

Jury Selection

- I. **Juror questionnaires:** These can be obtained from Clerk of Court. See also: Criminal Practice Form Book on the Criminal Practice Manual CD.

- II. **Meet the Jury !**
 - A. Understand your jury pool. Too many attorneys confuse the venire with themselves. A significant portion of the jury pool are folks who watch Fox News, are concerned about spiraling rates of crime, and who think that profiling is just good police procedure. Most often their understanding of what juries do comes from watching television depictions on shows such as Law & Order. They expect matters to be presented to them in a smooth professional presentation that takes less than an hour with commercial breaks. While that is, of course, unrealistic, there's a teaching point here: don't dawdle! Make your point and move on. Don't fall into the trap that many prosecutors fall into thinking that "more is more" – especially where the "more" entails repetition to the point of banality.

 - B. Don't bother trying to change jurors' preconceived notions. Not only does such an approach risk irritating them, it's not your job. People are what they are and no amount of attacking their ability to be "fair" is likely to change that. All jurors think of themselves as "fair" – even those who enter the courtroom ready to hang your client no matter what he or she is accused of having done.

 - C. Accepting that jurors think of themselves as fair-minded, however, doesn't mean that you must surrender to their biases. Juries tend to prioritize by first doing what they think should be fair, then what makes sense, and lastly they look to the law. Use voir dire to talk candidly with jurors about those biases and figure out how to use them to your client's advantage. Give your jurors every opportunity to prove they are fair by returning a fair and reasonable verdict of not guilty.

III. Prerequisites to Planning Voir Dire

- A. Jury Panel. This should be the list of the pre-seated jurors, or if your jurisdiction pulls capsules, with names in them, to call people up, at start of trial, alphabetical list originally given. This list should ultimately be such that, after all excuses for cause, you can put down each juror challenged with peremptories, by each side.
- B. Seating chart: Have some type of chart [see Appendix A] listing the juror's number, name, and where they are seated.
- C. By this point in the trial preparation you should have planned the position you are going to sell to the jury to the point where you are almost ready to deliver your closing argument.
- D. It is only when you have such a Trial Plan that you are ready to start planning the voir dire.
 - 1. The voir dire is tailored to sell this defense position.
 - 2. Jurors are selected because they are thought most likely to buy the defense position.

IV. Plan your Voir Dire

- A. One cannot be effective conducting essentially the same voir dire in every case or doing it off the top of one's head.
- B. Each voir dire must be tailor-made to carry out the Trial Plan in each particular case.

V. Manner of Voir Dire

- A. The object is to gain credibility with the jury and establish a relationship between you and your client and the prospective jurors.

1. Gradually dispel the suspicion they have of defense counsel.
2. You want to be the one to whom the jury looks for leadership.

B. Showing the qualities of a good human being and competent lawyer is necessary.

1. Sincerity.
2. Fairness.
3. Helpfulness.
4. Diligence.
5. Humanness.
6. People-oriented, not technical.
7. Competency as a lawyer.
8. Knowledge of the case.
9. Low key so jurors are not fighting back, and also leaving room for a more climactic approach on cross-examination and closing argument.

VI. Humanize the Defendant

A. Like your defendant and show it.

1. Babysit the defendant.
2. Talk to him.

3. Listen to him
 4. Touch him-pat him on the back, etc.
 5. Bring water to him.
 6. Arrange, if possible, for the defendant to be seen with his family.
- B. Call him by his first name often. Also occasionally refer to him as, "Mr. Jones". It demonstrates respect for the defendant.
- C. Tell the jury personal things about him, such as, "Joe went to high school not far from here at George Washington."

VII. Speaking of your client –

- A. Keep control of the client throughout the trial, beginning with the voir dire. (Remember the old adage: you never get a second chance to make a first impression.)
- B. Give the client a notepad and pen. This serves two purposes: first, gets them engaged – or seemingly engaged – in the courtroom process; and second, it gives the client a way to communicate with you without running the risk of creating an audible distraction.
- C. Tell the client to make eye contact with each and every juror during voir dire and trial – (assuming the client can do so without seeming intimidating.) This helps remind the jurors that they aren't trying "The Defendant," but are trying a case against John, their neighbor, a real person.
- D. Additionally, remind the client not to react to juror statements. A sudden gasp or muttered remark does not make the client more attractive to the jury.

VIII. How much Voir Dire?

A. Do not ask any question without purpose.

1. Don't be afraid to be brief.

a. Jurors are easily bored.

2. Some lawyers believe, as a result of the American work ethic or otherwise, that the longer they talk the more they deserve to win. Don't fall into this trap.

3. You gain credibility with the jury if they believe that when you stand up you do what is important and then sit down.

B. Ask, however, all the necessary and useful questions.

C. Use collective questions when they serve the purpose.

D. Do not repeat that which has been covered before ad infinitum.

1. Highlight important matters instead.

E. Learning and using the tremendously useful new psychological techniques will give you plenty to do in voir dire.

IX. Educate the Jurors as to your Case and the Governing Principles

A. Explain these principles to show that they are not technicalities but designed to insure that no person is unjustly convicted.

B. The system to protect against the conviction of innocent persons includes burden of proof being on the prosecution, requirement of proof beyond a reasonable doubt, the presumption of innocence, and the necessity for a unanimous jury.

1. Our problem in making these principles live is that we merely mouth them.
2. We must think about them, convince ourselves, "psych ourselves up" about them, and make them live for ourselves just before voir dire if we are to make them live for the jurors.

C. Educate the jurors as to the law upon which you rely and how it is based on common sense.

X. Deal with the Problem Areas

A. These are problems in every case which may get in the way of fairness.

1. Racial prejudice
2. Technical defenses.
3. Bias against the insanity defense.
4. Defendant not taking the stand
5. Whatever you find in the analysis of your case.

B. Sometimes it is best to not mention the problem if you feel you can successfully spotlight other matters so that the problem will not surface in the jury deliberation room.

C. If the problem is likely to surface in deliberations, it is best to lay the problem on the middle of the table and deal with it "up front."

1. The most useful solution maybe to tell the jury you have a problem and what it is and get them to deal with it.

D. If you are creative and plan in advance, you can often succeed in turning the jury around.

XI. Getting Information to use in Selecting Jurors

A. Different people have different ways of looking at the world which can usefully be called "sets"

B. When a situation arises the "set" may well determine the decision.

C. Determining the "set" of each prospective juror is therefore most important.

D. Skill, sensitivity and creativity are necessary to determine the attitudes and "sets" of each juror.

1. You can just ask the prospective juror but this may not produce a straight answer.
2. You can inquire about other things (such as priorities at work or in life, where the juror gets his/her information on the world, hobbies, organizations to which he/she belongs, etc.) and from these determine the crucial matter.
3. Watch for the non-verbal clues. Tone of voice, an inappropriate pause showing doubt, not looking at the defendant, looking to the judge or prosecutor for support, choice of words, etc., can tell one more than the words say.

XII. Questioning of Prospective Jurors

A. Pay close attention during the state's voir dire. Keep notes and integrate those notes into your own questioning.

B. Do not hide behind the yellow pad. Do not follow the questions listed there in rigid order.

C. Have list of topics to be covered written on one page, but carry on a conversation with the prospective jurors.

1. If you mention topic 1 and the juror brings up topic 10, go to it. You will cover all of the topics at the appropriate times by the time you are finished.
2. However, always end on a high note.

D. Watch for the non-verbal communication.

1. We may not have studied non-verbal communication formally, but we are all experts. We have been reading non-verbal communication for our entire lives.
2. We just need to trust our feelings.

E. Kinds of questions.

1. Closed-end questions leave little room but to answer "yes." They are useful in getting agreement on legal principles, but discourage expression by the prospective jurors.
2. Open-end questions give the juror encouragement to express himself or herself when asked questions, such as, "What are your feelings about someone accused of murder?"

F. Attorneys must develop their abilities to use open-end questions if they are really to get to know the prospective jurors.

G. For an excellent article on methods of questioning, see, "Psychological Methods of Jury Selection in the Typical Criminal Case" by Cathy E. Bennett, *Criminal Defense*, Volume 4, No. 2, March-April, 1977.

XIII. Challenging and excusing prospective jurors (Cause / Peremptory)

- A. Challenges for cause; These are governed by 46-16-115. Some courts, when a juror is excused for cause during defense voir dire, want the defense to finish their voir dire, before state, gets to question, the new juror. Others want defense to stop its voir dire, the state to then voir dire the newly called up juror, and the defense to thereafter resume. You must know how your judge handles this.
- B. *Batson* challenges require special attention. See: *Batson v. Kentucky*, 476 U.S. 79 (1986)
- C. Peremptory Challenges. In capital cases each side gets 8 peremptory challenges. Otherwise, each side gets 6 peremptory challenges.
- D. Alternate jurors. Usually, in felony cases, courts allow for one or two alternate jurors. Generally speaking alternate jurors are the prospective jurors called after the first 24 have been called. In utilizing your first peremptories, make sure you are not striking a juror after No. 24, or you could end up with someone on the deliberating jury. Alternates don't deliberate unless they are called in when a regular juror gets ill, etc.
- E. Excuses for cause. See: Title 3, Chapter 15, Part 3, M.C.A.
- F. *Peremptory Challenges Can Be Precious*.
- G. At times a prospective juror will say something which might always allow his being excused for cause. The Judge or prosecutor then often asks, "But you could be fair and impartial, couldn't you"? And the juror agrees.
- H. To avoid this problem, you must work to reinforce the juror's position and get the juror thoroughly committed. Elicit statements by asking the following:
1. It was not just something thought of in the last couple of minutes. It was a real concern?

2. I'm sure no one could talk you out of that?

a. This is to forestall the juror switching back when questioned next by the judge or prosecutor. The juror is now committed.

I. To excuse a juror for cause, use techniques and concepts of cross-examination.

XIV. SOME USEFUL TACTICS

A. Take the aura of majesty off the prosecution.

1. Catch the prosecutor in some misstatement of law to which the judge will sustain an objection.

2. Defense attorney is officer of the Court same as prosecutor.

3. No one has determined the guilt or innocence in this case—only a jury can decide.

B. Select particular jurors for specific points.

C. Disclose unfavorable aspects of the case to remove shock value.

1. The gory pictures do not hurt as much when the jury is prepared for them.

D. Make jurors believe the charge is as serious as possible.

E. Make juror's responsibility as grave as possible.

F. Pit one prospective juror against another.

XV. Checklist of Possible Areas to Cover

- A. Relationship or acquaintanceship with law enforcement officers.
- B. Victim of crime in past; close friend or relative of a victim in past.
- C. Employment of juror and spouse.
- D. Membership in organizations.
- E. Relationship or acquaintanceship with participants in case.
- F. Knowledge of case.
- G. Publicity.
- H. Acquaintanceship with scene.
- I. Effect of nature of case.
- J. Previous experiences of juror prejudicial to defense.
- K. Credibility of witnesses.
- L. Weight given to testimony of police officer.
- M. Verdict based on evidence, not speculation.
- N. The Information is not evidence.
- O. Racial prejudice.
- P. Matter has not been previously decided.
- Q. Grave responsibility.

- R. Law applicable to the case.
- S. Burden of proof on prosecution.
- T. Necessity of proof beyond reasonable doubt.
- U. Presumption of innocence.
- V. Requirement of unanimous verdict.
- W. Acceptance of these principles not as technicalities but as common sense method of protecting against the conviction of innocent persons.
- X. Any other matter having bearing on selection of the jury.

XVI. Selection of Jurors

- A. Give priority to those who may be leaders. The leaders will likely swing the verdict.
- B. It is a process of de-selection, so you excuse, in general, the one you most want off.
- C. Be very careful about using your last or nearly last peremptory challenge.
- D. Determine what groups you expect the jurors to form and examine closely the group dynamics.
- E. If your goal is a hung jury, look for those who will conflict.
- F. Consult the defendant about how he feels about a juror as the feeling may be reciprocal.
- G. The fundamental rule is to follow one's feelings as to whether a

particular juror will be favorable to your defense.