GETTING STRAIGHT ANSWERS IN VOIR DIRE

1. Introduction/Caveat —The techniques, skills and methods discussed in this presentation have either been learned from mentors, colleagues and from 39 years of trying cases. (17 of those years as a Colorado Public Defender, 23 years as a member of the faculty of NCDC). I have been blessed to have my path crossed with some of the giants in the criminal defense world and their willingness to take the time pass on what they have learned from their trial experiences. I recognize that each lawyer has one’s own style and that the techniques, skills and methods of effective voir dire will require blending with one’s own style.
2. History/Evolution of Voir Dire Methods:
   1. Profiling: Much of the older literature on voir dire emphasizes a generic discussion of jurors’ pedigrees, habits, hobbies, and affiliations. Many prosecutors still rely heavily upon voir dire questions such as: What are your favorite television shows? I call this method “the profiling of jurors”. We all know the ills of police profiling and its effects through accusations against innocent people. Profiling jurors by criminal defense lawyers is no less harmful. When trial lawyers profile, they fail to identify the prospective jurors who *will* find their clients guilty. Defense attorneys who continue to use this method are ineffective per se. In essence, you can’t judge a book by its cover and you can’t determine if a juror is in favor or against your theory by only looking at the surface.
   2. Core Values—Cathy Bennett and the Wounded Knee Experience: Effective jury selection has evolved into a focused discussion of jurors’ core values. By asking questions about a juror’s honest and true feelings, perceptions, behavior, prejudices and biases, a defense lawyer is now able to identify and exclude those potential jurors who cannot accept his or her theory of the case for innocence.
   3. De-Selection Rather than Selection (The Colorado Method)
      1. The present state of affairs in voir dire across this country, e.g., time restraints, judges and prosecutors who continue to use generic discussion of jurors backgrounds and personal habits, and our defense lawyers brethren and sisters who continue to believe that force feeding jurors to like them, to like their clients and that the accusations are not that bad, has brought us to the realization that the primary purpose of our voir dire is to eliminate the prospective jurors who pose the greatest threat to the

theory of the case for innocence. Now, we deselect jurors rather than select them.

* + 1. Deselection demands a completely different mind-set for the defense lawyer. The purpose of your questions is to get the jurors to reveal all the bad stuff about your case, about your client and about why they will vote against you, guilty, if they get a chance to. Deselection is counter intuitive to how we have been trained in the past and how we practiced in the past. In essence bad stuff is good for us, because if we don’t know their honest and true feelings, perceptions, behavior, prejudices and biases and how strong they hold these core values, we will not be able to determine who they are and who are the worst of the worst. And when we start to receive all the negative information that tells you that a potential juror is bad for your case, it is necessary to encourage the other jurors to join in the disclosures of whatever bad stuff they are holding back and have not revealed.
    2. In a nut shell, deselection has basically three goals:
       1. To identify the “Lee J. Cobbs” of the world who are on your jury (Lee J. Cobb character from Twelve Angry Men).
       2. To rate the bad jurors to evaluate the worst of the worst.
       3. To utilize your challenges for cause in order to preserve your preemptories.
    3. With regard to goal number 1, you must have the mind-set in the very beginning that every juror finds the charges repulsive, looks at your client as more likely guilty than not and that you as his lawyer will try to get a guilty person off.
    4. With regard to goal number 2 and number 3, you need to come up with a system in order to rate the jurors that are unfavorable to your case for innocence. Therefore, everyone starts with a negative mark and if they are deserving from their disclosure, each juror will receive an additional negative mark. Therefore, when the time comes to select, your system of rating will allow you to first challenge for cause the worst of the worst and exercise your preemptories for the rest.
    5. In order for deselection to be successful, not only is your mind set differently, how you project yourself when asking these questions becomes ultimately important. It is said that empathy is that essence in a communication that says to the person being interviewed, “I hear your feelings, thoughts and behaviors,” and “I hear your world.” It is that experience of crawling into the other person’s world and getting a feel for what it is like to live that person’s feelings, thoughts and behavior. Respect, or non-possessive regard, expresses to the person that his or her

world is respected and will not be judged by the listener. The third element, congruence, means the listener expresses on the outside what he or she is feeling on the inside. This means that the listener is a whole and genuine person. This is particularly important because unless the listener is genuine, the respondent will not be.

* + 1. In plain words this means 1) do not be judgmental, 2) acknowledge or thank the juror for his or her honesty, frankness and disclosure of private feelings, 3) you have to listen (genuinely listen) to what the juror is saying in order to ask the next line of questions.

1. Preparation for Voir Dire: Effective voir dire cannot exist without a well-developed and thoroughly worked out theory of the case for innocence.
   1. Absolute necessity: A well-defined, developed and worked out theory of the case for innocence
      1. That means you have identified all of the major issues in the case
      2. You have identified the bad facts of your case that cannot be ignored
      3. You have identified the fact based questions that must be discussed in voir dire
   2. Working Understanding of the Legal Framework-In order to address potential objections and rulings by the court, it is important to have a basic understanding of the legal framework that supports meaningful voir dire. It is important to understand Federal protections as well as the state constitutional and statutory protections that exist in your jurisdiction.
      1. Constitutional Protections
         1. Due Process
         2. Trial by an Impartial Jury
         3. Effective Assistance of Counsel
         4. As recognized by the U.S. Supreme Court, these constitutional protections translate into the core purposes of voir dire: “[T]o enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice,…or predisposition about the defendant’s culpability.’” *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (quoting *Gomez v. United States*, 490 U.S. 858, 873 (1989)
      2. Statutory / Rule-Based Protections
         1. In addition to basic constitutional protections, it is important to understand the statutory structure that supports the effective use of de-selection methods. The scope, nature and availability of voir

dire varies by jurisdiction. Colorado provides a basic example of a statutory voir dire struction.

* + - 1. Opportunity for voir dire expressly defined—
         1. Crim. P. 24 provides, in relevant part:

(a) **Orientation And Examination Of Jurors.** An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors *to facilitate an intelligent exercise of challenges for cause and peremptory challenges*. (Emphasis added).

* 1. 3 or Fewer Focus Topics-Voir dire techniques that efficiently locate and eliminate biased jurors require focus and priorities. What is the most critical issue related to your theory of the case? What other issues must you address before you can have confidence that the jury will fairly consider your theory? A focus on three or fewer topics accommodates time limitations, ensures relevance, and provides a platform for removing the worst prospective jurors first.

1. The Mechanics of Voir Dire
   1. Sorting Jurors Before Voir Dire
      1. Demographic Information Elicited by the Court / Responses Relevant to Statutory For Cause Challenges. Ordinarily, the court asks jurors a series of questions to determine whether or not the juror is excluded from service due to a statutory criteria (recent jury service, filial relations with law enforcement, business relationships with the parties, etc.). This information can be particularly useful to sort jurors into categories for more specific questioning about their biases and whether or not they have pre-formed opinions about the case.
      2. Use of Jury Questionnaires-Where allowed and practicable, a short juror questionnaire (i.e. 1 page or less) also facilitates the sorting of jurors by introducing the primary topics of voir dire. Use of a juror questionnaire helps efficiently identify potentially harmful jurors and also provides a basis for more specific questioning sooner rather than later.
   2. Types of Communication with Jurors (How to Ask Questions)
      1. Absolutely open ended questions!
         1. Why Open-ended questions are critical – open ended questions give jurors the freedom to talk about what they want to express. They ask for more information from the juror than closed ended questions. Many lawyers ask closed ended questions when they

think they are asking open ones. For example: There is a big different between “Do you have any opinions about this case?” (Which elicits a yes or no response) and more open ended questions (which ask the juror to provide a description. Examples of more open ended questions, include:

* + - * 1. What feelings do you have about this issue.
        2. What opinions do you have about this issue.
        3. What experiences have you had that give you these feelings and opinions.”
    1. Remember open ended questions deal with four parts of an experience:
       1. Trigger - An event or situation occurs (for example: a murder occurs, a person is arrested and the case receives publicity)
       2. Perception - The person forms a perception about the event such as, “the guy sitting next to the lawyer looks guilty and I bet he did it”
       3. Emotion - Out of this perception the person develops a feeling/emotion, e.g., fear, hate, disgust, etc.
       4. Hardened Behavior (i.e. a rigid bias) - From this feeling/emotion comes a behavior, the person is trying to get on the jury in order to convict
       5. Example: It becomes necessary to get information on all four parts of the experience in order to get an accurate reading of the person. Open ended questions that will follow would relate to the event described:

1. Mr. Juror, what do you recall reading in the newspaper or hearing about the arrest of my client in connection with this murder
2. What was your first reaction to the story
3. How did you feel when you read about it
4. What would you like to see done to people who are accused
5. The Importance of Receiving the Information Provided by Jurors - Once an open ended question is asked, it’s absolutely necessary that you listen with your ears and eyes to the answers by the juror. Let me repeat what I

just said, effective voir dire demands that you listen to what the juror said and how he expressed what he said. The information in the answer will tell you whether you need to continue to probe the answer with additional open ended questions. For example: After reading the article, did you express your feelings about the article to others, e.g., your spouse, friends, etc. Did you have a conversation where the article about the murder was discussed with others. How did they express their feelings to you about the murder and did you, with those other persons, express an opinion about the murder. Did the conversations with others re-enforce or change your feelings. Did it change your opinion. What was that opinion.

1. How to gauge if your voir dire is effective – Engagement is the measure of successful voir dire.
   1. If the juror is talking and you are listening, you are being effective
   2. If other jurors by their body language, expressions, interruptions want to express themselves after hearing the jurors answer, you are being effective; but
   3. If you are the only one talking and the jurors are giving yes or no answers, you are not effective
2. Breadth of Voir Dire - How many different issues, subject matters and topics should you cover in a voir dire
   1. As many as necessary to identify jurors’ receptions of a well- developed theory of the case. Again, 3 or fewer primary voir dire topics facilitate a manageable presentation. There may be a number of more specific issues in these 3 primary topics, though. The detail allowed for sub-issues/sub-topics will depend upon the time constraints imposed by the court;
   2. The various subjects of voir dire should be prioritized according to their importance to the theory of the case;
   3. An effective voir dire can be achieved by discussing the primary issue from the theory of the case in different ways. For example: In an attempted murder case involving the Hells Angels the judge limited voir dire to 1 ½ hours per side. Defense counsel effectively addressed one issue during voir dire: the image/perception of the Hells Angels. Efficient and effective voir dire can be done.
   4. Breaking the Ice
      1. Use of a Mini-Opening (if allowed in the jurisdiction)
         1. A mini-opening will allow for disclosure of critical facts of a case. Critical facts are those with substantial potential for disqualifying bias. For example: In a murder case where the client is accused of killing his two children and his wife, a mini-opening that discloses that there are two dead little boys allows for defense counsel to raise this issue before the jury to determine if there is a bias or prejudice against the client because of this known fact, the death of two small children.
      2. Cut to the Chase:
         1. Remember, before you get to ask your first question, the jury panel has already been poisoned, bored and tired from the judge and the prosecution;
         2. Because you have identified from a well-developed theory of the case of innocence what subject matters/issues you are going to raise, do not hesitate, start asking open ended questions about those subject matters/issues;
         3. Remember, you have prioritized what the issues you are going to talk to the jury about. Start with the one that you have determined to be the most critical and important;
         4. For many experienced criminal defense lawyers each one has developed their own method/style for how they first introduce themselves and begin their questioning. Whatever intro you use or method to begin questioning, its purpose is for the jury to understand that:
            1. What comes out of your mouth is straight talk, to the point and absolutely necessary to determine who is a proper fit for this trial
            2. You are genuine and sincere and you’re not trying to sell them a bill of goods
            3. And when you speak you use plain talk and no legalese or stilted language. You start strong and you finish strong.
            4. For example: A possible intro would be, after you heard what this case was about, then looked over at my client, how many of you said, gee, I wonder why he was falsely accused.
   5. Protecting/Insulating Jurors Who are Willing to Consider Your Theory of the Case
      1. Equal Protection
         1. *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting race-based preemptory challenges);
         2. *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (prohibiting gender-based preemptory challenges)
         3. Mechanics
            1. Defendant makes a prima facie showing that a preemptory challenge is based upon a prohibited criteria (race, gender, non-marital children)1;
            2. Through a “clear and reasonably specific” explanation of “legitimate reasons,” the State must offer a race-neutral basis for striking the juror;
            3. Considering all circumstances that bear on discrimination, the court must make an independent determination of whether exercise of the preemptory challenge reflects purposeful discrimination.2
      2. Remember, those jurors who you have identified from questioning as favorable to your theory of innocence will most likely be struck by the prosecution with its preemptories.
      3. Preempt Bullies – Beyond *Batson*, Confirm that Jurors Will Respect the Single Juror (Hopefully More) Who Vote Not Guilty – Voir dire can be used to effectively insulate jurors who are willing to consider and not- guilty verdict. By getting agreement that jurors should respect each other and that browbeating to achieve a unanimous verdict is inappropriate, a short amount of inquiry can facilitate better deliberations at the close of the trial.
   6. Increasing the Number of Preemptory Challenges (In Other Words, How to Successfully Present For Cause Challenges)

1 An inference of discrimination is sufficient to support a *Batson*-type objection. *Johnson v. California*, 543 U.S. 499 (2005).

2 The scrutiny required as part of a court’s analysis is significant. The failure to make findings based upon careful examination of the whole record may be the basis for reversal, notwithstanding a clear and convincing evidence standard of review. *See Miller-El v. Dretke*¸ 545 U.s. 231 (2005).

* + 1. Ultimately, an effective for cause challenge requires the use of plain dialogue to establish a mandatory reason for excusing the juror. In Colorado, the legal authority for such a challenge exists primarily through Crim P. 24 (b), which provides in relevant parts:

(1) The court *shall sustain a challenge for cause* on one or more of the following grounds:

\* \* \*

(X) The existence of a state of mind in a juror manifesting a bias for or against the defendant, or for or against the prosecution, or the acknowledgement of a previously formed or expressed opinion regarding the guilt or innocence of the defendant shall be grounds for disqualification of the juror, unless the court is satisfied that the juror will render an impartial verdict based solely upon the evidence and the instructions of the court[.]

(Emphasis added).

* + 1. Effective Use of Cause Challenges – When you identify a juror who you want to have excused for cause, in order to save your preemptory challenges, consider the following points in approaching cause challenges:
       1. Don’t be hasty, take your time
       2. Attempt to know and to learn as much about the juror as possible before seeking to solidify a challenge for cause
       3. Don’t proceed immediately to close ended questions
       4. Hold your cross-examination horses until, in your mind, a juror, when asked by the judge “you can follow my instructions, can’t you Mr. or Ms. Juror?” or “you can be fair, can’t you, Mr. or Ms. Juror?”, and the juror only response can be, no, I can’t. Sorry, I can’t be fair.
    2. Setting Up the For-Cause Challenge - Obtain the rationale of the juror. Continue your probing by finding where the juror is coming from in an open-ended way. By finding the reason or rationale why a juror feels a particular way, it is at this point that the juror has not only convinced himself but has expressed to all who were present to hear his or her rationale that the juror is genuine in his position on the issue and is much less likely to change his or her position.
    3. Use Close-Ended Questions in the End to Cement the Challenge. Only after you have gathered all of the information that fully explains the juror’s position, can the defense lawyer be in a position to nail down a

cause challenge by the use of leading questions. The use of leading questions with the information now in the hands of the defense lawyer allows the defense lawyer to confirm, reinforce the jurors position and closes all escape routes except the obvious, “I can’t change my position.” For Example:

* This position you have taken has been your position for a very long time.
* During this very long time you have thought about this over and over.
* You pride yourself as being a thoughtful person.
* You do not make statements like this lightly.
* Like all matters of importance, you consider this seriously.
* Having thought about this seriously, no one can change your mind on this issue.
* I couldn’t change your mind.
* Opposing counsel couldn’t change your mind.
* Not even the judge can change your mind on this issue.
  1. Summation –A Poker Game Where You Have to Play Your Best Hand – Once it is no longer possible to successfully assert for-cause challenges, the use of preemptory challenges requires a combined understanding of who presents the greatest risk to the theory of the case and how the identification of an alternate juror will impact the composition of the jury. To some degree, the use of preemptory challenges is a poker game. If the government excuses a juror that is problematic for you, you have a greater opportunity to excuse other jurors that are, perhaps, more detrimental to your theory of the case. In most circumstances, it makes sense to excuse jurors in order of priority. At the same time, if there are any apparent crackpots left in the venire panel, it may make sense to require the government to do the housekeeping. Also, to the extent that the court’s protocols make the selection of an alternate juror dependent upon who is seated last, the use of a final preemptory challenge requires strategy. In other words, evaluate whether a preemptory challenge changes the composition of the primary jury or whether it only changes who will serve as the alternate juror.

I do not want to trivialize the types of cases we have chosen to be responsible for and try. These cases are serious beyond description with life changing consequences for our clients. Our clients are special, human beings with precious lives who are holding on to us to protect them, to counsel them and to advocate for them. Our adversaries, as one judge reminded me many years ago, “Have more power than the pharaohs of Egypt and the emperors of Rome”. That being said, we play the hand that we are dealt, terrible facts, unappealing clients to others and court rulings that tie either one hand or both behind our backs. Yet, we persevere. We continue to try and change the environment in which we work, honing our skills and always looking for ways to improve our chances of winning. The reality is we cannot just accept our fate, we must continue to find

better ways to be effective. I together with my fellow colleagues and friends in this seminar, Lisa Wayne, Andrea George, Jeffery Robertson, Fernando Freyre, Martin Sabelli and my mentor, David Wymore, strongly believe and advocate the deselection process for voir dire.

CREDITS/SOURCES:

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Article: Brush ‘Em Off: Legal Authority That Lets You Ask Questions In Voir Dire to Select a Fair Jury

Cathy E. Bennett & Robert B. Hirschhorn

Article: How to Conduct a Meaningful and Effective Voir Dire in Criminal Cases

Michael L. Stout

Article: Jury Selection for the 21st Century

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