

Critical for Success

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**A primer for the less-experienced trial attorney.**

# Top Strategies for Voir Dire and Jury De-selection

In the last decade, civil jury trials in federal and state courts have virtually become an endangered species. In U.S. District courts alone, the number of civil jury trials declined from 11,446 in 1990 to 5,121 in 2006. Although

attorneys now primarily rely on mediation and arbitration to resolve cases, litigators must still hone their trial skills in the event that a case can only be appropriately resolved by a jury. While many of the elusive jury trials are handled by seasoned trial lawyers, opportunities do exist for less-experienced lawyers to assist with jury trials or handle their own trials.

A less-experienced attorney's first jury trial can be an anxiety-inducing experience. Many hours will be spent planning for the examination of witnesses, preparing the opening statement and the closing argument, and reviewing the exhibits. Preparing for voir dire is equally important. In this article, we will educate the less-experienced lawyer on how to properly prepare for voir dire, as well as how to successfully select his or her first jury.

## Pre-Voir Dire "To Do" List

Prevailing in a jury trial requires more than mere mastery of the substantive and proce-

dural law affecting a case; it requires strategic thinking and preparation for the art of jury selection. To prepare for voir dire, you (1) must understand the rules of voir dire in the jurisdiction of the case's venue, including the rules for challenging jurors, (2) learn about the judge's voir dire preferences, (3) consider the case-related issues that will directly affect your case strategy, and (4) determine your own preferences for voir dire.

## Learn the Venue Voir Dire Rules Including Rules for Challenging Jurors

To remove a prospective juror from the panel, a party may strike a juror for cause or use a peremptory challenge. Although all courts afford parties unlimited challenges for cause, courts limit the number of peremptory challenges each party may use.

In federal court, each party is permitted three peremptory challenges. 28 U.S.C. §1870 (2008). "Several defendants or several plaintiffs may be considered as a single

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party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." *Id.* The number of peremptory challenges each party is permitted in state court is governed by state statutes, or the states' rules of civil procedure. State statutes or rules of procedure vary greatly with respect to the number of peremptory challenges each party is permitted in civil cases. See MINN. STAT. ANN. §546.10 (2008) (two peremptory challenges); N.C. GEN. STAT. §9-19 (2008) (eight peremptory challenges); WASH. REV. CODE 4.44.130 (2008) (three peremptory challenges); N.J. STAT. ANN. §2B:23-13 (2008) (six peremptory challenges).

Regardless of venue, you must be familiar with the restrictions the courts have placed on the usage of peremptory challenges. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (peremptory challenges cannot be used on the basis of race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Hernandez v. New York*, 500 U.S. 352 (1991) (peremptory challenges may not be used in a discriminatory way against Latinos); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (peremptory challenges may not be used to exclude jurors on account of race in a civil case). Providing an exhaustive list of all of the peremptory challenge restrictions that exist in various courts is beyond the scope of this article; however, we advise you to research the restrictions on peremptory challenges that exist in the jurisdiction in which your case is venued prior to the commencement of voir dire.

### Learn the Judge's Voir Dire Preferences

Judges may have preferences concerning voir dire. It is critical that you familiarize yourself with the procedures and preferences of the judge before which the trial will take place. You should seek answers to the following questions as soon as the case is set for trial:

- Which voir dire questions will be asked by the judge? Some? All?
- Will the voir dire questions need to be submitted prior to voir dire? If so, when?
- How much time, if any, will be allotted to each side to conduct voir dire?
- Will the judge conduct challenges for cause in front of the juror, in cham-

bers, or in court, but first removing the juror?

- Will the parties need to request their strikes simultaneously—so that one juror could potentially be struck by two parties—or will peremptory challenges be issued on an alternating basis?
- Will the judge allow for time for cocounsel, or counsel and a jury consultant to confer regarding whether a peremptory challenge will be used?
- How many jurors will the judge sit in the jury box?
- How many jurors will serve?
- Will alternate jurors be chosen?
- Will alternate jurors be permitted to deliberate at the end of the trial?
- Will the judge provide a juror seating chart? If so, will the seating be assigned consecutively, by juror number, so that the first 24 people will be assigned numbers 1–24, or will seating be assigned in random order?
- Will the judge or clerk simply pull the next consecutive prospective juror, or will the prospective juror be randomly selected?
- Will the judge pre-screen all jurors for hardship, or only the jurors in the jury box?
- Will attorneys be permitted to back-strike?
- Will the judge allow a jury questionnaire? If not, consider filing a motion to request the use of a questionnaire. If the motion is granted, find out if the questionnaire's length is limited and if the judge prefers a particular questionnaire format.
- Will the judge allow mini opening statements as a part of voir dire?
- Will the judge allow a consultant to sit at counsel's table? If so, submit a motion *in limine* or enter into an agreement with opposing counsel to ensure that the jurors do not know that a jury consultant is present.

While many of the above-listed questions are most appropriately asked of the judge or the judge's clerk, a few additional questions are more appropriate for the seasoned trial attorneys in your law firm, local counsel, or colleagues who have tried cases before the judge. These include

- How receptive is the judge to jurors' hardship requests?

- How receptive is the judge to cause arguments?
- Does the judge attempt a great deal of rehabilitation of jurors who express bias?

### Consider Your Case Issues to Determine Strategy

Next, consider a collection of questions

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that pertain to sensitive case-related issues that will directly affect your case strategy. Because these questions pertain to privileged information and require a firm understanding of the facts of the case, you should only discuss the following questions with other lawyers working on the case, the client, or your jury consultant. Questions to consider include:

- What will be the key issues in the case?
- What will be the high information-yielding questions in voir dire?
- What will be the cause strategy for the case?
- In what sequence will cause questions be asked?
- What will be the appropriate strategy for rehabilitating opposing counsel's potential cause strikes?
- What will be your peremptory challenge strategy?

### Determine Your Own Voir Dire Preferences

The last, but not least, important step in preparing for voir dire is to determine your own preferences concerning voir dire. If your preferences do not violate the governing voir dire statute(s) and can provide

more efficient jury selection, consider asking the court for changes in its protocol. Some judges may have concrete rules for jury selection, but others may be amenable to change, especially if the modifications will result in greater efficiency.

First, approach the judge's clerk. For example, ask the clerk if the judge typically allows attorneys to receive random

More and more, the jurors who are willing to assign liability are not the same jurors as those who are willing to offer a large damage award.

juror lists in addition to, or instead of, the alphabetic juror list. If it is not typical protocol, appeal to the judge's desire for efficiency and suggest that the proceedings may be expedited and run more smoothly if the attorneys had a better sense of which jurors would be sitting in the jury box. Efficiency may be a particularly effective point to raise if you anticipate a long trial. Some judges are willing to compromise and provide the attorneys with one page of the list at a time; attorneys will not have access to the entire random order list, but will have sufficient information to better coordinate and plan jury selection efforts.

### Goals of Voir Dire

Trial involves the calculation and implementation of strategy, whereby the moves each party makes are calculated and executed to increase the chances that a party will ultimately prevail at the conclusion of the trial. Some steps, such as setting goals related to the development of certain fact witnesses, properly cultivating your expert witnesses, or prevailing on important motions *in limine*, may increase your chances of prevailing at trial. Additionally, if you achieve four particular voir dire goals, the selected jury may be more likely to find in favor of your client. Consideration

and employment of the strategies discussed in this article may help you reach the following four voir dire goals:

- Identify and de-select jurors who are negatively predisposed against your case.
- Lay the groundwork for cause strikes to maximize your peremptory strikes.
- Educate the jurors about the themes of your case.
- Gain commitments from the jurors to hold the plaintiff to his or her burden of proof.

### Strategy 1: Identify Juror Bias Issues

Voir dire is an attorney's first opportunity to determine potential biases against a client or a client's case. Uncovering the hidden biases of jurors requires you to step into the opposing counsel's shoes. In considering your case from opposing counsel's perspective, ask yourself the following questions: (1) who would the best jurors be for the other side? and (2) what open-ended questions can you ask to identify the other side's best jurors without unmasking your own best jurors?

Before you enter the courtroom, identify the answers to these two key questions. Making them your top voir dire priority will help you to better assess which jurors may be least receptive to your case. For example, in a Hurricane Katrina bad faith insurance defense case, jurors' responses to the question, "What do you think about insurance contracts that exclude claims caused by storm surge damage instead of wind?" will be far more valuable than finding out, for example, whether a juror ever served on a prior jury. Identifying juror bias is critical. In the event that the judge curtails your time to conduct voir dire, do not abandon this strategy. Rather, limit your focus to key bias issues.

### Strategy 2: Identify Liability and Damages Jurors

Many cases involve a defendant's liability for damages, even implicitly, as well as the request for damages. There will always be jurors who are pro-plaintiff, willing to quickly assign blame and return a large damage award. It goes without saying, identifying these jurors is a top priority in voir dire.

However, more and more, the jurors who are willing to assign liability are not

the same jurors as those who are willing to offer a large damage award. The liability-only jurors are more willing to render a verdict for the plaintiff, but award little or no damages because they do not always view money as a proper "fix" for the plaintiff's claims. Damages jurors, on the other hand, may resist placing blame, but once they are convinced to do so, open the floodgates to high damage awards, and to punish a defendant with punitive damages. If you are short on peremptory challenges or time, the obvious first choice between the two types of jurors is to apply a peremptory challenge to the high damages juror.

Often, defense attorneys hesitate to ask jurors about damages. Just as frequently, plaintiffs' attorney will ask about jurors' attitudes toward damage awards to identify high damage jurors to keep on the panel. It is important to identify a jurors' bias now, rather than waiting until they sit down at the deliberation table with a focused mission to express that bias to the panel.

As long as the plaintiff's attorney is not anchoring jurors to a large damage award, the plaintiff's voir dire questions on damages can help the defense identify jurors who are willing to use money to send a message. Be watchful of plaintiff attorneys' use of anchoring techniques to numb jurors to high damages. For example, a favorite tactic is to question potential jurors about ridiculously high numbers and reduce the amounts with each subsequent question, so that still-large multi-million dollar awards seem less shocking. "What amount would seem too large to you as a damage award? \$50 million? \$30 million?" The attorney will continue to decrease that number until the juror agrees with an amount in the plaintiff's desired range. When possible, make every effort to thwart tactics to anchor jurors to damages.

In general, throughout voir dire, you should note jurors' responses to the plaintiff attorney's damages questions. Jurors' responses may be used in cause challenge arguments if one of those anti-damages jurors ends up on your strike list for another reason. If you have evidence that the juror is also biased against the plaintiffs, it's easier to negate counter arguments to your cause request. You'll be more likely to convince the judge that your request is fair.

### Strategy 3: Ask Open-Ended Questions

Your goal is to identify experiences or attitudes relevant to your case issues. Limit your "Yes/No" questions. Instead, reformulate questions into open-ended questions to allow jurors more space to direct their answers, which will allow them to provide more information about themselves. When you feel yourself beginning a question with, "Have you ever..." stop and rephrase the question to begin with words that encourage open-ended responses such as, "How..." "What..." "When..." "Where..." "Tell me about..."

### Strategy 4: Design General or Ambiguous Questions

Giving jurors more leeway in their responses will permit you to gain a better understanding of their perceptions and the extent to which they hold certain beliefs. Ambiguous questions allow jurors to interpret your meaning and will give you a better sense of how pre-existing beliefs may color perceptions of your case. After asking a vague or ambiguous question, formulate follow-up questions to get more detail to probe the extent to which a belief is deeply held or the extent to which a juror was affected by an experience. Start with general encouragement, such as "That's interesting. Can you tell me a little more about that?" Become more specific with each follow-up question.

### Strategy 5: Create Dialogue among Jurors

Paying careful attention to the group dynamic will allow you to assess how the whole panel will interact during deliberations. When one juror responds, thank him or her, and ask who on the panel agrees or disagrees with that opinion. Or, direct the follow-up question to an individual juror first by asking, "Mr. Smith, Juror 8, what do you think about what Ms. Nelson, Juror 5, just said?" Then assess whether you have jurors who seem willing to stand up for and articulate their individual beliefs in the face of opposition. And, if a strong personality emerges, can you identify another juror who will create a balance?

### Strategy 6: Let the Jurors Do the Talking

It is always tempting to try to sell your case

during voir dire. But, the more talking the attorneys do, the less time the jurors will have to talk. The goal of voir dire is to uncover information about jurors to assess biases against your case. They need space

and time to offer insights about themselves. If they are rushed for time or only answer "yes or no" questions, they do not have the permission they need from you to tell you their stories.

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### Strategy 7: Identify as Many Jurors for Cause as Possible

Use your cause questioning sequence to elicit jurors' biases in their own words, and then repeat that bias in their own words. When elicit information to use to argue for a for cause strike on a juror, never ask that juror if he or she can be fair or impartial. Everyone wants to appear fair, so

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rather than encouraging a juror to honestly express their opinion, he or she will try to create the impression that he or she can be fair, even if it's impossible. Further, once you have identified a juror for a cause challenge, never ask the juror to "put aside" the bias. Where, exactly, is "aside" located?

Instead, ask the juror if he or she may initially lean, even just the smallest bit, toward the other side's position. Next, ask the juror to explain how his or her experiences and attitudes would affect his or her views in this case. The wording of the question, "How will your experience affect the way you see this case?" assumes that the juror's bias will indeed affect him or her, and gives him or her permission to express that bias to you. Finally, ask the juror if it would be better for him or her to serve on a different case. Thank the juror for his or her honesty and opinion. Ask the remaining panel if anyone else feels similarly. Document each response verbatim to make your strongest cause argument.

### Strategy 8: Rehabilitate Only the Jurors Whom Your Opponent Sets Up for Cause Strikes

This is the only time when the words "fair" or "impartial" should ever be used. The goal is to force your opponent to use a peremptory challenge to strike the juror, so encourage these jurors to commit to being "fair" in their own words. Document verbatim the juror's response. Use the verbatim

response to argue against your opponent's cause request.

### Strategy 9: Don't Indoctrinate Jurors

During voir dire, it is tempting to ask jurors easy questions that encourage them to agree with your case. However, indoctrinating jurors discourages them from telling you how they really feel. It forces them to align their answers with what they believe you expect from them. If you must ask some indoctrination questions, wait until you feel you have already received enough key information from jurors to make your strike decisions so that jurors are not discouraged from expressing opinions that will not benefit your case.

### De-selecting Jurors

First, ask the court to strike for cause all of the jurors from whom you elicited an indication of bias through your cause sequence questions. Challenges for cause are unlimited, so maximizing your strikes through cause is an excellent strategy. Have jurors' answers ready. Remind the court of their responses to your cause sequence questions, word-for-word when possible. Prepare for your opponent's cause strike requests. Have jurors' responses to your rehabilitation questions ready to read to the judge, as well as any other unbiased responses by jurors to dissuade the court from allowing your opponent's strikes. The goal of de-selection is to de-select those jurors who will not be receptive to your side of the story.

Identify which jurors you plan to de-select, rank ordering them by degree of risk to your case. Determine your strike order and acceptable jury compositions if you should need to pass, and thus risk that your opponent will accept the panel, to preserve strikes for risky jurors later in the sequence. Is there overlap between jurors that may be de-selected by both sides? If so, hold out until your last strike for these jurors to potentially force your opponent's hand in using his or her own peremptory.

When you identify which jurors the opposing counsel will most likely target for de-selection, come up with a few different "What if..." scenarios to have contingency plans for a few of your opponent's most probable de-selection choices. Do your own peremptory choices change with vari-

ous scenarios? As each juror is de-selected, who moves into their seat? Does each move bring risky jurors closer to the panel?

Look closely at the first 12 jurors, but keep in mind that the subsequent 12 jurors will have a likely chance of sitting on your panel. Conversely, if the first 12 seats are filled by neutral jurors while jurors who would be good for your case wait in the subsequent set, consider whether striking a few of the neutrals would help to move the beneficial jurors forward.

To decide how the group will function as a whole in deliberations and to better assess the effects of your opponent's probable peremptory choices, note which jurors (1) may not get along, (2) may be loners, (3) may be opinion leaders, (4) may sway toward the majority, and (5) may likely act as counterbalances to some of the stronger personalities. Continually assess what the panel may look like as a whole after each pair of peremptory challenges.

### Appealing to the Seated Jury

Once your jury is seated, you can increase its receptiveness to your message by returning to the jurors' voir dire responses. In opening statement, and even throughout trial, weave in the jurors' own words and experiences. For example, in a recent criminal case, one juror stated during voir dire that his quality assurance job was about the "shades of grey" because nothing is truly in "black and white." In closing, the attorney repeated the juror's own words back to him, reminding him that everything about the prosecution's case was a shade of grey. The attorney took the juror's phrase a step further, tying it to the burden of proof, explaining for the entire panel in those same terms that "shades of grey = not guilty."

### Conclusion

The selection of a jury is critical to your potential success at trial. Despite the great importance placed on voir dire, a less-experienced attorney need not become paralyzed by the anxiety resulting from being charged with the selection of his or her first jury. If you simply consider the suggestions included in this article, and execute the strategies we outline, you will increase your likelihood of selecting the best possible jury for your case. Best wishes on your first jury trial!

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