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VOIR DIRE AND JURY SELECTION

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LOOKING FOR A DIFFERENT, MORE EFFECTIVE WAY OF CHOOSING A JURY

For more than twenty years, I have been privileged to teach public defenders all over the country. And it pains me to conclude that when it comes to jury selection, almost all of us are doing a lousy job.

What passes for good voir dire is often glibness and a personal style that is comfortable with talking to strangers. The lawyer looks good and feels good, but ends up knowing very little that is useful about the jurors.

More typically, voir dire is awkward, and consists of bland questions that tell us virtually nothing about how receptive a juror will be to our theory of defense, or whether the juror harbors some prejudice or belief that will make him deadly to our client.

We ask lots of leading questions about reasonable doubt, or presumption of innocence, or juror unanimity, or self defense, or witness truth-telling. Then when a juror responds positively to one of these questions, we convince ourselves that we have successfully “educated” the juror about our defense or about a principle of law. In reality, the juror is just giving us what she knows we want to hear, and we don’t know anything about her.

Because the questions we are comfortable with asking elicit responses that don’t help us evaluate the juror, we fall back on stereotypes (race, gender, age, ethnicity, class, employment, hobbies, reading material) to decide which jurors to keep and which to challenge. Or even worse, we go with our “gut feeling” about whether we like the juror or the juror likes us.

And then we are surprised when what seemed like a good jury convicts our client.

This short treatise, and the seminar it is meant to supplement, are a first effort at finding a more effective way of selecting jurors. It draws on:

- § Scientific research done over the last decade or two about juror behavior and attitudes.
- § Excellent work done by defenders in Colorado in devising a new and very effective method for voir dire in both capital and non-capital cases.
- § Some very creative work done by defense lawyers all over the country.
- § My own observations of too many trial transcripts from too many jurisdictions, in

which good lawyers delude themselves into thinking that a comfortable voir dire has been an effective voir dire.

**I. SOME BASIC THINGS ABOUT VOIR DIRE –
WHY JURY SELECTION IS HARD. WHY WE FAIL.**

A. It is suicidal to just “take the first twelve.” It is arrogant and stupid to choose jurors based on stereotypes of race, gender, age, ethnicity or class.

Every study ever done of jurors and their behavior tells us several things:

- ! People who come to jury duty bring with them many strong prejudices, biases, and preconceived notions about crime, trials, and criminal justice.
- ! Jurors are individuals. There is very little correlation between the stereotypical aspects of a juror’s makeup (race, gender, age, ethnicity, education, class, hobbies, reading material) and whether a particular juror may have one of those strong biases or preconceived notions in any individual case.
- ! The prejudices and ideas jurors bring to court affect the way they decide cases – even if they honestly believe they will be fair, and even if they honestly believe they can set their preconceived notions aside.
- ! Jurors will decide cases based on their prejudices and preconceived notions regardless of what the judge may instruct them. Rehabilitation and curative instructions are completely meaningless.
- ! Many jurors don’t realize it, but have made up their minds about the defendant’s guilt before they hear any evidence. In other words . . .
- ! Many trials are over the minute the jury is seated.

For this reason it is absolutely essential that we do a thorough and meaningful voir dire – not to convince jurors to abandon their biases, but to find out what those biases are, and get rid of the jurors who hold them.

The lawyer who waives voir dire, or just asks some perfunctory, meaningless questions, or relies on stereotypes or “gut feelings” to choose jurors is not doing his or her job.

B. Traditional voir dire is structured in a way that makes it very hard to disclose a juror's preconceived notions

The very nature of jury selection forces potential jurors into an artificial setting that is itself an impediment to obtaining honest and meaningful answers to typical voir dire questions. Here is how the voir dire process usually looks from the jurors' perspective:

1. When asked questions about the criminal justice system, prospective jurors know what the "right," or expected answer is. Sometimes they know this from watching television. Sometimes the trial judge has given them preliminary instructions which contain the "right" answers to voir dire questions. Sometimes the questions are couched in terms of "can you follow the judge's instructions," which tells the jurors that answering "no" means that they are defying the judge. Jurors will almost always give the "right" answer to avoid getting in trouble with the court, to avoid seeming to be a troublemaker, and to avoid looking stupid in front of their peers.

EX: Q: The judge has told you that my client has a right to testify if he wishes, and a right not to testify if he so wishes. Can you follow those instructions and not hold it against my client if he chooses not to testify?

A: Yes.

While it would be nice to believe that the juror's answer is true, there is just no way of knowing. The judge has already told the juror what the "correct" answer is, and the way we phrased our question has reinforced that knowledge. All the juror's answer tells us is that he or she knows what we want to hear.

2. Jurors view the judge as a very powerful authority figure. If the judge suggests the answer she would like to hear, most jurors will give that answer.

EX: Q: Despite your belief that anyone who doesn't testify must be hiding something, can you follow the judge's instructions and not take any negative inferences if the defendant does not take the stand?

A: Yes.

The juror may be trying his best to be honest, but does anyone really believe this answer?

3. When asked questions about opinions they might be embarrassed to reveal in public (such as questions about racial bias or sex), jurors will usually avoid the possibility of public humiliation by giving the socially acceptable answer – even if that answer is false.

4. When asked about how they would behave in future situations, jurors will usually give an aspirational answer. This means they will give the answer they hope will be true, or the answer that best comports with their self-image. These jurors are not lying. Their answers

simply reflect what they hope (or want to believe, or want others to believe) is the truth, even if they may be wrong.

EX: Q: If you are chosen for this jury, and after taking a first vote you find that the vote is 11-1 and you are the lone holdout, would you change your vote simply because the others all agree that you are wrong?

A: No.

We all know that this juror's response is not a lie – the juror may actually believe that he or she would be able to hold out (or at least would like to believe it). On the other hand, we also know there is nothing in the juror's response that should make us believe he or she actually has the courage to hold out as a minority of one.

C. The judge usually doesn't make it any easier

1. Judges frequently restrict the time for voir dire. Often this is a result of cynicism – their experience tells them that most voir dire is meaningless, so why not cut it short and get on with the trial?

2. Judges almost always want to prevent defense counsel from using voir dire as a means of indoctrinating jurors about the facts of the case or about their theory of defense. And the law says they are allowed to limit us this way.

D. And we often engage in self-defeating behavior by choosing comfort and safety over effectiveness

1. Voir dire is the only place in the trial where we have virtually no control over what happens. Jurors can say anything in response to our questions. We are afraid of “bad” answers to voir dire questions that might taint the rest of the pool or expose weaknesses in our case. We are afraid of the judge cutting us off and making us look bad in front of the jury. We are afraid of saying something that might alienate a juror, or even the entire pool of jurors.

2. If a juror gives a “bad” answer we rush to correct or rehabilitate him, to make sure the rest of the panel is not infected by the bias.

3. As a result of these fears, we often ask bland meaningless questions that we know the judge will allow and that we know the jurors will give bland, non-threatening answers to.

4. We then fall back on stereotypes of race, age, gender, ethnicity, employment, education and class to decide who to challenge. Or worse, we persuade ourselves that our “gut

feelings” about whether we like a juror or whether the juror likes us are an intelligent basis for exercising our challenges.

Given all these obstacles to effective jury selection, how can we start figuring out how to do it better? My suggestion is to start with some of the things social scientists and students of human behavior have taught us about jurors.

II. VOIR DIRE'S MOST IMPORTANT BEHAVIORAL PRINCIPLE

It is impossible to “educate” or talk a complete stranger out of a strongly held belief in the time available for voir dire.

Think about this for a moment. Everyone in the courtroom tells the juror what the “right” answers are to voir dire questions. Everyone tries hard to lead the juror into giving the “right” answer. And if the juror is honest enough to admit to a bias or preconceived notion about the case, everyone tries to rehabilitate him until he says he can follow the correct path (the judge’s instructions, the Constitution, the law). And if we are honest with ourselves, everyone knows this is pure garbage.

Assume a juror says that she would give police testimony more weight than civilian testimony. The judge or a lawyer then “rehabilitates” her, by getting her to say she can follow instructions and give testimony equal weight. When this happens, even an honest juror will deliberate, convince herself that she is truly weighing all testimony, and then reach the conclusion that the police were telling the truth. The initial bias, which the juror acknowledged and tried hard to tell us about, determines the outcome every time. It is part of the juror’s personality, a product of her upbringing, education, and daily life. And no matter how good a lawyer you are, you can’t talk her out of it.

Imagine, though, what would happen if we gave up on the idea of “educating” the juror, or “rehabilitating” her. If we admitted to ourselves that it is impossible to get that juror beyond her bias. We would then be able to completely refocus the goal of our voir dire:

III. THE ONLY PURPOSE OF VOIR DIRE

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

When a juror tells us something bad, there are only two things we should do:

- Believe them
- Get rid of them

This leads us to the most important revision we must make in our approach to voir dire:

We Are Not Selecting Jurors – We Are De-Selecting Jurors

The purpose of voir dire is not to “establish a rapport,” or “educate them about our defense,” or “enlighten them about the presumption of innocence or reasonable doubt.” It is not to figure out whether we like them, or they like us. To repeat:

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

IV. HOW TO ASK QUESTIONS IN VOIR DIRE

Once we accept that the only purpose of voir dire is to get rid of impaired jurors, we have a clear path to figuring out what questions to ask and how to ask them. The only reason to ask a question on voir dire is to give the juror a chance to reveal a reason for us to challenge him. These reasons fall into two categories:

- ! The juror is unable or unwilling to accept our theory of defense in this case.

- ! The juror has some bias that impairs his or her ability to sit on any criminal case.

This leads us to two more principles of human behavior that will guide us in asking the right questions on voir dire:

The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.

The more removed a question is from a person’s normal, everyday experience, the more likely the person is to give an aspirational answer rather than an honest one. Factual questions about personal experiences get factual answers. Theoretical questions about how they will behave in hypothetical courtroom situations get aspirational answers.

A. ***Stop talking and listen*** – the goal of voir dire is to get the juror talking and to listen to his or her answers. You should not be doing most of the talking. You should start by asking open-ended, non-leading questions. Leading questions will get the juror to verbally agree with you, but won't let you learn anything about the juror. Voir dire is not cross-examination.

B. Let the jurors do most of the talking. Your job is to listen to them.

C. ***You can't do the same voir dire in every case***

1. Your voir dire must be tailored to your factual theory of defense in each individual case.

2. You must devise questions that will help you understand how each juror will respond to your theory of defense. This means asking questions about how the juror has responded in the past when faced with an analogous situation.

D. Our tactics should not be aimed at asking the jurors how they would behave if certain situations come up during the trial or during deliberations. That kind of question only gets aspirational answers (how the juror hopes he would behave) or false answers (how the juror would like us to think he would behave) They tell us nothing about how the juror will actually behave. They also invite the judge to shut us down.

E. Our tactics should be aimed at asking jurors about how they behaved in the past when faced with situations analogous to the situation we are dealing with at trial.

1. It is essential that our questions not be about the same situation the juror is going to be considering at trial, or about a crime or criminal justice situation – such questions only get aspirational answers.

2. Instead the question should be about an analogous, non-law related situation the juror was actually in. And we must be careful to ask about events that are really analogous to the issues we are interested in learning about.

EX: Your theory of defense is that the police planted evidence to frame your client because the investigating officer is a racist and your client is black. (Remember OJ?)

a. Asking jurors, “are you a racist?” or “do you think it is possible that the police would frame someone because of his race?” Will get you nowhere. Most jurors will say “I am not a racist,” and “Of course it's possible the police are lying. Anything is possible. I will keep an open mind.” And you will have no way of knowing what they are actually thinking.

b. You have a much better chance of learning something useful about the juror by asking an analogous question about the juror's experience with racial bias.

EX: Asking the juror to, “tell us about the most serious incident you ever saw where someone was treated badly because of their race” will help you learn a lot about whether that juror is willing to believe your theory of defense. If the juror tells you about an incident, you will be able to gauge her response, and decide how a similar response would affect her view of your case. If the juror says she has never seen such an incident, you have also learned a lot about her view of race.

F. You must consider and treat every prospective juror as a unique individual. It is your job on voir dire to find out about that unique person.

IV. WHAT SUBJECTS SHOULD YOU ASK ABOUT?

A. Look to Your Theory of Defense --

1. What do you really need to juror to believe or understand in order to win the case?
2. What do you really need to know about the juror to decide whether he or she is a person you want on the jury for this particular case?

B. What kind of life experiences might a juror have that are analogous to the thing you need to juror to understand about your case, or to the things you really need to know about the jurors?

EX: Assume that your client is accused of sexually molesting his 9 year old daughter. Your theory of defense is that your client and his wife were in an ugly divorce proceeding, and the wife got the kid to lie about being abused.

The things you really need to get jurors to believe are:

1. A kid can be manipulated into lying about something this serious.
2. The wife would do something this evil to get what she wanted in the divorce.

The kind of questions you might ask the jurors should focus on analogous situations they may have experienced or seen. Such as:

1. Situations they know of where someone in a divorce did something unethical to get at their ex-spouse.
2. Situations they know of where someone got really carried away because they became obsessed with holding a grudge.
3. Situations they know of where an adult convinced a kid to do something she probably

knew was wrong.

4. Situations they know of where an adult convinced a kid that something that is really wrong is right.

A fact you really need to know about the jurors is whether they have any experience with child sex abuse that might affect their ability to be fair. Therefore, you must ask them:

5. If they, or someone close to them had any personal experience with sexual abuse.

CASELAW ALERT: In *Taylor v. Sisto*, No. 09-15341 (2010 U.S. App. Lexis 10556), the Ninth Circuit reversed a conviction because the judge improperly instructed jurors that they could not take their personal experiences into account in their deliberations. The case contains good language stating that jurors should and do draw upon their personal experiences during deliberations. This supports our claim that judges should allow us to voir dire on the jurors' personal experiences, since they contribute to deliberations and verdict.

C. When you are choosing which question to ask a particular juror, you should build on the answers the juror gave to the standard questions already asked by the judge and the prosecutor. Often the things you learn about the juror from these questions will give you the opening you need to decide how to ask for a life-experience analogy. Areas that are often fertile ground for seeking analogies are:

1. Does the juror have kids?
2. Does the juror supervise others at work?
3. Is the juror interested in sports?
4. Who does the juror live with?
5. What are the juror's interests?

D. Another reason to pay attention to the court's and prosecutor's voir dire is that it will often lead you to general subjects that may cause the juror to be biased or impaired. Judges and prosecutors always spend a lot of time talking about reasonable doubt, presumption of innocence, elements of crimes, unanimity, etc. It can be very effective to refer back to the answers the juror gave to the court or prosecutor, and follow up with an open-ended question that allows the juror to elaborate on his answer, or explain what those principles mean to him.

V. HOW TO ASK THE QUESTIONS

Although the substance of the questions must be individually tailored to your theory of defense and to the individual jurors, there is a pretty simple formula for effectively structuring

the form of the questions:

A. Start with an IMPERATIVE COMMAND:

1. "Tell us about"
2. "Share with us"
3. "Describe for us"

The reason we start the question with an imperative command is to make sure that the juror gives feels it is proper and necessary to give a narrative answer, not just a "yes" or "no."

B. Use a SUPERLATIVE to describe the experience you want them to talk about:

1. "The best"
2. "The worst"
3. "The most serious"

The reason we ask the question in terms of a superlative is to make sure we do not get a trivial experience from the juror.

C. ASK FOR A PERSONAL EXPERIENCE

1. "That you saw"
2. "That happened to you"
3. "That you experienced"

This is the crucial part of the question where you ask the juror to relate a personal experience. Be sure to keep the question open-ended, not leading.

D. ALLOW THEM TO SAVE FACE

1. "That you or someone close to you saw"
2. "That happened to you or someone you know"
3. "That you, or a friend or relative experienced"

The reason we ask for the personal experience in this way is:

a. Give the juror the chance to relate an experience that had an effect on their perceptions, but may not have directly happened to them.

b. To give the juror the chance to relate an experience that happened to them, but to avoid embarrassment by attributing it to someone else.

VI. PUTTING THE QUESTION TOGETHER

EX: Assume we are dealing with the same hypothetical about the child sex case and the divorcing parents. Some of the questions might come out like this:

1. “Tell us about the worst situation you’ve ever seen where someone involved in a divorce went way over the line in trying to hurt their ex.”
2. “Please describe for us the most serious situation when as a child, you or someone you know had an adult try to get you to do something you shouldn’t have done.”

VII. GETTING JURORS TO TALK ABOUT SENSITIVE SUBJECTS

If you are going to ask about sex, race, drugs, alcohol, or anything else that might be a sensitive topic there are several ways of making sure the jurors aren’t offended.

- A. Before you introduce the topic, tell the jurors that if any of them would prefer to answer in private or at the bench, they should say so.
- B. Explain to them why you have to ask about the subject.
- C. It often helps to share a personal experience or observation you have had with the subject you will be asking questions about. By doing so, you legitimize the juror’s willingness to speak, and show that you are not asking them to do anything that you are not willing to do. If you decide to use this kind of self-revelation as a tool, be sure to follow these rules:
 1. Keep your story short.
 2. Make sure your story is exactly relevant to the point of the voir dire.
 3. Keep your story short.
- D. If you are going to voir dire on sensitive subjects, prepare those questions in advance, and try them out on others, to make sure you are asking them in a non-offensive way. Don’t make this stuff up in the middle of voir dire.
- E. If a juror reveals something that is very personal, painful, or embarrassing, it is essential that you immediately say something that acknowledges their pain and thanks them for speaking so honestly. You cannot just go on with the next question, or even worse, ask something meaningless like, “how did that make you feel.”

VIII. SOME SAMPLE QUESTIONS ON IMPORTANT SUBJECTS

A. Race

1. “Tell us about the most serious incident you ever saw where someone was treated badly because of their race.”
2. “Tell us about the worst experience you or someone close to you ever had because someone stereotyped you because of your (race, gender, religion, etc.)”
3. Tell us about the most significant interaction you have ever had with a person of a different race
4. Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their (race, gender, religion) and turned out to be wrong.

B. Alcohol/Alcoholism

1. “Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when they’re drunk.”
2. “Share with us a situation where you, or a person you know of was seriously affected because someone in the family was an alcoholic.”

C. Self-Defense

1. Tell me about the most serious situation you have ever seen where someone had no choice but to use violence to defend themselves (or someone else).
2. Tell us about the most frightening experience you or someone close to you had when they were threatened by another person.
3. Tell us about the craziest thing you, or someone close to you ever did out of fear.
4. Tell us about the bravest thing you ever saw someone do out of fear.
5. Tell us about the bravest thing you ever saw someone do to protect another person.

D. Jumping to Conclusions

1. Tell us about the most serious mistake you, or someone you know has ever made because you jumped to a snap conclusion.

E. False Suspicion or Accusation

1. Tell us about the most serious time when you or someone close to you was accused of doing something bad that you had not done.
2. Tell us about the most difficult situation you were ever in, where it was your word against someone else's, and even though you were telling the truth, you were afraid that no one would believe you.
3. Tell us about the most serious incident where you, or someone close to you mistakenly suspected someone else of wrongdoing.

F. Police Officers Lying/Being Abusive

1. Tell us about the worst encounter you, or anyone close to you has ever had with a law enforcement officer.
2. Tell us about the most serious experience you, or a family member or friend had with a public official who was abusing his authority.
3. Tell us about the most serious incident you know of where someone told a lie, not for personal gain, but because they thought it would ultimately bring about a fair result.

G. Lying

1. Tell us about the worst problem you ever had with someone who was a liar.
2. Tell us about the most serious time that you or someone you know told a lie to get out of trouble.
3. Tell us about the most serious time that you or someone you know told a lie out of fear.
4. Tell us about the most serious time that you or someone you know told a lie to protect someone else.
5. Tell us about the most serious time that you or someone you know told a lie out of greed.
6. Tell us about the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

7. Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out they were lying.

8. Tell us about the most serious incident where you really believed someone was lying, and it turned out they were telling the truth.

H. Prior Convictions/Reputation

1. Tell us about the most inspiring person you have known who had a bad history or reputation, and really turned himself around.

2. Tell us about the most serious mistake you or someone close to you every made by judging someone by their reputation, when that reputation turned out to be wrong.

I. Persuasion/Gullibility/Human Nature

1. Tell us about the most important time when you were persuaded to believe that you were responsible for something you really weren't responsible for.

2. Tell us about the most important time when you or someone close to you was persuaded to believe something about a person that wasn't true.

3. Tell us about the most important time when you or someone close to you was persuaded to believe something about yourself that wasn't true.

J. Desperation

1. Tell us about the most dangerous thing you or someone you know did out of hopelessness or desperation.

2. Tell us about the most out-of-character thing you or someone you know ever did out of hopelessness or desperation.

3. Tell us about the worst thing you or someone you know did out of hopelessness or desperation.

IX. HOW TO FOLLOW-UP WHEN A JUROR SHOWS BIAS

This is the crucial moment of voir dire. Having defined the purpose of voir dire as identifying and challenging biased or impaired jurors, we now have to figure out what to do when our questions have revealed bias or impairment.

The key to success is counter-intuitive. When a juror gives an answer that suggests (or openly states) some prejudice or preconceived notion about the case, our first instinct is to run away from the answer. We don't want the rest of the panel to be tainted by it. We want to show the juror the error of his ways. We want to convince him to be fair. Actually we should do the exact opposite.

- < There is no such thing as a bad answer. An answer either displays bias or it doesn't. If it does, we should welcome an opportunity to establish a challenge for cause.

- < If an answer displays or hints at bias, we must immediately address and confront it. Colorado defenders have referred to this strategy as "Run to the Bummer."

A. How To "Run to the Bummer"

Steps to take when a juror suggests some bias or impairment:

1. Mirror the juror's answer: "So you believe that"
 - a. Use the juror's exact language
 - b. Don't paraphrase
 - c. Don't argue

2. Then ask an open-ended question inviting the juror to explain:

"Tell me more about that"

"What experiences have you had that make you believe that?"

"Can you explain that a little more?"

No leading questions at this point.

3. Normalize the impairment

- a. Get other jurors to acknowledge the same idea, impairment, bias, etc.
- b. Don't be judgmental or condemn it.

4. Now switch to leading questions to lock in the challenge for cause:

a. Reaffirm where the juror is:

“So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense”

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

Q: “So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense.”

A: “Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn’t need your client to testify.”

Q: “How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?”

c. Reaffirm where the juror is not (ie: what the law requires).

“And it would be very difficult, if not impossible for you to say this was self-defense unless the defendant testified that he acted in self-defense.”

d. Get the juror to agree that there is a big difference between these two positions.

“And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn’t testify at all.”

e. Immunize the juror from rehabilitation

“It sounds to me like you are the kind of person who thinks before they form an opinion, and then won’t change that opinion just because someone might want you to agree with them. Is that correct?”

“You wouldn’t change your opinion just to save a little time and move this process along?”

“You wouldn’t let anyone intimidate you into changing your opinion just to save a little time and move the process along?”

“Are you comfortable swearing an oath to follow a rule 100% even though it’s the opposite of the way you see the world?”

“Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings.”