



Preventing Nuclear Verdicts: Workshop & Trial Academy

October 19-20, 2021

Chicago, IL

**Session Four: *Picking the Right Jury***

**The Art of *Voir Dire***

The art of voir dire is to encourage the jury to like you more than the plaintiff's attorneys. Defense counsel should pay attention to profile markers and the thoughts and feelings in prospective jurors based on the questions asked. A prospective juror's career can help defense counsel make an educated guess about whether they are analytical thinking people (e.g., engineers, law enforcement, accountants, etc.). Conversely, plaintiff's counsel tends to want primarily emotionally driven people (e.g., caregivers, teachers, writers, etc.). Making these inferences should be utilized when running out of time during jury selection.

Strategies defense counsel can use when conducting voir dire include identifying juror bias issues, identifying liability and damages, asking open-ended questions, designing general or ambiguous questions, and creating dialogue among jurors.<sup>i</sup>

**How Defense Should Frame a Case to Avoid a Nuclear Verdict**

The defense should always personalize the client. For example, imagine a school district was sued for the heinous crimes of one of its teachers. With such a difficult case to defend, a defense verdict can be reached by demonstrating the school district is comprised of many honest, and hardworking teachers who would be greatly affected by a judgment against the school.

One way to personalize corporate defendants is to present knowledgeable and likeable representatives of the corporation. Personalizing the defendant should begin during voir dire. The representative should know about the incident in question and show concern for the plaintiff

while garnering the trust of the jury. Defense counsel must emphasize the reasonableness of the defendant's conduct. This can be achieved by showing any applicable prior accidents, injuries, complaints, and what the defendant did to remedy those situations. Defense counsel should portray the defendant as honest. This is often achieved through adequate preparation of witnesses so they do not appear evasive or confused.<sup>ii</sup>

Defense counsel should also advance three themes in every case. Responsibility, reasonableness, and common sense should be introduced and discussed during jury selection. Defense counsel should ask potential jurors about their beliefs on each of these themes. For example, they may ask "How do you teach your children the value of responsibility?"

### **Put Yourself in the Potential Juror's Shoes**

Jurors typically feel uncomfortable during voir dire. In putting oneself in a potential juror's shoes, it is important for defense counsel to put potential jurors at ease and briefly explain the purpose of voir dire.<sup>iii</sup> One of the most important goals of voir dire is to get the prospective jurors to like you. Be polite and say "thank you for sharing" after their responses rather than moving on quickly to the next juror.

Being persuasive is important in the beginning of trial, and part of being an effective advocate is to put oneself in the juror's shoes. In doing so, it is important to keep in mind jurors think with their heart more than their head when making a decision. The key to accomplish this is to make them care about your client by giving them motivation or a compelling reason to act on your client's behalf.<sup>iv</sup>

### **What to Consider When Interacting with the Jury**

In addition to being polite to the prospective jurors, it is important to keep in mind jurors are not adversaries. Counsel is not entitled to prospective juror's information. If a juror feels uncomfortable sharing something, it is important to not press them on the issue as this can backfire and lead to losing a potential juror. Defense counsel must demonstrate genuine respect for the prospective jurors so they trust and like you. Jurors who feel mutual respect are more likely to receive the information with an open mind and favor the defense's side of the argument.

Defense counsel should pay attention to the age, sex, ethnic background, dress, and demeanor of the prospective jurors. Additionally, the interests and characteristics of prospective candidates should be noted. Paying attention to these aspects of a juror can be utilized to form connections, thus getting them to like the defense counsel.<sup>v</sup>

### **How to Determine if the Jury Likes Defense Counsel More Than Plaintiff**

One way to determine whether the jury likes defense counsel is by paying close attention to the body language and expressions of the jurors. The jurors may smile, nod their heads in agreement, or pay close attention while defense counsel is speaking. Another way to tell is determining how the plaintiff's attorney reacts when they notice the jury favors defense counsel more than them. Plaintiff's counsel may become more adversarial, ill-tempered, or not as engaging.

### **How to Handle Bias in Jury Pools**

While it is impossible to eliminate bias from the jury pool, defense counsel should understand implicit biases and have them work in your favor. Prospective jurors should be questioned about their feelings surrounding the basic facts and elements of the case. Questions may consist of how jurors feel about corporations, punishment for accidents, and whether they have any personal experience with similar types of accidents or injuries by themselves or family members.

Before conducting voir dire, it is important to consider which jurors are best for the opposing counsel, and what open-ended question should be asked to identify those jurors. Questions could include "Do you think you can wait until all the facts are in before you make a judgment in the case?" However, these direct bias questions are rarely effective in determining jury bias, because jurors will often deny any biases they have. Questions that include vague references to the facts of the case are more revealing of bias. For example, "From what you have heard and read, do you believe that if a gas tank explodes during a rear-end collision, the manufacturer was careless?" Another example might be, "Do you believe that every time a pedestrian gets hit by an automobile, the driver was careless?" If the questions reveal underlying bias, defense counsel should deselect that juror.<sup>vi</sup>

## **When and How to Use Jury Consultants**

Jury consultants can help organize mock jury trials, prepare focus groups, test voir dire questions, and provide consultation during trial. Mock trials are valuable because they provide information about what aspects of the case are compelling to a jury. Consultants help obtain mock jurors representative of the demographics of an actual juror pool selected during trial. Mock trials can also help defense counsel discover weak aspects in their case and understand evidence that may not be understood by jurors. Consultants can also be valuable in observing and listening to the prospective jurors during voir dire. The consultants are trained to decipher positive or negative aspects of a juror, such as body language or a micro-expression.<sup>vii</sup>

Jury consultants use science and data which allows them to make accurate inferences about a juror. When presenting evidence or testimony about your client, they may be valid arguments, but holding a mock trial may reveal jurors do not care about some evidence. This feedback can help illuminate areas where defense counsel can personalize a client more effectively.

## **Ideal Juror**

While the perfect juror may not exist, general techniques and patterns can be used to spot an ideal prospective juror. Some examples include people with higher education, people employed in white collar or technical fields, older individuals or retirees, and people with past jury experience.

Jury consultants have identified five different juror personality types. These personality types are (1) sympathetic, (2) analytical, (3) practical, (4) conventional, and (5) persuasive. These personality types tend to favor the plaintiff's or defense's side and can have a large impact in finding in favor of one side or the other. First, the sympathetic juror cares about the welfare of others. They are less concerned with logic and may even overlook or ignore evidence. They are more likely to award high numbers because they are governed primarily by their emotions. Thus, sympathetic jurors are typically pro-plaintiff. Second, the analytical juror is logical and curious. They are concerned with solving complex problems and are concerned with analyzing the evidence and data to objectively calculate appropriate and reasonable damages. Therefore,

these jurors side with the party who explains their case the best and supports it with reasonable and compelling evidence.<sup>viii</sup>

Third, the practical jurors are pragmatic and lack hyper-sensitivity that the sympathetic jurors have. They are concerned with fairness, justice, and restitution. They award plaintiff's damages if the defendant caused the injury and if damages will make the plaintiff whole. Fourth, the conventional jurors are rule-following people who love organization and structure. They tend to view things in black and white or right and wrong. They tend to have blind faith in authority figures. They tend to align with defense if they are representing a powerful authoritative defendant. Finally, the persuasive juror is opinionated, competitive, and value control. They have a large impact on the panel because they can sway other jurors to agree with their viewpoint.. Defense counsel should avoid these jurors if their client is liable in some way.<sup>ix</sup>

### **Defense Themes: Responsibility**

Questions defense counsel can ask regarding the theme of responsibility include: 1) is responsibility an important value for you and your family?; 2) do you think taking responsibility is something that is learned or a trait you are born with?; and 3) how do you try to teach your children to take responsibility for their actions?

Personal responsibility resonates with jurors and holds the plaintiff to a higher standard of accountability. The concept of personal responsibility is helpful to the defense because jurors are often skeptical of the plaintiff before they have heard the facts of the case. Jurors want to know the plaintiff's conduct was responsible before they can hold someone else accountable. If the jurors perceive the plaintiff acted irresponsibly they tend to hold the plaintiff accountable, even if the defendant's conduct was egregious.<sup>x</sup>

### **How to Provide a Defense Damages Number**

The issue of damages and providing a defense damages number should begin in voir dire. General questioning must be utilized to test juror attitudes about damages. The defense attorney has an opportunity during voir dire to introduce the idea the plaintiff may not have suffered an injury because of the defendant's actions. Defense counsel must ask jurors whether they have

experience caring for ill or disabled family members, personal history of hospitalizations or medical treatment, attitudes about the value of a dollar, and experiences with large companies. The damages number should be given by the defense to provide a perspective other than the plaintiff's number.<sup>xi</sup>

Jurors often have a difficult time conceptualizing non-economic damages and awarding plaintiffs for their subjective pain and suffering. Plaintiff's attorneys will often guide the jury and suggest the damages number. To counteract this, defense counsel must recommend their own, much lower award amount. Research studies show when defense suggest their own lower damages amounts, the jury produces lower awards.<sup>xii</sup>

The best way to provide a damages number and persuade the jurors is to educate and give direction for jurors to come to their own damages number. This can be done by showing how the plaintiff's attorneys and their experts are exaggerating their numbers. Defense counsel can show demonstrate while the plaintiff was injured in the incident, they suffered less harm than was proffered by plaintiff's counsel. Thus, the damages should be lower because the plaintiff's number is overcompensating in damages than what the plaintiff experienced in harm.<sup>xiii</sup>

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<sup>i</sup> Sarah E. Hornbrook, Jill M. Leibold, *Critical for Success – Top Strategies for Voir Dire and Jury De-selection*, 50 No. 10 DRI For Def. 46, (2008).

<sup>ii</sup> C. Barry Montgomery, Bradley C. Nahstradt, *How to Defend Punitive Damages Claims Effectively And Maybe Successfully*, 66 Def. Couns. J. 347 (1999).

<sup>iii</sup> Ellen Kreitzberg, *11.1 Introduction to Ciivil Voir Dire*, *Jury Selection: The Law, Art and Science of Selecting a Jury*, 360 (2020).

<sup>iv</sup> Dominic J. Gianna, *The Secret to Making Jurors Care: Do Everything from their Point of View*, *Opening Statements* 7:11 (2021).

<sup>v</sup> Ellen Kreitzberg, *11.1 Introduction to Ciivil Voir Dire*, *Jury Selection: The Law, Art and Science of Selecting a Jury*, 360 (2020).

<sup>vi</sup> C. Barry Montgomery, Bradley C. Nahrstadt, *Worth the Effort – Some Thoughts on Jury Selection*, 49 no. 10 DRI For Def. 36 (2007).

<sup>vii</sup> Marilyn Sher, *Using Jury Consultants*, 45 No. 6 Prac. Law. 59 (1999).

<sup>viii</sup> C. Barry Montgomery, Bradley C. Nahrstadt, *Worth the Effort – Some Thoughts on Jury Selection*, 49 no. 10 DRI For Def. 36 (2007).

<sup>ix</sup> C. Barry Montgomery, Bradley C. Nahrstadt, *Worth the Effort – Some Thoughts on Jury Selection*, 49 no. 10 DRI For Def. 36 (2007).

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<sup>x</sup> Lisa A. Blue, *Communicating to the Jury that your Client Deserves to Win Before the Client Says a Word*, ATLA-CLE, (2003).

<sup>xi</sup> C. Barry Montgomery, Bradley C. Nahstradt, *Worth the Effort – Some Thoughts on Jury Selection*, 49 No. 10 DRI For Def. 36, (2007).

<sup>xii</sup> Paul D. McCormick, *Countering Plaintiff's Attempts to Maximize Damages – Communicating with Jurors about Money*, 49 No. 9 DRI For Def. 39, (2007).

<sup>xiii</sup> Paul D. McCormick, *Countering Plaintiff's Attempts to Maximize Damages – Communicating with Jurors about Money*, 49 No. 9 DRI For Def. 39, (2007).