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May 2016 Jury Tip: “Take what the court gives you... in voir dire”

Even though I try to make my jury tips “one size fits all,” I know firsthand that the rules for voir dire and jury selection are incredibly different in courtrooms across the country. Having picked a jury in almost every US state, I am fully aware of the differences... but it may surprise the lawyers in California to know that in Texas, the lawyers voir dire the entire panel at once. It may surprise the lawyers in Texas to know that in upstate New York and some courtrooms in Pennsylvania, voir dire is conducted without the judge being present. And it may surprise the lawyers in New York to know that in some cities (Pittsburgh being one), the lawyers question the jurors one at a time, outside of the view of other jurors.

So this month, instead of giving you “one size fits all” voir dire advice no matter what your local rules are, I’m going to give you advice about how best to adapt to your local rules. Because no matter where you practice, every method of voir diring the jury has its own unique advantages, so let’s discuss some ways to take full advantage of your local rules... unless of course, you practice somewhere that allows no attorney voir dire.

Let’s start with courtrooms in which the lawyers are expected to voir dire the entire panel, all at once. There are some obvious disadvantages here—the one that drives me crazy is that your voir dire time is spread thin, and unless you’re willing to ignore jurors #30 through #50, you end up wasting valuable voir dire time hearing from jurors who probably will never make it onto the jury. Another disadvantage when voir diring a crowd: it’s incredibly easy for jurors who don’t want to talk—whether they’re shy or “stealth” jurors—to hide in the crowd and get away without talking. Unless you’re vigilant, you may end up having to make “strike or keep” decisions about several jurors who haven’t said a single thing.

But here’s the big advantage when you voir dire a crowd: the ability to start persuading is best with a big crowd. The larger the crowd, the more ears are listening and available for you to ask persuasive questions, and the more voices are available to make points to the rest of the jury. Make sure to find an “expert” juror to educate the rest of the room about some important fact that you want your jurors to hear. It’s much easier to find an expert juror in a crowd of 50 than in a panel of 12.

Getting a collaborative, persuasive “discussion” is much easier with a large crowd because of the larger volume of brave, outspoken jurors. When you’re voir diring a crowd, you have a much better opportunity to “focus group” some of the key issues in your case to see where most people stand on a key issue. And in some ways, it’s much easier uncovering bias in a crowd, because it’s easier to find one juror out of 30 or 40 or 50 than out of 12 who is brave or outspoken enough to express a negative attitude that you know is out there. And once you find the one brave “ice breaker,” it’s much easier to use their example to encourage others who feel that way to speak up.

For anyone who practices in courtrooms in which you only voir dire a small group—perhaps just the 12 in the box, or a “six pack” of the first 18 jurors—it’s usually difficult to find the perfect juror who has the specific experience or know-how to make a persuasive point to the rest of the jurors. But with a smaller group comes the advantage of quality over quantity—meaning you can spend much more time getting to know each juror. To me, having a few minutes at the absolute minimum per juror is essential to selecting a receptive jury; I never feel confident keeping a juror who didn’t answer any questions or who only gave a couple of safe “yes” and “no” answers without hearing them explain how they feel about an issue or two in their own words. When you have a small group and at least an hour to spend with them, you need to take advantage of the time by engaging with each juror on at least one issue and making sure that none of the jurors “hides” from you. So if you practice cases in a venue that allows voir dire of the first handful of jurors, make sure to dig deeper.

Another advantage of voir dire in rounds—meaning that you voir dire the first 6 or 12 or 18, but then voir dire new jurors as they come into the box in subsequent rounds—is that you have multiple opportunities to ask persuasive questions to a captive audience. Even though you cannot voir dire the first group in a later round, don’t forget that those jurors are still there listening to the new voir dire. You can’t ask them questions, but they will hear any persuasive questions you ask, so you can continue asking persuasive questions that get them thinking.

Maybe it’s because I’m most used to the “six pack” voir dire in California, but jury selection in smaller groups is the ideal method to me. But like any method, there are also some inherent disadvantages. To me, the worst is that jurors feel less comfortable expressing experiences, attitudes, and biases that are personal, sensitive, or controversial when there are other jurors around. Using written jury questionnaires is a good solution when you have a case that involves sensitive issues, but most judges don’t allow questionnaires, so it takes an especially skilled lawyer to make jurors feel comfortable enough to talk about sensitive topics in a public voir dire in groups.

Getting out these sensitive topics and controversial attitudes—for example, jurors who have been the victim of sexual assault, or jurors who don’t like illegal immigrants bringing lawsuits, or jurors who don’t want to admit in open court that they have driven drunk or regularly drive over the speed limit—is the most valuable silver lining in courts that voir dire jurors one by one in chambers. In those courtrooms that conduct voir dire one juror at a time outside the presence of the other jurors, your hands are tied in many respects. You can’t really ask persuasive questions or make a point to other jurors with one juror’s experiences. You can’t bounce ideas off jurors, or use outspoken jurors’ biases to encourage the shy jurors to talk. But despite those handicaps, your advantage is relative privacy, so make sure to ask more frank questions and dig deeper for cause challenges when you voir dire your jurors in a private setting.

And finally, if you practice in a court where no voir dire is permitted: good luck!