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## Butt wipes

### THE KEY TO VOIR DIRE?

One of the topics I always like to discuss with jurors during voir dire is the greatest invention of all time. Is it the butt wipe, the cell phone, or air conditioning? Is it the Internet? My good friend Darren Campbell had the nerve to suggest that the “wheel” or the “transistor” were the greatest inventions. I wonder how many jurors he has put to sleep with that kind of defeatist attitude. I’ll bet you can craft an argument in support of any of these. Air conditioning? Best to use that one during summer. The cell phone? In your hand, you hold all of the world’s collective wisdom. The Internet? What if one day Google was deleted? And we couldn’t google what happened to Google. The butt wipe? Cleanliness is next to Godliness.

We all know that you can win or lose a case during voir dire. If there is a golden rule of how to measure the quality of voir dire, it is in how much information you obtain from jurors, and the best measure of that is when jurors do the talking. That means jurors should talk more than you. Unlike at any other point in trial, you want to be surprised, you want to ask questions you *don’t* know the answer to. So how do you get the jurors talking? Ask them interesting questions that will not only get them talking to you, but to each other.

Focus on seeking information. Create a fun atmosphere that encourages jurors to talk. Ask open-ended questions that call for a narrative response. Listen and follow up. Make your questions clear – and make them short. Avoid the Socially Desirable Response Bias. You should avoid questions that include phrases that trigger the “looking good” response from jurors (e.g., “fair and impartial” or “bias or prejudice”) since they inhibit honest and candid responses. Be real – voir dire is a conversation with a juror; allow some of your humanity to show.

#### Can you render a large verdict?

In spite of what some defense attorneys think, you can ask about a

juror’s ability to enter a verdict in a certain amount: “Plaintiff’s attorneys are usually permitted to question prospective jurors as to their ability to return a large verdict if supported by the evidence. (Some individuals may be incapable of rendering a \$1 million dollar verdict under any circumstances). For example, in a case involving a \$1 million damage claim, plaintiff’s counsel may ask: ‘Assuming liability is established in this case, would you be able to return a verdict for \$1 million? Would you require a higher standard of proof on liability in order to return such a verdict?’” (Wegner, Fairbank, Epstein, California Practice Guide, Civil Trials and Evidence, Ch. 5 – Jury Selection, § 5:312, pg. 5-58.)

On voir dire, counsel may inquire as to any matter that would be grounds for challenge for cause, or that would assist counsel in intelligently exercising preemptory challenges. (Code Civ. Proc. § 222.5.) Counsel may ask any question that would assist him in determining ground for juror disqualification. In addition, liberal and probing examination is allowed. (Code Civ. Proc., § 222.5.)

A question fairly phrased and legitimately directed at obtaining knowledge for the intelligent exercise of preemptory challenges may not be excluded merely because of its additional tendency to indoctrinate or educate the jury . . . the potential for anticipatory argument . . . is an unavoidable consequence of the voir dire jury examination.” (*People v. Williams* (1981) 29 Cal.3d 392, 408.)

#### Responsibility and accountability

Ask questions about responsibility and accountability. For example: “Your child borrows a toy from a neighbor and leaves it out, it rusts. What is the first thing your child should do? (Apologize.) What does the apology symbolize? (Acknowledgement of responsibility.) Is acknowledgement enough? What does it mean to be responsible? What does it mean to be accountable? In addition to

apologizing, should your child buy a replacement toy? Why? If you hit a car in a parking lot, dent it, do you leave a note or just flee? Why?

Here are a few of my favorite voir dire questions:

1. Would you jump out of a plane? (Follow up: why/why not?)
2. Would you swim with sharks? (Follow up: why/why not; would being in a cage change your answer?)
3. Do you ever have dessert before dinner? (Follow up: why/why not?)
4. For the men: Ginger or Mary Ann? Ginger or Elvira? For the ladies: George Clooney or Brad Pitt?
5. If you had all the time you wanted, would you watch TV or read a book? (Follow up: What was the last TV show/book you watched/read?)
6. What’s your secret talent?
7. What talent do you wish you possessed?
8. What do you want to be doing in five years?
9. Where do you see yourself in five years? 10 years? 20 years?
10. What do you love best about your family?
11. Do you pray?

Voir dire should be time well spent; aim to make it a genuine conversation with jurors. Your purpose is to discover how jurors’ attitudes and the life experiences that shape them will impact your case. Judges are less likely to limit your voir dire or the time spent if the conversation with jurors is fair and intelligent, and most particularly if the jurors are doing the talking.

The best thing you can do is just be yourself. But I guess that presupposes that any of us are really that in tune with who we really are. But have fun at your next trial. And don’t forget the butt wipes.

