Paper Title: Wheel of Fortune: Effective *Voir Dire* Strategies

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Voir dire can be the most difficult part of the trial to prepare. Unlike witness examinations, lawyers frequently have no inkling about what the jurors may say in response to their questions. With all the various topics that can arise, delivering *voir dire* can amount to a "Wheel of Fortune," where you have to be prepared for anything that comes your way.

In any jurisdiction, voir dire is a tool for identifying and eliminating your riskiest jurors while hiding the jurors most likely to be favorable to your case, so eliciting bias and obtaining cause challenges should be the primary objective. This paper provides a step-by-step technique for "cause sequencing" – a series of questions that will lead jurors to ultimately admit they can't be fair after they have voiced a potential bias. First, however, we examine techniques for getting jurors to reveal those biases in the first place. Even if cause sequencing is ineffective and jurors ultimately say they can set their beliefs aside and be fair and impartial, eliciting these biases will identify the riskiest jurors as potential strikes and will enable you to prioritize your peremptory strikes for your most dangerous jurors.

I. Getting Jurors to Reveal Bias

A. Limit Questions Aimed at Pre-Conditioning

While some questions during the voir dire process may aim to instill your themes, help jurors see the case from your client's perspective, and seek commitments to follow the law, this technique, known as pre-conditioning, should really take a back seat to the questions that are the heart of voir dire: those deigned to reveal juror biases. While pre-conditioning or suggestive questioning could have a slight impact in shaping jurors' later thoughts and decisions – a psychological principle known as "priming" – the suggestive influence of an attorney's questions at this stage is actually quite limited. For one, jurors know very little about the facts or arguments that will be at issue, and most believe it is unlikely they will be chosen for the jury (we've all seen the looks of surprise when a juror learns he or she has been selected); therefore, they're not invested in the case enough at this early stage to be paying attention or understand how the questions relate to the case. Secondly, the decision you're aiming to influence – their verdict – is so far beyond the point of voir dire that any priming effects are likely to fade away.

Indeed, research by both cognitive and social psychologists have repeatedly shown that priming effects are strongest immediately following the suggestion stimulus, but the effects fade substantially over time (Bryant, J. and Oliver, M.B. (eds.) Media Effects: Advances in Theory and Research, 3rd Edition (2009)). This research has also shown that priming effects are minimal when the suggestion stimulus is short in frequency and duration. Thus, it's highly unlikely that a statement made by counsel during voir dire – or even a jurors' commitment to do something – will have any effect on the deliberations. Therefore, when there is restricted time for voir dire, we recommend limiting questions that are aimed to pre-condition, and focusing instead on those that reveal juror bias.

B. Put Jurors at Ease

Making jurors feel comfortable opening up to you is the first step to getting them to speak candidly about their biases. In jurisdictions with liberal attorney voir dire, one technique for putting jurors at ease is to provide a little personal information about yourself – to the extent permitted by the judge – within an example about acceptable bias. For instance, counsel might mention that he coaches his daughter's soccer team, and even though he generally considers himself a fair person, he could not be a completely fair and impartial referee if he were asked to officiate the league's championship game. An example such as this humanizes the attorney while also illustrating that bias is perfectly acceptable in some situations – and being a referee isn't all that different from being a juror. The attorney can then get jurors to loosen up by asking them to talk about situations outside of the courtroom where they might have difficulty being fair.

C. Explain Bias in a Courtroom

In addition to providing examples of everyday biases, attorneys should let jurors know that having difficulty being fair and impartial in *this* case doesn't make them unfair person: "We are all fair people and can be great jurors in most cases, but this might not be the case for you." Likewise, it may be helpful to let jurors know that they won't offend you or your client if they have negative opinions to share ("I've heard the lawyer jokes – trust me, I have thick skin").

D. Keep the Client Out of the Courtroom

As much as your client may want to watch the jury selection process, it's best to keep them out of the courtroom during the juror questioning. While they might not be worried about offending a lawyer, many jurors are reluctant to say negative things about your client or aspects of your case if the client is right there in the room with them. Most people want to be polite, and even those who voice negative opinions may filter or tailor back their real thoughts for fear of sounding offensive or being in the uncomfortable position of saying bad things "to someone's face." Thus, we recommend introducing your client or the company representative at the start of voir dire, but explaining that he or she will step out of the room to give jurors some privacy while they discuss their personal feelings and experiences.

E. Words Matter

A wealth of research indicates that how a question is phrased can influence the responses that are returned. Therefore, it's important to pay attention not just to the issues you plan to ask about, but *how* you are going to ask them. For example, to make jurors feel more comfortable responding, ask "How many of you believe…?" rather than "Does anyone believe…" The former implies that this is a normal way to feel, and that the lawyer expects there to be several members of the jury pool who feel that way. The latter may imply that this is a rare and unacceptable belief and that the lawyer is trying to single out one or two "bad people" who feel that way. "How" can also be used in individual voir dire, such as "How difficult would it be for you to set aside your sympathy?" Though a juror is perfectly free to respond "Not at all," the use of "how" implies that they indeed have sympathy, and that it would be difficult – at least to some degree – to set that aside. Not only will the juror be more likely to admit his or her bias, these questions will allow the juror to use their own words instead of merely responding "yes" or "no" to your questions, making them a stronger candidate for a cause strike.

Additionally, empirical research shows that jurors are less likely to say that they "cannot" or are "unable to" do something than to admit that they would "have difficulty with" or "struggle with" it. Similarly, most jurors are reluctant to admit they would "have a problem" with doing something. Therefore, we recommend asking general voir dire questions that use softer language (e.g., "How many of you would have difficulty sending plaintiffs home empty-handed?" versus "How many of you would have a problem sending plaintiffs home empty-handed?").

Also keep in mind that people in general are more likely to answer questions affirmatively than negatively, especially when responding to an authority figure, so when asking individual voir dire, we recommend phrasing questions such that the desired response – the one that reveals a bias – is a "Yes." (e.g., "Do you believe that corporations should be held to a higher legal standard than individuals in lawsuit?" versus "Do you believe corporations and individuals should be treated equally in a lawsuit?") A "yes" in response to the former could be grounds for a cause challenge, while a "yes" to the latter would unintentionally rehabilitate a juror you may want off the panel.

F. Body Language Matters

The body language of a person posing a question can also influence the response received. For instance, when asking jurors "How many of you believe…" the attorney may want to raise his or her own hand as a demonstration for the expected response. This not only encourages jurors to raise their hands, but again communicates that the lawyer expects at least some jurors to feel that way, normalizing the response. Further, during individual questioning, very subtle head nods while asking the question can influence jurors to provide an affirmative response.

G. Don't Be Afraid of Juror Responses

One of the biggest pushbacks we receive from lawyers on these techniques is their fear that jurors will say negative things that will influence other jurors. First, recall that priming effects fade with time, so things that other jurors say at this stage are likely to be long forgotten by the time the juror makes a decision in the case. Second, most beliefs – especially strong ones – are deeply engrained and resistant to change. It's hard enough for jurors to change other jurors' minds during deliberations by providing arguments supported by actual evidence; a juror expressing a belief – often without providing any evidence or facts to support it – is very unlikely to change the opinions or influence the beliefs of others in any way. The only time to be concerned about jurors spoiling the panel with their response is when they might reveal specific facts – not just opinions – about the case or the client that would be inadmissible and not generally known by others (e.g., an unrelated scandal or catastrophic accident involving your client). In this rare situation, spoliation can be avoided by prefacing the question with, "Without explaining why or what you've heard…" Then follow with questions such as, "Who has a negative opinion of my client or any reason?" and "Who has read or heard something that might give you a negative impression of my client?"

While these general techniques should help you get jurors to reveal their biases, making them targets for cause and peremptory strikes, a jury consultant with experience in similar cases can help you formulate questions that are aimed to reveal the type of biases that are relevant to your case and are indicative of the juror profile that you're seeking to remove from the panel.

II. Getting Jurors to Admit They Can't Be Fair

As previously indicated, eliciting bias and obtaining cause challenges should be the primary objectives of voir dire. Each juror you're able to remove for cause is essentially equivalent to having an additional peremptory strike that your opponent does not. Indeed, a successful voir dire should tilt the playing field in your favor by eliminating nearly all of the jurors who are predisposed to reject your story of the case before you ever get around to exercising your peremptories. In almost every case where we've sat a great jury, it was because counsel was effective at eliciting bias against our case or client, and skilled in getting multiple jurors to admit they couldn't be fair.

But getting a juror to announce that he or she cannot be fair or is unable to follow the court's instructions is no small feat. The pressures to provide a socially desirable response are heightened by the formality of the courtroom, the presence of other jurors, and the intimidating superiority of the judge. With limited time for voir dire, we understand why so many attorneys go in for the "kill question" too soon after a juror reveals a potential bias, but the value of a cause strike is worth the time it takes to lead jurors down a hole that will make it almost impossible for them to claim they can be completely fair and impartial. Thus, we recommend that counsel engage in the following sequence of steps aimed at encouraging jurors to say they can't be fair after they have revealed experiences

or attitudes that make them an undesirable juror for your case. Note that this series of cause sequencing assumes that the juror has already revealed potential sources of bias in a supplemental juror questionnaire or in general voir dire questioning.

Step 1: Put the Juror at Ease

While providing personal examples of bias can help put jurors at ease during the general voir dire, as suggested above, attorneys can help put individual jurors at ease by getting them to talk about themselves generally. For example, "Tell me what makes you good at your job," or "Tell me what makes you a good parent." These seemingly innocuous questions get jurors to open up and also makes them feel good about themselves, while providing insight into the jurors' personality and values. Once a juror has established to others that he or she is a good person, they'll be more likely to speak candidly about their negative feelings as well.

Step 2: Remind the Juror What He or She Said

Reminding jurors exactly what they've said earlier in voir dire or on their questionnaires – in the jurors' exact language – also has a dual purpose. For one, it helps establish and strengthen a record for what the juror actually said. This is particularly important where a judge has not carefully read the juror questionnaires or is not taking detailed notes of jurors' responses, as well as for when juror questionnaire responses do not become a part of the appellate record. From a psychological perspective, reminding jurors of what they have said also forces them to commit to the position, such that they'd feel like a hypocrite if they were to later recant.

Step 3: Ask the Juror to Elaborate

Getting jurors to elaborate on something that they've previously written or said further strengthens their commitment to that position and digs them deeper in the hole. Phrases that elicit elaboration include simple ones such as, "Tell me more about that," and "What experiences led you to develop that opinion?" Other questions that strengthen juror commitment are those like, "How long have you held that belief?" and "What that and important experience for you?"

Step 4: Acknowledge It Would Be Tough to Change

Cause sequencing is all about strengthening the juror's commitment to a given position. In psychology, the theory of cognitive dissonance explains that there is a tendency for humans to seek consistency between their actions and beliefs and, when faced with a decision, individuals will tend to act in ways that are consistent with previously expressed opinions or fundamentally change their beliefs. Essentially, the more a juror expresses a given belief (e.g., that corporate witnesses would lie under oath to protect profits), *and* that it would be difficult to change that belief, the more likely it is that the juror would stand by that belief and admit it couldn't be set aside. Thus, the fourth step in the cause sequencing is

to get the juror to further commit to his or her position by acknowledging that it would be difficult to change.

Questions for this stage would include those such as, "How likely is it that you're going to stick to your guns on this belief?" and "How difficult would it be for me to change your mind about that?" Notice that both of these questions refer to "*how* likely" or "*how* difficult," as opposed whether it would be likely or difficult, because we want jurors to express beliefs in their own words so that they fully take ownership of them – not just provide a simple "Yes" or "No" response.

Step 5: Throw the Softballs

Now that you've gotten the juror to commit to the belief, the next step is to ease the juror into admitting that the belief would affect him or her in *this case*. While it might be tempting to go for the kill questions at this point (i.e., would that make you unable be fair and impartial?), it's better to lead the juror down that path subtly. As we've said before, empirical research shows that jurors are less likely to say that they "cannot" or are "unable to" do something than to admit that they would "have difficulty with" or "struggle with" something. Consequently, we recommended using softer language to get the juror to admit they'd be affected in this case. Examples would include, "Might that experience color how you look at the evidence in this case?", "How difficult would it be for you to just set all that aside and render a verdict solely on what you hear in court?", and "What's the likelihood that belief or experience could influence your views of this case?" We also advise reminding jurors of what they have said again in this stage: "Given that you said you think corporations can't be trusted, would it be a struggle for you to treat corporations and individuals equally in this case?" or "Given your own experience with losing your mom in a fire, is it fair to say you'd start out leaning in favor of the plaintiff?"

Step 6: Go In for the Kill

Now that the juror has expressed his or her bias and how it would affect them in this case, you're better situated to get the juror to agree to the judge's or statute's "magic words." For most judges and jurisdictions, this usually refers to the jurors' ability to be fair and impartial, but some judges have higher standards (e.g., an inability to follow the court's instruction) or lower standards (e.g., providing an "unequivocal assurance" of impartiality). Thus, it is important to know the statutory language and applicable case law in your jurisdiction prior to jury selection.

Even these "kill" questions may be manipulated slightly to maximize your chances of securing the cause challenge, as subtle differences in wording can influence jurors' responses. For example, since empirical research shows that jurors are more likely to give a "Yes" response than a "No" response, regardless of the question posed, we recommend posing questions such that the desired response is a "Yes." (e.g., "Would those strong feelings make it too difficult for

you to follow the judge's instructions?" versus "Would you be able to follow the judge's instructions?")

III. Statement of the Case / Mini-Opening

In the hopes of piquing the interest of jurors and minimizing hardship requests, more and more judges are encouraging parties to make "mini-openings" prior to voir dire. In fact, California courts now require judges to "allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process." (CCP 222.5d). Typically, judges restrict these mini-openings to five or seven minutes, but that is more than enough time when you consider how these can be used to your advantage. In fact, even in jurisdictions that only allow the parties to read a brief statement of the case, the same advantage can be garnered with a cleverly crafted statement that downplays your case strengths and beefs up your opponent's case. That's right. You didn't misread that. We are essentially recommending that you "throw" your mini-opening statement, and here we'll explain why.

The Purpose of Voir Dire

As we've discussed above, the purpose of voir dire is to identify and remove your worst jurors, while hiding your best jurors so that opposing counsel does not get them removed from the panel. Thus, eliciting bias and obtaining cause challenges should be the primary objective. Eliciting bias will identify the riskiest jurors as potential strikes and will enable you to prioritize your peremptory strikes for your most dangerous jurors. Ideally, however, voir dire should lead jurors to ultimately admit they cannot be fair once they have voiced a potential bias or formed an opinion of the case that disfavors your client. This second part is key when it comes to the mini-opening.

Preview Your Case Weaknesses

In order to identify the jurors who will never be able to look past the weaknesses in your case, it is important to preview those weaknesses in voir dire. The mini-opening is the perfect opportunity to present the worst facts in your case so that you can discover what jurors think about those facts and how much those facts will impact their decision. This could include, for example, documents admitting knowledge of a potential product defect, missing or destroyed records, a company witness who has lied, or a subsequent remedial measure that you know will be admitted. Bringing these issues up in the mini-opening can elicit such a negative reaction from certain jurors that the jurors will admit they have already formed a negative opinion of your client or the strength of your case. In most jurisdictions, once a juror has formed an opinion on a matter in controversy, it is grounds for a cause challenge.

Don't Be Afraid of Juror Responses

One of the biggest pushbacks we receive from lawyers on this technique is their fear that jurors will say negative things that will influence other jurors. This concern is unfounded. First, the decision you are worried about influencing –

their verdict – is so far beyond the point of voir dire that any effects from comments made in voir dire will fade away with time. The things that other jurors say at this stage are likely to be long forgotten by the time the juror makes a decision in the case. Second, most beliefs – especially strong ones – are deeply engrained and resistant to change. It's hard enough for jurors to change other jurors' minds during deliberations by providing arguments supported by actual evidence; a juror expressing a belief – often without providing any evidence or facts to support it – is very unlikely to change the opinions or influence the beliefs of others in any way.

Reserve Your Strong Points

In addition to previewing case weaknesses, it is just as important to withhold your strongest facts. As much as you may want to tell jurors that the product has been approved by the FDA, or that the plaintiff misused the product, resist the temptation. There will be plenty of time to argue your case and win over the jury in opening statement and closing arguments. Remember: the purpose of voir dire is to remove your worst jurors from the panel and *hide* your best jurors. If you put your best facts out there during mini-opening, your best jurors are likely to announce that those facts win the case for them.

For example, one attorney client spent hours preparing his mini-opening, outlining the strengths of the case and thinking about how he would show the jurors that his client was in the right. And I can't blame him; that's what lawyers are ingrained to do, and this was a young second-chair attorney who was eager to show off his advocacy skills to the client and senior partner. Against my advice, the attorney proceeded to deliver a powerful mini-opening, explaining that the product had been thoroughly tested and approved by the FDA, that scientific research supported the defense position, and that the plaintiff's cancer was most likely genetic, given her extensive family history of the disease. Though he and the client felt good after sitting down, it quickly backfired when the plaintiff attorney began asking his voir dire questions. He asked, "Does anyone here think this is just another frivolous lawsuit? Is my client starting behind in this case before we even start?" Almost immediately, a slew of hands went up, with jurors saying things like, "Well, they said she has a family history of cancer, so I don't believe you could prove it was caused by the product," and "Well, if the product was approved by the FDA, then it must be safe." Opposing counsel was then able to get these jurors to say they had already formed an opinion in the case, and that the defense was starting with a leg up in their mind. Then, one by one, we saw our best jurors get excused from the panel. The young attorney then realized why I had advised him to reserve those facts for the *real* opening, and not to argue the case too strongly before voir dire.

Maximize Cause Challenges

To illustrate how effective this tactic can be, in one recent case, we advised the defense attorney to emphasize the weaknesses in the case and withhold the strong points during his mini-opening. After opposing counsel delivered a five-minute argument alleging that documents would show the company knew the product

was defective, and that such product caused the plaintiff's debilitating injuries, my client stood and read a brief, vanilla version of the defense position – essentially, "The company refutes these allegations and claims the plaintiff is not entitled to damages." What ensued was a very uncomfortable – but very valuable – two hours. During the plaintiff's voir dire, jurors berated the company, accused it of being the typical corporation that puts profits over safety, and described the company CEO – and his lawyers – as "slick snakes." They expressed how sorry they felt for the plaintiff and how awful it was that the company withheld important information from her. It was tough to hear, and our trial team struggled to keep their heads up over the lunch break, but I told them to wait. Just wait.

Following lunch, the smiles on our opponents faces quickly fell when they realized they were out of time, and not a single juror said anything that would warrant a plaintiff cause challenge. Plaintiff's counsel had almost no intel to assist him in exercising peremptories, and even jurors who expressed some anti-lawsuit sentiments said they could keep an open mind because "this case didn't sound like one of those frivolous suits." Once the defense got up to begin examining jurors, our opponents faces now turned to anger. Each of those jurors who said such awful things about our client, and each of those who expressed such sympathy for the plaintiff, ultimately said that they couldn't be fair and impartial to the defense – obvious grounds for a cause challenge.

To add insult to injury, the plaintiff's attorney was given the opportunity to try to rehabilitate some of those jurors. Hilarity ensued when he began arguing, "What the attorneys say isn't evidence, so if we can't prove everything I alleged in our brief opening, could you side in favor of the defendant?" Jurors quipped, "So are you telling us what you said wasn't true? Are you telling us you don't have any evidence to back that up? Then why did you tell us that?" Now, it was the opposing counsel's turn to feel uncomfortable. After some hemming and hawing, he eventually sat down.

All in all, my client was able to get 27 jurors excused for cause, leaving only those jurors who didn't express negative opinions of our case or client, even after hearing our weak position and the plaintiff's strong case. Those were the jurors who were truly open-minded, and who we knew we could easily win over once we delivered a powerful opening statement that explained all the evidence that supported our case. At that point, it was a slam dunk.

It's Worth the Wait

As uncomfortable as it is to hear jurors talk negatively about your case and client, it's essential to make sure you identify your worst jurors during voir dire and get them removed from the panel. To do that, you need to preview your case weakness and withhold your strong points. Doing so will bring the bad jurors out of the woodwork. Think about it: would you rather have those jurors says those terrible things now, or in the jury deliberation room? The more negative things they say about your case and client during voir dire, the more likely they will get kicked off of the panel for cause. So suffer through it, be patient; it will be worth the wait.