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Voir Dire, Tactics for First Impression

Learning to streamline the process and keep the jury engaged will result in a better dialogue and facilitate selection, explains Mark D'Argenio of UC-Hastings.

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It is perhaps fitting that simply parsing the meaning of the term *voir dire* is itself not a straightforward endeavor. When translated from modern French, it is said to mean alternatively "to see and to say" or "to see [them] say," both of which seem to characterize, accurately enough, the current legal process in question. However, the term has its actual origin in the Anglo-Norman language, where it means "that which is true." *Voir dire* was originally a term coined in common law courts to describe the oath taken by jurors when challenged. Now the term is used to more broadly describe the process by which jurors are questioned on their backgrounds and potential biases prior to being selected to sit on the jury.

Various tools and procedures available in *voir dire* allow a trial attorney to modestly steer the jury selection process in a direction favorable to a desired outcome. Most importantly, *voir dire* permits attorneys to use information gained about each juror as a basis for either a challenge "for cause" (based on disqualified or bias) or a "peremptory" (or optional) challenge. Good advocates will use *voir dire* to weed out prospective jurors who may be biased or prejudiced against their client's case. Obtaining the information needed during *voir dire* questioning, without alienating or otherwise upsetting prospective jurors, can be the key challenge of the *voir dire* process.

The exact procedures of *voir dire* are left, in large part, to the discretion of the trial judge, and efficiency is often the prime concern. One common method used to streamline the process, and to better ensure accurate and considered responses, is to prepare and issue a jury questionnaire.

When preparing a jury questionnaire, it is important, especially in multiparty cases, to work cooperatively with opposing counsel to make the questionnaire as brief and user-friendly as possible. Remember that jury questionnaires are usually better suited for obtaining basic information about the prospective jurors, such as occupation, legal knowledge and education. To address potential conflicts, include a list of all the parties, expected witnesses and trial attorneys, and ask each potential juror to indicate whether they personally know any of the individuals listed. Questions about political inclinations, hobbies and long-term aspirations are usually counterproductive in that they rarely elicit a helpful response and often come off as too personal. Likewise, save questions about leadership skills and other relevant personal traits for the direct questioning phase.

Another aspect of streamlining the *voir dire* process relates to the protocol for juror replacement. After the questionnaires are completed, attorneys are permitted to review the responses, make initial determinations about each juror and formulate further questions. The focus should be on the members of the panel that have been randomly

selected to initially occupy the 12 seats. It will be helpful at this juncture to know the potential jurors who will replace any of the 12 who are stricken. Whether this is possible, however, depends on what selection method is employed by the court.

Traditionally, if a juror is stricken, then another juror is randomly selected from the pool and questioned. However, many courts now employ the more efficient "six pack" or "strike-and-replace" method, whereby at least six alternates are randomly selected in addition to the 12 seated jury members. This increases efficiency by allowing counsel to focus on the responses of the specific alternates that will be replacing any of the originally selected 12 jurors. It also allows counsel to take into account the next available juror when determining whether or not to use a peremptory challenge on a sitting juror. Usually courts will have a pre-determined replacement procedure. However, it is a good idea to confer with opposing counsel early on to agree upon a juror replacement method should the judge seek input regarding which process is best for the case.

As a practical matter, a majority of your *voir dire* questions will be focused on whether the jury members have any personal experience with the issues involved in the case. In this regard, it is often best to start with more specific questions and then use the responses to those questions to elicit broader opinions. For example, in a construction case, a juror might be quick to note that they do not have any strong opinions, either way, about builders. To avoid this unhelpful response, ask a juror in the questionnaire whether they have ever owned a home. Then, during live questioning, ask a homeowner juror if she has ever hired a contractor to perform a remodel, and if so, ask about her experience with the process. Personalizing the questions will help to get the jurors talking, and by varying the talking points, will also help you keep the proceedings interesting.

Voir dire can also provide an opportunity to begin to lay out the themes of your case. However, since any themes will be conveyed in the form of a question, subtlety is important — otherwise, jurors may feel they are prematurely being put on the spot to take a side in the case. For instance, as a defense attorney in a personal injury case that turns more on liability than damages, it can help to preface your questions with an acknowledgement of the seriousness of the injury. This will not only increase your credibility with the jurors, but will also allow your question to focus squarely on the key issue of liability and whether jurors would be willing to deliver a defense verdict despite their potential sympathies for the plaintiff.

Remember that, while *voir dire* is a fast-paced and high-stakes process for attorneys, it is often dreadfully boring for jurors. Consider how you can liven up your questions with some harmless references to pop culture. Instead of asking, over and over, whether the jurors have any opinions on jury service, ask if they have seen certain movies depicting juries and what their reactions were. Have they ever read John Grisham's *Runaway Jury*, for instance? If so, what did they think? Peppering your questions with these types of references often improves your chances of building a rapport with the jury.

Even though not prohibited by law, pointed or personal questions should be avoided unless, as an attorney, you are relatively sure that these questions will provide the basis for an ironclad challenge for cause or crucial information for a peremptory challenge. An *in camera* interview, outside the presence of the other jurors, is one way to obtain sensitive information without offending a particular prospective juror. However, this can be a ponderous process that might irritate jurors eager to be either impaneled or dismissed. As a result, such requests should be made judiciously.

Despite these complexities, and the rapid pace of the process, it is crucial for an attorney to maintain composure in front of the jury. For example, it is important to remember and refer to each impaneled juror by name. This is part and parcel of good organization and preparedness on the part of an attorney, which jurors are receptive to at all times. This is especially true given the downtime inherent in the *voir dire* process. While you do not want to squander the opportunity to forge the most favorable jury possible, you must also resign yourself to a certain helplessness in that regard and remember that, above all, *voir dire* is your opportunity to make a first impression on the jury that will ultimately decide your case.

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