

THINKING OUT *of* THE BOX

JURY SELECTION REVISITED



Voir dire has been severely restricted in recent years. The federal courts have stood at the vanguard of limited voir dire and its influence is being felt at the state level. Consequently, some litigators, accustomed to the old, free-ranging norm for jury selection, have thrown up their hands on shaping jury composition favorably.

This is the wrong conclusion. Voir dire lives. It does, however, require new perspective and strategy to use it effectively. Perhaps we should say: Jury selection is dead; long live jury *de-selection*. You cannot win your case in this phase -- but you definitely can lose it here, before the first exhibit is entered and the first witness is sworn.

Voir dire can raise your chances of success significantly, by eliminating the greatest threats to your client among the prospective jurors. The process also is important in two other ways that have nothing to do with its stated purpose. One is pre-selling the jurors by testing and starting to drum home your trial themes. The other is monitoring potential jurors' language for phrases and concepts that must be fitted into your trial presentation, with the understanding that they will be favorably received by those who originated. We will return to these themes shortly.

As a litigator, you cannot truly select your jury. You are constrained by the jury-eligible population of the venue and more specifically by those called to serve for your trial. You must, as they say, play the hand you are dealt. Those trained in wide-open voir dire now must play under severe restrictions. Every litigator would love a properly-chosen panel full of favorable jurors. That is not an option. Parties get too few peremptory challenges and too few favorable rulings on challenges for cause to expect that. Besides, every litigator faces an adversary working to counteract every effort to shape the jury. You can hope only to remove the jurors most dangerous to your case.

Today's voir dire calls for (1) using principles of social psychology to determine and eliminate individuals most likely to be unreceptive to your position, while (2) using up peremptory strikes as strategically possible, and (3) without telegraphing valuable insights to your opponent unnecessarily.

The single most important practice is asking – or more like these days persuading the judge to ask – those very few questions on central value issues most likely to elicit answers that will expose unacceptable bias on the part of potential jurors. This advances your purpose of eliminating the greatest threats on the panel while conserving peremptories.

To acquire as much information as possible in a climate of severely limited attorney voir dire, try to persuade the judge to distribute a questionnaire to the potential jurors. This tool

reconciles the judge's desire for a quick process with your need to ask questions that can provide valuable information. The best questionnaires focus on crucial values and beliefs. These make the most effective litmus test for removing the most dangerous panel members.

Written or oral, the most useful questions are those that go straight to your own anticipated case problems and help surface jurors who may have a hard time embracing your trial themes. The point is to use any questions you are allowed getting directly to panelists' beliefs and values, eliciting how they make decisions at home or work, since this will provide invaluable insight into how they will fulfill their decision-making duties in the trial. Do not waste a question on how many kids they have.

Especially in the absence of significant attorney questioning, educated guesses must be made based on demographics and psychographics. Be careful, though, to use only characteristics with a real connection to decision-making. Studies done by our firm have demonstrated a strong correlation between long-term employment within a single field, on one hand, and attitudes and beliefs, on the other. Active and retired accountants, engineers and military people tend to follow rules closely and to forcefully advocate abiding by them. Furthermore, youth may be wasted on the young, as the saying goes, but peremptory challenges should not be. Young people tend to defer to their elders in group decision-making. Therefore, eliminating even a hostile young juror usually is an uneconomical use of a strike.

Older jurors, and those with more life or managerial experience, ordinarily will dominate the panel, especially if they have experience related to the nature of the case or to the legal system. Of course, that makes these potential jurors potentially dangerous to your case. This is especially so if your client appears to have violated the rules, since these jurors usually are comfortable accepting and enforcing rules. In an investor fraud case, for example, you may want to ask them how they feel about someone who takes risks and who is responsible when they turn out to be bad risks.

When you believe you have a problem juror, naturally you will consider using your precious peremptory challenges. But do not be hasty.

First, always try to craft questions that can show the judge this juror is unable to be fair at a fundamental level and must be removed for cause. If you have a juror who evinces reluctance to award damages, you should ask whether companies should pay for other people's mistakes. This will help determine how the person may place blame between the parties, or even elsewhere, as not infrequently happens, with clear implications for liability. When the juror answers "No," ask him or her to consider whether there are any exceptions. If you get another negative response, the clincher is to ask the rest of the panel who agrees completely. The show of hands will represent, in effect, volunteers for elimination on grounds of overt prejudice concerning damages.

In a contract case, make sure the jurors are asked how they would interpret a contract, in terms of the literal language vs. the parties' intentions. You should also consider the natural tension of people who think companies need to approach a deal honestly vs. the jungle theory of "company beware".

On the defense side, suppose you have a juror who seems closed-minded. Ask the judge to inquire whether the person makes decisions and then seeks evidence to support them. This will seem entirely reasonable to certain potential jurors but if the answer is "yes" the judge will have a hard time retaining someone who admittedly makes decisions first and only after the fact tries to cobble together information to support them.

Many lawyers act on hunches based upon panel members' signals of hostility or sympathy. Do not take for granted that a juror who appears generally sympathetic will end up being helpful to your cause. Unfavorable attitudes about which player to blame in a situation like your case will override whatever friendly body language you may have detected during voir dire.

At least as great a trap is assuming that a potential juror who has had an experience similar or analogous to your client's will therefore necessarily sympathize with your side at trial. It is entirely likely that instead that the recall of an anxiety-provoking episode will backfire against you, because the juror will play out the analogy by placing responsibility on someone other than the opposing party, perhaps even on your client. We have seen this occur dramatically, at first hand. We once conducted a mock trial concerning misdiagnosis of a child's medical condition. A juror's husband had suffered analogous treatment. Far from empathizing with the child patient, however, the juror somehow convinced herself that the child was malingering in her day-in-the-life videotaped. In classic psychological terms, she experienced a defensive anxiety reaction, which typically prompts a response of confrontation, avoidance or blame.

This dynamic is so powerful and dangerous that if unsure you should seriously consider using a peremptory to remove a juror with a life experience similar to your client's at issue in the trial – unless you can clearly determine the empathy factor during voir dire. In any event, such life experiences are the most important information to derive from voir dire, along with the nature and the lengths of employment in potential jurors' work history.

As you work to shape the jury's composition, your questions actually can be doing triple duty.

The second aim is pre-conditioning jurors on the themes of the case as well as "inoculating" potential jurors on negative aspects of your case. By framing questions so they will elicit commonsense responses, you will start making potential jurors familiar and comfortable with your position. Questions should be framed as the most reasonable propositions possible, to maximize the likelihood of affirmative responses. The psychological value of this technique

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is that the panelists ultimately seated are more likely to affirmatively identify with your position because they will have acknowledged, in effect, that it is consistent with their own beliefs and values. Even a negative response is valuable, as a “repair” is possible by asking “can you think of a circumstance where this would be understandable?” In most cases, your negative juror will help you find a solution that is used to educate the rest of the panel.

But voir dire should create a conversation in which you are vacuuming up from potential jurors even more valuable information for the trial than you are conveying. By asking open-ended questions, you will gain invaluable insight into the language potential jurors use to process your themes.

Take the question, “What does the phrase ‘fired for cause’ mean to you?” In listening to the answers you are not only noting the specific language that individuals use, you are compiling rhetorical trends – making note of words and concepts used by more than one juror. Say that one of them responds. “Being fired for cause means that you have done something, committed some *violation*, that warrants your being let go.” Another replies: “Yeah, I agree with what she just said, it means doing something that is in *violation* of company rules.”

During your opening statement representing the wrongful-termination, you should look directly the first juror, if seated, and say, “Ms. Robertson trusted that Mr. Herman would act like a reasonable employer, and not fire her when she didn’t directly violate anything that warranted being let go.” Also, make note of the trend, and weave the absence of any violation by Robertson throughout the case – opening, direct and cross-examination, demonstratives and summation. The more that jurors can relate to you, the more willing they will be to accept your version of the case. The receiver of a message forms positive associations with the sender who speaks their language.

Valuable as they certainly are, such rhetorical reconnaissance and pre-conditioning on trial themes must be considered secondary goals in the era of restricted voir dire, when judges have grown so hostile to attorneys’ trying their cases in jury selection. Never lose sight of your central objective: ensuring that however few questions are asked, and by whom, they are phrased so as to expose forcefully and pointedly the values of potential jurors who cannot give your client a fair hearing.