



Trials. Not Errors.

in this issue:

Highlights:

- Interview, don't 'examine' jurors.
- First impressions matter.
- Commitments are important.

Spotlight on Voir Dire

Six More Tips on Voir Dire for Defense Counsel

Don't view the voir dire as, "The Voir Dire Examination."

You should view it as an "interview." Your approach and demeanor will differ noticeably depending upon your orientation. If you fail to adopt an interview orientation, you will most likely respond with a cross-examination approach.

The importance of the first minute.

Often defense counsel must begin their voir dire without benefit of a break after plaintiff counsel finishes. Thus, all too often, the first minute of the defense voir dire consists of somewhat clumsy "preparations." This usually involves dragging the podium out from the corner of the courtroom (if the plaintiff's attorney has not used one), fussing with papers and seating charts, all the while making apologies to the jury. This, unfortunately, becomes the jury's first impression of defense counsel. To avoid this, you should undertake better preparation before the jury is brought into the courtroom on the morning of the voir dire. You should make appropriate arrangements, such that when the Judge turns voir dire over

to you, you can proceed deliberately to face the jury and begin your interview without interruption.

Plaintiff must carefully plan voir dire. The defense must plan to be flexible.

If the Judge has given plaintiff's counsel free reign during voir dire, you must respond to plaintiff's 'persuasive questions.' You cannot simply proceed sequentially through a list of prepared questions, ignoring the 'suggestions' that were imparted by plaintiff's counsel. In addition, throughout voir dire, you must repeatedly illustrate, "the other side of the coin." You must 'teach' jurors from the very beginning (before plaintiff opening) to anticipate the defense position while listening to the plaintiff's assertions.

When possible, respond to jurors' need for information.

In order to be persuasive, a speaker must be viewed as trustworthy, competent and likable. You have a chance to begin fostering these perceptions during voir dire. Jurors are nervous, confused and often wondering: 'How does all this work?' 'What does burden of proof mean, anyway?' 'How do I know how to decide who should win?' Help jurors understand their task. If you reduce their confusion, they can attend to you more closely and they will begin to see you as a leader and a teacher. You may have an opportunity to explain, "In a civil trial such as this, you will hear the evidence, then the Judge will give you



instructions regarding the definition of negligence. You will then examine the evidence and decide if anyone, including the plaintiff, was negligent. The law is your set of decision rules. You will decide whether the facts fall under those definitions. Does that sound like a job you're comfortable carrying out?"

It is important to obtain commitments for jurors to follow basic tenants.

Ask jurors, "Will you, throughout the entire proceeding, wait (hold in abeyance, suspend a decision, refrain from committing to a position) until you hear both sides of the case before making a decision?"

"Will you be vigilant in following the Judge's instructions about not allowing passion or sympathy to sway your verdict? If you find yourself or others suggesting, 'gee, the poor plaintiff, we should somehow find the defendant responsible so the plaintiff can get the financial help he needs,' will you call attention to such a statement, and remind yourself and others about your duty as jurors?"

"Will you voice your opinion, even if you are in disagreement with all of the others?" (Diversity of opinion generally works for the defense.)

Know, in advance, what you need to know about jurors.

What you need to know from jurors certainly varies from case to case. However, in general, at the end of the voir dire, you want to be able to look at a juror and answer the following questions:

- A) Where does this person fall along a leadership/influence continuum?

Is this person a persuader,
a participant or,
a non-participant?
- b) What is the likelihood that this person could become an “expert” on the jury because of some personal experience he/she has had with the issues in this case?
- c) In light of all of the information about this juror (The ‘constellation’ of all relevant information), is he/she likely to be predisposed against me? If given a chance to talk to him/her, one-on-one, could I persuade him/her of the merits of my case?

Often, there is a tendency to focus on one of two isolated aspects of a juror’s background, and make challenge decisions based upon those items alone. Unless you have conducted pretrial research and found that there is a reliable relationship between jurors’ predispositions in your case and one or two demographic variables, decisions made on narrow interpretations are often misguided.

It’s also important to reflect on your rapport with each juror. Rapport should be factored into the analysis in the final decision-making stage. Inexperienced attorneys will often use rapport as the first, or only, criteria for keeping/challenging a juror. It should never be overlooked but it should be examined only after an objective review of the juror is undertaken.

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Dr. Jones earned her undergraduate degree at St. Lawrence University and her doctorate in psychology from the University of Alabama, one of the few institutions in the country that offers a concentration in clinical psychology and law.

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