaintiff's demand in the sum of ten million dollars and return a verdict for the defendant?

IX. JUDGE'S CONFERENCE:

In a typical jurisdiction, following the completion of the voir dire by the court and by both the plaintiff's attorney and the defense attorney, the court will declare a recess and allow each attorney to meet with his respective client to review the jury list and the voir dire responses.

The attorneys will then meet with the court in chambers to select the jury.

In most jurisdictions there are two types of challenges: peremptory challenges which are challenges without any particular reason being given, and challenges for cause where there has been a sufficient response by a juror to show bias or prejudice.

In utilizing the peremptory challenges it is important for the lawyer to be aware of the case of *Batson vs Kentucky*, 476 U. S. 69 (1986). The United States Supreme Court has commented on this area of jury selection and it is important that the attorney be prepared to

respond accordingly.

Most jurisdictions allow three or four peremptory challenges and unlimited challenges for cause. If you have determined during your voir dire examination that a juror is totally biased and has indicated that they cannot be receptive to your case and has orally indicated such to the court, then you should present a challenge for cause.

An example would be where you would ask the jury a question as to whether or not you can be fair and impartial to XYZ Insurance Company, or whether or not you have had a bad experience with XYZ Insurance Company. A juror would indicate that he had such a bad experience and was not satisfied with the treatment that he was given. This lays the groundwork for a challenge for cause.

Most jurisdictions, during the judge's jury conference, require the plaintiff's attorney to review and present to the defense attorney twelve jurors. The defense attorney's response will then be based partially upon the plaintiff's attorney's challenges and utilizing the jury profile previously prepared.

X. CONCLUSION:

It is important to conclude your voir dire examination with a catch-all question which hopefully will cover everything that has not been asked during the various examinations that have taken place. Occasionally I will utilize a question as follows:

Numerous questions have been asked of you by the court,
and by the opposing attorney concerning this particular
case and your prospective roles in it. At the conclusion of this the
voir dire examination, is there anything in your hearts and minds
that would prevent you from being fair and impartial to the
defendant, Dr. Jones?

Another and more complete question would be as follows:

You have heard the questions that have been asked. Do you of course understand that we are not questioning you as to whether or not any of you will try to be fair. We know that you will try. Rather, we are simply seeking to identify life experiences you might have had which would give you some opinions or basis concerning aspects of this particular case which might be difficult for you to put aside. Every lawyer who has ever done what I am doing now, worries tht he has not asked the right question of the jurors and has left something unknown that he should have discovered. We all fear finishing up this process and leaving one or more jurors thinking, õboy, if those guys had only been smart enough, they would have discovered this fact about me that they should have know.ö What I would like for you members of the jury panel to do is to tell me whether or not we have left you in that state of mind. Is there something about you or your background that you now know, having heard the court and the opposing counsel as well as my questions, that we should ask you about or should know about that only you know at this particular point of the trial.

In conclusion, voir dire provides the attorneys their only trial opportunity for two-way communication with the jury. As the title of this paper suggests, this is a rejection not a selection process since you are attempting to eliminate those individuals that in your opinion would not be favorable to your side of the case.

The type of juror that you select would of course depend upon the locale and the circumstances of your particular case. My personal goal in the selection of a quality defense jury is to select the people of highest intelligence. Intelligence, in my opinion, is the determining factor utilized in the selection of a typical defense jury. This does not always mean that the person of the highest education is the most intelligent since many people who have multiple degrees have little or no common sense. This evaluation can partially be made through the jury questionnaire, but more importantly

the determination is made during the conversation that I attempt to have with a prospective juror.

If I sense bias in a particular juror, then of course the best tactic is to attack the problem head-on and to discuss this prejudice in a courteous manner. I have a very high opinion of the jury system and find that most jurors try to be honest and that they are generally willing to share their thoughts if asked to do so. I am constantly asking myself as I pursue my voir dire examination with each juror or with the entire panel, do I like this particular individual, am I comfortable with this individual, and will this individual think as I do and support my particular side of the case.

There is no specific equation as to the progression of a trial, and the personal style of the trial attorney is of equal importance as are the rules of procedure and the applicable law. An effective trial attorney effectively blends his personality into his theme of the case. It is my continued belief as has been stated on many occasions that the selection of a jury through the voir direct examination is a very personal experience and should be conducted as such.

Remember, this is a conversation between you and the potential jury panel. It is not a cross-examination.

XI. SAMPLE MEDICAL MALPRACTICE VOIR DIRE EXAMINATION OUTLINE:

- 1) Ladies and gentlemen of the jury panel, I am (attorney's name) and I am representing the defendant, Dr. Robert Jones, and his clinic, the Urology Clinic. Dr. Jones is a urologist practicing in (city/state) . As Dr. Jones's attorney, I am allowed to ask you a few questions to determine your prospective role as a juror in this case.
- 2) First I would like to verify your names from the jury roll. (Check and pronounce each name and obtain eye contact with each juror.)
- 3) Do any of you know the plaintiff who has brought this lawsuit,

Georgia Davis and her husband, Bill Davis? They are residents of (city/county/state) _____, and Mr. Davis is employed as a mechanic at the (place of employment) _____ and his wife is a waitress at that location.

- 4) Have any of you or any member of your family ever been represent by (plaintiffsøattorney) _____, or his partners? (State names)
- 5) We anticipate that the plaintiff, Ms. Davis, will call the following individuals to testify as her part of this trial: (name each individual, their address and ask if any member of the jury panel knows such individuals.)
- 6) The plaintiff, Ms. Davis, will call Dr. Smith and Dr. Jackson as expert witnesses in this case. These doctors are specialists in the field of OB/GYN and practice in (city/state) _____. Have you or any member of your family ever been treated by any of these physicians?
- 7) Do any of you know or have you heard anything through the media or otherwise about the alleged facts of this case?
- 8) Have any of you or any member of your immediate family ever been in a lawsuit where you have brought the lawsuit?
- 9) Does anyone in the jury panel at this time feel that just because the plaintiff has filed this lawsuit against this doctor that the doctor is automatically guilty of some wrong doing.
- 10) Under our system of government, anyone can sue anyone else at any time for any reasons, regardless of whether or not their case has any merit.
- 11) I anticipate at the conclusion of this trial that the court through Judge (name) _____ will read to you written instructions of law that apply to this case. I anticipate that one of those instructions will tell you that the law in this state is that physicians are not guarantors of the health and well-being of each and every patient that they treat nor of the procedures they perform. The court will instruct you that the standard by which a physician is judged is òdid his care and treatment conform with that degree of care, skill and diligence ordinarily exercised by other physicians of like training and specialty under the same or similar circumstances.ö

Can each of you tell me that you will follow this instruction if granted by the court and not hold Dr. Jones to a higher standard than the law requires, which is what I have just stated to you?

- 12) Have any of you ever had an experience with a physician or any health care provider that was so unpleasant that you might feel some bias or prejudice toward Dr. Jones which would prevent you from being fair and impartial to him?
- 13) This is a civil case and in a civil case, the person who brings the lawsuit, in this case Ms. Davis, has the burden of proof. In other words, she has the burden to prove the charges that she has made against Dr. Jones by what we lawyers and the Court call a preponderance of the credible or believable evidence. The Court through its written instructions will tell you what the phrase "preponderance of the evidence" means. In this case, Ms. Davis has charged that Dr. Jones was negligent in that:
- a) He failed to warn her of the dangers that could result from an abortion; and
 - b) That he failed to determine after the initial procedures that the pregnancy had not been aborted.

Ms. Davis alleges that as a result of this procedure, she sustained serious bodily injury and severe mental and emotional damage.

- 14) Can each of you tell me by an affirmative nod of your head that you will require the plaintiff to prove these charges by a preponderance of the credible evidence and that if she fails to prove these charges, that you will so return a verdict for Dr. Jones? (Ask for a response by a nod of the head, row by row.)
- 15) Objections:
- 16) Sympathy:
- 17) You as a prospective member of the jury panel which will consist of twelve of your number, will be the sole judges of the weight and worth of the testimony that you hear from this witness stand. Will you promise me that you will observe each witness, listen carefully to what they say and observe their demeanor while they testify?

18) Follow instructions of law read by the court:

19) Hearts and minds:

Is there anything in your hearts and minds that has not been asked that will cause you to be less than fair and impartial in this case?