

THE GAVEL

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Persuasion during Voir Dire: How to influence jurors at the earliest opportunity

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Despite the judge's instructions and their best intentions, jurors DO begin making judgments from the first minute of trial. As cognitive beings, all of us begin building stories from the earliest available information; as jurors, we cannot help but begin constructing a story out of the case's preliminary introduction and the opening statement, no matter that we are instructed that these are not evidence.

A recent study of mock juror decision-making at Cornell University showed that 85% of prospective jurors showed "pre-decisional bias" in their decision-making. That is, their interpretations of incoming evidence were biased to support the party they favored early on in the case. Empirical evidence supports this finding; in our experience conducting mock trials over the past four years since the formation of Isosceles Consulting, we have found that only 12.4% of jurors change their verdicts between the conclusion of opening statements and the end of trial.

Knowing that jurors make up their minds very quickly in trial, it is to the advantage of the savvy attorney to begin persuading the jurors at the earliest available opportunity. In most cases, this opportunity is voir dire.

Even though voir dire is designed to elicit information from your jurors and to remove bias, the persuasive art of pre-conditioning jurors during voir dire can be more effective than the ensuing opening statements, presentation of evidence, and testimony, simply because it comes first. Although overt pre-conditioning during voir dire is prohibited, the ability to frame the issues and the ideology of your case through the questioning process itself can be just as persuasive.

The goal of subtle persuasion in voir dire is to help jurors to frame the case in your terms. This can be accomplished using three techniques. First, EDUCATE jurors about your case by introducing questioning with snippets of information about the case; by providing intriguing information about the case, you are not only explaining the reasoning behind your mysterious voir dire questions but are also introducing and highlighting information that your jurors will use to initially judge the case. For example: "This case is about a car accident in which the defendant's car was out of brake fluid; juror number 8, how often do you have your car checked and serviced?"

Second, RELATE the jurors' own experiences to your way of thinking—your theme—about the case. For example, if you are defending a builder in a construction defect case that has done a wonderful job building 20 elaborate homes in a development complex but is being sued for problems in one home's basement, you might ask: "Juror number 11, you teach first grade; at the end of the every year, do 100% of your students read and write? Juror number 3, you work for the post office; does 100% of your mail reach its intended destination? If not, does that mean you've done a poor job or been negligent?" By subtly outlining the ideology of your case and translating it into terms that your jurors understand and relate to, you can avoid making direct statements about your case while being just as effective in communicating your message and persuading your jurors. Although this takes some creativity and improvisation, the ability to relate your case to the jurors creates powerful anecdotes that help jurors to identify with your client and your position throughout the course of the ensuing trial.

The third example, INSTRUCTING jurors on the law and how it applies to the case, is the least persuasive of the techniques but is often used and still effective in focusing jurors in certain directions. Commonly-used techniques may be designed by the plaintiff when jurors may be skeptical of defendant's liability ("Do you understand that a company can be held responsible when its employee injures someone while working?") or by the defense to ensure that jurors do not assume guilt ("Do you understand that all it takes to sue someone is for the plaintiff to make an accusation and file a lawsuit?"). Questions may be designed to dispel jurors' reservations ("Do you understand that a doctor can be responsible for injuries suffered as a result of their negligence even though the doctor was not responsible for the contraction of the disease itself?") or to focus jurors on certain issues and away from others ("Do you understand that, regardless of their job history and work performance, an at-will employee can be terminated for any reason?").

Persuading the jury is but one part of voir dire; eliciting biases and critical opinions and experiences from the jurors on which to base jury selection is essential to success at trial, as is the overlooked art of establishing a positive rapport with the jurors. Voir dire's intended purpose is to remove bias from the jury, and successfully arguing a case is virtually impossible before a jury with deep-seated biases. As your jurors are learning about the case during voir dire, you need to be learning about your jurors. What do they know about the issues specific to the case? A juror with an understanding or specialized knowledge of the case issues, especially a complex case, will focus on the evidence differently than a juror with no understanding or knowledge. Who are your jurors likely to trust? It is critical to ask your jurors what experiences they have had with (and how they feel about) people and situations similar to those in the case; jurors are unable to psychologically set aside their prior experiences and biases, as they are asked to do in trial, and will always color their impressions of the litigants with their personal feelings toward others who they see as similar; for example, they will assume that a doctor in trial is very much like the doctors that they have dealt with in the past. How would your jurors react in a similar context? Often trials come down to issues of personal responsibility; in general, jurors who take personal responsibility in the specific areas of the case (be they health, finance, home, etc.) will tend to fault the plaintiff for failing to

take personal responsibility, whereas those who delegate work (to doctors, lawyers, contractors, etc.) tend to be pro-plaintiff. Uncovering predispositions is critical to success at trial. Never believe that you can sway any juror; once predisposed, a juror is exceedingly difficult to rehabilitate and persuade to vote against his/her biases.

Persuasion during voir dire is not your only opportunity to create a positive first impression of your case; building rapport with your jurors during voir dire builds trust in you as the attorney, and in your case by extension. Techniques as simple as thanking jurors for their time, remembering (and correctly pronouncing) their names, making eye contact, smiling, and taking an interest in what they have to say during questioning makes an extraordinary difference in how likely the jurors are to like and believe you.

Yet in terms of arguing your case, pre-conditioning is invaluable because, in cognitive terms, the groundwork is more important than the structure itself. Jurors view your case only one way, and they build this framework before the trial has officially begun. Once jurors have framed your case a certain way, they are almost certain to accept all evidence and testimony that fits that frame and reject all evidence and testimony that does not. Psychologically, first impressions are heavily influential, and once a juror decides that a plaintiff or defendant lacks credibility, that juror will find his/her evidence faulty considering the source. Given a persuasive voir dire, jurors just may make up their minds prior to opening statements.

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