

Getting The Most Out Of Voir Dire

Friday, Oct 26, 2007 --- A number of years ago, I had a jury trial in the Midwest. It was an employment discrimination case that I was asked to try on relatively short notice for reasons that are not worth mentioning. The trial ended very well for our client, or else I would be unlikely to want to discuss it, let alone share a story about it.

On the first day of the trial, after hearing arguments on the parties' various motions in limine, the judge had the jury panel brought in. He seated a dozen of the potential jurors, then turned to our opposing counsel and said, "You may begin."

The attorney, who had been practicing for more than 20 years, looked at him and said, "Begin what?"

"You may begin questioning the potential jurors."

"About what?"

The judge called us to the bench and explained to our opposing counsel that he could commence voir dire.

"I thought you were going to do that," the attorney said, and the judge shook his head no.

Over the next half-hour or so, opposing counsel tried to come up with questions to ask the jury. As you might imagine, it was a struggle, and he quickly turned the floor over to us.

Putting aside all that we are taught about trials and all of the warnings judges give juries — particularly their warnings that what the attorneys say is not evidence and that jurors should wait until they hear all the evidence before they make up their minds — I have always felt that particular trial was won on voir dire.

While opposing counsel had struggled to come up with questions off the top of his head, appearing unprepared to the potential jurors, we had taken voir dire seriously so that we would end up with a jury that might not only be accepting of our client's arguments, but perhaps even predisposed to agree with them.

I thought of that trial recently as we commenced an employment discrimination trial on the West Coast. Once again, we took voir dire seriously and ended up with a jury we felt very strongly about. It was a smart,

well-rounded jury that had responded well to our questioning. Before we had even given our opening statement, they seemed to understand our client's arguments and were open to accepting them.

After our opening statement, where the jury gave us and our client its full attention — which they had not done during our opponent's opening statement — opposing counsel called us to see if we would be willing to offer his client something to put an end to the trial. He did not have to tell us why: it was already clear that we had made a strong connection with the jury through voir dire, and the opening statement had merely solidified that connection.

Over the years, I have seen attorneys approach voir dire with different degrees of seriousness. Some plainly considered it an afterthought, if they considered it at all, and ended up with juries that seemed disinterested in their case. Others took voir dire so seriously that they read from a lengthy script of questions, which left the jury bored.

Having seen various approaches and having had both positive and negative experiences myself during voir dire, it would appear that the following should be considered in an attempt to conduct effective voir dire and end up with a jury that would be accepting of your case:

1. Remember that you are making the first impression for yourself and your client.

Contrary to what some attorneys may believe, the opening statement does not create the jurors' first impression of the attorneys and their clients. By the time the parties get around to the opening statements, the jurors may have already observed the attorneys and their clients for several days, if not longer. While the purpose of voir dire may be for the attorneys to learn about the potential jurors, it is naive to think that the jurors are not formulating their own opinions about the attorneys and their clients at the very same time. It is the first opportunity that attorneys have to introduce themselves and their clients to the jury.

2. Remember that at least one juror is always watching you and your client.

During voir dire, even during your opponent's voir dire, you should assume that at least one potential juror is always watching you or your client. If you don't think they will notice an eye roll, or a guffaw, or a look of panic, you are very mistaken. And if you don't think that a potential juror will tell the others about that eye roll or guffaw or look of panic, you are even more mistaken. Following the recent trial that I mentioned above, the one that was resolved after our opening statements, the jurors told us that they had been disturbed that one of opposing counsel's colleagues nodded off during voir dire. Because of the way we were seated in the courtroom, we hadn't notice that. But the jurors had.

3. Use voir dire to connect with the jury.

Like it or not, jurors are influenced by how much they like the attorneys in the case. Perhaps they are more likely to side with someone they have come to like. Perhaps they are just more likely to listen to someone they have come to like. In either case, voir dire provides an excellent opportunity for an attorney to make an important connection with jurors. Reading questions to the jurors in a monotone may help you get some important information, but it would seem unlikely to aid you in building a rapport with the jury. Speaking directly to the jurors, calling them by their names rather than their juror numbers, and personalizing your questions can help create that connection.

I have always liked to explain to jurors that voir dire is the one opportunity for attorneys to learn about who the jurors are and have normally asked each juror what he or she likes to do with his or her free time, then followed up with a question or two about those activities. Every lawyer has his or her own style, and I am not suggesting that everyone needs to be "folksy" in talking with jurors. But taking an interest in them and their pursuits can be the difference between a juror who will pay attention at trial and a juror who will not.

4. Use voir dire to diffuse issues and steal your opponent's thunder.

Very few cases being tried to a jury are perfect. If they were perfect, they wouldn't need to be tried — one side would have been awarded summary judgment. Voir dire provides an excellent opportunity to share and diffuse concerns you might have and steal the thunder from your opponent at trial.

If you are concerned that a key witness later lost his job for absenteeism, you may want to ask the jurors if they believe that someone who was terminated for absenteeism could not be trusted to tell the truth about prior events he had witnessed. Such a question steals the surprise of the employee's termination and could identify jurors who would have an adverse reaction to that witness.

More likely, few if any jurors would say they believed such a person could not be trusted, and they would seem likely to then ignore the witness's termination if and when it arose during trial as you have planted the seed that it does not affect the witness's credibility. In a recent trial, our opposing counsel planned to attack the credibility of a key witness because he had gotten the date of a critical meeting wrong in his deposition. By addressing this issue throughout voir dire, we stole that issue from our opponent such that they were unable to make much of it at trial.

5. Educate the jurors about your case.

In conducting voir dire, you are not only trying to determine how the potential jurors would respond to your case but you also have the opportunity to tell them about your case at the same time. Well-worded questions can accomplish both goals. There is no reason to wait until trial to tell the jury that the age-discrimination plaintiff was terminated for insubordination. Instead,

ask the jurors if they believe that older employees should be allowed to defy their superiors. Ask them if they believe that different rules should apply to older workers. Few jurors will respond affirmatively to those questions, but they will certainly remember them as the case proceeds. You have not even given your opening statement, yet you have already started to argue your case to the jury.

6. Watch all of the jurors.

Just as the jurors are always watching the attorneys and their clients, you and your colleagues should be watching all of the jurors, not just the one being questioned. Did a juror yawn or shake his head while you were talking? Did a juror roll his eyes? Someone at your table should be assigned to watch all of the other jurors during your questioning so you know about any reactions they might have. At a trial several years ago, I hadn't noticed that a potential juror scowled at me whenever I questioned the other jurors. We would not have struck him from the jury had my colleagues not noticed that, and the case may have had a different outcome had that juror remained.

7. Identify jurors who are too excited about the trial — or who are trying too hard to get dismissed.

One of the truths of jury trials that we lawyers are not supposed to discuss is that few people summoned for jury duty actually want to serve. People frequently joke about what they will say or do to get out of jury duty. While some excuses are certainly legitimate, we have all seen jurors struggle to come up with elaborate excuses to try to get out of serving. If there is a juror who is trying too hard to get the judge to excuse him or her, it is important to analyze why, as well as to analyze whether keeping that juror is going to help or hurt your client.

A juror who doesn't want to be there may well be one of the most vocal people in the jury room, trying to force a verdict just so he or she can go home. At the same time, it is important to identify jurors who seem too excited about serving on a jury, or about serving in your case in particular. Does that individual have an ax to grind? If so, against which side? Being willing to serve on a jury is one thing. Being excited about it is something else entirely and should be viewed with appropriate suspicion. A juror with an agenda can be a trial lawyer's best friend or worst nightmare, depending on the agenda. Find out what that agenda is, if you can, to determine whether to strike the overly interested juror.

8. Peremptory challenges are precious — and dangerous.

While the number of peremptory challenges each party may use varies from jurisdiction to jurisdiction, one thing remains constant: peremptory challenges are both precious and dangerous. They have to be used skillfully. Striking one juror may only result in replacement by someone even less inclined to side with your client. And if you have exhausted your peremptory challenges, you will be stuck with that unfavorable juror.

Before striking a juror, particularly if you are running low on peremptory challenges, ask yourself if that juror is someone who seems likely to exert himself or herself in the jury room, or if he or she is more likely to just go along with the rest. You may be willing to live with the latter.

9. Don't profile.

Putting aside the serious legal issues of selecting jurors based on their race or sex or age, it is just plain silly to pick a jury based on an assumption that people of the same race or sex or age all think alike. They don't, and only someone who doesn't interact with people on a regular basis would believe otherwise. Use voir dire to find out how the individual jurors think. Find out about their own experiences. Find out about their own biases and preconceived notions. And don't think jurors themselves don't notice if you start striking people of the same race or sex or age. They notice things like that, and they probably aren't going to think too highly of you if they spot you doing it.

10. Don't embarrass jurors.

In trying to gather information to determine if jurors might have some preconceived notions about your client or the case, it is easy to forget that those jurors have feelings. There is no need to embarrass them. If a juror tells you she feels she was sexually harassed at work, asking her to provide details in front of a room filled with strangers may embarrass her — and it may cause her to lose respect for you and sympathy for your client. If the judge will allow you to do so, ask her about the details in a sidebar. If the judge will not permit that, politely ask her to tell you whatever she feels comfortable telling you. Your sensitivity and courtesy will be noted by all of the jurors.

11. Get the jurors talking — but don't let one juror taint the pool.

Depending on whom you speak with, the phrase "voir dire" is derived from Latin, French or both and means "to speak the truth." Don't forget that the idea behind voir dire is to get the potential jurors to talk to you so you can determine if they can approach your case with an open mind — or, better, whether they might be inclined to accept your arguments.

Asking simple yes-or-no questions has a purpose during voir dire, particularly if you are trying to educate the jurors about your case and weed out clearly biased jurors. But it is the open-ended questions, when you ask the jurors how they feel about something or what their experiences are, that will really provide you with the information you need.

At the same time, you need to be careful about letting a juror talk too much if what he or she is saying might taint the other jurors. For instance, if someone has a particularly negative impression about your client, you may want to ask the judge to allow you to question that juror in a sidebar rather than let him or

her tell a long story criticizing your client in front of the other jurors.

12. Be prepared to change your mind.

It's easy to pigeonhole a potential juror based upon some of his or her early answers to questions. Probe a little deeper, and you may find that the juror you had originally planned to strike might be the one of the best persons to hear your case. The juror who said she once filed an internal complaint of harassment may end up telling you that she believes too many people file frivolous claims. The juror who used to be a union member may tell you that he ended up being disappointed in the union or is now a working in management. Your snap judgment could be correct, but it could also be incorrect. Take the time to find out.

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