

Voir Dire

Pretrial Preparation Techniques for an Effective Voir Dire

Introduction

Voir dire can be a highly productive process, providing a wealth of information for making astute challenge decisions — and laying the foundation for your case — or it can be a disastrous waste of time. Effective voir dire and jury selection

require careful preparation.

This article reviews the pre-trial preparation techniques that can help you develop voir dire and jury selection

strategies to help you pick the best audience for your case and to give that audience the right impression.



*develop voir dire
and jury selection
strategies*

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Introduction

The primary purpose of voir dire is to provide attorneys with enough information about prospective jurors to make intelligent use of peremptory challenges. It is nothing less than the process that permits you to find the audience that will be most receptive to your case.

But the lawyers aren't the only participants who learn something during voir dire. While you are busy eliciting information from prospective jurors during voir dire, the jurors are rapidly picking up clues about you and your case. They are formulating impressions of the merits of your client's case and your own credibility, competence and trustworthiness. If your voir dire is haphazard or half-hearted, jurors will undoubtedly draw negative inferences about you and your client's case.



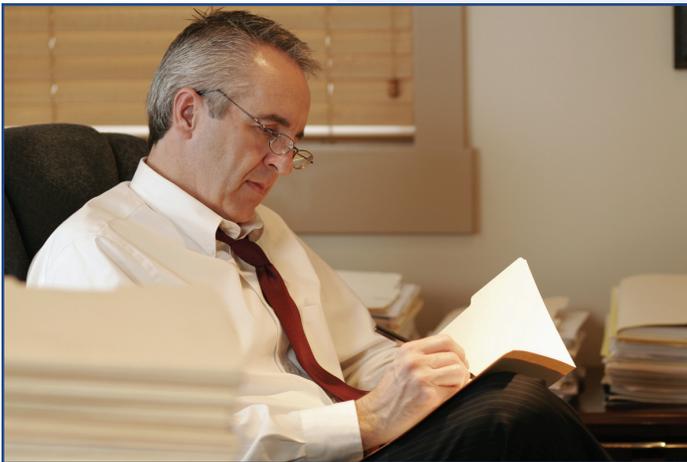
*Find the audience
most receptive to
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Planning the Questioning Process

The most fundamental aspect of planning an effective voir dire is to develop a set of appropriate questions for the prospective jurors. This is no time to resort to a list of canned questions that may or may not be relevant to your case. An excellent starting point for developing your questions is to list your case themes. All of your questions should in some way aim to elicit responses that tell you which prospective jurors will be favorably disposed to your case — and which ones you should strike from the panel. (We will discuss specific model questions later in this article.)



Start with “How” and “Why” Questions.

Structure your questions to elicit the maximum amount of information from jurors. Ask open-ended questions that begin with phrases like, “Can you tell me a little about...?” or “What have your experiences been with...?” In general, questions that begin with “what” (“What did you study in college?”) elicit basic facts and generalities from jurors. Questions that begin with “why” (“Why did you study psychology?”) elicit explanations; and “how” questions elicit jurors’ feelings. Generally, you will obtain the most valuable answers with “how” and “why” questions.

Ask Easy Questions First.

The order in which you ask questions is important. Most people maintain a low profile in a group. They are nervous and uncomfortable. You give jurors an opportunity to relax if you start the interview with easy, basic questions, such as, “What’s your occupation?” or “Where do you work?” After you have broken the ice, move into questions that ask about feelings. You are more likely to obtain expansive, meaningful answers if a juror is relaxed.

Review the Questions.

When you finish drafting your questions, have others review them. Better yet, have someone else read your questions out loud so that you and the reviewers can all hear them. Many lawyers have inadvertently embarrassed an otherwise good juror with a well-intentioned, but poorly phrased question. “Did you ever get to college?” may embarrass the potential juror; “What’s your educational background?” probably won’t.

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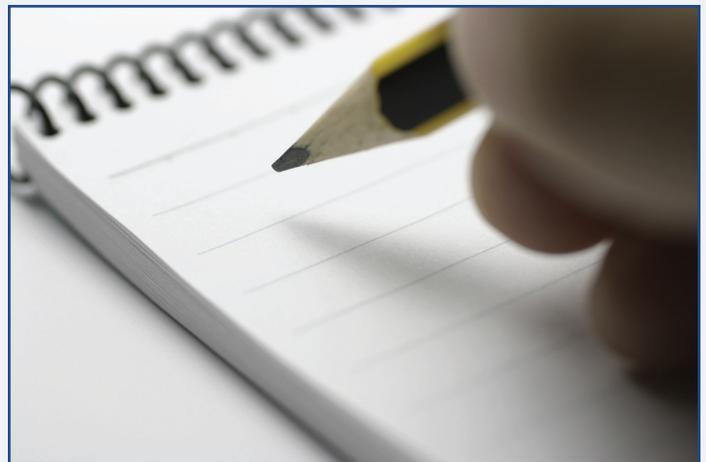
Planning the Questioning Process

Plan Alternative and Follow-up Questions.

Design several different ways of asking for the same information. If you have told prospective jurors you are interested in them as individuals, and you ask every one of them the same questions, you will reduce your credibility. Follow-up questions will help you tailor the questioning to the juror and help the jurors expand on their initial replies. Good follow up questions include, “Can you tell me more about that?” “Why is that?” “How so?” “I’m not sure I quite understand; could you explain?” and “What is it like to...?”

Don’t Ask About Fairness Unless Challenging for Cause.

Eliminate questions about potential jurors’ “fairness” or “impartiality” in your voir dire questions, except when you are pursuing a challenge for cause. Jurors resent being asked if they can be fair, and you rarely get meaningful replies. Save this term for the judge or your pursuit of for-cause challenges.



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Interacting With Potential Jurors

Since the jurors are forming impressions of you and your case, remember, first impressions are lasting. They also affect what happens to incoming information. People accept subsequent information from a source that they view as credible, and reject information from discredited speakers. A positive first impression will give you a halo of credibility and open the door for the prospective jurors to believe you and your witnesses. A negative first impression will do exactly the opposite.

What Prospective Jurors Look For.

Jurors will be evaluating your credibility, sincerity, and trustworthiness from the very beginning. They will also be looking for cues about your confidence in the case. Don't be overly dramatic and don't go out of character. Be real, be human. Demonstrate your convictions.

Set the Right Tone.

The tone you set is important. You want to create a relaxed informal atmosphere in which people feel comfortable speaking up. The formality of the courtroom atmosphere does not invite open, free exchanges. You will have to work at establishing rapport.

Self-Disclosure.

Social psychologists regard voir dire as a self-disclosure interview during which an interviewer is seeking information from interviewees about their history, attitudes, and beliefs. Research has consistently demonstrated that self-disclosure on the part of the interviewer leads to greater self-disclosure from the interviewee. People do not readily reveal their thoughts about sensitive topics to strangers. Instead, they reveal themselves to those who have disclosed to them; they "reciprocate," hence the phenomenon known as the "reciprocity effect." People seem to feel compelled to respond in kind to another's self-disclosure. This principle is often neglected during voir dire.

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thoughts to strangers*

Overcoming Resistance.

Many lawyers offer a cursory introduction of themselves and their clients, begin asking prospective jurors very personal questions, and are then frequently puzzled and frustrated by the "resistance" they meet, or complain that jurors never tell the truth during voir dire. The problem, in all likelihood, is a lack of reciprocity. They are asking for too

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much information while offering too little of it themselves.

Breaking the Ice.

Many attorneys very effectively break the ice by acknowledging to jurors that facing a group of strangers can be a little unsettling during the first few minutes. They tell the jury that they can understand how it feels to be in the jury box facing a courtroom full of strangers. Such comments “model” self-disclosure to the prospective jurors. One of the ways we learn to behave appropriately in a new situation is to observe other high-status individuals. Handled with poise, such “admissions” do not diminish the attorney’s credibility, but instead enhance his or her effectiveness in jurors’ minds.

Establishing Empathy.

You may want to tell jurors that you understand how difficult it is for them in the jury box. If you’ve been there yourself, you might consider telling them so. Seek to establish a common bond with the jurors. Suggest that by working together perhaps you might be able to help each other feel more at ease and get through the process relatively quickly.

Let Them Know What Your Role Is.

Let jurors know that it is difficult to ask some questions, but that you know from past experience that it is helpful to everyone involved if you ask them. Don’t just tell them that you have to ask certain questions for your client’s sake. Jurors know you’re interested in your client. Let the jurors know that you are interested in them. Point out that questioning generally benefits jurors as well. Explain that many jurors in other trials were grateful they had been asked about issues and evidence that would be introduced in the trial. It allowed them to evaluate whether they could be objective jurors for a particular case, and not find out too late that the case presented many personal, painful connections that they could not remove from their thoughts.

“Self-Induced Challenges.”

You may also want to model a few so-called self-induced challenges. Think about your own background. What type of case would be difficult for you to sit on as a juror? Think of one, and then describe it for the jury. For example, if the situation fit, you

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might explain to jurors that as a parent of a six-year-old boy who had been injured in an automobile accident involving a drunk driver, it might be rather difficult for you to be an open-minded juror in a driving-while-intoxicated case. It simply might be too hard for you to pay attention to the evidence, which would be a disservice to both sides. Explain that in such a case, you feel you would need to be excused from serving on such a jury. Then explain to the panel that you want to give them the opportunity to tell you about the things they feel might interfere with their ability to hear the case. You are essentially inviting jurors to “self-challenge,” thereby removing some jurors you might otherwise have to eliminate through a risky challenge for cause. Challenging a sympathetic prospective juror has its risks.

Strive for Openness.

Create an atmosphere of openness rather than interrogation. Always encourage the potential juror to tell you how he or she feels, rather than telling “us” or telling “the court.” It is easier to reveal feelings to another person than to broadcast them to strangers in a courtroom.

Listening and Reinforcement.

One common complaint among former jurors is that they felt the lawyers were more interested in recording their answers than in listening to them. By demonstrating your interest in the replies of jurors, you can show that you value what they say. Have a master seating chart for recording jurors’ names and a checklist of voir dire topics that you plan to cover with each juror. You must be able to talk with jurors and not merely direct questions at them.

Reinforcing Helpful Speakers.

Reinforce those jurors who provide descriptive answers. By thanking jurors who speak up, you invoke an age-old principle of psychology; a behavior that is reinforced will occur more often. Not only do you encourage the individual to whom you are speaking to talk more; other jurors looking for cues on how to behave appropriately learn how to win praise. Potential jurors value praise from a high-status individual, and the praise reinforces the praised behavior. “I admire your honesty” and “I appreciate your willingness to be candid with me,” are potent reinforcing messages.

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Reading Potential Jurors' Behavior

Bring along co-counsel, a paralegal, or a consultant, but do not try to conduct voir dire alone! Listening to jurors' replies, observing their style of answering, noting their nonverbal behavior and recording their responses—all while trying to ask coherent questions and develop a rapport—is too much for one person to accomplish. You need someone else to record potential jurors' replies and help you observe their behavior.

When to Keep an Eye on Them.

It is absolutely essential to have someone observe the prospective jurors for you while you are asking the questions and to observe them yourself while your opponent is asking the questions. You may get the impression that a juror who frowns while you interview her is hostile to you. But if you do not observe that person's behavior while opposing counsel interviews her, you have no way of judging whether your impression was correct. The juror may very well throw the same scowl at your opponent, perhaps signaling nothing more than indigestion or mere resentment at having been called for jury duty.



Reading the Nonverbal Cues.

Observe the posture of the potential jurors. Do they look defiant? Are their arms crossed? Are they leaning forward, using gestures as they speak? Do they maintain eye contact while speaking? While they give their answers do they let their eyes roam? Do they appear intimidated? You cannot, of course, catalog and assess every nonverbal signal. But you should stay alert for behaviors such as looking away, leaning back, rolling eyes toward the ceiling, and sighing as if giving each answer is a Herculean effort. Look for the following cues:

- Are potential jurors' eyes averted, downcast, or do they look directly at you and your client?
- Is a potential juror's speech hedging, direct and clear, or flippant and sarcastic?
- Is a potential juror's body withdrawn and apologetic, erect and relaxed, or still and defiant?
- Are the potential jurors' hands fidgety, relaxed, or clenched?

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Reading Potential Jurors' Behavior

Watch their Interaction.

When you or your assistants observe the potential jurors, you should all try to look at them from a number of vantage points. One very important thing to assess about prospective jurors is their interaction with each other and the court. Try to discern the following about them:



- Are they “feelers” or “reasoners,” sensitive or insensitive, emotional or unemotional, capable or incapable of empathy, sentimental or hard-hearted?
- Do they seem to be reclusive or sociable, isolated or involved?
- Do they have a narrow or a wide range of interests?
- Do they appear timid or adventurous, quiet or talkative, secure or insecure, vulnerable or confident, fearful of the world or imbued with a strong sense of personal safety?
- Are they introverted or extroverted, dependent or independent, hesitant or spontaneous, self-denying or self-indulgent, humble or arrogant? Do they convey the feeling that they view the world with trust or mistrust?
- Would you describe them as idealistic or cynical, naïve or clever?
- Do their actions appear deliberate or impulsive?
- Do their attitudes seem conventional or individualistic, rigid or flexible, indecisive or decisive?
- Would you characterize them as complainers or cheerful, lethargic or energetic, prone to excessive worrying or happy-go-lucky?

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Persuaders, Participants, and Non-Participants

One very important judgment you need to make about each juror before beginning to exercise peremptory challenges is to determine how influential any given juror is likely to be during jury deliberations. Often, lawyers mistakenly look only for one potential foreperson. Research has revealed that in fact, there are three or four likely forepersons on the panel. Observations of hundreds of jury deliberations reveal that jurors display one of three levels of participation in the deliberation room.

Level 1: The “Persuaders.”

At one level are the “persuaders.” These three or four individuals (roughly 25 percent of the group) make over 50 percent of the statements during deliberations. They are active leaders and coalition builders. They are relatively easy to spot on a jury panel if you are surveying the group for more than one leader.

Men in their forties are most likely to be among this group, but it is by no means their exclusive province. Jurors who are active leaders and persuaders can be male or female. Prior jury service often gives them special credibility among other jurors, and an otherwise quieter juror will emerge as a leader. Previous experience managing or supervising people is also a clue that an individual may be a persuader. If you utilize a juror questionnaire (discussed below), you can directly ask potential jurors how often they find themselves in leadership roles. Most jurors are relatively accurate in their self-assessments.



Level 2: The “Participants.”

The second group of jurors includes the “participants.” These jurors (usually about half of the panel) are very verbal, active, and responsive. In contrast to persuaders, who often offer statements of fact from the trial, participants are more likely to offer opinions. For example, a persuader might say, “Dr. Smith testified that the test results revealed the plaintiff had a serious depression,” to which a participant might respond, “Well, in my opinion, he was a pretty unbelievable witness. I don’t trust head doctors.” Participants generally do not build coalitions themselves, but actively support the leadership of persuaders.

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Persuaders, Participants, and Non-Participants

Level 3: The “Non-participants.”

Finally, “non-participants,” who make up the remaining three or four jurors, generally say very little. They remain passive and are clearly followers. They volunteer few if any comments, unless called upon by the group to speak, in which case they usually pass on the opportunity to speak or say, “I agree with what Joe said.” They will follow the majority inclination.

Why It Matters.

The importance of these distinctions is in recognizing where to focus jury challenges. Six peremptory challenges do not seem like a lot when looking at a group of 12. However, it would be a waste of a challenge to eliminate a non-participant in a civil case. Even if such a juror would reject your position, this is not the juror who could persuade others to agree. Instead, focus your challenges on the three or four jurors who are likely to be persuaders and who are likely to oppose your position. If you successfully eliminate them and the replacements are acceptable, you can then turn your focus to participants. Essentially, this step forces you to look at each individual juror as a group member. Having assessed the jurors’ experiences and background through the voir dire, you must now make one final assessment of jurors’ likely position within the group.

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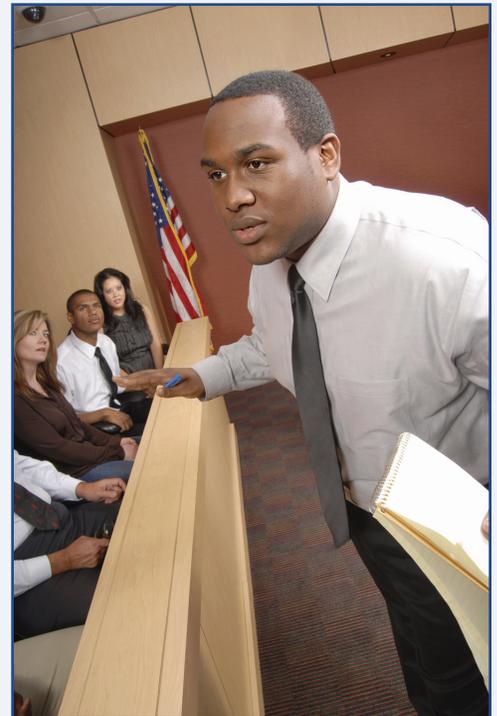
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Asking the Right Questions

After you have elicited the information that tells you who the jurors really are, you may want to sensitize them to some important concepts. The form of a question influences whether you are asking for information or imparting it; thus, you can use questions as a subtle form of persuasion.

Know When to Use Persuasive Questions.

You can be creative with such questions. But remember, they give you little information about the jurors. Ask them only after you have fully examined jurors and gathered all the information you need. Do not ask every juror these questions or they will lose their power.



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Areas of Inquiry

Basic Areas.

The following questions are basic areas of inquiry relevant to most cases. These questions were designed for use in a prospective juror questionnaire, but most are easily asked in open court during voir dire.

- What is your occupation?
- Who is your employer?
- What is your employment status (full-time, part-time)?
- What is the principal activity of the company where you work?
- Do you hold any other jobs at present (second job, part-time job)?
- What is your title or position?
- In your work, do you have management or supervisory responsibilities? (This is an important question in assessing leadership on the jury panel.)
- Have you had management or supervisory duties in the past? (This and the previous question should alert you to possible persuaders.)
- What other occupations have you worked in? (Attorneys often fail to ask about other occupations. In our society, economic influences sometimes require people to work temporarily in occupations that reflect little about an individual's occupational preferences. You should be looking to learn about their occupational identity. For example, a juror may tell you, "I'm a sales clerk at Macy's." Without further inquiry, you may fail to uncover the fact that this person has worked for 12 years as an accountant in a small corporation that recently downsized.)
- Have you ever been a member of a trade union?
- Have you ever owned your own business? If yes, please describe?

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Areas of Inquiry

- Do any other adults live in your household? (If yes, get occupations and educational backgrounds of all; note that this question is broader than merely asking about a spouse.)
- What is your marital status?
- What city do you live in?



- What other cities have you lived in for more than one year?
 - Where did you grow up? (Questions about where a juror has lived give you a sense of how narrow or wide a juror's exposure to different people has been.)
 - What is your educational background? What was your major area of study?
 - Have you attended any other educational programs (evening schools, certification programs)?
 - What type of volunteer work have you done? (This is especially important in personal injury cases, from both plaintiff and defense perspectives.)
- Do you have children? (If yes, be sure to get ages and occupations, if appropriate.)
 - What are the occupations of your extended family members (Parents, brothers and sisters)? This question is often overlooked, yet parents and siblings, especially those living nearby, exert strong influences on jurors, certainly as important as a spouse's.
 - Do you have any friends or relatives who are judges or attorneys?
 - What civic, social, religious, or other organizations are you affiliated with?
 - What are your major hobbies, interests, spare-time activities?
 - Have you, any members of your family, or close friends ever filed a lawsuit?

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Areas of Inquiry

- If yes, who filed the lawsuit?
- What was the suit about?
- How was it resolved?
- What were your feelings about the process at the conclusion of the case?
- Have you, members of your family, or close friends ever been sued?
- If yes, who filed the lawsuit?
- What was the suit about?
- How was it resolved?
- What were your feelings about the process at the conclusion of the case?
- Have you ever testified in a trial or ever given a deposition?
- Have you ever retained an attorney?
- Were you satisfied with the services you received?
- Would you describe yourself as a leader infrequently, occasionally, or frequently? (This question is directed at uncovering possible persuaders. It is best asked on a prospective juror questionnaire, but can be asked orally, if done sensitively.)
- Have you ever written a letter to the editor of a magazine or newspaper? (This question is a red flag for identifying a participant. A person who has written a letter to the editor obviously has opinions and wants to share them.)
- How would you describe yourself in 10 words? (This is an excellent question. It elicits superb information when asked on a questionnaire. It can also be asked orally, but again, it must be done sensitively, and the attorney may want to offer a few self-descriptions of themselves to elicit the reciprocity effect.)

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Areas of Inquiry

- Have you ever served as a juror? (If yes, get details.)
- Were you ever the foreperson of a jury? (This is another signal that you may be dealing with a possible persuader.)
- Have you taken any courses, had any training in any of the following areas? (Ask about specific fields of study or training that could give the potential juror some knowledge, or even prejudices, about your client's case. If the potential juror has had such training, obtain answers to all relevant areas.)
- Have you, any of your family members, or close friends ever worked for...? (Prepare a list of all relevant occupations or businesses.)
- What additional information should I know?

Case-Specific Questions.

Obviously, there are numerous areas of inquiry that will be unique to the case at hand. These areas will be clear from your pretrial analysis of the case. There are several ways to generate ideas for voir dire questions and deciding how to evaluate jurors in light of their replies.

*There are several
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Questionnaires

Questionnaires for prospective jurors are extremely effective for soliciting background information. Courts are permitting lawyers to use them with greater frequency and fewer restrictions. They cover far more information than oral voir dire can and, surprisingly, the information is generally very candid and insightful. Many jurors find it easier to express themselves on paper than in open court, and they elaborate in response to questions, which might otherwise receive only one word replies.



Questionnaires Can Save Time.

When developed and administered effectively, questionnaires generally save court time. Judges find them useful in expediting hardship requests. In complex cases with many important issues to cover with jurors, or in cases involving multiple parties, they can be a very helpful tool.

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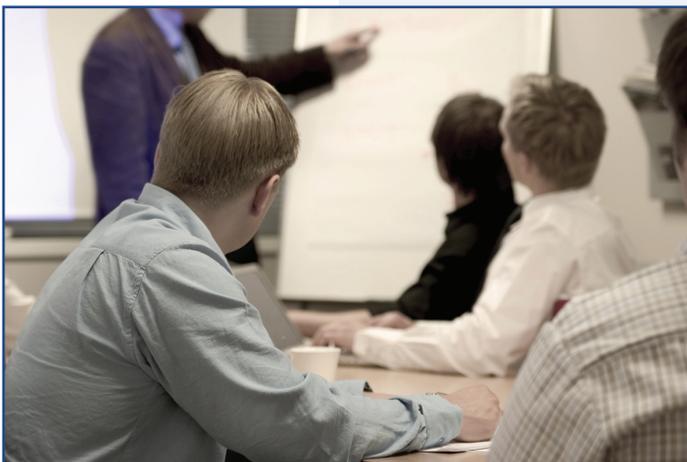
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Assessing the Case

Discerning which type of juror will be most receptive to the arguments and issues in a case requires careful attention to key issues, and at times, the application of fundamental marketing research tools. Before conducting the voir dire, or planning a jury selection strategy, it is important to understand the emotional, psychological, or prejudicial elements of the case, which may draw the attention of jurors. You can accomplish this by observing the reactions and thoughts of non-lawyers in focus groups and mock trials.

Focus Groups.

An informal, effective way to obtain such insights is to undertake a focus group. A focus group is a roundtable discussion undertaken with a dozen jury-eligible community residents. Counsel presents a summary of the case and a colleague, familiar with the issues, presents the opposing side. With the assistance of a moderator you are able to listen to the questions and comments from the group. You will be tempted to answer the questions and persuade the group on the merits of your case. Resist the temptation. It is more important that you hear their reactions and their questions. Which issues draw their attention? What assumptions do they make about matters that weren't presented to them? What analogies do they use in discussing the case? Their comments, questions, and observations can provide valuable insights about what real jurors may think of the issues, and serve as important guides for voir dire and jury selection.



Mock Trials.

For more complex cases, consider a more structured investigation. A mock trial is one of the most powerful tools for analyzing your argument strategy and assessing jurors' likely responses. They provide a wealth of information beyond what a focus group can offer. Mock trials force you to think through the entire case several weeks before trial. Moreover, planning a mock trial demands that you fully evaluate the opposition's case, because you must present a strong case for the other side if your mock trial is to be meaningful.

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Assessing the Case

The Advantage of Large Panels of Mock Jurors.

If you use several panels of mock jurors, you can obtain a sample size large enough to yield meaningful distinctions about juror profiles. For example, in a products liability case, you may be able to learn whether men or women, or people who have some experience with similar products, would be more favorably disposed toward your case. Mock trials call for extensive preparations and careful attention to the recruitment of jurors to accurately reflect the jury pool in the trial jurisdiction. Research at the mock trial level is generally more cost-effective if coordinated by those trained in their design and implementation. The cost for a one-or-two-day long mock trial has become increasingly affordable, even for relatively modest cases.

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Conclusion

Preparing for voir dire is time well spent. An effective voir dire can provide you with information for making effective challenge decisions during jury selection. Together with case assessment tools such as focus groups and mock trials, the voir dire process can give you a distinct edge in picking the best possible jury and trying your case to a receptive audience.

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