

Voir Dire: Something to Savor

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Perhaps 99 percent of you face the prospect of a jury trial in the near future. Perhaps 1 percent of you will actually start that trial and engage in the courtroom version of cocktail party conversation: voir dire.

Lawyers traditionally spend little time preparing for the voir dire stage of a trial, for several reasons: There are plenty of other, seemingly more important things to do; the lawyer may not think the trial is actually going to start; and, precisely because voir dire is seen as a form of schmoozing, attorneys traditionally place great stock in their well-honed powers of observation and in their abilities as judges of human character.

These factors conspire to cause trial lawyers to approach preparation for voir dire as a last-minute affair, and the result is comparable to gulping several shots of bourbon. Instead, voir dire should be approached calmly, with plenty of lead time — more like savoring a fine wine.

The fundamental principle of voir dire, of course, is to select jurors who will be receptive to your case. To do that, you need to first clearly spell out what your ideas are. In other words, what are the themes of your presentation? Does the case boil down to rich vs. poor, honesty vs. deceit, overreaching vs. reasonable expectations? The first, essential step is for you to have clearly in mind the fundamental ideas your case involves.

The next challenge is to decide, well before you ascend the courthouse steps, what juror types you would prefer. Conservative or liberal? Unconventional or old-fashioned? As they say in sociology, "social-emotional" or "task-oriented"?

Then, there is the in-court process of questioning the jury. A few rules are obvious. Never, never embarrass a juror ("You mean you never even attended college? Wow. Did you even finish high school?"). According to legend, a prominent Los Angeles trial attorney who always thought it was clever to plumb the depths of his jurors' psyches by asking them what their bumper stickers said got into trouble with that technique. In spite of an elderly woman's reluctance to describe the bumper sticker (as it turned out, the car belonged to her grandson), the lawyer insisted, forcing the poor thing to blurt out in open court the obscenity that emblazoned her bumper.

The challenge of indoctrinating the jury to your themes by means of your questions, without having your wrists slapped by the judge, is a substantial one. Judges are extremely sensitive to the fact that lawyers like to get a jump on the competition through questions that are really thinly veiled mini-arguments. Accordingly, it's wise to draft hypothetical questions, and revise them before you get to trial, in an effort to make them objection-proof.

You should display sensitivity to the patience level of the jurors. A common complaint heard from panel members after a trial is that one or more of the attorneys asked the same questions, over and over, with no apparent purpose for the annoying repetition. They see no point to the lawyer

asking every single candidate, "Now, do you promise to put aside any feeling of sympathy for the plaintiff when it comes time to reach your verdict?" Although it may be important for you to repeat questions, it's also important to avoid raising the hackles of the jury. They've probably been sitting around the jury room for hours or even days, their paperback books have been read, and they want to get on with it. If the jury comes to regard you as a jerk even before the first syllable of your opening statement, you are, presidentially speaking, in deep doo-doo.

Keep careful track of jurors' names, and the comments they make during voir dire. Unless you have a photographic memory, this can be extremely difficult. If you are not trying the case alone, make sure the attorney assisting you takes copious notes on the exchanges with the jurors. Long after a panel member has forgotten everything about the trial, he will remember that you forgot his name entirely, you got his name wrong, and you mixed up the fact that he was the pearl diver, and the fellow sitting next to him was the accountant.

Challenges for cause must, of course, be approached gingerly. True, after the judge rejects your argument that a juror is biased, you may exercise a peremptory challenge, but you have only so many silver bullets, and it's better not to be forced to use one. In addition, jurors tend to be protective of one another and may feel an attack on one is an attack on all of them.

During the pretrial conference with the judge, you should determine the manner in which the court handles voir dire. Initially, the judge will probably invite you to submit written questions and areas of inquiry you would like the judge to add to the questions set forth in the Standards of Judicial Administration.

The court will then call for a panel of prospective jurors, excuse those who should not hear the case, summon 12 jurors to sit in the jury box, and read the voir dire script (which includes an explanation of the nature of the case; introduction of the parties, attorneys and names of witnesses; and questions of whether any juror has special training in fields relevant to the case).

The judge then invites the attorneys to question jurors "for cause," either by permitting each attorney to alternately question each juror in order, or by permitting each lawyer to question the entire panel for cause. After all attorneys have passed for cause, the judge offers the lawyers a right to exercise peremptory challenges. If the plaintiff accepts the jury as constituted, the defense has an opportunity to exercise a peremptory challenge. Only after both sides have accepted the jury, or all challenges have been exhausted, is the jury seated.

Usually, the judge will designate two jurors as alternates. Occasionally, however, to keep the entire jury panel on its toes, the court will seat 14 jurors, and announce that two of their names will be drawn by lot at the conclusion of the trial, and those two jurors will act as alternates. This hopefully avoids the dozing alternate syndrome.

Discovery Act Correction

Last month's discussion of the "discovery priority" rules mistakenly referred to the Los Angeles Superior Court's "Law Departments Policy Manual" as preserving priority based on the order in which notices of deposition are served. In fact, the manual does not apply to discovery governed by the Discovery Act.

Business Litigation

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