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Voir dire, the files in your mind

THIS TRIAL SKILL REQUIRES TRAINING, WRITING AND MEMORIZING SCRIPTS, AND CONSTANT PRACTICE UNTIL YOU INTERNALIZE THE VOIR DIRE

For many trial lawyers, voir dire is the most challenging part of trial. And we have a great advantage: we get to go first. This means we get to set up or “frame” every issue. We get to begin the discussion on every topic, thereby establishing ourselves as the leaders. The jury has to follow someone; it’s either going to be us or the defense lawyer.

Importance of rapport

The most important thing to do in voir dire is to establish rapport. I define rapport as an easy flowing feeling of comfort that both you and your jurors have – sort of like talking with old friends. Lawyers cannot build rapport if they are stuck in their head thinking about what to do next. You must be “reflectively listening.”

When we are talking with friends we are not thinking ahead; we patiently wait,

take in their thoughts, and respond without worry that they are going to judge us. When we aren’t with our friends, we do the opposite. We worry about the stranger’s opinions, and how they may be taking in what we are saying and thereby editing our overall message. We don’t want to say the wrong thing during this type of conversation, so we try to carefully choose our words, and end up manipulating our message as we filter and think. This type of reaction to strangers creates exchanges that are not natural and harmonious like the ones we have with our friends.

Reflective listening

Reflective listening means imagining what the other person is saying. This is one of the most difficult skills to master in voir dire. To reflectively listen to a juror means the juror must feel that you

are with them. Reflective listening is key to understanding the feelings of others and building rapport with your jury. As soon as a juror begins speaking, the rest of the world should disappear. Focus on them like they are the last person on Earth; that’s how important they should feel. Also, don’t start formulating your next question, reading your notes, or taking notes until they are done.

Preparation

You must prepare! The time to start working on your voir dire is yesterday. When a trial is on the horizon, it is too late to start writing, memorizing and, *internalizing* the voir dire. Many people object to rote memorization. They say, “oh, it will make me stiff, not spontaneous.” The opposite is actually the truth. I have trained and coached dozens

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of lawyers in the past few years, so I'm speaking from experience. Each time I am learning a new piece of voir dire, I record it and play it over and over until it is internalized. You should also get a transcript of your opponent's voir dire. This way you can preempt all of his or her best stuff.

Framing

Every question you ask must be framed properly. You can direct the jurors' thinking and avert a lot of wasted conversation by meticulously setting the contextual framework. For example, compare the difference between "biases and prejudices, what are your thoughts?" and "I want to talk to you about biases and prejudices, we all have them, without them we wouldn't be human." Words matter, they should be used with precision.

Structure

Most voir dire has a structure. The introduction tells the jury what you're going to talk about. This way you are all on the same page. The body discusses the issue. The conclusion tells the jury why you discussed this issue. When lawyers forget to tell the jury the "why," jurors can become confused and impatient.

Writing a new voir dire script

Writing a new piece of voir dire is a creative effort. Like most writing, saying it out loud helps you hear how it sounds. After you have the base voir dire, start writing the questions, and the predictable juror response. It is very beneficial when creating a new voir dire script to have a partner or co-counsel to brainstorm the flow with.

All of voir dire and human behavior is predictable. When you are creating a new voir dire to handle an issue in trial, you should write it out as follows:

- Introduction:
- Attorney:
- Juror:
- Attorney:
- Juror:

Imagine what the juror's answer will be to every question. Every time that you

get stumped in a focus group, you should celebrate, because you won't get stumped in trial.

There is no reason to reinvent the wheel. I borrow ideas from anyone who has a good voir dire. Parts of the following voir dire I took from Don't Eat the Bruises, written by Keith Mitnik. Like anything, take what is useful and adapt it to best help your case.

For this example, assume a car struck a bicyclist, and the defense has asserted the defense of comparative negligence.

Attorney: There is something called *comparative negligence*. It allows a defendant to claim that if he or she is at fault, then the person who is suing is at fault, too. If the defendant proves up that defense, then the jury would determine a percentage of fault between the two sides. That's the general concept of comparative negligence. Does this make sense to everybody?

(Jurors nod)

Attorney: This is a case where a car hit a bicyclist. Their side has asserted a defense of *comparative negligence*. They are not supposed to start out with the finding that my client was at fault; they have to prove it. My concern is that some people feel, in a case like this, the person on the bike should bear part of the fault, after all riding a bike on a roadway is dangerous. Regardless of what the rest of the evidence shows, that would be their starting point in this kind of case.

Who here feels that the person on the bike is at least partially at fault for his or her injuries, regardless of what the rest of the evidence shows?

Juror John: I do.

Attorney: Why? Tell us more.

Juror John: Bicyclists are often reckless and ride erratically.

Attorney: Would it be fair to say, in all honesty, that you're not going to be able to put those feelings aside, that you can't turn them on and off like a light switch? That you have some partiality towards feeling that way, even just a little bit? You won't be able to ensure that you could be entirely impartial in a case like this.

I was recently in San Jose helping Dan Schaar who was preparing for trial

against the county of Santa Cruz. He didn't have a good voir dire script for when a plaintiff sues a public entity. So we came up with the following script:

Attorney: One of the defendants in this case is the county of Los Angeles, and as you have already heard, I am going to be asking you for a verdict in the tens of millions of dollars. I need to know that if I prove my case with the evidence, and the law supports it, will you be able to deliver a verdict for the appropriate amount? Or will you have some hesitations?

Juror John: I would be concerned, that's a lot of money.

Attorney: I can understand why you might feel that way, and it is a lot of money. Your job will be to sit as appraisers of the human losses that were done to Joe and his life. The law requires us not to allow any outside factors to influence our verdict.

When I say outside factors, does everyone know what I mean?

Juror Joan: I am confused.

Attorney: Juror Joan, when I say outside factors, I mean considering things like "how will it get paid?" "Who will pay it?" or "will it ever get paid at all?" or "will a just and appropriate verdict increase my taxes?" The law also says that we are not to allow "sympathy for either side" to affect our verdict. We are to only consider the value of Joe's human losses. (Go through jurors one at a time.)

Attorney: Juror Joan will you be able to do this?

Juror Jones: Yes.

Attorney: Folks, let me summarize; your job is to evaluate the case, to be the appraisers and to place a dollar value on these human losses, based ONLY upon the evidence.

Here's my question...Can we all do this?

Jakob Norman, a trial lawyer and jury consultant out of Casper, Wyoming, and I were discussing how a large body of research shows that the jurors who take the most detailed notes during trial often become the foreperson. It isn't uncommon that when a person's notes differ from other jurors' recollections, the panel often relies on the notes, not their

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memory. They do this even though the judge instructs them to do just the opposite. To deal with this situation in voir dire, we wrote the following:

Attorney: During this trial, you're going to be allowed to take notes, and that's a good thing. But one of my concerns is that sometimes when we take notes, we're not listening, and I know that's true for me. Is that true for anyone else? During the trial, you might notice that after a witness answers a question, I may jot down a few notes, and this may take a moment or two. Is this going to bother anybody?

(Jurors shake heads)

And at the end of the trial, you'll be able to take your notes into the jury room with you. In order for you to reach a just verdict, all 12 of you will need to have an equal voice. And some people take a lot of notes, and that helps us remember, and some people don't, because we remember better by listening.

So here is my question, regardless of whether you take a lot of notes or none at all, can we all promise or agree that our voices will be heard in the jury room while deciding this very important case? Can we all do this?

Sometimes our memory may differ with our notes, or others' notes. If that happens, the Judge is going to instruct us that we should rely upon our memory. Not our notes or the notes of others. For example, if Juror X says, 'my notes say this,' but our memory is Y, will you defer to their notes, or will you be able to rely upon your memory?

Of course it would be a good idea to reinforce this in closing argument.

80/20 rule

Many people have been taught that to conduct voir dire correctly, the jurors should be talking 80% of the time and the attorney 20%. Just the opposite is true. You should be speaking 80% of the time, framing the issues for your jury. Some jurors are very lonely and will talk at great lengths if given the opportunity. This frustrates the judge, other jurors and you. When you are doing most of the talking, the process is much more efficient. Everybody, especially judges appreciate efficiency during trials.

The follow-up

There is always more than one choice to respond to a juror. Here are a few examples;

- Just a nod and a smile.
- You can say "thank you."

After they have shared, a connecting image may appear in your mind; if so you can have a conversation about it. They may offer some resistance: this is a gift. The only way to reframe an issue/witness, is that you must meet them where they are before you can take them where you want to go. For example, if a juror says, "what good will the money do?" you can respond by saying, "you're right, what good will the money do?" Now you can go on to explain that money justice is all we have in America. If you try to explain to the juror why they are wrong, you will only increase the resistance.

None of the follow-ups are better than the other. Instead, when you have internalized all of them, they will be easy to choose from as one will feel more right than the others in the moment.

Pausing

The importance of pausing cannot be understated. Pausing allows the jurors' minds to keep up and allows the attorney to add emphasis to whatever word preceded the pause and whatever words follow the pause. So often attorneys speak fast and move from topic to topic. Pausing is important for the jurors to receive all of the important information we present.

Sequencing

The order in which you sequence your topics is very important – voir dire must be sequenced. After gaining rapport, you typically start with biases against your particular kind of case in general, i.e., personal injury cases, money for pain, large verdicts, burden of proof – ending with the "warts."

- Biases against personal injury cases
- Economic vs. non-economic
- Big money verdicts
- County defendant
- Sympathy/empathy

- Prior civil defendant
- Bicycle bias/riders
- Civil burden of proof
- Conflicting experts
- Brain injury/dementia
- Depression/PTSD
- Note taking
- Defense goes last

Alternates

Part of preparing includes having a strategy for your second round, third round, etc. Doing the same thing over and over will come across as a shtick. Have a plan for the later rounds. Your questions should summarize your most important pieces of your previous voir dire.

"Did we all hear our discussion on saying what we really think and feel?"
 (I raise my hand. Jurors raise theirs. Model from the start.)

"Do we all edit and filter what we say?"

"Juror Jones, can you give us an example?"

Limited time

If you only have twenty minutes, I suggest that you spend the first five minutes getting rapport, and then get rid of anti-personal injury, big verdict jurors. Follow these with any case-specific voir dire. If people like you and trust you, they will listen to you.

Practice monthly

You must practice. It is imperative that you know all of your voir dire scripts like you know your name. Practice in front of others. If you don't have a focus group, practice with your colleagues, line up stuffed animals, do whatever it takes. The best is to do focus group practice at least once a month. Take the time to record yourself; be hard on yourself. Watch the videos of yourself. It helps to have a practice group that meets on a regular basis.

Voir dire, like trial lawyering, is an activity that can only be learned if it is practiced with effort persistently. You can read about it until you're blue in the face;

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this won't make you better. To get better you have to perform. Perform for your friends, focus groups, and most importantly, go to trial. The best trial lawyers I know find a reason to go to trial, not an excuse to avoid it.

Daniel Ambrose has tried over 150 jury trials and spent the last decade working on advancing and teaching advanced trial skills.

Through 20 years of practice, he has found a unique method to help trial lawyers efficiently master their skills, The Trojan Horse Method. The Trojan Horse Method is considered a "complete system," from voir dire to rebuttal. Dan currently lives in Manhattan Beach, California and now focuses on civil and criminal trial work, consulting, trial coaching and teaching. He is a frequent speaker on witness preparation, direct examination, and voir dire.

Stephen A. King, currently a partner at Rodriguez & King, Attorneys at Law, is a Los Angeles criminal-defense, personal-injury and civil-rights trial lawyer with over 100 jury trials to verdict. He is a graduate of the Gerry Spence Trial Lawyers College and serves as an instructor at the Trojan Horse Method program.

