

# **How to Argue and Win a Request for More Time On Lawyer-Conducted Voir Dire and/or for the Use of Jury Questionnaires**

**LaBarron N. Boone**

Possibly no area of trial practice is the subject of more theory and speculation than jury selection. Many trial lawyers will agree that jury selection is the most important part of a trial. To go one step further, many trial attorneys will also agree that a great number of cases are won at jury selection. As a result, a case may be won or lost by the time the jury has been seated in the jury box.

## **I. The Importance of Voir Dire**

In getting to this stage, each trial must go through the voir dire process. The importance of the opportunity to directly communicate with the jury at any point in the trial cannot be overlooked.<sup>1</sup> This idea is especially true of voir dire. Direct communication with the jury during voir dire is an attorney's first opportunity to advocate their position to the jury.<sup>2</sup> It is also the initial establishment of his or her credibility as a lawyer. This is critical as credibility will directly impact an attorney's ability to persuade the jury to their analysis of the case.<sup>3</sup>

Lawyers conducting voir dire are faced with an immense challenge. This challenge entails questioning a group of total strangers (usually thirty or forty or more) in a formal environment to determine their hidden biases, agendas, and prejudices that may affect their ability to serve fairly in the case.<sup>4</sup> One aspect of voir dire that is troublesome to many attorneys, those new to the professions as well as seasoned attorneys, is the time limitations placed on this phase of the trial. It is often the case that these constraints

prohibit the attorney from discovering juror biases and negative predispositions.<sup>5</sup> The other side of the coin is also a valid argument: when given time, many attorneys spend much of it trying to predispose jurors to their clients' case rather than asking questions that might reliably reveal an existing predisposition. Therefore, a balance must be found. The remainder of this paper will discuss how to successfully petition the court for additional time during the voir dire process.<sup>6</sup>

## **II. Difficulties with Limited Voir Dire**

Since speaking publicly is generally recognized as the most common personal phobias, voir dire is a frightening process to jurors. It is naïve to expect prospective jurors to speak publicly about some of their personal and emotional concerns in a somewhat threatening courtroom environment without having adequate time to develop some relationship of credibility and trustworthiness with the group before even approaching any sensitive subject such as “lawsuit abuse” or other biases a juror might have.<sup>7</sup> It is also virtually impossible to convey the complexities of a products liability case where the failed product took several years to design and develop. Likewise it is a daunting task in attempting to explore the important intricacies in a medical malpractice case. If the trial court sets some arbitrary time limit such as fifteen or even thirty minutes, determining the proper jurors for a fair trial may be impossible.

It is essential for an attorney to maximize what he learns about each potential juror before and during voir dire. Often during voir dire, the judge only allows questioning of the group as a whole with little follow-up. However, most judges are willing to extend time limitations if they are willing to extend time limitations if they feel

that they attorney is asking relevant, case-specific questions. As the “guardian” of the jurors, the judge will recognize a need for additional time if the jurors are participants rather than mere spectators in the jury selection process.<sup>8</sup> But, in the cases where you are before a judge who wants to adhere to time limitations, there are numerous strategies for persuading the judge to allow additional time.

### **III. Techniques to Expand Voir Dire**

Not only is it possible to get the court to give more time with and information from prospective jurors, but also it may be crucial to do so. You can ask the court to improve voir dire conditions in one of several ways. If your judge or jurisdiction permits it, you can seek to get a sequestered voir dire (at least for certain questions) to eliminate the group dynamic that inhibits most persons from revealing something about themselves in front of strangers.<sup>9</sup> Obtaining attorney-conducted voir dire or expanded questioning or a written questionnaire may be difficult, but if the requests are supported by case law and germane to the problems in the case, they are often granted.<sup>10</sup> If all else fails, getting the judge to add your voir dire questions can be critical in getting potential jurors to open up about themselves. The judge will appreciate neutral, well-crafted questions and the other side’s objections to your questions are less likely to prevail.<sup>11</sup>

To prevent limits on your time, it is important to make a record before voir dire as to the need for latitude to ask case-specific questions. Voir dire can be cut by eliminating background questions, but an attorney should not relinquish the time needed for case-specific questions that go right to the heart of the matter.<sup>12</sup> If the court then cuts you off, you could say, “Judge, if you had given me time, here are the questions that I

would have asked,” and present a list of closed-ended questions that would be considered appropriate in any case.<sup>13</sup> In order to preserve error for a trial court’s restriction of the voir dire examination, counsel must read into the record the questions disallowed by the court.<sup>14</sup> Additionally, the restricted questions which are read into the record must be proper voir questions.<sup>15</sup>

It is important to be diligent, thorough, and persistent. Unless the lawyer conveys to the judge that he or she feels this is a major issue, there is no reason for the judge to break with tradition. One technique that has been successful is to tell the court in good faith you believe your case will take a specific number of hours or days, but if the court allows you more time for voir dire, you will shorten your presentation of the case by a specific amount.<sup>16</sup> The argument is that a thorough voir dire by the attorney will give him or her a better reading on what issues are important to the jurors and the case presentation can be shortened accordingly. Without this information, the lawyer must guess which issues are important and therefore will have to present which issues are important. As a result, the lawyer will be inclined to present any and all evidence available.

Another approach is for an attorney to offer to shorten his or her closing argument if the judge will allow more time to voir dire the jury.<sup>17</sup> Most courts have huge dockets. If the attorney can save the court time or streamline the case, the court may expand the voir dire conditions.

To encourage the judge to expand the voir dire conditions, it is important to file some or all of the following motions: 1) motion for jury questionnaire; 2) motion for attorney participation in voir dire; 3) motion for individual voir dire on limited issues; 4)

motion to prohibit jury service in similar cases; 5) motion for additional and separate peremptory strikes; 6) motions for change of venue due to massive and prejudicial pre-trial publicity; 7) motion for small group voir dire; 8) motion for additional time to conduct voir dire; 9) motion to submit follow-up questions after each juror; 10) motion for fees to retain a jury and trial consultant; 11) requested voir dire questions to be submitted to the panel and individual jurors; 12) motion to allow the defendant to participate in voir dire; or 13) motion to allow the magistrate to oversee the attorney conduct to voir dire.<sup>18</sup> The motions you can file that relate to jury selection are only limited by your finances, time, and ingenuity.<sup>19</sup>

General experience has revealed that when the lawyers file the motions, request hearings, and fight as hard for expanded voir dire as they do at a motion to suppress evidence, the attorneys often get something, whether it be a questionnaire, some attorney participation, an additional peremptory strike or maybe just a couple of extra questions that the judge normally would not ask. This battle is worth fighting. With your client's rights at stake, an attorney is obligated to seek every means available to secure the fairest jury possible when the day in court arrives.

---

<sup>1</sup> Mark R. Kosieradzki, *Selecting A Jury In Collision Cases In the Age of Legal Reform*, ATLA 2001 Winter Convention, p. 41 (Feb. 2001).

<sup>2</sup> *Id.*

<sup>3</sup> Cynthia R. Cohen, *Effective Defense Voir Dire: Making Sense of Juror's Experiences*, Defense Counsel Journal, p. 352 (July, 2001).

<sup>4</sup> David Marsh, *Voir Dire*, Alabama Trial Lawyers Association No Nonsense Summer Seminar, p. 8 (Aug. 1996).

<sup>5</sup> Robert D. Minick, *Using Jury Consultants to Assist Voir Dire*, Litigation and Administrative Practice Course Handbook Series Litigation, PLI Order No. H4-5185 (1994)

---

<sup>6</sup> *Id.*

<sup>7</sup> *See* David Marsh

<sup>8</sup> Cathy E. Bennett & Robert B. Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics in Civil and Criminal Litigation, § 11.14 (1993).

<sup>9</sup> Gillian Drake, *Deselecting Jurors Like the Pros*, Maryland Bar Journal, (March/April, 2001).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See* Cathy E. Bennett & Robert B. Hirschhorn.

<sup>13</sup> *Id.*

<sup>14</sup> Cathy E. Bennett, Robert B. Hirschhorn & Heather R. Epstein, *How to Conduct A Meaningful & Effective Voir Dire In Criminal Cases*, 46 SMU L.Rev. 659, 690 (1992).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 678

<sup>18</sup> *Id.* at 677

<sup>19</sup> *Id.*