

## **Jury Selection**

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As you voir dire and pick your next jury in a nursing home trial, you should be mindful of the fact that in recent years the jurors sitting in front of you have likely been bombarded by a national tort reform campaign that has convinced many that our country is in crisis due to frivolous litigation. This campaign is well orchestrated, well financed, and has been extremely successful. You will find people sitting on your panel who believe that our justice system has been taken over by litigants who have brought misfortune on themselves and who are out to “win the lottery”. You will hear these very statements. Many of the jurors you face will be watching you and your client closely to see if you are “part of the problem.”

In jury selection today, the lawyer does not have to ask the jury if they have heard about the “McDonald’s” case, the jurors themselves will bring it up. They will know little of the actual facts of the case or it’s eventual outcome, but they will know that a large sum of money was rewarded to someone who spilled coffee on themselves. Plaintiff’s lawyers may find themselves in the predicament of having far more individuals on the panel who believe that frivolous lawsuits are a serious problem in our country than can be removed for cause or by preemptory challenge. The best-case scenario could be to identify which of

these people would be the most influential and remove them. Picking a jury is a difficult task that requires much thought and preparation prior to trial. No longer can a lawyer spend fifteen (15) minutes asking the panel to raise their hands in agreement with him or her as to certain propositions and then strike certain jurors based on gut reaction.

### **Voir Dire Preparation**

During voir dire you are attempting to do several things at once:

- Elicit extensive information from each juror about their background, experiences, and opinions
- Begin to develop a rapport with the jurors
- Begin educating jurors on the issues of your case,
- Begin persuading jurors that your case is just and deserving of a verdict.

You must prepare for voir dire long before trial. It is helpful during discovery and throughout the litigation to keep a voir dire file where you jot down notes and other thoughts regarding issues that arise or may be problematic in your case. These notes can be incorporated into a jury questionnaire or used as a basis for questions.

If the value of your case justifies it, a focus or study group can be extremely helpful in jury selection. Focus groups usually involve presenting the critical issues in your case to several groups of people and eliciting their questions, feelings, attitudes and opinions. Focus group responses are far more reliable in picking a jury than stereotypes and assumptions.

## **Jury Questionnaires**

An excellent way to obtain a substantial amount of information about prospective jurors, without hours of questioning, is through the use of jury questionnaires. Even if allowed significant time for voir dire, it is practically impossible to find out all of the basic information that you need from each potential juror. Jury questionnaires allow you to gather consistent information about the backgrounds and attitudes of each person, which will then form the basis for more specific questions during voir dire. If the Court will allow the use of such questionnaires, you should spend significant time in developing them. Likewise, the jurors should be given sufficient time by the Court to answer the questions. A questionnaire will take less time to complete than it would take to elicit the information orally and it allows jurors to disclose sensitive and private information that they would otherwise be reluctant to voice in the courtroom. Attached is a jury questionnaire that could be used in a nursing home case.

## **Tips for Jury Selection**

### **- When you start talking, they begin deciding.**

Despite what the judge tells them, jurors begin making judgments from the very moment they lay eyes on you and your client. You have probably seen the statistics indicating that jurors make up their minds very quickly at trial, many after opening statement, so you must begin persuading from the outset. Voir dire is an opportunity to begin pre-conditioning jurors through subtle persuasion. This takes creativity and preparation, but will help the jury frame the case in your terms. By subtly outlining the issues in your case in ways that the jury can

understand and relate to, you can avoid making direct statements about the case while communicating your message in a persuasive way.

**- It's not about you**

The key to successful voir dire is to get the jurors talking. Direct statements asking the jury to agree or disagree by raising their hands are worthless, unless used in a very limited way as a means of educating the jury. You must have dialogue with each of the jurors if you are to find out their background, experiences, and opinions. Ask open-ended questions that give each individual an opportunity to talk. Keep track of those who do not volunteer an answer and question them individually. Otherwise, you may find yourself with a jury composed of those who did not volunteer to speak and were therefore not struck from the panel.

**- Don't fear the answers**

In this age of tort reform, you cannot avoid asking the tough questions for fear of what might be said. Find out how they feel about lawsuits and the idea of someone suing a nursing home. Do they have reservations concerning lawsuits against doctors or other healthcare providers? When you get an answer contrary to your position, use that as an opportunity to question the rest of the panel and find out if anyone else feels that way. You would like to have a jury of people who agree with you on the issues, but those people are going to get struck. You are striving for a jury of open-minded people who will do their best to listen and make a decision based on the evidence, instead of pre-conceived notions.

**- Develop a rapport.**

Voir dire is an opportunity to establish a bridge between you, your client and the jury. As you elicit the information you need, show an interest in each individual and what they are saying. Call them by name and don't fail to acknowledge the significance of their responses. For instance, if a juror mentions losing a family member recently, acknowledge it and be human. If you don't, everyone in the courtroom will notice it.

**- Be honest about your case**

Disclose the major weaknesses in your case during voir dire. By doing this early, you will enhance your credibility and minimize the impact.

**- Don't allow a monopoly**

Be careful that individual jurors do not monopolize voir dire. Some people on your panel will be delighted to stand up and answer your questions and will take too much of your time if you let them. Segue from their answers to questions directed to other jurors along the same line of thought. Get everyone involved.

**- Ask meaningful questions**

Use your allotted time to ask questions that will provide you with helpful information. This sounds simplistic, but how many times have you heard a lawyer's voir dire sound like a form checklist of questions. For instance, the question "Can you be fair and impartial?" is useless. A better question would be

“Is there anything about this case that might cause you to favor one side or the other before you hear any evidence?”

**- Educate**

You must educate the jury on the important issues in your case and that begins during voir dire. Find out if any of the jurors have misconceptions about key issues. When a misconception is discovered, ask open-ended questions to find out if it truly is a misconception, or actually a deep-seated bias.

**- Persuade**

This is your only chance to converse with the jury. In a subtle way, you have the opportunity to influence how the jurors view your case. Take advantage of it.

**Conclusion**

Uncovering the attitudes, experiences and opinions of the potential jurors is key to successful jury selection. Gathering and processing this information, building a rapport, educating and persuading the jury during voir dire is a challenging and vital task. Focus on your voir dire preparation just as you would other important aspects of your trial, because if you are unable to seat a fair and open-minded jury, the rest of the trial will most likely be an exercise in futility.