

VOIR DIRE:
THE ART AND SCIENCE OF JURY SELECTION

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I. SCOPE OF ARTICLE.

This article suggests a practical method of voir dire designed to obtain what you really need to know from prospective jurors.

II. WHY IS THIS IMPORTANT?

Selection of the best jury possible is critical to the success of your case. "Voir dire in civil trials is the whole tamale."¹ Research has indicated that most jurors, perhaps as many as 80 percent, subconsciously have decided who should win the lawsuit after completion of the opening statements. Their attitudes, beliefs, values and experiences will determine how they perceive and filter the evidence. The same piece of evidence may be viewed quite differently by jurors who hear or see it from different perspectives.

Persons who believed that O. J. Simpson was guilty before the trial started will remember the DNA evidence. It supported their predisposition that he was guilty. Persons who believed that O. J. Simpson was not guilty will remember that the glove didn't fit. That evidence supported their predisposition. The same evidence, heard by the same jury, can produce totally different recollections to jurors of different predispositions.

We have no control over who is called to our jury panel. We are responsible, however, for identifying and attempting to remove from the panel those persons who are incapable of hearing the evidence impartially, if not favorably, to our case. It does you no good to learn in the postconviction interview something about a juror that, if you had only learned in voir dire, would have caused you to remove that person from the jury. It is your job to learn such things during voir dire. The obvious question is, therefore, how do you do it?

¹Bennett, *Civil Voir Dire Thoughts*, 22 Texas Trial Lawyers Forum 19 (1988).

III. THE "NEW VOIR DIRE."

I advocate a style of voir dire that may sound strange to some older lawyers and judges. I did not invent it. I learned about it from my friends Cathy Bennett and Robert Hirschhorn², who have taught and used it with great success across the country. I have used it and have seen it work. For lack of a better term, I call it the "new voir dire."

Most of the voir dire examinations I have seen are "old voir dire." The lawyers lecture the jury panel as if they were delivering an opening statement. They ask few questions. They ask meaningless questions. They ask leading questions. They think that the voir dire is about persuasion and showing off. They think they can persuade a hostile juror, through their brilliant oratory, to abandon slowly developed and strongly held "gut" feelings about life. They are wrong, as they will find out when the trial is over and they learn what they should have learned in voir dire.

In the "new voir dire" the lawyer mainly listens. He³ tries to speak as little as possible. He asks open-ended questions. He is not afraid of hearing a "bad" answer. He talks to every juror. He knows that this is not the time for speeches or persuasion. He does not try to "commit" anyone to anything. He is after information, from the juror, that will help him decide, on some basis other than stereotype, whether this person will be a good or bad fact finder for his client.

IV. SO YOU WANT TO BE OPRAH!

In order for you to learn from a juror, the juror must be willing to talk to you. Openly. Honestly. Candidly. That is hard for the juror to do. I learned from Cathy Bennett that the number one fear in America is the fear of public speaking. It ranks above the fear of snakes. It even ranks above the fear of death.

Approach voir dire from the perspective of the juror. She⁴ is not here voluntarily. She has been summoned to this place. She is missing work. She had to get up early, drive downtown for only the third time in her life, and she could not find a place to park. She is intimidated by lawyers and their system. She wants to go home.

After waiting in many lines, like a recruit in boot camp or a terrified college freshman during registration, she is given a number, paraded into a cold courtroom and made to sit on a hard bench. The Judge then reads to her the admonitory instructions from Rule 226a. They include the following:

The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning

²Many of the terms used in this paper, such as "fear list" and "looping" came from Cathy and Robert.

³The pronoun "he" is used because it is shorter than "he/she." These concepts apply regardless of gender.

⁴Again, the pronoun used is not intended to suggest either gender.

you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers.

She is not anxious to talk to you. Where do you begin?⁵

V. **ELEMENTS OF THE "NEW VOIR DIRE."**

A. **Be honest.**

If you are nervous, or your palms are sweaty, consider telling the jury how you feel. You want them to trust you, and such honesty can be a good start. On Larry King's first broadcast he was speechless! He didn't know what to say. He didn't have the guts to do it. After three false starts, the station manager kicked open the control room door and said "This is a communications business." King then knew what to say. He would just be honest. These were his first words:

Good morning. This is my first day ever on the radio. I've always wanted to be on the air. I've been practicing all weekend. Fifteen minutes ago they gave me my new name.⁶ I've had a theme song ready to play. But my mouth is dry. I'm nervous. And the general manager just kicked open the door and said, "This is a communications business."

KING, *supra* at 23.

B. **Ask open ended questions.**

No amount of lecturing at them, being persuasive during your *voir dire*, or ignoring their attitudes will do the trick. You must ask a question that requires them to open up and tell you their thoughts and feelings about your case-specific issues.

Bennett, supra at 19.

In the "old" *voir dire*, lawyers asked useless and leading questions. The juror, who was more afraid of speaking than snakes, and who didn't want to embarrass himself, always knew the right "lie"

⁵Books have been written by professional interviewers about how to get people to open up to you. See, for example, GERRY SPENCE, "HOW TO ARGUE AND WIN EVERY TIME" (St. Martin's Press 1995); LARRY KING, "HOW TO TALK TO ANYONE, ANYTIME, ANYWHERE, THE SECRETS OF GOOD COMMUNICATION" (Crown Publishers 1994); BARBARA WALTERS, "HOW TO TALK WITH PRACTICALLY ANYBODY ABOUT PRACTICALLY ANYTHING" (Doubleday & Co. 1970).

⁶Larry Zeiger was considered too "ethnic." The station manager had the *Miami Herald* open on his desk. There was a full-page ad for King's Wholesale Liquors, and Mr. Zeiger was told he would host something called *The Larry King Show*. KING, *supra* at 22

to tell. The juror does not want to stand out in the crowd. He wants to hide among his peers. The lawyer learns nothing from asking, "You can be fair, can't you," or "You're not a bigot, are you." I have heard lawyers say that they will take something "from the jury's silence." No informed strike was ever taken from a juror's "silence."

In the "new voir dire," you don't want the jury's silence. You want their candid answers. Try open-ended, direct questions such as these:

Mr. Jones, how do you feel about . . . ?

Mrs. Smith, what do you think about . . . ?

Mr. Conner, what is your opinion about . . . ?

Some people think.... Other people think.... Mrs. Edwards, what do you think?

Watch the good talk-show hosts. When Oprah is at her best, the audience is doing all the talking and she is merely passing the microphone from one speaker to the next. I suggest that in voir dire, the lawyer should talk no more than 20% of the time. All the rest should be the jurors talking.

You must be willing to *give up power to the jury*. Voir dire is not about you. It is about them. You are not the center of attention. They are.

C. Dealing with the Judge.

Many judges were raised in the "old voir dire" school. They are accustomed to hearing speeches and leading questions from the lawyers, with the jury talking very little, if at all. If you meet any such judicial resistance, remind the judge of what she just read in her admonitory instructions from Rule 226a: "The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes." The judges with whom I have discussed the "new voir dire" have been very receptive to it.

D. Develop a "fear list."

In every case, there are two or three things that scare you to death. With the wrong juror, they can lose the case by themselves. For example, if you are a plaintiffs attorney, your client might have previously used cocaine. If you are a defense attorney, your client might have lost the allegedly defective product that had been returned to its quality control department for analysis. If you are a criminal defense attorney, perhaps you are worried about what the jury will think if your client does not testify. These are critical matters that you must discuss with the jury panel!

In the "old voir dire," we would never ask about such things. The answers might "taint the jury." In the "new voir dire," we recognize that we must know our potential jurors' views on these matters. Thus, we might ask questions like these:

"Mr. Jones, the defendant might not testify in this trial? What do you think about that? or

"What reasons come to mind why a defendant might not be able to testify in a criminal prosecution against him? or

"I am embarrassed to say that we lost the suture after it was removed from the body in the autopsy. Have you ever lost anything that was very, very important? Please tell me about that experience.

E. Bad answers.

In the "new voir dire," we are not afraid of "bad answers." Indeed, there are no bad answers. If you are afraid to talk to the jury panel about such things as "lawsuit abuse," the "insurance crisis" and the like, you will not find out until it is too late that your jury was swayed by a strong juror's inflexible views about the system rather than the facts of your case. What we want is information about the jurors. If it "hurts" us, great. Knowledge is power.

There is sometimes a reluctance to ask important questions because of a fear of "educating the other side." That is no reason to avoid the big question. The goal is to find out about, and remove from the jury, persons who cannot be fair. I have found that "educating the opposition" is not a real problem, and asking the hard questions, which gives all parties the necessary information, frequently leads to shortening the overall length of the voir dire.

When you get the "bad answer," be honest. Thank the juror for her candor. You needed to know what she had to say. But don't stop there. Find out if there are others who feel the same, or who feel differently. For example, you might say something like this:

Thank you for your answer, Mr. Jones. I needed to know that, and I really appreciate your candor. Ladies and gentlemen, who else agrees with Mr. Jones that jury verdicts have gotten out of control and someone must stop them?

After you are sure that you understand clearly why each of those jurors feels that way, then ask the converse:

Now I'd like to ask it the other way. Who feels differently than Mr. Jones about whether jury verdicts have gotten out of hand?.

As necessary, ask each of those potential jurors:

Why do you feel that way?

Finally, if you are not clear about where any potential juror stands on your fear list questions, ask him.

Mr. Davis, I'm still unsure where you stand on this question. We have heard from some people who feel that jury verdicts have gotten out of control, and others who feel that they have not. What do you think?

F. Looping.

Jim Perdue and other great teachers of trial advocacy recommend organizing concepts in groups of three. People tend to remember things like "duty, honor, country." "See no evil, hear no evil, speak no evil." "It was wrong, he knew it was wrong, and he did it anyway." Irving Younger taught that if a person hears something three times he will most likely believe it. This concept can be used in voir dire to reinforce "good answers." "Looping" is the incorporation of a good answer into your next question.

Suppose that you are a criminal defense attorney whose client will not testify. Using the "new voir dire," you courageously ask the panel:

What reasons do you think there might there be for a defendant not to testify in his own defense?

You immediately get a "bad answer":

Because he's guilty.

You are glad to know this. (Otherwise, you would have learned that juror's belief in the post-conviction interview!) You thank the juror for his honesty, and ask for more:

Thank you, Mr. Jones, for your answer. That might be one reason why someone might not testify. Can anyone think of any *other* reasons why a person might not be able to testify?

Now you get a "good answer."

Maybe he has a *speech impediment*.

The favorable response has been said once. You now have an opportunity to repeat it. You say:

Maybe he has a *speech impediment*. Thank you Mrs. Brewster. Does anyone else agree with Mrs. Brewster that a person might not be able to testify in his own defense because he has a *speech impediment*?

The favorable response has been stated three times. You can now safely ask about *other* reasons why a defendant might not be able to testify in his own behalf. If his failure to testify is a big item on your fear list, you must find out how what each juror's "background, experience and attitude" is about it.

_____ **G. Personal or sensitive questions.**

Sometimes the most important questions involve very personal matters. For example, in a sexual molestation case, it is imperative to learn whether, and the extent to which, potential jurors have had similar experiences. Such inquiry must be handled delicately. You might want to put the initial question in the third person, so as to avoid any juror fearing that he or she will be asked to discuss a personal experience publicly. Such persons should then be questioned further at the bench, or in individually sequestered examination. As before, direct questions should be used.

Once a candid discussion is started, you will learn who was involved, what happened, when it happened, its effect upon the participants, etc. If the Judge expresses reluctance, remind him that under his Rule 226a instruction, you are entitled to learn about the *background, experiences and attitudes* of the prospective juror.

In such a case, this topic will be on your fear list. You *must* learn about the juror's experience during voir dire. If you are talking so much that you do not get this information from the juror, no matter how brilliant your oratory, you are well on the way to losing the case.

_____ **H. Avoid "lawyer words."**

How much would you learn about the jurors if they spoke only Russian and you spoke only Spanish? Talk like you used to talk "before the operation." Oprah talks with her guests using their language. So should you.

Forget words such as "prior" and "subsequent." "Before" and "after" will work much better. Talk about the "accident" rather than the "occurrence in question." Many jurors think that "credibility" has to do with their credit! Try "believability" instead.

Many great trial lawyers discuss their case with children before they try it. If the children cannot understand them, many jurors will also not understand them. "Lawyer words" are artificial barriers between you and the jury. To the extent possible, we want to avoid barriers between us and the jury.

_____ **I. Remove barriers.**

Just as "lawyer words" are intellectual barriers that we want to remove, there are some physical ones to be avoided where possible. One is the lectern. Another is our dress.

Unless the court requires you to remain at the lectern, I recommend that you get away from it. Not only is it a barrier, but it encourages overuse of your notes. I also like to dress a bit more casually during voir dire than at other points in the trial. The more relaxed you can be with the jury, the more likely they are to respond to your questions honestly.

_____ **J. Be yourself.**

The jury will spot a phony. You cannot be Joe Jamail, John O'Quinn, F. Lee Bailey, or whomever your hero may be. Be yourself. Be honest. A bumbling, stammering, sincere and honest lawyer is much more likely to be trusted by a jury than an actor trying to be what he is not.

_____ **K. Have someone take notes for you.**

Do not try to do everything yourself. Have someone else take notes for you. You should focus on interacting with the jurors. Maintain eye contact with them at all times. Listen to what they are saying. Follow up where necessary. You simply cannot do that and take notes at the same time.

The note taker does not have to be a lawyer or a paid consultant. It can be a friend, spouse, secretary, legal assistant, or anyone capable of taking accurate notes.

L. Avoid stereotypes.

In the "old voir dire," lawyers struck jurors based upon stereotypes. These included such things as race, gender, occupation, age, etc. Many lawyers began voir dire with the preconception that they didn't want any blacks, school teachers, Lutherans, union members, and a million other things, *no matter what*. Perhaps that is part of the reason that *Batson*⁷ and its progeny threaten our right to make informed, peremptory challenges.

In the "new voir dire," there are no stereotypes. A defense lawyer in a personal injury case who would strike Clarence Thomas merely because he is black might be making a big mistake. In a criminal trial, a prosecutor who leaves a police officer on the jury without asking about his experiences may regret it. Ask the juror questions. Find out his *background, experiences and attitudes*.

_____ **M. Questionnaires.**

A questionnaire for prospective jurors can greatly expedite a properly conducted voir dire examination. It will give a wealth of information that can be followed up in oral questioning.

It should not be one-sided. It should fairly present all questions in which either side is interested. Get the other side's concurrence, and negotiate an agreement between counsel. If necessary, present a motion for a questionnaire.

⁷*Batson v. Kentucky*, 476 U.S. 79 (1986). "Rather than continue to struggle for many more years with protracted litigation over this issue, we would be better served by admitting that for all practical purposes, peremptory challenges are dead." *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 151 (Tex. 1995) (Gonzalez, J., concurring).

VI. JUROR DISQUALIFICATION.

The rules for qualification and disqualification of jurors are contained in the Texas Government Code at Section 62.102-105. Jurors are disqualified if they have an interest in the litigation or exhibit any bias or prejudice in favor of or against any party to the litigation. The Texas Supreme Court has recently readdressed the issue of disqualifying jurors on the basis of bias or prejudice as a matter of law in *Cortez v. HCCI-San Antonio*, 159 S.W.3d 87 (Tex. 2005). The trial court has the ability to make a factual determination as to whether a potential juror exhibits bias or prejudice based upon his or her answers to questions during voir dire.

In *Cortez*, the Supreme Court analyzed the prerequisites for disqualifying jurors and examined the longstanding rule that veniremen cannot be rehabilitated. In *Cortez*, a venireman stated that he had “preconceived notions” and that he would feel biased based upon the nature of the case. After making these statements that would normally disqualify a juror before *Cortez*, the opposing counsel rehabilitated the venireman by asking whether he could put aside his feelings and try to listen to the evidence and be fair to all parties. The venireman gave equivocal answers to the effect that he could put aside his feelings and be fair and the trial court denied the challenge for cause. The Texas Supreme Court affirmed the trial court’s and court of appeals’ ruling stating “The proper stopping point in efforts to rehabilitate a venireman must be left to the sound discretion of the trial court.” Prior to *Cortez*, the general rule was veniremen could not be rehabilitated and were automatically disqualified once they expressed any apparent bias or prejudice. Now, under *Cortez*, trial courts have discretion in allowing rehabilitation and will be given great latitude in probing through counsel’s questions in efforts to attempt to determine whether or not veniremen are truly biased or prejudiced. The Supreme Court recognized the skillful nature of lawyers in asking leading questions to elicit answers that previously resulted in the automatic disqualification of jurors and the unfairness in this process. The *Cortez* opinion does, however, leave some magic buzz words that should lead to juror disqualification. For instance, if a juror states that he has an inability to find for a party or that he could not be fair and objective and states this in an unequivocal manner, this should still be automatic grounds for disqualification. As a practical matter, this will change the practice of voir dire in that the trial judge has discretion to permit rehabilitation questions. Accordingly, counsel wishing to challenge a juror must now be prepared for rehabilitation efforts and must elicit strong and unequivocal answers to questions indicating the venireman’s inability to be fair and impartial, not relying upon automatic disqualification as a result of answers to bias or prejudice type questions.