

THE GAVEL

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A Better Approach to Voir Dire

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Conducting the perfect voir dire is a lot like juggling; there are so many objectives to accomplish, and it is incredibly challenging to keep them all in mind simultaneously. Voir dire should be much more than just listening to your jurors; at the same time, you must be aware of how your tone is influencing your jurors' answers, the rapport you are building (or failing to) with your jurors, the impression you are leaving with your jury about your case, and which jurors—regardless of their biases—are the most important.

At the same time you are asking insightful questions, you should be carefully choosing your tone and phrasing to encourage comfortable responses, building rapport, telling the story of your case through the order and choice of your questions, subtly persuading your jurors with value-loaded questions, and identifying the most dangerous, vocal jurors on your panel. This is a challenging task for even the most experienced attorney without assistance, so let's discuss a few of these challenges one at a time.

Uncover hidden biases by encouraging unpopular answers

Perhaps the trickiest part of uncovering juror bias during voir dire is getting jurors to honestly admit to biases involving sensitive, controversial, or inflammatory issues. While it may be (relatively) easy to get a juror to discuss his/her distaste for doctors or police officers, insurance companies or Wal-Mart, and frivolous lawsuits or emotional damages, it is very difficult (but hugely important) to get jurors to admit feelings of racism, distrust of foreigners, or opinions about sensitive topics like sexual harassment or capital punishment in front of a crowd of strangers and figures of authority in open court.

Even seemingly non-controversial topics may be difficult for some jurors to discuss in open court. Many jurors feel embarrassed admitting to any bias and are unwilling to appear unfair to the judge, attorneys, and fellow jurors. But because all biases are crucial to juror decision-making and critical to the success of your case, you need to do everything in your power to uncover these biases and identify jurors with unfavorable predispositions toward your client and your case.

Before I discuss some voir dire techniques to better elicit juror biases, I should mention that using written juror questionnaires to supplement the voir dire process is often highly effective in getting jurors to divulge controversial opinions on sensitive issues. Juror questionnaires filled out privately help jurors feel more comfortable and anonymous in expressing sensitive opinions and save valuable court time. Not only are questionnaires

more private, but for some reason (likely boredom), jurors tend to provide you with far greater detail while filling out a lengthy questionnaire than during voir dire in open court.

During the voir dire process, the key to uncovering guarded juror biases on sensitive issues is to create a comfortable environment for the jurors to express themselves. Questions must be carefully worded, prefaced, and posed in a way that shields the jurors from even the slightest perception that the questions are controversial, judgmental, or have a right or wrong answer.

The secret to creating a comfortable, honest voir dire process lies in perception. As long as you create the perception for jurors that any answer they may give is reasonable and safe, the jurors will have no problem divulging what may be a deeply guarded and explosive point of view. Nothing you do can prevent a juror's response from being controversial or offending other jurors. But in order to elicit a controversial opinion from a juror, you must ask it in a way that implicitly suggests that even the most outrageous answer is commonplace or acceptable.

Take a moment to think about the effect that a voir dire question asked judgmentally may have on your jurors' answers, and what you are implicitly asking jurors between the lines. When you bluntly ask your jurors if they have negative opinions or biases against a group of people, you are in essence asking them to admit that they are prejudiced or unfair. Not only are most jurors uncomfortable admitting prejudices in open court, many jurors do not recognize that the opinions they may have are biases, and so few jurors will volunteer honest answers.

If you want an honest, insightful response, never ask a juror if he/she is biased. For the most part, the only jurors who will answer "yes" are the savvy jurors attempting to get off the jury. The only time to directly ask a juror if he/she is biased is to support a cause strike for the judge, and only do so once you have already led the juror to build a foundation of biased and opinionated statements that you can use to corner the juror into admitting bias.

A much more effective technique of eliciting honest biases is to avoid using words such as "prejudice," "negative opinion," or "bias" and instead pinpointing specific feelings and opinions that you believe would translate into bias. Using a controversial example, instead of asking jurors "would anyone here hold the fact that my client is an illegal immigrant against him in trial?" try putting it this way: "A lot of Americans feel that illegal immigrants take advantage of our system without contributing fairly to it; does anyone here agree with that, or feel that illegal immigrants should not have the same right to a lawsuit, protection under American law, or the right to recover damages as a legal citizen?"

Certainly this is a controversial topic and question, but by mentioning that many Americans agree with either side, and more importantly, by phrasing it as a public policy question rather than a question of prejudice, jurors will feel more comfortable giving

honest opinions without fear of their answers being interpreted as prejudicial or offensive.

Of course, this technique comes with the caveat that you should never give the impression to the rest of the jury panel that you agree with an offensive or controversial position on a sensitive issue. Playing devil's advocate to encourage prejudiced jurors to be forthcoming runs the risk of offending the rest of the jury panel. Instead, position yourself as a neutral party who is curious as to which side of an evenly-disputed issue each juror identifies with, and save any signs of judgment until after the jurors have answered.

The same principles to asking questions on sensitive topics apply to gathering honest responses during everyday voir dire. Any time you ask a question in which your point of view as the attorney is obvious or in which you are asking them to directly acknowledge a bias runs the risk of pressuring jurors into censoring themselves. Worried that your jurors may mistrust your large company defendant in a lawsuit? Rather than asking your jurors directly if any have biases or negative opinions about large corporations, be more subtle yet to the point; ask the jury if anyone believes that a large company, because of its larger resources, is more able or likely to conceal damaging evidence. Worried about jurors who will not award non-economic damages to your plaintiff? Rather than asking your jurors if they have a problem with awarding money for pain and suffering, first ask them if they believe that a person's physical and emotional well-being are valuable.

Another caveat is that not every voir dire question should be asked neutrally. The use of persuasive questions to subtly pre-condition the jury is a necessary and effective tool, and questions designed to persuade should certainly be asked in a way that implicitly communicates right and wrong answers. Subtle, judgmental pressure created by leading questions is what persuades jurors to accept your viewpoint, build consensus around your point of view, and relate that viewpoint to your interpretation of the case.

You significantly reduce your opportunity to receive honest answers from jurors when you ask questions that make your jurors feel judged or outspoken. With every question you ask during voir dire, carefully consider whether you are asking your jurors to acknowledge a prejudice, whether it is obvious which answer you would prefer to hear, whether they may perceive their answers as offensive to the other jurors, and whether or not your intentions are transparent. Taking great pains to ensure that your jurors feel comfortable with any answer they may give is your best chance to uncover honest answers and to uncover hidden biases.

Give your opening statement during voir dire

Voir dire is not only about uncovering bias and learning about your jurors; it is also your jurors' first opportunity to learn about your case. I cannot stress enough how critical the jurors' first impressions of your case are, how quickly jurors build a framework of your case, and how influential this framework is in shaping how they view the evidence and their verdict decisions.

Independent research studies and my personal experience in mock jury trials has shown that 80-90% of jurors are closed to persuasion and locked into their verdicts by the end of opening statements. Keep in mind, however, that your opening statement is not your first opportunity to begin persuading jurors. A properly done voir dire can guide jurors to frame the case in your terms, make them more receptive to your themes, and highlight aspects of the case that will give your strengths added importance in their minds throughout trial. All of this can be done without arguing a position, discussing case information directly, or even using direct pre-conditioning techniques, using a subtle persuasive technique called exposition.

The principle of exposition, as it applies to voir dire, is to let jurors know what the case is about through the topics and phrasing of the voir dire questions themselves. In a theatrical or literary context, exposition is a narrative device used at the beginning of a play, story, or film to give the audience necessary background information and introduce them to the characters, the conflict, and the plot. Keep in mind that you are telling a story during voir dire, and consider how clearly that story is coming through.

In a case about a car accident, a voir dire session revolving around questions about occupations, hobbies, former jury experience, feelings about lawsuits and damages, and opinions about vague principles and values presents jurors with a confusing, disjointed story that leaves them confused about what your case is about. Failing to use exposition wastes a golden opportunity to guide your jurors in building their framework about what the case is about and, more importantly, to persuade them about what is important.

Spend time thinking about not only the topics that you want the jury to focus on, but also about the order of your voir dire questions. The order of the topics you bring up should mirror your introduction of topics, evidence, and themes in your opening statement. For example, a strong expository voir dire in a breach of contract case might begin with questions about experiences with business deals and contracts, delve into experiences and feelings about broken contracts, highlight evidence by asking the jurors if they have ever been involved in dispute with a vendor who refused to remedy faulty products or services, and move into questions about lost revenues, business valuations, and damages. By the end of voir dire, your jurors should know what the case is about, what the defendant or plaintiff did wrong, how the plaintiff was harmed (or was not), and how damages should be defined.

With each question you ask, think about more than the answers your jurors give you; think also about the message that each question sends to the jury. Each question implicitly tells your jurors that the topic of the question is an important topic in the trial, and may tell them even more than that. Questions may give jurors information about the actions of the litigants, and may even give jurors the impression that you are concerned or nervous about certain topics. Linger too long on a topic, no matter how important (plaintiff attorneys, this often includes feelings about frivolous lawsuits and tort reform), sends the message to many jurors that you are overly concerned and nervous about the topic and is a red flag to many that this reveals a weakness in your case.

When listening to your questions, jurors will assume that the situations your questions present are identical to those involved in the case, so make sure to highlight your strongest evidence, your client's strongest conduct, and the opposing litigant's worst actions in your questions. Defense attorneys, ask your jurors how they feel about an employee who takes 38 unrelated sick days off from work in a year, or how they feel about a plaintiff in an employment lawsuit who applies for only 3 jobs in a year without success and remains unemployed for 18 months. Plaintiff attorneys, ask your jurors if their employer has ever passed them up for promotion in favor of a less-qualified employee of a different race or gender, if their doctor has ever failed to respond to an emergency phone call, or if their contractor has ever gone over budget on their home improvement project without providing adequate justification. These questions not only uncover potential biasing experiences and opinions, they also give the jurors a strong, persuasive sense of what your case is about.

Exposition during voir dire takes a great deal of care and thought, especially when your primary goal is to learn about your jurors and uncover biases. If properly done, jurors will be far more receptive to your matching opening statement and your trial themes, and will be far more likely to view the case in your terms throughout trial.

Identify the most influential, vocal jurors on your panel

Not all jurors are created equal; some jurors tend to be far more vocal and persuasive than others, and these jurors are far more influential than their counterparts.

A juror identified as potentially vocal can be an influential advocate or your worst nightmare in deliberations, depending on how they feel about the case. A relatively dispassionate juror, on the other hand, is not likely to sway other jurors during deliberations, even if they take a negative position on your case.

Although not an exact science, vocal jurors are often not difficult to identify. Dynamic, engaging, opinionated personality types almost always translate into persuasiveness on a jury panel. Take a closer look at your jurors' occupations to find the dynamic, leadership types; more often than not, the entrepreneurs, executives, managers, and salespeople are the most outgoing and forceful jurors on the panel. The other group of vocal jurors is those who take a personal interest in the case due to personal experience. Although not necessarily vocal by nature, jurors who have a similar personal experience with the events of the case (i.e. a relative suffered a similar injury) or who have special knowledge of the case issues (i.e. a contractor in a construction defect trial) are in a better position to personalize the case and thus become much more vocal.

If you feel comfortable about the makeup of your panel toward the end of jury selection and you are faced with the choice of striking a vocal juror whose biases are unclear and a non-vocal juror whose biases may be negative, opt to strike the wildcard vocal juror. As counterintuitive as it may seem, it is usually better to use a peremptory strike on a juror you have little information about than on a juror whom you believe to be somewhat

biased against your case. Whereas the non-vocal juror will merely be a quiet, dissenting minority voice on your panel, the vocal juror has the potential to throw a monkey wrench into your plans. If you like your panel but spot that Henry Fonda in the eighth seat, you'll know what to do.

Conduct a better voir dire

No part of voir dire is less important than any other; just as the predispositions of your jurors are absolutely critical to the success of your case, the impressions you leave on your panel during voir dire are indelible. In post-trial interviews, jurors often report deciding cases based upon which attorney they liked more and found more believable; building rapport is crucial. Frequently, jurors who seemed to be favorable turn out to be unfavorable, or vice versa, because they weren't candid, honest, or comfortable enough to express strong opinions in voir dire; asking questions the right way is crucial. Although they don't intend to, most jurors have made up their minds about a case by the end of opening statements; telling your story and being persuasive in voir dire is crucial. And finally, mock jury and actual trial deliberation regularly shows that even a few vocal jurors can be more powerful than nine or ten opposing jurors and sway verdicts by themselves; identifying vocal jurors during voir dire is crucial.

A perfectly conducted voir dire takes enormous skill, but that skill can be developed by carefully considering each of your challenges and objectives long before jury selection begins. When you have written your best voir dire questions, think about ways to phrase them that don't imply a right—or politically wrong—answer. Carefully consider the order of your questions, and read between the lines to consider the story of your case that the questions are telling. Don't force yourself to do all of this by yourself, simultaneously; bring someone to assist you in writing down your jurors' answers and assessing their demeanor, whether a jury consultant, fellow attorney, or assistant from your office. Although challenging, conducting the best voir dire you can may make an enormous difference in your success in trial.

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