

Voir Dire

The overlooked and underrated art

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Voir Dire
The overlooked and underrated art

- I. State (NY) cases only, with a few exceptions
- II. Importance of Voir Dire
 - A. Severely underrated and underutilized
 - B. **Not a *pre*-trial process, rather the *first* process *in* your trial**
 - 1. Some of these prospective jurors are your first potential witnesses
 - a. Experts (not permitted at trial)
 - b. Experience (also not available as proper trial witness)
 - 2. Your voir dire is a preview – maybe the first part of – your opening
 - 3. Remember (regardless of the topic of any lecture or program), the trial is a seamless whole; there are no “parts.”
 - a. Voir dire, opening, cross-exam, summation all interface and anticipate each other.
 - b. Your eye is always on your summation, regardless of which “part” you are on.
 - C. Much may depend upon the particular judge’s “Strike zone.” You must determine the dimensions.
 - 1. Read Ct Appeals, *People v. Boulware* 324 N.Y.S.2d 30 (1971)
 - a. Holding was a major setback
 - b. But contains some good Language (“strike the balance,” “broad discretion,” “wide degree of latitude,” “[no] rigid guidelines”)
 - c. Note that Ct App said “Resolution of this matter is ... impeded by the fact that no transcription of the Voir dire appears in the record.”

- III. A major problem: increasing restrictions on the lawyers
 - A. Content
 - B. Time; e.g. 15 min for 18 prospective jurors

- IV. Restrictions hard to argue against because most lawyers (both prosecution and defense)
 - A. Do not know how to use voir dire properly
 - B. Waste (squander, in fact) time. “Get on with it.” *People v. Boulware*, 324 N.Y.S.2d 30 (1971).
 - C. Become an embarrassment to everyone, including the judge
 - 1. Bore, impose upon (juror’s time), insult intelligence
 - a. E.g.: Both sides want only a fair jury (hogwash)
 - b. “Conventional” questions are often useless
 - (1) Q: What do you like to read? A: Shakespeare, Wall-Street Journal
 - (2) Q: What do you like to do? A: Hiking (all Manhattan jurors like to hike), walking on the beach in the rain, candle-lit dinners at home
 - (3) Q: What TV do you watch? A: PBS, Discovery Chanel, History Chanel

- V. What kind of juror are you looking for? Depends on the particular case.
 - A. Intelligent
 - B. Unintelligent
 - C. Can appreciate abstractions and ideas
 - D. Can appreciate only concrete concepts
 - E. Someone you feel good about; someone you can talk to
 - F. Someone who can relate to your client (perhaps a retired serial killer)
 - G. Stereotypes?

VI. Purposes, Objectives, Uses

- A. Not really jury “selection,” because of
 - 1. time limits
 - 2. unmanageably large groups
 - 3. subject-matter restrictions
 - 4. Number of challenges available

- B. Jury “selection,” in practical reality, is merely choosing some of the worst to kick off, forced to keep the rest.

- C. Statutory, literal: qualifications (what the statute says the purpose is)

- D. What is this juror bout?
 - 1. Bias: e.g. crime, race
 - 2. Attitudes concerning, e.g.
 - a. Fifth Amendment [“I’d need to hear both sides.”]
 - b. Presumption of Innocence
 - c. Lawyers
 - d. Cops
 - e. The system
 - 3. Intelligence (high or low, depending on case)
 - a. Objective — job, education
 - b. Subjective — dealing with questions and concepts
 - (1) the frustrating non-sequitur response: “I’ll-listen-to-all-the-evidence.”

- E. Artful (what we really need to do)
 - 1. Prepare the audience (set the stage)
 - 2. Propositions: e.g. Where you can prove plain view testimony is a lie created for search & seizure purposes, ask Jurors to agree that drugs inside glove compartment — as opposed to in plain view — may be an important difference.
 - a. thus, you determine the issue for the case
 - b. If X, then Y (you know the cards in advance)

3. Propaganda (education) — involves more speaking by attorney.
 - a. Adversary process — DA wants to win
 - b. Innocent people go to trial
 - (1) Ask for juror’s perception of trial of innocent man
 - (2) Establish understanding of type of person who goes to trial though innocent — sinners, not saints
 - (a) not Rabbis and Priests
 - (b) People whose life style and circumstances make them appear seem guilty
 - c. Reality of the process: e.g., liars do not grow long noses
 - (1) people lie for money — civil cases
 - (2) politicians lie adroitly — current events
 - (3) spouses — e.g. 20 years before lying scoundrel is revealed
 - (4) small window into witness — because
 - (a) time constraints
 - (b) formal setting
 - (c) rules of court
 - (d) limits on human skill available to lawyer
4. Dust off the inventory of the brain’s warehouse of not-much-used information and utilize your first “witnesses” in the trial (perhaps more important than the real witnesses to come) to remind jurors of what they forgot they knew. Some examples:
 - a. I.D. problems
 - (1) reacquaint jurors to everyday experiences
 - (2) “remind” them of studies that “everyone” is familiar with
 - (3) confirm understanding that certainty does not correspond to accuracy
 - b. Police
 - (1) fraternity – “brother” officers
 - (2) para-military
 - (3) no more truthful or reliable than anyone else

- c. Informers
 - (1) benefits
 - (2) motives
 - (3) corroboration necessary
- 5. Use jurors as your first witnesses. E.g.:
 - a. Retired cops
 - b. Previous jurors
 - c. Previous grand jurors – e.g.:
 - (1) (Having seen hundreds of cops testify, do you have any problem with the proposition that cops might lie under oath?)
 - (2) A GJ proceeding is one-sided
 - (a) no judge
 - (b) no defense lawyer
 - (c) only direct, no cross
 - d. Previous civil jurors
 - (1) people lie even just for money
 - (2) every civil trial has two sides: one truthful, one necessarily mistaken or lying under oath
 - e. Divorced wives of cops

VII. Waive making a record? Or refuse to waive?

- A. Reasons not to waive
 - 1. Create record for appeal, of course
 - 2. Intimidate and control unscrupulous judge and/or prosecutor
 - 3. Good form and practice: avoid criticism later
- B. Considerations regarding waiver
 - 1. Would the presence of a reporter (and a record) motivate the judge to be more restrictive (self protective)?
 - 2. Would the fact that what you are doing is being memorialized cause the judge and/or prosecutor to pay cautious attention?
 - 3. Enhances more informal atmosphere. Will that help you?

VIII. Begin your control the trial's vocabulary — the language of the trial

A. Make your vocabulary, and thereby your point of view, the language of the trial; refuse to use the vocabulary of your adversary

1. Examples

- (1) interrogation (not *interview*)
- (2) presence elsewhere (not [never] *alibi*)
- (3) deal or deal letter (not *cooperation agreement*)
- (4) informer (not *cooperating witness*)
- (5) story [of a prosecution witness] (not *testimony*)
- (6) prosecutor (not *The People, The Government*)
- (7) Mr. Smith [your client] (not *the defendant*)
- (8) complainant (not [never] *the victim*)
- (9) rehearse (not *prepare*)

IX. Practical How-To

A. Be selective as to which jurors you question, and which you avoid questioning

1. To develop basis for a cause challenge
2. To exploit, while you have the chance, those the DA will surely challenge
3. To exploit, while you have the chance, those you will surely challenge
4. To exploit, while you have the chance, those who, for whatever reason, will certainly be excused (e.g. personal hardship, clearly stated bias)
5. To extract information where you are truly uncertain

B. Don't ask questions of a juror you like

1. Wastes time
2. Gives Prosecutor opportunity to see what you see and knock off juror

- C. Structure your questions with purpose
1. Open-ended to get a dialog going, hear what a juror sounds like and is like
 2. Leading to plant a “recollection” or “knowledge” in the jurors’ heads. E.g.:
 - a. “You’ve heard about and seen on TV those familiar experiments with eye-witness ID problems?” [answer will likely be yes]
 - b. Not: “Do you know anything about eye witness studies?” [answer will likely be no]
- D. Discuss issues at hand in your case, e.g.
1. Police testimony
 - a. PD as a fraternal organization
 - (1) term, “brother” officer
 - (2) how many believe cops give traffic tickets to other cops?
 - (3) Who are our “witnesses” (expert and experience) on the panel to give “testimony”?
 - (a) relatives
 - (b) ex-wives
 - (c) previous jurors
 - (d) previous grand jurors
 - (e) retired cops
 - (f) those with personal experience; e.g., traffic court
 - b. Experiences of prospective jurors with cops
 - (1) traffic court
 - (2) previous jury service
 - (3) previous grand jury service
 2. Identification
 - a. Dangers of ID by strangers
 - b. Remind jurors of everyday (usually harmless) mistakes we all make
 - c. Bring to their minds their “knowledge” of “well-Known” studies on vagaries of Eye Witness ID.

3. Informers
 - a. Motive to lie
 - b. Bias
4. Motives to lie
 - a. Civil cases, for money
 - b. Relationship to a party or witness (e.g., anger)
 - c. Benefits
5. Trial of an innocent person
 - a. Does the juror believe innocent people are tried?
 - b. What does the trial of an innocent person look like?
(Answer: like the trial of a guilty person)