



Jury Selection Without Attorney-Conducted Voir Dire

Theresa Zagnoli

It is a difficult task to convince lawyers and judges that voir dire is an asset in jury selection when they have selected juries without it for years. Trying a case to a jury without voir dire is like a wedding without courtship — the ritual is observed, the marriage may last, but the potential for disaster arising from misunderstanding is staggering.

The papers have been filled with debates on the jury system in the months past. For the most part, they've challenged the integrity, intelligence and intentions of many jurors. Thorough voir dire can alleviate this anti-jury bias.

Those who practice law without attorney-conducted voir dire, do so under a tremendous handicap. Voir dire is most effective when the judge and the attorneys speak directly to prospective jurors. But isn't the judge better suited to question jurors because he/she is the most fair, experienced and knowledgeable person in a courtroom? Aren't judges rigorously fair, insightful and thorough in identifying and excusing potential jurors who cannot give the evidence full, fair and impartial consideration? Don't they vigilantly watch for the mere hint of bias and prejudice so that only the evidence will be considered?

No.



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Because judges are perceived to be the most important authority figures in the court, jurors will modify their opinions to avoid embarrassment in front of an audience and give the most socially acceptable answer. Research tells us the higher the authority figure asking the response, the more likely the person will compromise his/her answer to respond in a socially acceptable way. We are in the early stages of new research, part of which is asking state and federal judges to whom they believe the jurors will be most honest. To date, many judges believe jurors are telling them "the whole truth." They may underestimate their power and overestimate their ability to persuade jurors to share opinions.

Imagine this exchange in voir dire for a medical malpractice case:

Judge: Do you have any bias that would prevent you from rendering a fair verdict in the case?

Juror: No.

Judge: Are you in any way in favor of one party or the other?

Juror: No.

Judge: Do you have an opinion about this case that would affect your ability to render a fair and impartial decision?

Juror: Why no judge, your honor. *I'm just going to listen to the evidence and overlook my ethnic, racial and occupational history, everything I've read in the newspaper and seen on television, my bad experiences with insurance claims and my friendship with my brother-in-law, the doctor. I'm sure I can forget that I was once sued by a scum-sucking freeloader. You couldn't find a fairer person than me.*

Jurors tell judges what they think judges want to hear. The bench simply cannot engage in the kind of candid dialogue in the same way an attorney can. The judge's cautions and perfunctory delivery does not promote honesty, it promotes conformity. Judges think that if the juror is instructed to do something, they will. Some research shows as many as 15 percent of people surveyed would follow their own views, regardless of what the law said, even if they disagreed without the law—and that's if they understood the law. Many judges do not agree, or are not aware of this possibility. Many judges say if a lawyer has done the job, he/she should be able to try the case to anyone. That philosophy has proven to be untrue in copious amounts of research.

The debate continues. Some lawyers and judges believe it doesn't matter who makes up the jury, but only how well the evidence and the law can be presented. Others believe the venire has become so sophisticated and knowledgeable, it is no longer possible, or desirable, to find a juror who has not formed some significant opinion about the issues to be evaluated in trial. Lawyers have been known to boast that because of their superior

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skills, they can try their case successfully to any group. Others have been heard to say, "I'll take the first twelve people who sit down." Continued insecurity, conflict and misconception about the best method of asking juror questions have given rise to more and more judge-conducted voir dire. Research and experience suggest that this effort is misguided, and may, in fact, work against the goals of justice.

Even if jurors told "the whole truth" in voir dire, judges don't always ask the right questions. I'm not talking about "conditioning" the jury, which is one criticism of attorney-conducted voir dire. Voir dire must identify potential jurors who won't be fair because of events or experiences that are very specific to the issues and evidence of the case; and no one is more familiar with all aspects, complexities and nuances of your case than the advocate.

To have a person who you imagine doesn't like you, sitting in the jury box, staring at you for days or weeks on end, is disconcerting. Whether you are correct in your assessment is not the issue. The lawyer should have the right, within reason, to be comfortable with the panel.

To educate the jury is not to condition the jury. It is to expose the people to terms, concepts and issues that may be completely foreign to the jurors. Or, to raise issues they may hold opinions on. It is a mistake to believe that jurors come to the courtroom understanding what they need to know to begin a trial. The anecdotal evidence of naiveté is staggering. There are two contributing factors to this. The first is the tried and terrible tradition of delivering the instructions of law post evidence. The second is the wave of videotaped "you're on the jury now" introductions that are sweeping courthouses across America. While in theory it works, (nothing is left out, there are consistent presentations, there is ample entertainment value) it omits the most important tool of learning – interaction.

What can be done to improve voir dire? What can attorneys do when attorney-conducted voir dire is not allowed or is severely controlled by the court?

First, they must recognize jury selection as an integral part of the case. Attorneys should not have to try their cases to someone who cannot or will not listen. Attorneys shouldn't have to deal with a juror who, after they have listened, is going to vote against your client because they have their own pre-existing perspective which cannot be changed. First and foremost, voir dire should be conducted for the purpose of identifying and disposing of these lost cause jurors. Even when the judge is asking the questions, the purpose of jury selection in voir dire stays the same.

In attorney-conducted voir dire, two additional goals are to build rapport and to begin to educate the jury about your case and the law. You want to build rapport because you need to see if you can. If you cannot connect with a particular juror you may not want them

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to sit on this jury. The judge cannot make this determination for the lawyer. You want to do this, not so much because you think the juror will vote for you, but it is to enhance your working conditions over the course of the trial. Here's what you can do in the confines of the voir dire-less system to accomplish all three goals.

How to Identify Your Worst Jurors:

1. Always submit questions for the judge to ask. Submit a complete voir dire or just a couple of great questions, but always add your own. This will begin to expand the judge's own standard list of questions by asking to have the same questions added each time. He or she will from time to time come across a worthwhile question to add to his/her own. For example, two that often get overlooked which are extremely important to knowing your jurors are:

WHAT DID YOUR PARENTS DO FOR A LIVING? and,
DO ANY OF YOU KNOW ANYONE ELSE ON THIS PANEL?

2. Request the use of a supplemental juror questionnaire. These are being used more and more across the country. Always ask for it, but keep it short and useful.

3. Ask for permission to ask additional questions. Ask each time, be creative, request reasonable, relevant areas of voir dire and design your questions so one will lead to another. Be prepared and don't waste time. Take on areas of questioning that can only be done by you. For example: In a case where you are asking to be compensated for the loss of a parent, you need to know if anyone was raised in a single parent home. This is an example of a potential bias that may not occur to jurors on their own. They may not be able to set aside the feeling that they got along with only one parent or that they deserved to have two parents, depending on their perspective. The judges as well may not consider this area relevant to qualify a juror. Always keep in mind that voir dire isn't just about qualifying a juror or a challenge for cause. You have the right to acquire information upon which to use your peremptory strikes.

4. Pay close attention to the jurors' verbal responses and even closer attention to their non-verbal responses. Don't get caught working on your opening or making notes about some law you want to look up. Just because the judge is doing the questioning, that doesn't let you off the hook. Watch to see who talks to who during breaks, which of the jurors speaks out, which one has said nothing. Make judgments about why a particular juror has not spoken. Maybe they are shy, maybe they are intentionally keeping a low profile. Do they avoid eye contact? Do they watch the judge or attorneys like a hawk? Watch jurors who are not being questioned, how do they respond to someone else's



answer. What are they doing when they think no one is watching them?

One piece of good news here is that researchers have found that an observer to an interaction is better at detecting deception than a participant in the exchange.

How to Establish Rapport

Assuming you do not get the opportunity to voir dire the panel, rapport building has to be done other ways. Behavior divides into two categories; those behaviors which are directed at the jury and those behaviors which are directed at someone else in the courtroom for the jury's benefit.

At the jury: Pay attention, smile, nod if someone is coughing. Be the first to jump to your feet for a glass of water. Notice when they are cold and hot and tired and hungry. Can they see the exhibits or hear the witnesses? Ask the judge for breaks or heat or air or water for the jurors' benefit. Bend over backwards, without being condescending or fake. Tend to them at all times as if you were the bailiff. All this can be done without ever addressing them directly.

For the jury: Act the same way to your staff, the court staff and opposing counsel. Be a nice person. Jurors by the hundreds report that often during trial, they have nothing better to do than watch the lawyers. They say this takes up a great deal of their time. They enjoy doing it during breaks, when nothing is going on, when you don't think they are watching you. Since they are not allowed to speak about the case, they spend many breaks and lunches talking about the attorneys. They go home and tell their families what outrageous or nice or smart thing the lawyer did today. They make bets on what color tie you will be wearing. They discuss how they were offended by what they believed to be a personal attack on the opposition, or if you make your objections in some idiosyncratic way. They also discuss how you interact with your client and the judge.

Don't think for a minute that your personality doesn't count or that you can't use it to your advantage in opening just as you would have in voir dire.

When you deliver your opening, act as if you are getting to have that personal conversation with each juror that you would have had in voir dire. Don't just make eye contact, have a bonding experience with every juror.

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How to Educate the Jury

In the absence of attorney-conducted voir dire, here are some suggestions for compensating. Make a list of concepts and terms you would have asked jurors about if you could have questioned them. Next, make a list of questions you would have asked that relate to juror attitude and values. Last, make a list of all the questions you would have asked for the sole purpose of persuading jurors to your way of thinking. Weave those questions into your speech in the form of key words, statements, reminders and rhetorical questions. When you see puzzlement on their faces, stop and explain further the point to be made.

Treat the court like a classroom: instruct the jurors. The most effective method of learning is to do it yourself. Since jurors can't go to the scene of events, can't question witnesses and can't test theories themselves, attorneys help them through the stories the witnesses tell and through the display of a rich variety of demonstrative exhibits. These techniques will not compensate for a lack of voir dire. But, they will make you more persuasive, and make your local jury selection process more meaningful. Sadly, after experience, the second most effective method of learning is through dialogue and the only place this happens is voir dire. Lecturing is the least effective way to learn, yet that is how we treat most juries.

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Conclusion

The only way to know your juror, to know who to strike or how to persuade is to get to the juror's value system. "A value system is an organization of beliefs concerning modes of conduct along a continuum of relative importance." From the court's perspective, a little more knowledge about the juror's value system may lead to higher quality juries affecting outcomes and ultimately public opinion of the system. This is important at a time when the jury system is taking such a public hit. Furthermore, it is not necessary to delve into a juror's mind to uncover how he/she came to establish his/her values or what he/she believes to be standard and normal. You don't need to know whether a juror loved his mother to know if he will be pro-plaintiff or pro-defendant. However, it is essential to know what the juror believes to be normal, correct, ethical and moral. You can't argue that your client's conduct was reasonable or your opponent's was negligent, if you have no baseline of the jurors' own standards. This type of questioning can rarely be done effectively by the court. It takes a trial lawyer who has a genuine concern for both his/her client and the jury system, to ask probing, meaningful questions, such as, "If you had a family member who was injured, would you hesitate or think twice before suing the person you thought was responsible?" This tells us much more than asking, "Do you agree with the plaintiff's right



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to bring a lawsuit and have it heard by her fellow citizens such as yourselves?"

Instead of "Do you believe in the right to award punitive damages?" or "If the facts show and the court instructs, could you award punitive damages?" You can ask the jurors if they think punitive damages do what they are meant to do. Or, "Do you think punitive damages overcompensate a victim and have become excessive?"

I believe it would be better for attorneys to have the opportunity to voir dire and lose the right to strike jurors, than to try cases without the right to talk to them at all. You all know that to be forewarned is to be forearmed. Thus, it may be better to have a bad juror and know it, than 12 jurors who you know little about until it's too late.

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SUPPLEMENT TO PLEADING FOR SUPPLEMENTAL JUROR QUESTIONNAIRE

The following research from the fields of communication and psychology supports the Plaintiff's contention that a Supplemental Juror Questionnaire is necessary in this case.

The majority of prospective jurors have little or no experience with the justice system and find the courtroom to be an intimidating place. A tremendous amount of social/psychological research has established that attitudes and behaviors are influenced by situational conditions. There are several intimidating factors about the courtroom setting that work together to create a situation that influences the manner in which jurors respond to the voir dire process generally and to specific questions. Specifically, there is a considerable amount of research to support the contention that judges are perceived to hold a great deal of power and authority, thereby creating an intimidation factor that influences prospective jurors' responses to voir dire questions.

The judge's intimidation factor becomes especially pertinent when considered in conjunction with the results of research about jurors' attention to social approval and social desirability. This research indicates that jurors' ability to candidly express their feelings on important facts is inhibited by their need to appear as acceptable as other jurors. This results in jurors unconsciously trying to conform their expressed beliefs to other members' beliefs, especially with those appearing to be the most respectable. Therefore, as the socially acceptable ("right") answers become clear during the beginning of the voir dire process, answers from jurors will become less candid. Jurors are not likely to express prejudice in a group voir dire and jurors will have difficulty admitting confusion about or disagreement with the basic principle of the American justice system as explained to them by the judge. (Sources: Marlowe, D. and Crown, D., "Social Desirability and Response to Perceived Situational Demands," *25 Journal of Consulting Psychology* 109, 1968. Hare, A. Paul, Handbook of Small Group Research, *The Free Press of Glencoe*, 1962 and studies cited therein. Zajonc, R.N., "Social Facilitation," *149 Science* 269, 1965.)

The effects of publicity on voir dire has been of interest to social scientists and is

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debated in legal circles. It is particularly relevant today as more trials are attracting public attention and, in effect, are being tried in the media. National Jury Project has identified several sources of prejudice that can seriously affect a party's ability to get a fair trial. One, "There had been widespread dissemination of alleged evidence." And, "The specific content of pretrial publicity is likely to evoke prejudice" (Bonora & Krauss, 1979). Most of the available research involves criminal, rather than civil, trials. However, one can argue that the basic effects are the same.

Even after excusing potential jurors for cause, jurors exposed to publicity related to a case were significantly more likely to convict in a criminal trial (53% guilty compared to 23% guilty). Even if potential jurors are asked during voir dire about the extent of their level of bias, it appears they are unable to accurately gauge how much they have been influenced by publicity (Sue, Smith & Pendroza, 1975). These authors conclude that publicity has a significant effect on juror bias and that the bias survived voir dire "unscathed." This finding also was supported in another study that found jurors exposed to publicity were more likely to convict (Dexter & Culter, 1990).

Prospective jurors' exposure to pretrial publicity has several effects. First, there is social pressure to conform to what the prospective juror believes the community considers a just verdict. This is a particularly timely concern, give the recent publicity surrounding the Los Angeles riots following the Simi Valley, California verdict. In high-publicity cases, jurors will be more aware of the fact that their verdicts will be scrutinized. Second, it is possible that during deliberations, information from the trial and information from the media become confused. Jurors may start making decisions based on information and misinformation. This can occur consciously and unconsciously. This can occur in spite of judicial instructions to guard against it.

If jurors know something (for example, a fact reported in the media), it will affect their decision even if they are instructed by the judge to disregard it. An illustration of this comes from a large-scale jury research project conducted by the University of Chicago Law School (Cialdini, 1985, Broeder, 1959). Participants in this study were actually on a jury at the time of the study. Thirty (30) juries heard tapes of evidence in the case of a woman who was injured by a car driven by a careless male defendant. When the driver said he had liability insurance, the jurors awarded his victim an average of \$4,000 more than when he said he had no insurance (\$37,000 as opposed to \$33,000). When the driver said he was insured and the judge ruled that evidence inadmissible, the instruction to disregard had a boomerang effect and caused an average award of \$46,000. This suggests that juries are unable or unwilling to disregard information they know but are instructed to disregard. It would be even more difficult for a juror to disregard information from one's own community.

In conclusion, the debate continues between the freedom of the press versus the right to a fair trial. It is clear that jurors who are exposed to publicity are significantly influenced by it.