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# **Know Your Audience: Best Practices in Voir Dire for Defense Counsel**

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## **Know Your Audience: Best practices in voir dire for defense counsel**

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One or two biased jurors can transform a verdict. The importance of having the right – and avoiding the wrong – people in the jury box is difficult to overestimate. Yet jury selection is often under prepared for, and ineffectively handled. The truth is that the principles of jury selection and the practice of voir dire are simply not taught in law schools at anywhere near the depth required for mastery, leaving litigators to learn through, for lack of a better phrase, trial and error. This document outlines strategies for preparing for and conducting jury selection rooted in jury psychology, jury research, and direct post-trial juror feedback.

### **THE JUROR EXPERIENCE**

Over the years our team has conducted thousands of post-trial jury interviews with actual jurors. Most report having entered the voir dire process feeling alienated, disenfranchised, and essentially “lost.” The juror experience begins for them with receiving a summons in the mail – an unpleasant event to be sure. Things typically don’t get much better from there. Their complaints often center around cancelling previously-scheduled appointments, being told to wait for interminable lengths of time upon arriving at court, filling out invasive questionnaires, and worrying the whole time about being ripped out of the fabric of one’s life. They sense questions are frowned upon by unreceptive court officials and bailiffs. By the time voir dire begins, jurors are often deeply skeptical of both sides and are just beginning to realize they may not have the tools they need to make the right decision. In short, jurors are anxious and yearning for someone to trust, yet few attorneys manage to take advantage of this opportunity.

### **WHY WON’T ANYONE TALK TO ME?**

Several years ago I was assisting with jury selection in a small Midwest venue for a case involving serious property damage, personal injuries, and deaths. During plaintiff counsel’s voir dire he spoke, by my estimate, approximately 90% of the time. When he did choose to pose an actual question, it was of the leading variety and clearly geared not toward his stated goal of learning about the jurors, but rather toward amassing support for challenges for cause against jurors with business experience or higher socioeconomic status. About twenty minutes into his voir dire, he was really hitting his stride. He actually appeared to be enjoying himself. Quite suddenly, the panel as a whole stopped responding to him. None of the jurors would say a word no matter how hard he tried. In frustration he finally asked, “Why won’t anyone talk to me?” After a pause, a large, blue-collar-type gentleman in the back of the gallery raised his hand and said loudly, “Because we don’t like you!” At that point the courtroom erupted in laughter. What had happened? Plaintiff’s counsel had, in effect, been cross examining the jury and they had simply become fed up. He had in fact not been interested in learning who the jurors were, but rather was only interested in “winning” in voir dire and tricking jurors that fit his profile into saying the magic words that would get them struck for cause – and the jurors knew it. In short, he had

insulted their intelligence and wasted their time. He had lost forever the opportunity to gain their trust. Not surprisingly, he lowered his demand substantially and settled the case.

One of the principles we teach is that jurors do not begin the voir dire process trusting counsel. That trust must be earned. The truth is jurors begin their service with heightened skepticism of both parties. They understand that the process is adversarial, and many assume counsels on both sides are planning to spin, withhold, or even bury the truth. This is why research consistently demonstrates that when counsel tries to overtly persuade in voir dire, it backfires and counsel winds up hurting their case. Why is this so? Jurors are so skeptical and so untrusting that they assume whatever theme counsel is pushing is probably the case's biggest vulnerability, not its strength.

## **PREPARING THE VOIR DIRE STRATEGY**

We recommend that instead of trying to frame the case by landing themes, counsel follow a kind of Socratic teaching method; something not dissimilar from a focus group approach wherein counsel delivers a series of open-ended questions designed to elicit values-based and thematic statements from the jurors themselves. How is this done? By developing lines of questioning that help jurors feel safe sharing their true thoughts.

The five step example below is an approach that can be adapted to any case issue. The idea is that counsel is not making a statement and asking "do you agree" nor are they asking "are you biased;" instead, they are asking "is there a problem and if so, what should be done." Analysis of the recommendations that follow reveals jurors' biases.

- Step 1: Counsel tees up a new topic, and earns trust by acknowledging that as an advocate for their client, they are in fact coming from a biased position themselves.
  - o Counsel: "This is a case dealing with a collision between a passenger car and an 18-wheel semi-tractor trailer. As the attorney representing the defendant trucking company, I obviously want to know how you feel about trucks and truckers."
- Step 2: Counsel next establishes that it is normal to have some dislike for or even fear of big trucks.
  - o Counsel: "So, first question; who here wishes there were a lot more big trucks on the highways?"
    - It is almost certain no one on the panel wishes there were more big truck on the highways. By getting the whole panel to acknowledge this, it makes any jurors who are in fact truly biased against trucks not feel alone in their views, which dramatically increases the odds that they will admit to the court that they cannot be fair.
    - It is likely that several jurors will laugh in response to hearing this question. The question is somewhat absurd by design. The laughter indicates that a bond of understanding is forming between counsel and the jury. The bond is

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