

## VOIR DIRE AND JURY SELECTION: ETHICAL AND TACTICAL CONSIDERATIONS FOR A SUCCESSFUL VOIR DIRE.

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Many trial lawyers consider *voir dire* to be the most important part of the trial. They have good reason to feel this way. *Voir dire* is your first opportunity to make an impression on the jury. Moreover, it is your first chance to make your case to the jury. Granted, the basic case law governing the *voir dire* process suggest that the only purpose of *voir dire* is to help the court and the lawyers determine which potential jurors harbor any biases or present any conflicts that make them inappropriate jurors to serve in the case at bar. For judges, "inappropriate" means the juror has a bias or conflict so severe that the juror must be struck for cause. For trial lawyers, "inappropriate" also includes those less severe biases and conflicts that are not strong enough to strike the juror for cause, but raise sufficient strategic concerns that a preemptive strike should be used against the juror for strategic reasons. *Voir dire* presents a number of strategic decisions for a trial lawyer and your questions are likely to have a variety of strategic purposes.

For an effective trial lawyer, *voir dire* is about more than just the selection of a jury. *Voir dire* is when you make your first impression, develop your relationship with the jury, raise your theory of the case and explain the relevant legal concepts. Of equal importance is that *voir dire* is your opportunity to begin persuading the jury, albeit indirectly. However, the trial judge has so much discretion over what you do and how you do it that your *voir dire* can be a disaster if you are in conflict with the expectations of the judge. This presentation will focus on the issues that most concern a trial judge regarding the manner of questioning by trial lawyers when the judge allows questioning by the lawyers.

### 1. Developing A Strike For Cause.

The purpose of jury selection is essentially the same in all fifty states: A process to select jurors who will listen to the evidence before making a decision and base their decision only on the evidence adduced at trial and the Court's instructions. *MuMin v. Virginia* 500 U.S. 415 (1991). This is referred to as juror competence. A juror who does not meet this standard is not qualified to serve. *United States v. Cunningham*, 523 F.2d 218 (8th Cir. 1975). Therefore any motion to strike for cause must be based on a record that demonstrates a prospective juror's inability or unwillingness to meet this standard. *Butler v. United States*, 351 F.2d 14 (8th Cir. 1965)

The basic standard for striking for cause is pretty much the same in every federal jurisdiction and all fifty states. A lawyer seeking to strike a juror for cause must first show a foundation for the strike, that is, a statement or answer by the juror or some fact concerning the jurors background that suggest, prima facie, that the prospective juror has an improper bias, has reached a conclusion or opinion that is based on facts or experiences outside the evidence, made a decision that should not be reached until deliberations have begun, or has a conflict of interest. Once this foundation is met, the lawyer seeking to strike for cause must show that the prospective juror is **unable** to set aside any bias, pre-mature conclusion, outside information or conflict and render a verdict based only on the evidence during the trial and the instructions of the court. See, *Wainwright v. Witt* 469 U.S. 412,423 (1985)

Trial judges, even in jurisdictions where the judge does most of the questioning, expect lawyers to give clear reasons to strike for cause. Judges, knowing that the option of a peremptory strike is there for the close cases, prefer to avoid the risk of a case being reversed due to a close decision to strike a juror for cause. It is always better to pin down a juror that you wish to strike if they have given a disqualifying answer but was equivocal about it. For example, the classic "I think I can set it aside" or "I will try to be fair" needs to be clarified. One approach is to ask the venire member "If you were boarding an airplane and asked the pilot 'Can you fly this airplane' would you accept 'I'll try' or 'I think I can' as an acceptable answer?" This will usually cause the prospective juror to re-word their answer. If the venire person insists on equivocating, then the foundation for striking for cause is stronger. It is obviously more difficult for trial lawyers to get clarity from an equivocating juror if the trial judge is doing the *voir dire*. This is a controversial subject that would require a CLE on the subject alone. The case of *Harold v. Corwin* 846 F2d 1148 (8th Cir. 1988) provides an excellent discussion of the issues and will give you great arguments in favor of allowing significant *voir dire* by the lawyers.

Just keep in mind that the decision to strike for cause is within the sound discretion of the court and is reviewable only for an abuse of discretion. *Vanskike v. ACF Industries, Inc.*, 665 F2d 188 (8th Cir. 1981). This is true in all states and federal jurisdictions. Therefore, make sure that your questions are not argumentative or tangential and clearly establish the "incompetence" of a juror you wish to

Obviously, the general rule is that you cannot engage in commentary or argument about the case during jury selection. The reason for this rule is obvious: argument at this stage could bias the jury before admissible evidence is heard. Of equal importance is the effect such arguments have on the trial judge. The truth of the matter is that trial judges hate the *voir dire* process. Argumentative comments or questions could cause the judge to vent a little frustration at your expense in front of the jury. However, there are some techniques that can help you make a few argumentative points without running afoul of the law. I call it "positioning" the jury or getting them to see the case from your point of view.

Set the stage for your questions by discussing the Burden of Proof. You are entitled to jurors who are willing to accept standard for proving the element as will be set forth in the jury instructions. A plaintiff will want to minimize the venire person's perception of just how high that burden is. You can spin the basic law in a question that positions the jury your way. For example, a prosecutor might ask: "Is there anyone here who believes that the state must have a perfect case and cannot accept convict on evidence that only proves the charges beyond a reasonable doubt?" A defense counsel might say "Is

there anyone here who thinks it is unfair that the state has to do more than put on a good case but must prove all allegations of crime beyond any reasonable doubts that arise?"

On the civil side, a plaintiff might say: "Justice requires that you follow all instructions that the court will give you. We are only required to give you enough evidence for you lean for the plaintiff at the end of the case. Is there anyone here who will require us to give you more than a preponderance of the evidence?" The defense attorney could say: "The law requires the plaintiff to *PROVE* the ALLEGATIONS the plaintiff has made against the defendant. Is there anyone here who will not follow the court's instruction that the plaintiff has the burden of proof?" You can see the subtle arguments in these questions. Note especially how emphasizing the words "prove" and "allegations" suggest a burden similar to the criminal standard. Look for the words that will be in the instructions that you can say in an argumentative tone while asking a impermissible *voir dire* question.

Don't argue with a juror, let another juror do it for you. This technique is fairly simple. One juror expresses a view that is damaging to your case. You simply turn to the entire panel and ask "Is there anyone here who disagrees with Ms. Jones? "Why is that sir"? Listen carefully as you don't want the venire person to say something that could poison the panel. Your opponent will be just as interested in the answer as you are. Even though this person might be struck for cause or as a peremptory by your opponent, the rest of the panel will have heard an argument that you cannot make.

Use the power of the judge. By this I mean the instructions. For example, if you know that you will be cross-examining an expert who is evasive. You can say, "The judge will be instructing you that you must decide whom you choose to believe. He/she will give you some things to go by. Is there anyone here who feels they cannot pay attention to what a witness says and HOW they say it before they decide if they can believe a witness?" When the judge reads the witness credibility instruction, it will appear the judge is backing up your claim. This can be done with a number of points raised in the preliminary instruction. However, it is very important that you tie it to the juror's duty to follow the court's instructions. You have a right to strike for cause a juror who will not follow an instruction of the court

Ask a question that makes your point but raises an issue that your opponent will raise. By this I mean a sort of double reverse type of question such as "We have the burden of proving that the defendant was negligent when he collided with the rear of Ms. Jones car. The defendant does not have to give an excuse or any evidence, but if he does can you wait until the end of the case before you decide your verdict?" This sounds like something the defendant would want said but it is also a subtle attack on the defense with the word "excuse". You can restate the word in closing more forcefully.

If you are on defense, take advantage of any topic the plaintiff did not cover. For example, "Mr. Jones just asked you about his burden of proof, but he did not ask you if you can hold him to his burden as to EACH element of his claim. Can you hold the plaintiff to his burden of proof on each part of his claim?" Or "Mr. Jones mentioned that that this case involves a rear end collision. Is there any one here who will not consider road conditions before arriving at a verdict?" You can see the subtle arguments here yet both lawyers are exposing areas that go to juror competence.

Always keep in mind that trial judges and prospective jurors can be affected and irritated by the tedium of *voir dire*. Keep your questions relevant to the task and be very succinct. Avoid irrelevant commentary or long explanations about the responsibilities of jury service. Unfortunately, everyone listening to you, including the judge, wants you to get to the point and move on. Just as you are selecting a jury, the jurors are selecting a lawyer. The lawyer they believe is most respectful of their time.

## 2. Your Duty Of Candor Towards The Court

There can be no greater source of friction between a lawyer and a judge than the lack of candor by the lawyer. The duty of candor to the court is simply a requirement that lawyers be honest with the court when making assertions about the law or referencing facts during discussions with the court. This degree of honesty can be difficult at times because circumstances may require you to admit something to the judge that will undermine your client's interest.

With regard to *voir dire*, an area that can lead to problems with the court is when a lawyer clearly violates a court order restricting certain questions or answers. This can come up in situations where you feel the door has been opened by an answer given by a prospective juror or a question asked by your opponent. While you may be correct that the door has been opened to a certain question, the judge is less likely to be convinced by your argument if you simply march through a door the judge closed. It is far better to approach the bench at the moment you decide a door has been opened and advise the court. The judge can then decide the propriety of your question before the jury hears it. This simple act of deference and candor can actually get you the ruling you want. There is any number of circumstances calling for candor with the court. Just remember, if it feels sneaky, it probably is.

The failure to disclose a relationship with a prospective juror can also really get you in trouble. It is best to ask to approach the bench as soon as you recognize someone. If you see someone you know while you are questioning the panel, you can also simply ask the person a question like, "Mr. Jones, I recognize you as my son's math teacher. Can you tell me if that relationship will affect your judgment in this case?" You should not object to your opposing counsel seeking to ask further questions of the juror as the judge will doubt the credibility of any reason you would have for such an objection.

## 3. The Duty of Zealous Representation During *Voir Dire*.

As with all other aspects of advocacy, you have a duty to "zealously" represent your client during *voir dire*. However, it is important to note that "zealous" representation does not mean zealotry. You certainly are obligated to give your client your very best effort, but your zeal must be constrained by the other professional obligations you have. That is why the Model Rules of Professional Conduct were amended to remove the word zealous and replace it with diligence. Hence Rule 1.3 now reads "A lawyer shall act with reasonable diligence and promptness in representing a client. However the first comment to the rule states "A lawyer must also act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf."

Regardless of whether your state has adopted the more recent Rule 1.3, you have a duty to advance every reasonable effort on behalf of your client, especially in the courtroom. However, it is the desire to adhere to that duty that brings lawyers into conflict with judges more often than other. What is often excused by lawyers as appropriate zeal can often be seen by judges and jurors alike as unnecessary “Rambo” lawyering or even just plain offensive and disrespectful. This then leads to the judge taking action to contain the apparently overzealous lawyer and at the same time undermining the lawyer’s credibility with the jury.

To confuse you even further, judges and jurors expect a lawyer to “fight” for her client, especially criminal defense attorneys, as this provides assurance that the trial is a fair fight. At the same time, judges especially expect lawyers to abide by the expectations of Rules 3.1 to 3.9, which require such things as appropriate decorum in the courtroom, candor to the court, fairness to the opposing and so on. How then, does a trial lawyer meant the duty of zeal and diligence under Rule 1.3 without crossing the line into unethical conduct under 3.1-9? Consider the following Do’s and Don’ts:

***Do Make Your Duty of Candor To The Court A Personal Priority.***

When lawyers mislead the court, the judge can easily make a reversible error. Therefore nothing is more important to a trial judge than the duty of candor. It should likewise be important to you. If your trial judge begins to question your honesty, your effectiveness overall will suffer. For example, when there are battles over the use of a specific question, the trial judge will be influenced by the credibility of the lawyers regarding what the prevailing law says or how the question should be weighed. You do not want to be at a disadvantage here, because rulings on *voir dire* questions are very rarely a basis for a successful appeal. In every state and federal jurisdiction you can find any number of appellate opinions upholding a judge’s ruling because there was no abuse of discretion. Simply put, if the body of applicable evidence law allows for any basis for the trial judge’s decision, your court of appeals will likely affirm. This means that your brilliant evidentiary argument at trial could be the better argument, but your opponent’s lesser position will prevail simply because the judge does not trust what you say.

***Don’t Be An Ace: Avoid Anger, Cockiness Or Extreme Behavior Before The Jury Or Judge.***

This may seem obvious, but many a lawyer in the heat of the moment has simply gone a bridge too far in open court. A judge reacts to anger as an affront to judicial authority and often leads to a judicial response before the jury that undermines your effectiveness for the rest of the trial. Likewise when confidence turns in cockiness, you will lose the jury. Extreme behavior such as shouting, crying or fist pounding may seem like a persuasive tactic but carries such extreme risk of backfiring that such conduct is best avoided. Moreover, such conduct can violate your duty of decorum under Rule 3.5 and make you the butt of several jokes during jury deliberations or the subject of “guess what happened today” courthouse gossip.

***Do Watch Your Language.***

This sounds like something your mother said, but far too many lawyers have lost credibility with the judge and jury by using locker room language unnecessarily. Don't assume that language you hear on TV, even broadcast channels, is acceptable in the courtroom. While some salty language may be acceptable in the greater community, there is an expectation that lawyers and judges will be more reserved. Even the town drunk will expect the lawyers to be sober during trial. Foul language distracts the jury and causes them to dwell on the appropriateness of what you said and what it tells them about your character.

***Do Listen Carefully To The Judge's Instructions Regarding How The Judge Expects Voir Dire To Be Conducted.***

Even in jurisdictions that allow the lawyers to handle the entire voir dire, individual judges may have specific methods that they apply to voir dire. Some judges may prefer general questions before specific questions are asked of individual veniremen. Others may have certain subjects that they want handled a certain way. There may even be time constraints that the judge expects to be followed. If you are not aware of these particular requirements of the judge you are before, you may suffer some embarrassment when the judge cuts you off and corrects you before the jury. Moreover, you certainly don't want to appear uninformed in front of your client. The best way to prepare for this is to raise these issues during a pretrial conference.

***Do Speak Up.***

This may seem obvious but any judge can tell you about the times either the judge or court reporter had to interrupt a trial lawyer and instruct them to speak up. In many courtrooms you will have to turn your back to the judge and court reporter in order to question some jurors. It is easy to forget that you need to raise your voice. Otherwise you run the risk of an incorrect record or the judge ruling against you on an objection because the judge misheard your question.

***Don't Argue With A Venireman.***

Prospective jurors come to court with whatever biases or concerns they carry every day. They are not "pc" and may have no concerns about what they say or who might be offended. You look terrible arguing with them, even if you are trying to make a necessary point. It is better to ask "Is there any one here who disagrees with Mr. So-is-so?" When you get a hand call on that person and let them argue for you. More often than not, such a venireman will be able to respond with arguments the court would never let you make. Some lawyers think they can get rid of a prospective juror they don't like by drawing the juror into a fight. This is legally erroneous. If you create the prejudice by your comments to the venireman the judge does not have to give you a strike for cause.

***Don't Use Legal Jargon Or Complicated Words In Your Questions.***

Prospective jurors are not impressed by your broad vocabulary or knowledge of the law. They are far more likely to relate to a lawyer who speaks to them as if they were friends at the dinner table. When you are preparing your voir dire take the time to think through your questions to police verbose and arrogant language, even if you question only from an outline. If you must use a legal term of art, explain the terms meaning during your questioning.

***Don't Make Speeches Or Arguments.***

Lawyers who try to take advantage of voir dire by making speeches or arguments to the panel are among the few universal pet peeves of trial judges. Judges tend to view these lawyers as arrogant with little respect for the court. They are treated accordingly. Such conduct will justify the judge putting restrictions on your questioning or time that your opponent does not have. Moreover, you will likely have to deal with the court admonishing you before the panel. This gets you off to a very bad start with both judge and jury.

***Do Avoid Unnecessary Objections.***

Jurors see *voir dire* as a conversation between themselves and the questioning lawyer. They are trying to listen carefully to both questions and answers. Your objections are an interruption that is not appreciated unless your opponent does or says something so clearly wrong that the jurors would also object to it if they could. Certainly, some objections must be made to preserve your record on appeal, but those are few and far between. If you must object make it good. The jury's irritation will be compounded by the judge overruling you.

***Don't Ask The Court To Strike A Juror In Open Court.***

Judges view it as blatant grandstanding for a lawyer to move to strike a juror for cause in open court. The judge does not want to broadcast to the panel what to say in order to get out of jury duty. Making such a motion in open court could easily lead to a denial of your motion if the call is at all close, foreclosing you from elaborating on your concerns. The appellate courts are unlikely to save you as they too are unimpressed by such open court motions. If you think a juror needs to go right away, simply ask to approach the bench.

***Do Limit Your Questions To Relevant Issues.***

Too often lawyers ignore the fact that jurors hate having their time wasted. Judges are usually very focused on this and can themselves become impatient with a rambling set of questions. It is true that you will have some questions that are not facially relevant but serve a useful strategic purpose. However, keep these to a minimum. The judge will be much more inclined to stop you or sustain an objection against you if you have strayed too far from the question of a juror's competence to serve. You will also lose credibility with the jurors who will view you as unprepared or unconcerned about the negative impact of jury duty on their lives.

***Do Remember That Time Is Of The Essence.***

*Voir dire* is boring, period. No one has ever designed an exciting *voir dire*. Both jurors and judges want you to quickly sit down and shut up. Limiting your speechmaking and keeping your questions relevant will go a long way towards gaining credibility with the jury and the judge's confidence in your ability.

***Do Develop Your Challenges For Cause.***

Too many lawyers assume that a judge hears an answer the same way they do. When a venireman says something that appears to you to disqualify the venireman do not assume that the judge agrees. Spend some time locking down the juror with follow-up questions. "Are you saying that you distrust any person who sues a doctor or only in certain cases?" is an example of locking in your reason to strike for cause. Jurors are reluctant to admit a bias and may initially give a vague or general comment that, on its face, does not require that the juror be struck for cause. Careful and specific follow-up questions can be the key to winning your motion to strike.

***Do Not Suggest Your Dissatisfaction With Any Possible Instruction Or Rule Of Law.***

One sure fire way to draw an admonishment from the judge in open court is to make a comment or ask a question that directly or indirectly makes a negative criticism of the applicable law or a likely instruction. Comments like "At the end of the case his honor will give you what we call jury instructions which are just a lot of legal gobbledygook" (Actual lawyer comment). This may seem like a good way to relate to the jury but puts you at risk for a judicial response like: "Counselor, I don't know where you went to law school, but my instructions are not mere gobbledygook but the binding law" (Actual judge's response invoking the laughter of several jurors).

***Do Discuss Pretrial With The Judge And Opposing Counsel Any Questions You Intend To Ask About Sensitive Matters.***

If you really want to get on a judge's bad side, just launch into questions about sensitive matters such as pre-trial publicity, punitive damages, insurance coverage, or a witnesses criminal history without having raised the issue with the judge before trial. These and many others are matters that can lead to a mistrial and you just might get one, including cost and sanctions, if you have not reached an understanding before trial about how, and if, such issues are to be handled. Make sure you have taken the time to think through the issues you wish to raise to make sure you aren't treading into potential troubled waters. Often judges can approve an approach to a sensitive topic that does not go too far but allows you to ask an important question.

***Don't Strictly Follow A Prewritten Script.***

This is a common mistake of young lawyers. They get a set of questions from an experienced superior or they prepare a script of questions. The problem is that effective *voir dire* is about listening as much as questioning. Judges will often step in to speed you up if you are asking questions that were answered when a venire person previously gave a narrative answer that went beyond your last

question. Moreover, you can easily miss important follow-up questions if you are tied to a script. A script can easily cause you to violate several of the Don'ts mentioned above. You are better off with an outline of the subjects you wish to cover and then proceeding with open ended general questions followed by more closed specific questions that relate to the answers given.

This list is not meant to cover all the tactics of a winning *voir dire* However, carefully following these Do's and Don'ts can help you accomplish a *voir dire* that gives you a desirable jury that has a positive attitude towards your case, you and your client.