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Do's and Don'ts of jury selection

NO MATTER WHAT YOUR EXPERIENCE LEVEL,
YOU CAN BE EFFECTIVE IN VOIR DIRE

Trials aren't completely won and lost in jury selection, but all lawyers acknowledge it's a big part of winning. Pick the perfect jury and your job gets much easier. Make some mistakes in jury selection and you're essentially down 10 points with a minute to go. Because how jurors' brains work matters more than how you present the case, jury selection may not be the only factor in winning or losing, but I believe that it is the most important phase of trial.

As a jury consultant who picks juries every week in every variety of civil trial, I have seen every kind of juror, every kind of lawyer, and every kind of tactic in voir dire. Sometimes I'm fortunate to work with lawyers who are outstanding at voir dire: they ask questions effectively and they get a good amount of information about their jurors before picking the jury. I love when this happens – I can feel confident that I chose the right people because I heard important opinions, good and bad, and I don't feel like I picked the blindly.

Sometimes however, I see a voir dire that gives me very little information about how receptive each juror will be to each side. Not enough information puts you in a tough spot, because a properly done voir dire is an amazing opportunity to learn as much as possible about the people who will be deciding your case. With that opportunity in mind, here is a list of **DO's** and **DON'Ts** during jury selection whether you've picked 100 juries or zero.

Don't despair if you feel that voir dire is challenging; doing a voir dire effectively is not about being the most amazing trial lawyer or about being the most charismatic person in the room – any lawyer can put together an effective voir dire if they just follow these **DON'Ts** (and **DO's**) of jury selection.

DON'T let yourself get too nervous

Voir dire can be nerve-racking; you have to ask questions off the cuff, you

can't rely on a PowerPoint to assist you, and you have 50 strangers watching your every move. Unlike cross-examination, voir dire is the one time during trial when you have no clue what answers you'll get to your questions. It's okay to be nervous, nobody is expecting you to be perfect. But in fact, jurors appreciate lawyers who are human and self-deprecating. Don't be afraid of getting nervous, as long as you never let nerves get in the way of your objective in voir dire. Don't get so nervous that you sit down before your line of questioning is finished. Don't get so nervous that you forget your well thought-out questions and just make up questions instead. Don't get so nervous that you let the judge or the other side shut you down with an objection. Take a deep breath and ask the same question a different way. Don't get so nervous that you pass just because the other side did, even though there are jurors you don't like on the panel.

DO come prepared

Write out your questions if you are worried you might forget them. Bring an associate or partner (or a consultant) to help you take notes during jury selection if you need another eye. Keep a tally of the strikes that have been exercised, and keep a running list of the jurors you don't like so you are ready when the judge asks for your challenge.

DO focus on building credibility and rapport

Make eye contact, (no writing notes – have someone else do it!), call them by their names, and genuinely be interested in their responses. Most importantly, thank your jurors when they're done sharing, especially if they have been brave and "brutally honest" enough to share a bias against your case with you. The best way to encourage other biased jurors to talk is to thank the one who shares their view. The best way to silence other biased jurors is to argue

with someone's bias, cross-examine them, or tell them they're not following the law.

Don't cut them off, don't speed to the next question while they're still talking, and do not shy away from a bad response. Believe me, you want to hear the bad responses! If you aren't hearing any bad responses, more likely than not you don't have an amazing jury, you have an ineffective voir dire. The last thing you want is to have a biased juror make it onto your panel because you didn't make them feel comfortable enough to share a bias.

When someone expresses a bias – "everyone has pain, money won't fix anything" – consider it a wonderful opportunity to ask any other jurors if they feel the same way. Understand that jurors expressing negative views in front of other jurors does not "poison the panel." Jurors are rarely swayed by another juror's feelings. Think about it for a second: if juror #2 is so impressionable that juror #3's beliefs change his mind, won't he be just as likely to change his mind during deliberations if you select a good jury?

DON'T spend excessive time getting jurors to like you

You can spend more time buddying up to jurors than you do asking the tough questions that identify bad jurors. This is tough for many attorneys because they hear about lawyers who are skilled at memorizing jurors' names and who get the jurors laughing at their jokes and they think that this must be how to win a case – get the jurors to like you! Popularity is not the same as credibility. Remember that jurors expect lawyers to manipulate them by presenting only the good facts, so jurors are impressed when lawyers show the courage to confront and tackle the bad facts. Showing jurors that you're reasonable and won't ignore the bad facts is how you build credibility.

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A juror who laughs at your jokes may still have some very negative feelings about issues in your case, and cracking a few jokes during jury selection will ultimately not be enough to win them over. Don't be fooled by a false positive! Believe me, we hear a lot of jurors say during focus groups, "That lawyer was a really nice guy, but..." Now popularity is never a bad thing, so **DO** spend some time warming jurors up during voir dire to get them comfortable and receptive to talking to you.

DON'T avoid the bad issues

DON'T avoid bringing up a "bad" issue during voir dire because you are afraid to hear negative opinions from your jurors or because you are worried about their answers influencing other jurors. If there's a fact about your client or your case that the other side will argue against you, you must bring it up. For example, if you are suing in a dangerous condition case because your client got hit by a car, but your client was drunk, bring it up! Yes, many jurors have bad opinions about alcohol consumption and you'll certainly hear some bad answers, but you **NEED** to figure out who the worst jurors are for you. And the silver lining is that the worse the issue, the easier it is to get jurors dismissed for cause.

DO consider a questionnaire

Voir dire isn't about hearing answers that make you feel good about your case, voir dire is about asking about the bad issues and striking jurors that have a problem with these issues. If you're especially worried about a sensitive issue, **DO** convince your judge to consider using a written questionnaire. Judges are especially receptive if there are extremely sensitive, personal issues (like experiences with molestation or sexual harassment)... especially if you convince your judge that without a questionnaire, hours will be spent in private sidebars during voir dire. If you are trying to use a questionnaire, **DO** try to compromise with the other side on the included questions, or the judge may not allow it. Many judges don't allow questionnaires if the two sides can't agree on them.

DON'T be satisfied with silence

This is probably the most common mistake I see made in voir dire: a lawyer asks a question, nobody responds, and the lawyer meekly or naively moves on. I'll tell you exactly what happened: jurors want jury selection to be over, and they think that if no one speaks up, the trial will be done faster. Guess what? Most of the time, they're right. Not enough lawyers force jurors to talk. And once jurors see a lawyer move on, they'll keep ignoring questions because they know it works. Never just move on to the next question. When faced with the awkward silence, **DO** ask one of your jurors a polite, direct question to get someone to respond. Pick someone and ask them "well, how do you feel about that?" Trust me that, once you've gotten the ice broken, the jurors tend to warm up and start answering. You probably won't have to call on jurors more than two or three times.

DON'T rely on "can you be fair and impartial?"

DON'T ask jurors who you're trying to get off for cause if they can be "fair or impartial," or if they would "have a problem with..." some jury instruction or issue in the case. Think of bias this way: villains in movies don't think they're the bad guy, and most biased jurors don't think they're unfair or biased. Tort reformers believe that they are far more "fair" than jurors who have no caps on damages. Jurors who are blindly loyal to doctors don't think they have a "problem" with medical malpractices lawsuits; the problem is yours for filing them. If you ask these jurors if they can be fair, they're going to say yes, (unless they are angry or want to get out of jury duty).

Everyone likes to think of themselves as fair, especially when an imposing judge is inquiring. If you make the mistake of asking a bad juror if they can be fair, and they say yes, you may lose your cause challenge regardless of the other negative things they may have said, because the judge or the other side will immediately retort, "They said they can be fair." Instead, **DO** encourage them to

admit that they're right and you're wrong, no matter what the facts show. Don't ask them if they can award "reasonable" damages; ask them if they feel that millions of dollars is "always unreasonable," no matter how injured a plaintiff is.

DON'T rely on demographics

During your jury selection **DON'T** rely on demographics unless you have no other choice. If you are in federal court and have little-to-no voir dire time, using stereotypes is an acceptable last resort. But when you have some time to voir dire, test your assumptions. Don't assume an engineer won't award damages for pain and suffering; ask him directly. Don't assume that the mail carrier is sympathetic; probe and find out for sure. No two people of any type are the same, especially when it comes to weighing the nuances of your particular case. A middle-aged mother isn't necessarily going to give you a plaintiff verdict, and an older white Vice President isn't going to necessarily give you a defense verdict, so please stop relying on demographics over experiences and attitudes. An older executive who volunteers at a homeless shelter, or who coaches little league because he "loves to mold kids into strong and empowered adults," might be a great plaintiff juror, whereas a middle-aged woman who teaches elementary school might actually blame a plaintiff for not following rules or for not taking responsibility for their actions. Only fall back on demographics and conventional wisdom if you have no other choice.

DON'T waste a strike

DON'T waste a strike on a juror who seems to be a follower or someone who likely won't speak up during deliberations. Every juror technically gets an equal vote, but some jurors influence others and some don't. If you're deciding between two bad jurors and you have only one strike left, always strike an outspoken juror over a shy, quiet one. Always strike a social juror over an anti-social one. A meek juror with bad feelings

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about your case rarely has much impact on deliberations, but outspoken jurors who are good communicators are persuasive to others.

Keep in mind that choosing a jury is as much about the combination of jurors as it is about the individuals, and if you have other dominant good jurors, a meek bad juror will likely do little harm. Also keep in mind who will come into the box after you exercise your strike, so if you have a strong, negative juror coming on next, don't waste a strike on the follower unless you think you have more strikes than you will need.

DO prepare your plaintiff for voir dire

Jurors make judgments immediately from their first impressions of the plaintiff. I can't overestimate how often I see plaintiffs make careless mistakes in front of jurors. Don't let them come in improper court attire (they should not be dressed worse than the jurors, for example), don't let them talk in front of jurors, and warn them to avoid showing any attitude or expressions. **DO** have them show up respectably dressed (not necessarily in a suit, but nicely dressed and comfortable), do prep them about what's going

to happen, and do answer their questions if they are nervous or worried about the process. Trial can be overwhelming for both experienced lawyers and first-time plaintiffs; sometimes it's hard to find the extra time to hand-hold the client, but the credibility of your client is crucial, so make the time.

DON'T oversell your case in voir dire

If a judge gives you a chance to do a mini opening before you ask the jury any questions, **DON'T** oversell your case. Mini-openings seem like a great way to win over your jury, but it's a huge mistake: mini-openings can be disastrous when done the wrong way! Jurors can't differentiate between your opening and evidence from witnesses; it's all evidence to them. So the more persuasive your mini-opening, the more good facts you tell them about, the more likely you're going to persuade your good jurors to pre-judge the case and walk away for cause.

Too many times, I have seen terrific jurors lost to cause when they say they can't be fair; because the case is too sad, they sympathize with the plaintiff too much, or they are already outraged at something the defendant did. If this is

not enough reason to avoid making your case sound amazing in your mini-opening, consider the other effect: if you make your case sound great in your mini-opening and don't bring up the bad facts, your jurors will feel misled once the case gets started. Instead, something counter-intuitive: **DO** undersell your case for the jury, and **DO** bring out your bad facts in your mini opening. The best use of a mini-opening is to make it easier for you to identify and get rid of bad jurors, so focus on the bad facts, not the good ones.

If your plaintiff was drunk when they were hit in the crosswalk, mention it in your mini-opening! Don't mention that other accidents had happened at that intersection before, or that the city had known of these accidents and done nothing about them — keep that for your real opening, where it can do real damage.

Claire Plotkin is a jury consultant in Los Angeles who has consulted in all types of civil litigation, including employment, personal injury, and business disputes. She selects juries, mock-tests cases, preps witnesses to testify, and gives advice on how best to present your case in trials, from large to small. ☞