



Voir dire in a nutshell

Conducting the voir dire can be maximized by following five steps

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California Rules of Court, rule 3.1540(a) requires the trial judge to examine prospective jurors, orally, by written questionnaire, or both. Once the trial judge has completed that task, the attorneys must be permitted to ask additional questions. Rule 3.1540(c) states,

On request of counsel, the trial judge must permit counsel to supplement the judge's examination by oral and direct questioning of any of the prospective jurors. The scope of the additional questions or supplemental examination must be within reasonable limits prescribed by the trial judgment in the judge's sound discretion.

So the task before us is to make the most of what in all likelihood will be time-limited voir dire. To be plain, many lawyers squandered the opportunity. Voir dire was too often an exercise conducted with disinterest in the jurors, used by lawyers to indoctrinate or inoculate. It often accomplished little more than extracting hollow promises of fairness, frequently reduced to little more than head-nodding.

Step 1: Case analysis

The best voir dire is derived from a solid case analysis. Know what your case is about, what the jury themes and issues are, what biases are likely to affect jurors' views of the facts, the parties and the issues. Know what scares you most about the case, and craft voir dire questions which address these issues.

Step 2: Advance preparation

As you work on the case, keep a running list of issues you think are relevant for jury selection – areas you need to explore in voir dire. Jot down draft questions as you go along, just as you would make notes for your opening statement or closing argument as you prepare a case for trial.

Think about the qualities that might make someone good or bad on a case – the issues jurors will react to (violence, drugs, sex, identity with the victim, police or witness credibility issues), the neighborhood where things happened, the race, ethnicity, appearance and background of your client, etc. Consider the degree to which your case is detailed and technical, or broad-brushed and emotional. Consider how these issues affect jurors' reactions to the case.

Prepare your questions in advance (you can get lots of help with this from jury selection manuals, see especially National Jury Project's *Jurywork: Systematic Techniques*, Clark Boardman Callaghan, 2d Ed., 1983, updated annually; and *Bennett's Guide to Jury Selection and Trial Dynamics*, West Publishing, 1995).

Step 3: Voir dire questionnaires

Whenever possible, use voir dire questionnaires; time-limited voir dire will not replace them. Submit a questionnaire to the court and counsel pre-trial. The questionnaire will give you consistent information about the entire panel. A well-designed questionnaire provides demographic information, identifies case awareness, addresses pre-trial publicity, and extracts relevant attitudinal and experiential information. Questionnaires promote *CANDOR* (big time!), they afford jurors a degree of privacy, and eliminate the opportunity for taint (that is, jurors don't go to school on each other's answers, nor do jurors unfamiliar with the case become contaminated by information others may have).

Questionnaires provide:

- Consistent information about the entire panel.



- A preview of the entire panel.
- More candid answers.
- The basis for cause challenges early in the process.
- An opportunity to use your voir dire time more strategically.
- Time savings/more effective (and efficient) use of oral questioning.

Every questionnaire must be read and analyzed:

- Read the questionnaire with highlighter in hand.
- Make notes of the most important comments.
- Note areas to follow-up in oral voir dire – draft questions.
- Decide how much (if any) additional questioning you want to do with each juror.
- Create a brief summary (even a few notes on the questionnaire of the salient information).
- Note your reaction to the juror on the basis of the questionnaire.
- Give each juror a rating.
- Decide if there is a motion for cause on the basis of the questionnaire content.
- Create a list of relevant questions not covered by the questionnaire.

Step 4: In court

If there is a simple standard by which to measure the quality of voir dire, it is in how much information you obtain from jurors, and the best measure of that is when *jurors do the talking*. That means *jurors should talk more than the lawyer*.

Unlike at any other point in trial, you *want* to be surprised, you want to ask questions you don't know the answer to.

Simple Ground Rules for Voir Dire:

- *Seek information.*
- Create an atmosphere that *encourages jurors to talk*.
- Ask open-ended questions: *Call for a narrative response.*
- Listen and follow-up.
- *Never interrupt* a juror.
- Make your questions understandable:
- *Ask short questions.*

- *Don't use complicated vocabulary or legalese.*
- Avoid words like: *fairness, unbiased, impartial.*
- *Don't argue with a juror* – you want to “*get the bad news now*” (rather than in the verdict). In fact appreciate the juror for his/her candor and honesty.
- Make *eye contact*; be interested in what jurors have to say.
- *Avoid routine questions.*
- *Be real* – voir dire is a conversation with a juror, allow some of your humanity to show.

Background information

If you do not have a questionnaire, you will need to inquire about basic identifying and background information. Even with a questionnaire you are likely to need to spend some time in this area, if only to clarify some written responses.

Background questions put most people at ease; they are safe, familiar and provide valuable information. In addition to more traditional background questions, the following queries begin to reveal differences between jurors:

- What newspapers and magazines do you frequently read?
- What talk radio programs do you listen to?
- Where do you get most of your news – from TV, radio, newspaper, the Internet or conversations with others?
- How do you usually spend your free time?
- What organizations do you belong to?
- What would you say is the most important informal learning experience you've had (that is, something outside of school)?
- Tell me the names of two public figures, living or dead, that you most admire.
- Who would you say knows you best? How would (that person) describe you?

Open-ended questions vs. Closed-ended questions:

Open-ended questions are those that begin with *What, Why, How, Where*, and they call for a *narrative*

response. Closed-ended questions typically start with *Do you* or *Would/Wouldn't you*, or worse yet – *You would/wouldn't*. Closed-ended questions require *yes/no* responses and might best be likened to leading questions. They typically tell people what to think and telegraph what is the right answer. For example:

- Would you follow the court's instructions and ?
- Do you have any biases which would cause you to ...?
- Despite those horrible experiences could you still judge the case on the facts and the law as his honor gives it to you?

Closed-ended questions:

Generally speaking these questions are a waste of time, *unless you are pinning down a cause challenge or trying to rehabilitate a wonderful juror*. Only then should you use such leading questions.

Unfortunately closed-ended questions come easily to most of us; while trying to avoid them, attorneys can still try to make the most of this unfortunate habit by following up a closed-ended question with a probe that effectively opens the question up.

- Why do you feel that way?
- Tell me more about that.
- Can you think of an example?
- Tell me about an incident that comes to mind.
- Why do you think so?
- What was your reaction when (that) happened?
- What impression did that make on you?
- How do you think that's affected you?

Keep it interesting:

Chances are the more jurors do the talking and the less the lawyers talk, the more interesting things will be.

However, your questions are key to eliciting informative responses. Questions that call for thoughtful responses will keep things more interesting, and they will allow you to differentiate between jurors.



Sample open-ended questions:

In a battered woman's/self defense case where a woman has often stayed with an abusive mate for a period of time, you might want to ask:

- Why do you think some women stay in abusive relationships?

Where race is an issue, you might want to ask:

- Please describe the kind of relationships you have with people of races other than your own. (Do you visit each other's homes?)
- Some people think racism is pretty much a thing of the past, what do you think?
- Have you ever felt discriminated against? (Tell me about that.)
- What effects do you think racial discrimination has on people who are the targets of discrimination?
- Have you ever been afraid of someone of another race? (Tell me about that.)
- Some people feel that people claim racial discrimination as an excuse for their own shortcomings, what do you think?

Witness credibility: Everybody has had the experience (with their kids, co-workers, friends or relatives), when confronted with conflicting stories, of having to decide who was telling the truth:

- How did you go about deciding who was telling the truth?
- What factors did you consider?
- Why do you think a person might lie?
- Can you think of a situation in which a person could be honest, but mistaken about what happened?
- In determining whether someone is

telling the truth, are there things which you think should not be considerations?

- How about the person's occupation? - Why not?
- Their race? - Why not?
- Their sex or sexual orientation? - Why not?
- Whether they are poor or rich? - Why not?
- Some people think police officers should be believed automatically, just because they are police officers, what do you think?

Step 5: Keeping track of information

Whenever possible, have someone present with you during voir dire, who, at the very least, is taking careful and accurate notes of what jurors are saying. As the lawyer involved in the voir dire, it is hard to engage jurors, ask appropriate follow-up questions, make eye contact, watch the whole box and alternates, and take notes at the same time.

During a break you will want to review the voir dire notes. Develop a rating system for evaluating jurors. Depending upon the case this may include:

- Basic civil justice attitudes (burden of proof, presumption of innocence).
- Nature of tort (reaction).
- Relevant personal experience/exposure.
- Civil justice experience.
- Identity with the victim.
- Identity with the defendant.
- Case-specific defenses: Self-defense, psychological testimony, mistaken

identity, police misconduct/law enforcement credibility.

Consider the jury dynamics:

- Leaders and followers.
- Prior juror service.
- Disagreements and tensions.
- Conflicting world views.
- Anticipate likely allegiances between jurors.

Voir dire should be time well spent; aim to make it a genuine conversation with jurors. Your purpose is to discover how jurors' attitudes and the life experiences that shape them will impact your case. Judges are less likely to limit your voir dire or the time spent if the conversation with jurors is fair and intelligent, and most particularly if the jurors are doing the talking.

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