The Real Purpose of Voir Dire

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The psychological underpinnings of voir dire are not consistent with the legal limitations and customary practices for questioning of jurors. There is conflict between the inherent purpose of voir dire, which is to find impartial jurors from a pool representative of the community, and the true yet unstated purpose of every attorney, which is to find jurors predisposed to their position. Towards those ends, the court allows attorneys to question jurors. Lawyers want the greatest possible latitude to delve into juror proclivities and psychological indicators of bias. The court, on the other hand, restricted by the notion that the object is impartiality and justice, limits the questioning within parameters established by case law and predicated, at least in theory, on notions of fairness.

This paper will examine, first, the history and judicial parameters for voir dire. Then, using case study, I will compare the practical objectives and methodology of a trial team, including attorneys and jury consultants. It will include interviews with trial judges, trial attorneys, and jury consultants who use principles of psychology to assist attorneys in jury selections. Over the past 20 years, I have conducted many focus groups and assisted with the selection of many juries, and will interpose my experience. The cases I have followed contain a classic examination of prejudice, and the parties believed that the outcome was largely dependent on jury selection.

History of The Jury

The earliest juries of our time were required to have personal knowledge of the case and to base their verdicts solely on that knowledge. Evidence was not relied upon in the determination of guilt until the year 1330 when the jury began to fill the role as the defendant's protector against government persecution.[1] Historically, juries were representative not of the masses but only of elite, white males, who owned property, were educated, and of good character. It was not until hundreds of years later when women and African-Americans were included on juries and the modern "cross section of the community" standard became the norm.[2]

What is Voir Dire?

The literal translation of Voir Dire is "to see and speak the truth." Technically, voir dire is the preliminary stages of a trial where prospective jurors are examined to determine their suitability to serve as jurors on the particular case. Otherwise known as jury selection. The stated purpose of the procedure is to excuse jurors holding biases that are likely to interfere with their

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[1] Deidre Golash J.D., Ph.D., *Race, Fairness, and Jury Selection*, 10 BEHAV. SCI. & L., 155-177 (1992).

[2] Id.

impartiality.[3] Because of the Sixth and Fourteenth Amendments of the U.S. Constitution which provide for a fair and impartial jury, voir dire is important in order to achieve a broad representation of the community. This should include members of the defendant's own persuasion represented on the jury to preserve the appearance of fairness and to function as a hedge to overzealous prosecutors.[4]

While potential juror lists were formerly compiled from voter registrations, most states now supplement the voter lists with drivers' license lists. There are some general disabilities that may disqualify someone for jury service: a male or female under 18 years-old, a non-citizen of the United States, a non-resident of the state of jurisdiction, and those previously convicted of a felony.[5] People of unpredictable character and behavior who may be drug addicts or alcoholics are initially eligible to be questioned during voir dire. The test for determining competency is whether a juror can disregard any prejudice he may have and render a verdict solely on the evidence presented and the judge's instructions. There should ideally be no preconceived opinions; thus, a juror should be excused if there is a question[6] of his remaining impartial in his decision.

The voir dire may be conducted by either the Judge or the attorneys. Although there is not any empirical studies to measure the quality of the information elicited, it is suggested that judge conducted voir dire not only saves time and money but also increases juror candor because of the formal demeanor of the Judge.[7] Critics argue, however, that there is less candor on the part of the jury because they are concerned about displeasing the judge; thus, they simply tell His Honor what they think he wants to hear.[8]

In 1965, a researcher by the name of Broeder found that potential jurors distort their replies to questions posed during voir dire.[9] Also, in an empirical study designed to measure juror disclosure, it was found that jurors disclosed more to those who they liked, who shared equal status with themselves, and who reciprocated by disclosing self information of their own.[10]

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[3] Susan Jones, *Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor*. 11 LAW & HUM. BEHAV., 131 n. 2 (1987).

[4] Deidre Golash J.D., Ph.D., *Race, Fairness, and Jury Selection*, 10 BEHAV. SCI. & L., 155-177 (1992).

[5] Florida Civil Trial Practice. Jury Selection, Chapter 3.

[6] Trial Handbook for Florida Lawyers. 3d. Chapter 8.

[7] Susan Jones, *Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor*. 11 LAW & HUM. BEHAV., 131 n. 2 (1987).

[8] Id.

[9] Id.

[10] Id.

The method in this experiment was to have half of the 116 eligible community residents questioned by the judge and the other half questioned by the attorneys.[11] Results of the study showed that the jurors changed their answers twice as much when questioned by a judge, were more candid in disclosing their beliefs when questioned by an attorney, and were more forthright and honest when questioned by an attorney with a personalized rather than formal demeanor.[12] It further seemed apparent that if the interviewer presented a warm and friendly persona, then not only would he gain positive regard for his clients, but the jurors also disclosed more because they did not think they would be punished for their answers.

After the jurors are questioned on their background and views of the law, their impartiality must be assessed. Based on this determination, the attorneys have two procedures for excusing a juror incapable of rendering a fair and impartial decision: peremptory challenges and challenges for cause. For those jurors that do not meet the statutory requirements or admit a prejudice, attorneys can challenge them for cause. In that case, the judge has the discretion to grant or deny excusal. Peremptory challenges can be exercised for no stated reason, even if it is just a gut feeling of the attorney. "Prudent use of either challenge is, of course, contingent on getting honest, accurate information from potential jurors regarding their background, attitudes, and beliefs."[13]

Jury Demographics

Historically, underrepresentation of racial minorities was ensured by the use of registered voting lists, individual state requirements such as ability to read and write, absence of convictions of record, the state resident requirement, and the stereotypes actually behind peremptory challenges.[14] Federal Law states that jury selection must be random and representative within specified geographic districts in the court's jurisdiction.[15]

In *Baston v. Kentucky*, the Supreme Court held that peremptory challenges could not be used to exclude jurors on the basis of race.[16] The Court reasoned that by enforcing a discriminatory strike, the lower courts are in essence becoming a party to the biased act.[17] The judge has discretion in conducting voir dire, and the Constitution does not always entitle a defendant to ask questions on voir dire specifically directed towards matters that may prejudice

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[11] Id.

[12] Id.

[13] Id.

[14] Hirashi Fukurai, Edgar Butler, Richard Krooth, *Where Did Black Jurors Go? A theoretical synthesis of racial disenfranchisement injury system and jury selection*.

[15] U.S. 90th Congress House Report. 1968.

[16] Baston v. Kentucky, 746 U.S. 79 (1986).

[17] By Paul Cassell, *200 year old tradition of peremptory challenges fades away*, at A21.

him.[18] However, in some cases where a significant issue concerns the race of the defendant, the constitution requires that the panel be so questioned. In another case, *Ham v. S. Carolina*, in which the defendant was a known civil rights activist, the Supreme Court required lower courts to ask jurors whether they could be impartial and disregard any prejudice they may keep.[19] Since this question is unlikely to produce any telling information about the jurors, attorneys are likely to supplement it with questions about interracial friendships, voting patterns, views on race, and other private matters.[20] In order for the excluded person to be part of a racially protected group, the person must have common ideas and attitudes representative of that group so that the community of interests would not be represented if that person were excluded, and the person must have experienced discriminatory treatment and be in need of protection from community prejudice.[21]

Until recently, courts were split on whether the *Batson* rule extends to gender. However, the Supreme Court has, in a five to four decision, in *JEB v. Alabama*, made an affirmative ruling on the matter, concluding that Batson should and does extend to cases of gender bias.[22] If it is a false assumption that members of the same race would be partial to one of their own, then it follows that the same must hold true for members of the same sex.[23] Gender, like race, would be an unconstitutional proxy for juror competence and impartiality; thus, the Supreme Court decided that peremptory challenges can not be used to remove jurors based on sex either.[24]

Individual attitudes are more revealing then gender stereotypes. Extending the *Batson* rule to gender may open the door for exclusion of potential jurors based on age, religion, employment, and political affiliation. Therefore, if attorneys were allowed more latitude in questioning prospective jurors, then there would be no need for the controversial peremptory challenges.[25] However, while peremptory challenges would not be necessary if lawyers could more freely explore for bias, they may still be desirable. This is because the challenges allow lawyers to question prospective jurors intensely without too much fear that the juror will retaliate against the lawyer's client in the event that a challenge for cause is not granted. Further, if a lawyer has an intuitive negative feeling about a juror (or visa versa) and there is no viable way to get a challenge for cause granted, then the peremptory challenge could be used to get that juror off the panel.

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[18] Ristaino v. Ross, 424 U.S. 589 (1975).

[19] Ham v. S. Carolina, 409 U.S. 524 (1973).

[20] Id.

[21] U.S. v. Dipasquale, 864 F.2d 271, 275 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989).

[22] 511 U.S. 127 (1994).

[23] By Paul Cassell, *200 year old Tradition of Peremptory Challenges Fades Away*, at A21.

[24] *Sex Bias Barred in Jury Selection*. SUN SENTINEL, April 20, 1994, at Court 9A.

[25] Id.

If, however, the lawyers were permitted more latitude in questioning prospective jurors, the court's resources would be taxed because of the extraordinary lengthy voir dire examinations. Efficiency and economic issues would have to be taken into account. Therefore, in order to protect privacy and speed up the process of selection, judges limit the type and number questions attorneys can ask potential jurors.[26] In order to strike a balance, the judge has the discretion to set a time limit at the outset of the case. In doing this, he may want to consider the length and complexity of the case as a whole and then place a time limit on the voir dire that would coincide. Thus, in a capital case, with issues of grave importance, voir dire should be unlimited in time and scope in order to better learn about juror proclivities.

In a capital case, jurors are also selected or rejected based on their views of the death penalty. If a potential juror could fairly determine guilt or innocence but could not impose the death penalty, then that person may be excluded from the jury; this is true even though these people tend to engage in more vigorous debate and discussion before reaching their decision.[27] If, on the other hand, the potential juror could fairly determine guilt or innocence but could impose the death penalty, then they are includable as part of the jury; this is true even though these people are more likely to consider a defendant guilty and convict him before hearing any evidence.[28] Thus, the death qualification process seems to produce a biased jury as opposed to the sought after impartial jury. In an experiment conducted with 600 participants, 500 were includable jurors who would impose the death penalty in a series of murder vignettes they were given to read .[29] The study showed that even people opposed to the death penalty (excludables) would apply it anyway in especially heinous or cruel crimes.[30]

Excludable jurors are also, however, more favorable to the insanity defense than the death-qualified jurors who will actually be hearing the case.[31] In another case study, where jurors read insanity vignettes and made judgments of guilt or innocence, it was found that death-qualified jurors were more likely to vote guilty in mental disorder cases (i.e.: schizophrenia).[32] The experiment also made clear that people who favor the death penalty are more likely to favor

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[26] Susan Moses-Zirkes, *Does Gender Matter in Choosing Juries?* PUBLIC INTEREST DIRECTORATE MONITOR. P40.

[27] Lockhart v. McCree, 476 U.S. 162 (1986); Robert Robinson, *What does unwilling to impose the death penalty mean anyway? Another look at excludable jurors.* 17 LAW & HUM. BEHAV. n. 4 (1993).

[28] Id.

[29] Id.

[30] Id.

[31] Phoebe Ellsworth, Raymond Bukaty, Claudia Cowan, and William Thompson, *Death Qualified Jury and Defense of Insanity*. 8 LAW & HUM. BEHAV., n. 1/2 (1984).

[32] Id.

the prosecution, distrust the defendant and his attorneys, take a punitive attitude, and believe the insanity defense to be a cop out.[33]

One of the most important reasons for not selecting a member of the panel to sit on the jury is prior knowledge of the case. Because of the tremendous growth of the media, and social media, news coverage (fake or not) of a trial has the potential to become imbedded in the minds of the community and affect the defendant's right to a fair trial. In this respect, the First Amendment right to free press is in conflict with the Sixth Amendment right to a speedy and impartial trial because the more people who know the media's version of the facts, the longer it takes to find an impartial jury. Jurors with more extensive knowledge about a case are more likely to favor the prosecution even if it is a news story covering no specific facts about the case (i.e.: prior record, failed lie-detector test, confessions, etc.).[34] While judges can instruct jurors to base verdicts solely on the evidence presented in court, jurors lack the cognitive control to prevent the information from influencing their judgments.[35] Voir dire is the remedy that the defendant must rely upon to protect him from the adverse effects of pretrial publicity.[36]

By selecting a jury from a panel comprised of many demographic groups, we do not necessarily obtain an impartial jury, but we do acquire a jury that better reflects the actual biases of the population.[37] The hope is that the combination of opposing biases will cancel each other out in deliberations and provide for impartiality in the decision.[38] The wider the variety of life experiences, beliefs, and background of the jury, the more likely it is that the verdict will err on the side of fairness and impartiality.

But Is Impartiality the True Objective of Jury Selection?

While the socially accepted purpose of voir dire is to screen out and excuse potentially biased jurors, the true unstated purpose of the process is to reject jurors biased against your side. Attorneys select jurors who they will be able to persuade, not jurors who will be "fair and impartial" to both sides. The art of manipulation is used by both sides to precondition the jurors to each client's advantage. Since voir dire gives the jury its first impression of the attorneys, it is the counsel's best chance to sell himself and his client. The questions on voir dire enable the attorneys to ascertain how a juror thinks and what he will be receptive to hearing.

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[33] Id.

[34] Geoffrey Kramer, Norbert Kerr, and John Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*. 14 LAW & HUM. BEHAV., n. 5. (1990).

[35] Id.

[36] Id.

[37] Deidre Golash J.D., Ph.D., *Race, Fairness, and Jury Selection*, 10 BEHAV. SCI. & L., 155-177 (1992).

[38] Id.

Attorneys can educate jurors on the facts and the law through the voir dire questions. The attorneys should become adept at asking questions in a way that will elicit the desired response. Many attorneys attempt to educate jurors not only to ascertain which ones would be favorable but also to make them more favorable by educating them about the issues in the case. By asking questions of one potential juror, the lawyer can educate and bias the others on the panel. If one juror replies in the sought-after manner in front of the rest of the panel, then the other potential jurors become exposed to that way of thinking. For example, consider the case where the main issue was proper installation of a child seat in a car. There is one mom on the panel, and the rest of the jurors are older men. The attorney can ask her how she installs her car seat to best keep her child safe. If the attorney can get her to say that a particular installation is unsafe, then she becomes an expert witness of sorts. This may plant a lasting impression that the lawyers would want to make in the mind of other jurors who may not have had similar experiences.

Open-ended, non-directive questions that require more than a yes/no answer are best in order to get the desired answer. For example, instead of saying, "Can you abide by the principle of law that a defendant is not deemed guilty if he chooses not to take the stand?", more would be learned about the juror by stating the question in a different way: "Defendant is not required to take the stand and testify, and if he does not, it can not be taken as evidence of guilt. Some jurors have difficulty with this, and that's okay. How would you react if the defendant did not take the stand and testify on his own behalf?"[39] A case study on non-directive voir dire found that the informal style of asking questions created an atmosphere where jurors felt less constrained to give a socially desirable response and freer to express his actual feelings[40]

During voir dire, the attorney must set the stage for the jury so they know what to expect if they are chosen. It is often said that a case is won or lost on voir dire because it is the first time that the attorney has the chance to build a rapport with the prospective jurors. Since it is essential that each juror serving be sympathetic to the case the attorney wishes to present, voir dire must be utilized as a tool to precondition jurors.[41] Preconditioning serves two important functions: it prevents the jury from thinking that the attorneys are trying to hide information because the bad evidence is admitted right away, and it causes the jury to be familiar and sympathetic to the client's case.[42] While preconditioning may not be a "proper" role for voir dire, we do not live in a perfect world and sometimes justice is best served by preparing prospective jurors to be receptive to views they may not have otherwise had coming into court.

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[39] Kathy Middendorf and James Luginbuhl, *Value of a non-directive voir dire style in jury selection*. 22 CRIMINAL JUSTICE & BEHAVIOR, n. 2 American Assoc. for Correctional Psychology (1995).

[40] Id.

[41] Florida Civil Trial Practice. Jury Selection Chapter 3.

[42] Id.

Jurors not only learn about the law and facts of the case by listening to the others on the panel, but they also may learn incorrect information or various strategies to get excused from serving. Jurors can be questioned individually or in front of the rest of the panel. As suggested previously, because individual voir dire is time consuming, most judges prefer group voir dire. For this reason, many jurors may imitate answers they have heard given by their peers. This creates an obstacle for attorneys who are trying to discover backgrounds and attitudes and isolate prejudices. Because attorneys have found that delving into juror proclivities is a psychological task, experts called jury consultants are hired. Consultants practice scientific jury selection which entails linking demographics and personality traits to juror predispositions in order to predict verdicts.[43] There are many different remedies, types of questions, and techniques the attorneys and judge can implement in order to ensure a "fair" trial.

Remedial Measures and Techniques

When a potential panel has been tainted by pretrial publicity, one of the jurors yelling out biased misinformation in front of the others, or the identity of one of the parties/attorneys, the judge has various remedial measures at his disposal to counteract the negative effects. Because of this prior knowledge, potential panels in the community may have preconceived notions about the facts or a dislike/distrust of one of the parties.[44] In this case, a judge may be inclined to grant a motion for change of venue. Trial Consultants conduct change of venue studies to determine the extent of community knowledge, pre-existing community attitudes, and the prospects of a prejudiced jury pool. Two techniques are utilized in order to accomplish the change of venue study: media content analysis (ie: publicity research) and community attitude surveys.

A venue study entails researching the demographics, media coverage, social media, in the nearby counties, and community attitude surveys conducted in those areas. First, contact the chamber of commerce in the county to research the general demographics of the area (i.e. how many women, how many Hispanics, the mean age, etc). In order to measure the extent of knowledge the surrounding counties have of the specific case, Google articles or media coverage dating back to when the-case actually occurred. The community's attitude can be measured by calling people in the area or going to a local mall and asking them questions about a "hypothetical case." Ask people if they knew about the case, how much they remembered, where they learned it from, how much, how they felt about it, and general demographic questions (i.e. age, income, status, occupation, and what social media platforms they frequent). "Even if the court denies a motion for a change of venue, evidence of potential prejudice may persuade the court to expand the questioning of prospective jurors during the voir dire, may convince the court that individual as opposed to group questioning is appropriate, and may increase the willingness

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[43] Gary Moran, Brian Cutler, Anthony De Lisa, *Attitude toward tort reform, scientific jury selection, and juror bias: verdict inclination in criminal and civil trials*. 18 LAW & PSYCH. REV., 309.

[44] Shari Seidman Diamond, *Scientific jury selection: What social scientists know and do not know*. 73 JUDICATURE, n. 4. (1990).

of the court to grant challenges for cause when a juror gives some sign of predisposition in the case."[45]

Since it has already been established that voir dire is crucial to the outcome of a trial, it would behoove the attorneys to find out as much as they can about the jurors who will be deciding their client's fate. Because extended voir dire accounts for more guilty votes and people tend to lie when questioned in public,[46] attorneys should ask a variety of questions covering a wide spectrum of beliefs, attitudes, and backgrounds in order to determine juror bias. Good questions to ask jurors which tend to build a rapport with them and delve into their privacy include: age, number of children, marital status, spouse's occupation, children's occupation, attitudes toward big corporations, stock held in any corporation, political affiliation and views, religion, education, publications read and the frequency with which they are read, views on the death penalty, experiences with the legal system, social organizations, hobbies and interests, etc.

There are many other techniques implemented by trial consultants in order to expose juror proclivities and prejudices and select the jurors most inclined to vote for that side's client. These techniques are used to guide attorneys in analyzing juror attitudes, identifying strengths and weaknesses of the case, and predicting the outcome of the case. Aside from case analysis and stratagem (the psychological effects of the attorney's chosen words on the juror), the trial consultant also conducts witness preparation (how to answer questions, eye contact, body language, etc.), focus groups, mock trials, and voir dire research.

In a focus group, mock jurors hear abbreviated arguments presented by the trial team and are given actual jury instructions. They are carefully observed and evaluated during deliberation to pinpoint problem areas that may require more explanation. The main goal of the focus group is to analyze issues in a case in order to shape or refine the case. A mock trial is a more in depth and extensive focus group which also tests the effect of opening and closing statements on the jury. Jurors fill out questionnaires before, during, and after the evidence is presented. The questionnaires before the trial begins seek background information on the jurors as well as their views on the particular facts and law in the case. The questionnaires during and after the trial enactment ask, among other things, what issues the jury believes to be the most important, why they voted a certain way, and what could have been said that would have changed their minds. After comparing the questionnaires, it becomes possible to determine what type of person would likely be pro-plaintiff (or state) and what type would be pro-defendant. Lawyers are sometimes so involved with the case that they think they are explaining all the pertinent information in an understandable manner. However, "A pretrial test of juror reactions to the facts of the case and arguments that both sides are expected to make can provide a crucial warning that the message is unclear, that the theme initially selected is not plausible, that jurors will be unconvinced by the

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[45] Id.

[46] Gary Moran, Brian Cutler, Elizabeth Loftus, *Jury selection in major controlled substance trials: the need for extended voir dire*. 3 FORENSIC REPORTS 331-348. (1990).

message, that jurors are troubled by missing information,"[47] or that emphasis should be placed on an issue that the attorney deemed minor.

While profiles of favorable juror prospects can be compiled through pre-trial attitudinal questionnaires, a trial consultant implements techniques in the courtroom as well (ie: jury selection, demonstrative evidence, structuring opening statements and closing arguments, and jury instructions). In-Court rating of attitudes and non-verbal communications can be accomplished during voir dire by asking questions and taking notice of body posture, speech disturbances, and tone of voice.[48] In an effort to curb the extensive jury questioning on voir dire, judges have been more willing to allow the use of jury questionnaires. Lawyers can use these questionnaires effectively to screen jurors for more extensive inquiries at voir dire by finding on its face an indication of bias in the jurors answers. This would allow freer and more expansive questioning of the potential jurors; however, it is very unlikely that the jurors would be honest and readily reveal bias on the questionnaires. There are other ways to detect bias and determine which of the jurors would be the most advantageous to select. Attorneys can help with this by asking the right questions in the right way.

Who Do We Want on The Jury?

We want those who will vote for our client. Each case requires certain individual attitudes and beliefs on the part of the jurors in order to accomplish the desired objective. Few cases will ever be the same; however, Ward Wagner, author of *Art of Advocacy--Jury Selection*, discusses some generally accepted theories in the profession.[49] Wagner says that women are good potential jurors if the defendant or his attorney is handsome because women tend to distrust other women. He states that since the desired juror is one whose mind can be molded, those between 28-55 are preferable because they are the most alert and receptive to complex defenses. As far as the ethnicity of the jurors are concerned, Wagner points out that a vigorous cross-examination of a person of certain descent may be resented by jurors of the same background. On the other hand, if the defendant is of a particular persuasion, jurors of that nationality should be placed on the jury. According to Wagner, police officers, military men, and their wives are usually not good selections for a jury because they tend to believe that an arrest is a bona fide indicator of guilt.

Further, if a juror can promise the court that his prejudice against the defense of insanity will not impede his ability to be impartial, then he will not be disqualified. However, if the

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[47] Shari Seidman Diamond, *Scientific jury selection: What social scientists know and do not know*. 73 JUDICATURE n. 4. (1990).

[48] Jeffery Frederick, Ph.D., Social Science Involvement in Voir Dire: Preliminary data on the effectiveness of "scientific jury selection". Vol. 2 n. 4. (1984).

[49] WARD WAGNER, JR., ART OF ADVOCACY--JURY SELECTION. (Matthew Bender ed., Times Mirror Books 1989).

attorney can get the person to admit that he would require overwhelming proof of insanity before acquitting the defendant, then the potential juror will be excused. Wagner assures us that this rule applies similarly to pre-trial publicity. If a juror can satisfy the court that he will be impartial despite his exposure to outside knowledge and preconceptions, then he will not be disqualified. If, however, the juror has already formed a fixed opinion based on prior knowledge or prejudice related to a material issue in the case, then he will be excused from serving on that jury. For example, if the juror has knowledge of prior case procedural history and knows that the defendant has already been convicted by a jury, he may be of the opinion that there is no reason for a second trial occurring just because of some technicality. It is for this reason, Wagner states, that if the attorney can persuade a potential juror to say that they have knowledge of a prior conviction, then the person will be excused because of the potential for bias and the inability to be impartial. But how do the attorneys get the prospective jurors to give the desired answers during voir dire?

Is there a Right Way to Conduct Voir Dire?

The true, yet unstated purpose of voir dire is to attempt to select those jurors who will be receptive to the attorney's view of the facts. This can be accomplished by building a rapport with the juror, preconditioning the juror, and delving into each juror's private thoughts and experiences. The comments of the attorneys explaining who the principals are, what is going to happen, the applicable law, the jury's function to obey the judge's instructions and decide the case impartially, while necessary, elicit no useful information about the jurors.[50] Attorneys should ask the juror to discuss his background, experiences, hobbies, interests, and activities in order to procure information that can "help the lawyer decide what kind of person the venireman is and if he will make a good juror" to his side.[51] Are there certain techniques that should be utilized in pursuing this goal? Of course, as there are in any craft.

Attorneys should begin by introducing themselves and their client and discuss various aspects of the law. For example, the pool of jurors should be informed that the plaintiff has the burden of proving the case, what that standard of proof entails, and a quick sketch of the facts in the case. The Lawyer should ask the jury panel right away whether they can hold the plaintiff to his burden, if they know anything about the accident or crime, if they have any bias against the particular law to be used in the case, and if they know any of the parties or witnesses in the case.[52] Silent responses reveal much about a person, so during the potential juror's response, the attorney must carefully watch his movements, body language, facial expressions, and mannerisms to determine if the juror will be receptive to his later arguments. For example, a juror who can not look his interrogator in the eye or who can not stop playing with his top button may just be nervous, or he may be telling a verbal untruth.

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50 Florida Practice and Procedure. Chapter 23 p376.

51 Id.

52 Id.

It is extremely important to sound sincere and express genuine interest in each juror. One way to do this is to apologize ahead of time for any prying personal questions. Jurors resent having to display their personal life in public, so the attorney should explain the purpose and ask forgiveness of the jury pool as a whole. The jury should be addressed in a friendly, calm, courteous, and respectful manner that allows the juror to feel like an equal to the attorneys. Attorneys can make each juror feel like the most important person in the room by addressing each juror by name, active listening, and some humility. An attorney should never be sarcastic because it may offend jurors, but if the attorney inadvertently embarrasses a juror, he should apologize immediately.

Attorneys should avoid repetition, so that the jurors will not become bored. If routine questions are repeated for each juror, the panel begins to feel as if the attorney does not really care about the responses or about them as human beings. Also, jurors should be prepared for harmful evidence against the lawyer's client. If jurors discover damaging information at a later point in the trial, they will become distrustful of the attorney because of the belief that he was trying to cover up the secret. Similarly, the lawyer should quickly object to misstatements of law made by opposing counsel during voir dire. He should object in a clear, calm, informative manner, using simple language so the potential pool does not think he was trying to block the truth. If a prospective juror should become antagonistic, the attorney should "refrain from exhibiting belligerence at all costs because the venireman may be on a future panel or another venireman selected to hear the case may resent the display of attitude."[53] The best thing to do would be to politely and unobtrusively move on to questioning the next juror.

Friends should not sit on the same jury because they may be more apt to be persuaded by the other. Jurors who are experts on the particular issue in the case should also not be impaneled because of the potential for impressing his outside knowledge upon the rest of his peers. The athletic looking juror is hard to convince, but once convinced he will usually be loyal to the chosen side.[54] When excusing jurors, counsel should be very careful to be extremely polite. This is because that person may have become friendly with a juror who was selected to hear the case, and offending that person could be enormously detrimental to one's case. The smartest attorneys are those that remember the juror's responses concerning issues and beliefs during voir dire and proceeds to use those very words in closing argument.

Counsel should make a concerted effort to display a laid back demeanor. Attorneys may want to consider turning their chairs around to the other side of the desks in order to face the jury pool. Begin by acclimating the jury to the courtroom procedures, facts of the case, and relevant law, and then ask all prospective jurors the same general questions: What do you do for a living, What does your spouse do for a living, What are your feelings on the law, Have you ever been a victim of a crime, Did they catch that person, What do your children do, What do you teach, Is there anyone close to you in law enforcement, What are your hobbies, Have you sat on a jury before, Did you reach a verdict, etc. If the attorney is a local, he/she should make sure that all the

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[53] Id.

[54] WARD WAGNER, JR., ART OF ADVOCACY--JURY SELECTION. (Matthew Bender ed., Times Mirror Books 1989).

veniremen are aware of that fact. One may make comments such as, "Barney is your brother? He can sing so well! .... I heard you give a speech yesterday .... You are a stay at home mother? G-d Bless You." It is also important to ask how much pre-trial publicity or outside knowledge they have of the case.

Attorneys should be sure to introduce themselves, remember everyone by name, and relax people with humor. Before questioning the panel, make a brief `speech' as follows: "Are you nervous? Well, it's okay to be nervous and it's normal. I read a poll a few days ago that said the biggest American fear is public speaking. Number two is death. I am nervous speaking in public too. I am especially nervous because I have to ask you some very personal questions. I am not trying to pry, but this allows us to know more about you. I want to apologize for those questions right now. I promise not to embarrass you, and if I inadvertently make you uncomfortable, just tell me you'd rather answer that question in private. I also want to thank you now for your time and your honesty."

There are ways to make people reply in the desired manner. The best thing to do is slightly change around their words when repeating their answer to get the answer you want. For example, "Would it be fair to say .... If I understand you correctly, you are saying ...." Also, just by asking the same question repeatedly in a different way, the jurors will change their answers. The jurors will begin to open up, tell personal stories (i.e. rapes, murders, accidents, etc.), and share feelings. With active listening and one-on-one friendly conversational style, the attorney will make it easy for those jurors to disclose the most private of information. Above all, respect should be displayed for everyone, no matter the occupation or status because they all have their own stories to tell. By asking case specific yet general questions, the attorney is essentially suggesting what the theories of the case will be and planting the seed as to how the prospective jurors should be thinking.

Conclusion

Cases are won and lost on Voir Dire. While the socially accepted purpose of voir dire is to isolate and excuse potentially biased jurors, the true, yet unstated, purpose of the process is to reject jurors biased against your side. A balance can be properly struck between the justice system's desire to select impartial juries and the lawyer's interest in selecting sympathetic ones by better training and preparing our lawyers or eliminating jury trials and leaving the voir dire to be conducted by the judge. However, this would ignore that judges have bias too, and sometimes their bias is more deeply rooted than that of the community. Attorneys attempt to select jurors who they think will be able to persuade, not jurors who will be "fair and impartial" to both sides. The art of manipulation is used by both sides to precondition the jurors to the attorney's theories of the case. Attorneys strive during Voir Dire to build a rapport with the potential jurors on the panel because studies show that veniremen are more likely to disclose private attitudes, beliefs, and experiences to a friendly, informal person who treats them as equals.

The questions on voir dire enable the attorneys to ascertain how a juror thinks and what he will be receptive to hearing. Effective attorneys have perfected the art of asking questions in a way that will elicit the desired response or disclosure of information. Because human beings are complex and attorneys want those jurors who are predisposed to vote in favor of their client, the

trial team usually hires a consultant to analyze and strategize the case. Techniques such as focus groups, mock trials, community attitude surveys, and pre-trial publicity research help to educate the attorney about the extent of knowledge the prospective jurors will have about the case, their preconceived opinions and views on the case, problem areas that need to be emphasized or refined, and how the wording of their arguments will psychologically effect the jury.

It is extremely important to be or at least sound sincere and express genuine interest in each juror. One way to do this is to apologize ahead of time for any prying personal questions. The jury should be addressed in a friendly, calm, courteous, and respectful manner that allows the juror to feel like an equal to the attorneys.

There is conflict between the inherent purpose of voir dire, which is to find impartial jurors from a pool representative of the community, and the true yet unstated purpose of every attorney, which is to find jurors predisposed to their position. We are not really looking for fair and impartial jurors, but jurors who will be on our side. We attempt to get rid of the worst people and live with the rest .... jury deselection.