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Everything you wanted to know about voir dire

A MASTER TRIAL LAWYER SHARES A CAREER'S WORTH OF JURY-SELECTION KNOWLEDGE

The judge has given you 20 minutes to examine 18 prospective jurors. Your job is to determine which jurors you would like on your jury, which jurors you need to excuse and which jurors you can challenge for cause. While doing this seemingly impossible task, you need the jury to like and trust you. You ask, "How can I do this?" I reply, "Know the rules, learn the techniques and practice, practice, practice."

The judge is king

No matter how much you prepare or how many cases you have tried, every voir dire is ultimately influenced by your trial judge. The judge has tremendous discretion in the process of selecting a jury. The judge will make the following decisions: whether to allow a jury questionnaire; what time limits, if any, to impose; whether you will examine 12, 18 or more jurors at a time; how extensive the court examination will be; what, in the judge's mind, is or isn't a proper question; who will be excused for hardship; what must a juror say that will convince the judge to grant a challenge for cause; and the extent to which a judge will try to rehabilitate a juror who admits he cannot be fair.

Some judges will keep an open mind and entertain lawyers' suggestions on how to make the process fairer. Other judges will treat the courtroom as their kingdom and will consider any suggestion by the lawyer as a threat to their reign.

Your job is to figure out what will work best with your particular judge. If you disagree, disagree respectfully. There's nothing worse than making an enemy of the judge at the beginning of trial.

What does the king want?

Now that you know the judge is king and the king views you as a serf or the village idiot, you need to know the king's local, local rules.

Most judges will tell you what their rules are if you only bother to ask. The following questions should be asked

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if the judge has not already indicated how he conducts voir dire:
1. Will the attorneys be given the randomized list of prospective jurors?
2. How many prospective jurors will the judge initially seat: 12, a 6-pack (18), or more?
3. How much time will the judge allow each attorney to ask questions of the initially seated prospective jurors?
4. How much time will the judge give each attorney to ask questions of the new prospective jurors who are seated?
5. How many peremptory challenges does each side have? This only becomes an issue if there are two or more plaintiffs and/or two or more defendants. When there are only two parties, each party is entitled to six peremptory challenges. (Code Civ. Proc., § 231, subd.(c).)

Where there are more than two parties, the court divides the parties into two or more sides according to their respective interests, and each side has eight peremptory challenges. (*Ibid.*)
6. How many peremptory challenges does each side have for alternate jurors? Section 234 of the Code of Civil Procedure specifies one challenge for each alternate.
7. If needed, will the alternates be selected randomly or is the juror in alternate seat No. 1 the first alternate to be called? The attorney needs to know the answer to this question before the alternates are selected. If the alternates will be chosen based upon the seat in which they sit, it is much more important to use your peremptory challenges on the juror who sits in the seat No. 1. Section 234 of the Code of Civil Procedure states that if a juror is discharged, the court shall "draw the name of an alternate." Los Angeles Superior Court Rule 3.70 states that if several alternate jurors are available, the replacement is usually selected by lot (unless counsel stipulate to some other procedure).

Read the instructions on the box before you play the game

Although the judge has tremendous discretion, she is supposed to follow the law.

Every trial attorney needs to read Section 222.5 of the Code of Civil Procedure. It would be wise to make a few copies of this Code section, and if the judge disputes your statement of the law, you can quote from the Code itself, which says:
1. "[C]ounsel for each party shall have the right to examine . . . any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause."
2. "[T]he trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case."
3. "The fact that a topic has been included in the judge's examination should not preclude additional non-repetitive or non-duplicative questioning in the same area by counsel."
4. Although the trial judge has discretion, "Specific unreasonable or arbitrary time limits shall not be imposed in any case. The trial judge shall not establish a blank policy of a time limit for voir dire."
5. "The trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning."
6. "A court shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires."

If that is the law, why do so many judges restrict an attorney's voir dire?

First, the judge may not have read this section since judges' school. Before you ask, "How can that be?" ask yourself when was the last time *you* read it.

Second, judges, like anyone else, get stuck in their ways and impose the same restrictions over and over.

Third, judges understand that jury service is a burden and they don't want to make the jury panel come back the next day because the judge has allowed the attorneys an unlimited time to ask questions.

Fourth, if the court grants too many challenges for cause, the trial will be delayed while another jury panel is called the next day. If you understand the reasons why the judge may not follow the letter of the law, you might be able to find a compromise you and the judge can live with.

Challenges for cause

The Code of Civil Procedure sets forth the grounds upon which a juror may be challenged for cause. Section 225 allows a challenge for cause for one of the following three reasons:
1. General Disqualification – the juror is disqualified from serving in the action on trial;
2. Implied Bias – when the existence of the facts as ascertained, disqualifies the juror;
3. Actual Bias – the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

Section 203 sets forth eight criteria that disqualify a person from serving as a juror. Read the code section. Of the eight criteria, the one that most frequently presents itself is a prospective juror who may lack knowledge of the English language.

Section 229 specifies when a challenge for implied bias may be taken. A challenge for implied bias includes a blood relationship or relationship by marriage to any party or alleged witness in the case. It may also be taken based upon a prospective juror's relationship to a party, or officer of a corporate party.

These relationships include family members, business partners, master and servant, principal and agent, debtor and creditor, landlord and tenant. If one of the criteria is met, it is irrelevant that the prospective juror has no actual bias.

Section 225 deals with actual bias. Actual bias is the basis for a challenge you will use most often. The code defines actual bias as, "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror

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from acting with entire impartiality, and without prejudice to the substantial rights of any party."

If the court does not sustain your objection as to actual bias, argue that the juror should be excused under section 229, subdivision (f) which defines implied bias as "the existence of a state of mind of the juror evincing enmity against, or bias towards, either party."

Challenges for cause are made after the conclusion of the attorneys' voir dire. Section 226, subdivision (d), states that, "All challenges to an individual juror, except a peremptory challenge, shall be taken, first by the defendants, and then by the people or plaintiffs."

Almost every judge will have the attorneys exercise challenges for cause at sidebar. The court will usually ask if the party has any challenges for cause and if the answer is in the affirmative, the court will ask you to approach sidebar. If the court does not, request permission to approach sidebar before making any such challenge.

When making the challenge it is helpful for the attorney to quote the words the prospective juror said during voir dire that establish the bias or prejudice. If the juror has stated that he favors one side over the other but he thinks he can be fair, ask the court to excuse the juror for implied bias under Section 229, subdivision (f). If the juror favors one side, he has evidenced a state of mind of a bias towards one party, even if he later says he can be fair.

To improve your chances of successfully challenging a prospective juror for cause, you need to tie-down the juror so that neither defense counsel nor the judge can rehabilitate him.

Tie that doggie down

Calf roping, also known as tie-down roping, is a timed rodeo event where a rider ropes a calf, jumps down from her horse, and restrains the calf by tying three legs together. The event derives from the duties of working cowboys, which often require catching and restraining calves for branding, castrating or medical treatment. Chances are the calf would prefer not to be branded or castrated, so he will be inclined not to cooperate. It is important that the calf be fully restrained, or he will get away.

The same is true when trying to establish a cause challenge. You need to tie-down the juror because some judges sternly tell the juror, "Everybody has biases and prejudices. But you would follow the law if I told you, wouldn't you?" It takes a strong-willed juror to tell the judge that he would not follow the law. When the juror does a 180-degree turn and sheepishly agrees that he will follow the law, the judge has successfully loosened the knot and your challenge for cause has run away. You will be forced to waste a peremptory challenge.

To prevent this, tie the knot. To do so, consider the following approach:
Q. Mr. Smith, you've told us that you do not believe in pain and suffering damages. Did I hear you correctly?
Q. I'm sure you're not alone. Many people feel the same way. Is this a belief that you strongly hold?
Q. Have you held that belief for a long time?
Q. Am I correct that because of your strong belief against pain and suffering damages, you would be unable to award such damages even if we proved such damages had been suffered?
Q. I appreciate your honesty. Is it correct that if pain and suffering damages were not involved, you would have no problems being a juror on this case?
Q. But the jury may be asked to award substantial money for pain and suffering. I suppose there's nothing I or the defense attorney could say to change your long-standing belief, is there?
Q. Mr. Smith, the judge may tell us that the law says that if someone negligently causes another person to experience pain and suffering, then jurors are supposed to award pain and suffering damages. From what I hear you say, you, despite the law, would still be unable to do so?
Q. Thank you again for your honesty.

With this type of examination, you have made the prospective juror feel that it is not wrong for him to hold this bias or prejudice. You have told him that many jurors hold the same conviction. You have informed him and the other jurors that the pain and suffering damages are substantial. You also had the juror commit more than once that he could not award pain and suffering damages no matter what you or the defense attorney tell him. More importantly, you have had him commit to the fact that even if the judge tells him the law requires pain and suffering damages he would still be unable to make such an award.

Remember, securely tie-down the prospective juror so he will not get loose. Otherwise, you can kiss your challenge for cause goodbye.

More likely true than not true

Jurors' beliefs about the burden of proof can often lead to a successful challenge for cause. Even if the jurors' answers do not give rise to a challenge for cause, it's an opportunity to expose the panel to this important issue.

Many jurors either do not understand the concept of preponderance of the evidence or they do not agree with it. Explain to the jury what the burden of proof is. It is simply "more likely true than not true." David Ball's mantra is to hold the palms of both hands up as if they were scales. When you explain the burden of proof keep both hands balanced. When you say that all you have to do is show that it is "more likely true than not true," slightly tilt one hand up and one hand down. Tell the jury that is all you need to prove.

You will discover that a number of prospective jurors do not agree with this burden of proof. Some people believe that if you are asking for money in a lawsuit, you need to prove your case by 60, 70 or 80 percent. Identify these jurors because, more likely than not, they are defense jurors. They are defense jurors not only on the issue of negligence but causation and damages. Get those jurors to commit that they could not follow a law that requires the plaintiff to prove her case by 50 percent and a feather. Tie these jurors down so that neither the defense nor the judge can loosen the knot you have created for cause challenge.

Having said that – no one wants a plaintiff to win on a technicality. Many

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jurors who believe that they can abide by the law of "more likely true than not true," will subconsciously hold the plaintiff to a higher burden. If the jurors believe that you think the only way for you to win is to tip the scales ever so slightly, they will be skeptical of your case from the outset. After you have tied down the jurors who say they will require a higher burden of proof, advise the jury that this is the same burden that the defense has if comparative or contributory negligence is a part of the case. When jurors understand that this burden applies equally to both sides, it becomes a little more palatable.

Finally, near the end of your discussion on burden of proof, tell the jury that you intend to prove each issue with much more proof than a slight tipping of the scales. This way the jury understands that you believe you have a strong case and you don't have to rely on the weight of a feather to win.

While you are selecting a jury, the jury is selecting an attorney

Attorneys who believes they can dazzle the jury with either their intelligence or their bullshit are the same attorneys who, after the case is lost, will tell anyone who cares to listen how stupid those jurors were. Jurors do not want brilliance. Jurors want the truth. Most jurors want to believe that the verdict they render is the correct verdict. Help the jurors decide that you are the attorney they can trust. This process begins the moment the jurors walk into the courtroom. The jurors form judgments even before they hear you speak.

First impressions are important. These first impressions are often carved in stone by the time voir dire has been completed. The following are some tips that may help the jury select you as the attorney they should believe.

1. Lose the BS.
2. Know your case.
3. Show respect to the judge, the jurors and your opponent.
4. Ask short, simple and easy to understand questions.
5. Lose the legalese, medicalese and any other "ese."
6. Be pleasant but not unctuous.
7. Be confident but not arrogant.
8. Be sincere.
9. Be pleasant.
10. Don't come across as an advocate.
11. Don't argue with a juror.
12. Don't embarrass a juror.
13. If you are not organized, at least appear to be. Keep your suit pressed, your shoes shined, and your hair cut. Keep your side of the counsel table orderly.
14. If a juror cannot understand your question, apologize for not making the question clearer. It is always your fault, not a juror's fault, when they don't understand your question.
15. Be emotionally congruent. If the juror is talking about a sad situation, your demeanor should be emotionally congruent with what the juror is discussing. If you are discussing a happy event, your demeanor should be congruent with your words.

Charisma

The Random House Dictionary defines "charisma" as charm, magnetism, presence. The Collins English Dictionary defines "charisma" as "a special personal quality or power of an individual making him capable of influencing or inspiring large numbers of people." Synonyms for charisma include allure, appeal, attraction, aura, magnetism and *IT*. Do you have *IT*? If not, would you like to get *IT*? What does one have to do to find *IT*? Emma Seppala, Ph.D., in her book The Happiness Track, has six suggestions on how to increase your charisma.

1. Empathy – The ability to see things from another person's perspective and to understand how that person is feeling. You can only be empathetic and place yourself in another person's shoes if you are fully attentive to them, which you are obviously only able to do if you are completely present with them.
2. Good listening skills – The ability to truly hear what someone is trying to communicate to you, both verbally and nonverbally. A person with good listening skills does not interrupt. If you are distracted or thinking about what to say next, you are not truly present. You are not truly listening.
3. Eye contact – The ability to maintain someone's gaze. Eye contact is one of the most powerful forms of human connection. We intuitively feel that when someone's gaze shifts away from us, their attention has also shifted away. Good eye contact makes people actually feel seen.
4. Enthusiasm – The ability to uplift another person through praise of their actions or ideas. Enthusiasm is difficult to fake because it is such an authentic emotion. It can only occur when you sincerely engage with what someone else is doing or saying. For your enthusiasm to come across powerfully, you have to sincerely feel it. Again, your ability to be fully present and engaged is essential.
5. Self-confidence – The ability to act authentically and with assurance, without worrying about what the other people think. Many people are so busy worrying about how they appear that they end up coming across as nervous or inauthentic.

Their focus is on themselves rather than on the other person. When you are fully present, you are focused on others rather than yourself. As a consequence, you naturally come across as confident. Instead of worrying about what others are thinking of you, you are composed, genuine and natural.

6. Skillful speaking – The ability to profoundly connect with others. It is essential to know your audience if you want to make an impact. The only way to do so, however, is to tune in to them. When you are 100 percent present with your audience, you are able to understand where they are coming from and how they are interpreting your words. Only then can your words be sensitive and appropriate. When you speak skillfully, you will be truly heard.

Dr. Seppala says charisma, simply put, is absolute presence. Voir dire is the only time during trial where the attorney can be absolutely present with the jury.

Tips on how to be present with the jury

The first step is to eliminate that which separates you from the jury. When asking questions, note-taking should be kept at a minimum.

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It is difficult to establish a rapport when your eyes are focused on your paper instead of them. Taking notes when you are asking questions also slows down the process. The best approach is to have someone else in your firm, be it a member of your staff, an associate or even the senior partner, take the notes. The notes you personally take when the jurors respond to the judge's questions should be the follow-up questions you want to ask.

Don't misunderstand – it is important that you remember what a prospective juror said if you are going to exercise a challenge for cause. It is equally important that you remember what the jurors said when deciding who to peremptorily challenge. It is also useful to remember what the jurors have said because you may effectively use their own words during argument. It is just better to have someone else take the notes.

A lectern is a place to keep your notes; it is not something for you to stand behind. Attorneys who stand behind a lectern might as well talk to the jury from behind a brick wall. Even though you can look at the jury from behind a lectern, you have placed a physical barrier between you and the jury. When I see attorneys ask questions from behind a lectern, I can almost hear the jurors ask, "What is he hiding from us?"

The best technique for being present is to listen intently to what the jurors say. Jerry Spence says that humans were created with one mouth, but two ears – because listening is more important than speaking. No truer words have been said when it comes to voir dire. Every second you are speaking is a second that could have been used to listen. Let the prospective juror talk. When the juror stops talking, say, "Tell me more." The only way to intelligently "guess" who you should excuse (yes, I said "guess") is to have an ample opportunity to hear what the jurors say and to observe how they say it. It's difficult for a juror to feel he is being heard if the attorney is doing most of the talking.

Tick-tock, tick-tock, tick-tock, ad nauseam

The American Heritage New Dictionary of Cultural Literacy defines "ad nauseam" as, "To go on endlessly; literally, to continue 'to seasickness.'" If you don't fully grasp the meaning, go to a courtroom and subject yourself to a boring voir dire. As a courtroom spectator, unlike the prospective jurors, you are free to walk out. The jurors must sit there and listen as the attorneys drone on.

Voir dire can be excruciatingly boring for everyone involved, except for the attorney asking the questions, and usually the juror who is responding to the questions. The following are a few suggestions on how you can minimize the boredom.

1. Keep the questions short.
2. Whenever possible, ask questions to the group and then follow up with individual questions. Group questions require all the prospective jurors to pay attention and participate.
3. Don't ask any one juror too many questions. It becomes monotonous and the other jurors will not pay attention to the points you are making. To keep their interest, you need to go from one juror to another.
4. Except for a few important areas, don't re-ask the same questions that were covered by the judge.
5. Make reference to what one juror has said when asking another juror a question. This is called looping. "Mr. Smith said he did not like his last experience serving as a juror. Tell us about your last experience." If nothing else, Mr. Smith will be awakened from his deep sleep because his name was mentioned.
6. You can keep an audience's attention by your voice, gestures and movement. Unfortunately, voir dire does not give attorneys a reason to move about the courtroom, but it certainly gives them the opportunity to vary their voices and to use gestures. If you are uncomfortable with speaking or gesturing, purchase the book The Articulate Advocate: New Techniques of Persuasion for Trial Lawyers by Brian K. Johnson and Marsha Hunter.
7. Except in limited situations, which will be explained later, don't repeat what the juror has just told you. Attorneys who habitually repeat the answer are doing so to stall while they think of another question. This can be as annoying as listening to a person who begins every question or statement with "you know." Rather than use filler words, let the jury enjoy the one or two seconds of silence while you think of your next question.

When repetition works

Having explained why the attorney should not repeat a juror's answer, there is a time when repetition works. If a juror has just told you he believes that most plaintiffs are malingerers, don't hide from the answer in the hopes that the other jurors have not been paying attention. They will have heard that answer. This is a time when the attorney should repeat the answer given.

Q. "Mr. Smith has told us he believes most plaintiffs are malingerers. Thank you for your honesty, Mr. Smith. Who else on the jury believes as Mr. Smith, that most plaintiffs are malingerers?"

By repeating the answer, you have benefited three ways. First, you have sincerely thanked Mr. Smith for his honesty. Second, you have shown the jury that you do not hide from negative comments. Third, you have used this negative statement by one juror to allow you to identify other jurors who hold a similar belief.

Repetition can also be effective when a juror makes a statement of fact that is beneficial to your case. Repeating the answer in the form of another question reinforces the point you want to establish. Imagine that you represent a client who was in an accident. After a number of years she still complains of pain. You know that the defense doctor will argue that your client should have recovered in six to eight weeks. Mrs. Black, juror No. 3 states that she was in a minor car accident and still has problems five years later. You know that the defense will exercise a peremptory challenge on Mrs. Black. She will never be able to tell the other jurors that the defense doctor, Dr. Washout, must be crazy because she is

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still in pain after all these years. Don't let the opportunity be wasted.

You want to ask Mrs. Black questions concerning how she thought she would get better and didn't; how she underwent medical treatment but only got temporary relief; the fact she never imagined that she would continue to have pain after all these years following a minor fender bender. After she has "testified," you move on to other jurors to reemphasize the point.

Q. Mr. Smith, Mrs. Black told us that a minor car accident, in her words "a fender bender," caused her significant pain. Do you think it's possible for a minor fender bender to injure someone?

A. I don't know.

Q. Mrs. Black also said that five years later she continues to have pain. Why do you think a minor accident could cause someone pain five years later?

A. Your guess is as good as mine.

Q. Well, Mr. Smith, do you think everybody heals the same way?

A. No, I suppose they don't.

Q. Do you think maybe that is why Mrs. Black still has pain, whereas if you had been involved in the fender bender, any pain you had would have gone away within weeks or months?

A. Yeah, everybody is different. I guess that's why she still has pain.

Q. Thank you, Mr. Smith. Who feels as Mr. Smith that people are different and the time it takes to heal from an injury may vary from person to person?

After covering this important point with those jurors who agree, turn the question around and ask who feels differently. For those who feel differently and are bold enough to admit it, no amount of expert testimony will convince them to change their minds. You've identified those jurors who need to be excused.

By repeating the favorable response you have had an unbiased person, a juror, make the point for you. When your doctor testifies that although most people would have recovered, not everyone heals the same, the jurors will remember Mrs. Smith's story. You have also identified those jurors who will never believe that someone will continue to have pain after six to eight weeks. By the way, you haven't convinced Mr. Smith. You used him as a foil. You never intended to change his mind.

Steal the defense's thunder

If your client has a very sympathetic injury, you want to be the one to tell the jury that your client isn't looking for sympathy. He has had all the sympathy he can stand from his family and friends. All he is looking for is justice, justice based on the facts and the law. Ask the jurors as a group if they would be willing to put aside any feelings of sympathy.

Next, turn the question around. Ask one of the jurors if she would also be willing to put aside any sympathy she may have for the defendant because the defendant was just negligent, he didn't intentionally try to harm your client. Ask another juror the same question. After two jurors say they would be able to put aside any sympathy for the defendant, ask the group as a whole if they would be willing to put aside sympathy for either the plaintiff or the defendant.

If you handle the sympathy card in this way you will have taken the wind out of the defense sails. Defense attorneys love to make it sound that you are asking for a sympathy verdict and, that without sympathy, you have no case. You need to be the first one to tell the jury that sympathy is not part of this case.

In addition to stealing the defense's thunder, you have turned the sympathy card around so that the jury understands that although the defendant didn't intentionally cause the injury, intent has nothing to do with this case. It is the defendant's negligence that requires a verdict in your client's favor. The jury is not to reduce the amount of damages because it may feel sympathy towards the defendant.

Put a frame on it

Neither the judge nor the jurors will appreciate your attempt to use voir dire to precondition the jury. Blatant preconditioning doesn't work; it can alienate the jurors at the outset. Framing, however, is different than preconditioning. Framing doesn't tell jurors how they should decide the case. Framing puts the facts and the law they will hear in the context that you give them. For example, you want the jury to compensate your client for all the harms and losses she has suffered. Rather than begin your questioning on the subject of damages, frame the issue of damages in the context that a wrongdoer should be responsible for his actions.

In a medical-malpractice case, a typical defense is that an error in judgment is not negligence. Frame the "mistake" defense by pointing out that some errors are unavoidable, while others are due to someone acting unreasonably. Ask the jurors if they believe a doctor who unreasonably makes a mistake should be held responsible.

The following are some questions to Mr. Smith, an accountant, that will illustrate this point.

Q. Mr. Smith, you are an accountant. Do you believe that most accountants try to do the very best job they can?

Q. In order for an accountant to do the best job he can, do accountants try to obtain as much information as available before giving clients advice?

Q. Do accountants try to obtain as much information as available because that can help prevent them from making a mistake, an error?

Q. In some situations, can an accountant, after obtaining all the necessary information, still make a mistake or an error?

Q. In that situation, if the accountant did his job and obtained the necessary information and an error was made, that wouldn't necessarily be the accountant's fault, would it?

Q. But if the error was made because the accountant chose not to obtain the necessary information before giving his client advice, do you believe it would be his fault?

Q. Tell me why you think the error would be the accountant's fault in that situation?

Q. Who agrees with Mr. Smith that if it's necessary for someone to obtain all necessary information before he gives advice

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to his client, and the person chooses not to do so, that person is responsible for the error?

Q. Mrs. Black, you raised your hand. Tell me why you think it would be the person's fault who chooses not to obtain the necessary information?

Q. Mrs. Black, if a doctor needs to obtain all necessary information in order to properly treat his patient, and the doctor makes an error because he chose not to obtain that information, do you think the error may be the doctor's fault?

Q. Tell me why.

Q. If a person is supposed to do his job a certain way, and chooses not to do it, do you think it's a proper excuse to say "Well, mistakes happen?"

Q. Mr. Jones, why don't you think that's a proper excuse?

What you are trying to do is to frame the issue with a generality that does not specifically pertain to the case. When you have made your point you then move on to the profession or job in question. The point is to get the jury to view the evidence in the frame you have given them.

Who should I excuse?

If you file your case in federal court, the decision as to who you should keep and who you should excuse is vitally important. An unanimous verdict is required in civil cases in federal court. In state court you only need 9 out of 12. In state court, you can still win if three jurors hate your case. In deciding who to keep, you need to discover who the strong jurors are. One strong juror is worth three, four or more weaker jurors. A strong juror can and will convince the weaker jurors to vote as he or she wants them to vote.

If you pay attention, you can identify the strong jurors. A strong juror is a person who: has served as a foreperson on a prior jury; holds a supervisory position at work; is a professional such as a doctor, attorney or engineer; is at ease when speaking; is a celebrity; is someone who the other jurors speak to during a break. The strongest juror has charisma.

Unless you have a good feeling that a strong juror will vote for your client, you may consider using a peremptory challenge on that juror. The last thing you want during deliberations is to have a strong juror advocate for your opponent.

It's not what the juror said, it's how he didn't say it

Don't underestimate body language. A prospective juror may tell you one thing with his words and tell you a different story with his body. Sometimes a juror wants to be selected on a jury because of a hidden bias or prejudice. That juror may not only conceal her bias with her words but also her body. The obvious body language signs will be hidden; or worse, she will purposely adopt a false body language to fool you. This juror wants to sit on the case so she can destroy you and your client.

When she answers your questions she will make sure that her arms are not folded across her chest. Rather than leaning back in the chair to get as far away as possible from you, she will lean toward you. The scowl that is normally on her face will be replaced with a big smile. Rather than sit stone-faced when you ask her questions, she will be nodding her head in apparent agreement.

How can you *not* be fooled by such a juror? The key is to compare the prospective juror's body language when you are asking her questions with the body language she displays when you ask other jurors questions. Observe her body language as she listens to answers the other jurors give with which she doesn't agree. Since she is no longer on stage and thinks your attention is focused on someone else, she will let her guard down.

But how can you make eye contact and be engaged with the juror you are questioning and watch the other jurors in the box at the same time? You can't. This is why during voir dire it is important to have one or more assistants in the courtroom who can keep an eye on the other jurors.

Hocus focus

Focus groups are very useful in identifying issues. Focus groups are less useful in deciding which jurors to accept or excuse. The attorney needs to be careful in relying upon the statements of traditional in-person, live focus group participants in determining how to exercise challenges. The reason is simple. One needs a large sample group before the results are predictive.

Let's say you had a medical-malpractice case involving alleged negligence during an abortion. Even though the law states that challenges must not be used to excuse someone from a protective class, such as gender, religion, race, age or sexual orientation, you may be concerned that men would be less plaintiff-oriented than women. If the live focus group had six female participants and six male participants and five of the six females were in favor of a plaintiff verdict and only two of the six male jurors were for the plaintiff, you may be tempted to use your peremptory challenges on the men. This could prove to be a disastrous decision. The sample size is much too small.

A traditional live focus group has anywhere from 12 to 15 participants. Even if you run the live focus group 3 times, your sample group would only be 36 to 45 participants. In order for the results to be diagnostic you would need 100 or more participants. This would be cost prohibitive for a live focus group.

For the cost of a typical live focus group with 12 to 15 participants, one could do an online focus group of 100 participants. The greater the number of participants, the more confidence you can have to predict who will make a better juror for a particular case.

Assume that you represent a woman who, while walking her dog off a leash was attacked by a man's dog who was also off leash. You may wonder if dog owners would be more or less sympathetic to the injured plaintiff than people who did not own dogs. In putting together the online focus group, the focus group company could have 50 dog owner participants and 50 participants who were not dog owners. The results of the focus group could determine whether dog ownership did or did not influence the negligence finding, and the comparative fault for the damage finding.

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Based upon the results of the focus group, you can take the other information you obtained during voir dire to make a more intelligent decision as to who you want to keep on your jury.

Who's on first?

For those of you too young to remember Abbott & Costello's comedy skit, "Who's on First," go to YouTube. After you have done so you will then understand the importance of keeping track of your jurors. Place square Post-Its on a stiff file folder. Number the Post-Its to correspond with the jurors' seat numbers. When the jurors' names are called, write their names on their Post-It. During the examination write the information you need to remember (hopefully an assistant will do this so you can maintain eye contact with the jurors) on the Post-It. When a juror is excused, remove that juror's Post-It and replace it with a clean Post-It. If you follow this procedure, you'll know that Who's on first, What's on second, and I Don't Know is on third.

The most important point to remember when keeping track of the jurors is which jurors you definitely need to excuse and which jurors you would like to keep. After the jurors have been questioned, assign a score of 1 to 4 and write it in small print on the Post-Its. Write it small enough so only you, not your opponent, can read it. Assign a 1 to the jurors you must excuse and a 4 to the jurors you would love to keep. Assign a 2 to the jurors you would like to excuse if you had enough challenges left and a 3 to the jurors with whom you will probably be willing to live with. This will allow you to keep track of the jurors you need to excuse. Before excusing a juror or passing the peremptory challenge, scan the sheet and pay particular attention to the jurors to whom you assigned a 1 or a 4.

Did he use 6 challenges, or only 5? Do you feel lucky? Well, do ya, punk?

As it was important for the bad guy in the Clint Eastwood film "Dirty Harry" to remember if Harry had fired six shots or five, it is equally important for you to remember how many peremptory challenges you have used and how many your opponent has left. Each time you use a challenge, write it down so you don't forget how many challenges you have left.

Every time your opponent uses a challenge, write it down so you don't forget how many challenges she has left. The actual number of peremptory challenges left as well as the comparative number you and your opponent have left, is crucial in determining whether to accept the jury as constituted or to exercise another peremptory challenge. If you are ever in doubt as to the number of challenges you have used, ask the court.

The quickest draw in the West

Often there will be a prospective juror who you know you want to excuse but you have a sense the other side may have concerns as well. It may be that the juror is quirky, or he has an opinion about everything. It may be the juror has said many things that indicate he will not be a good juror for you, but he has also said a few things that raise the hair on the back of your opponent's neck. When this happens, don't be too quick on the draw to exercise your peremptory challenge. If you use your first three or four peremptory challenges on other jurors, the other side may believe that you are willing to accept the problematic juror. Your opponent may blink first and excuse the juror. You can improve your chances by instilling doubt in your opponent's mind. If the problem juror says anything that is negative to the defense position, spend some time on that issue with the juror. The more you can get the juror to expand on those issues, the more concerned your opponent may become. As with everything else concerning trial strategy, there is a caveat. Remember Who's on first. Don't forget that the problematic juror must go. If your opponent doesn't take the bait, exercise your challenge.

A leopard doesn't change his spots

An attorney who uses voir dire to change a juror's opinion is wasting his time. If a few minutes of questioning can get a juror to say that he was wrong and the attorney is correct, either the juror is telling the attorney what he thinks the attorney wants to hear, or the juror really didn't have a strong belief.

Usually what will happen is a prospective juror will make a comment such as, "That McDonald's verdict is a perfect example of a frivolous lawsuit," and the attorney will embark on a long-winded justification as to why the juror is wrong. Rather than changing the juror's mind, the attorney will accomplish the following: he will have wasted valuable time on that juror; he will have come across as a pompous ass; he will have alienated that juror and other jurors who hold the same belief; and he will have telegraphed a clear message to the other jurors . . . don't tell that attorney how you really feel or you will be given a lecture as to why you are wrong.

The plaintiff would ask the court to thank and excuse juror No. __, Mr. ___

When it comes your turn to exercise a peremptory challenge, the proper response if you were to use the challenge is to ask the court to thank and excuse that juror. State both the number and the name of the juror you wish to challenge. Show the juror the respect he or she deserves. After the judge tells the juror that he is excused and he is to report back to the jury assembly room, thank the juror as he is leaving the jury box. As with everything else you do in the courtroom, be sincere. It's a genuine "thank you," not an Elvis Presley "thank you, thank you very much," after he finishes a song.

If you decide to pass the peremptory challenge, stand up, look at the jury and say "Plaintiff accepts the jury as presently constituted."

Me, me. You forgot about me

Despite the fact that many people do not like public speaking, everyone, and I mean everyone, wants to feel important. After the judge has examined the jurors,

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most of the jurors will have gotten over their stage fright. They will not hold it against you if you politely ask them questions. On the other hand, if you fail to ask a prospective juror any questions, that juror may feel that you purposely chose not to ask her questions because you do not value her opinions. If you believe a prospective juror will eventually become a member of the jury, make it a point to ask him or her some questions.

Conclusion

Unfortunately, attorneys have little opportunity to practice their voir dire skills. Unlike direct and cross-examination that can be practiced during depositions, the same is not true for voir dire. Unlike opening statement and closing argument that can be practiced while taking a shower, voir dire requires the give-and-take of another person.

Although an attorney should carefully craft important voir dire questions and practice asking those questions, the only way to become comfortable with doing voir dire in front of a jury is to practice voir dire with a number of people.

The attorney needs to practice responding to the negative statements made by jurors; obtaining more information from a non-talkative juror; getting a juror to acknowledge that he could not be fair in this particular case using one juror's response as a lead to questioning other jurors; and putting the case in the frame you want. Most importantly, the attorney has to practice all of this while coming across as a caring human being.

The only way to become proficient is to practice. The more you practice, the more confidence you will have. With more confidence, you will be able to effectively employ the more subtle techniques that will raise your voir dire skills to a new level.

Remember what the man said to the tourist when asked, "How do you get to Carnegie Hall?" "Practice, practice, practice."

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