The "Meat and Potatoes" of Voir Dire:
Eat Your Dinner Before Dessert or You May Have to Eat Crow

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Americans are fortunate to have a unique legal system that provides the right to a trial by an impartial jury. In order to secure that impartial jury, attorneys have the opportunity to conduct voir dire and jury selection.

Voir dire is fundamental to the legal system, but often not used to maximal advantage. Many attorneys find voir dire difficult, and even some of the most experienced attorneys are not good at it. Why? Because they identify *the wrong objective* and/or use *the wrong approach***.**

Attorneys Often Have the Wrong Objective

Clients often ask, "What kind of jurors do I want?—Male or female? Young or old?" Wrong questions. The objective of voir dire is not to identify people who will side with you. Why not?

The phrase "jury *selection*" is a misnomer—it is a process of *de*-selection, as attorneys can only determine which jurors should *not* serve due to bias through *challenges for cause* and *peremptory strikes*. Theoretically, attorneys can *ex*clude an *unlimited* number of jurors through *"challenges for cause"* when a juror demonstrates bias, and/or an unwillingness to decide the case based on the

evidence presented at trial rather than preconceptions or outside information, etc. In practicality, however, there may be a limit to the number of cause challenges a judge may grant even if a juror expresses bias; that is, some judges will "adjust" the threshold for bias and reduce the number they will grant to ensure that they can get a jury seated.

Irrespective of how the judge handles challenges for cause, attorneys are permitted only a *limited number* of *peremptory strikes* to *ex*clude jurors, as the rationale for exclusion is not discriminatory (e.g., based on the juror's race or sex, etc.).

The jurors "left standing" after challenges for cause and peremptory strikes become the impaneled jury.

So, if in voir dire you identify those jurors who *like* your case—you're just telling opposing counsel whom they should target for cause or peremptory strike.

The objective of voir dire is to find your enemies—not your friends. Think of it this way—when do you want to find out that a juror hates your case? Before or after the trial?

The primary focus of voir dire should be: (1) to identify those who simply *cannot* hear your side of the case because of bias; (2) to get jurors' biases *on the record* to establish the basis of cause challenges; and/or (3) to determine which jurors have "earned" one of your precious few peremptory strikes.

A secondary objective of voir dire should be to introduce defense themes, if time permits.

So, having determined that the objective is to identify those jurors who will *reject* your case, how do you get jurors to confess their biases clearly on the record? Take up the banner of the opposing side, and do it with conviction.

Attorneys Often Take the Wrong Approach

Many attorneys take the wrong approach in voir dire and alienate jurors by acting like advocates. This is understandable. Attorneys are trained to stake out a position and defend it. The process of voir dire goes against the training and experience of attorneys.

Voir dire is a conversation, or interview, not an argument. The tone of the attorney should be congenial, not adversarial; solicitous, not accusatory; affirming, not challenging.

The goal of an interview is not to win—it is to give way—go with the flow—allow the respondent to self-disclose and feel safe and good about doing so.

Common Mistakes in Voir Dire and How to Avoid Them

Using the Right Words, but the Wrong Tone

One of the biggest challenges for defense attorneys in voir dire is conveying that jurors who find the plaintiff's case compelling are reasonable for doing so. Why?

Lawyers are smart, and smart people usually think they are right. Smart people often unwittingly communicate that those people who disagree with them are unreasonable, wrong, ignorant, or misguided. But this is the antithesis of the message you want to communicate to jurors in voir dire.

The objective in voir dire is to get people to *confess their biases*—share candid thoughts on sensitive topics—thoughts that may be unpopular and/or unflattering. You are asking jurors to reveal themselves in open court in front of dozens of strangers, many of whom are more educated, more powerful, more sophisticated than they are.

In voir dire, you want to communicate that everyone there is right and respected for their opinion—there are no wrong perspectives and answers, and you want to hear all of them.

Using the Wrong Words, and/or Wrong Tone

Attorneys sometimes adopt rigid language that causes jurors to bristle and/or "dig in their heels."

To establish grounds for cause, jurors have to admit to bias, but no one thinks of themselves as "*biased*" or "*unfair*" or "*prejudiced*." On the contrary, most people would say they are exceptionally fair-minded, unless, of course, the person is trying to get out of serving on a jury, in which case they'll readily say "I'm biased… I can't serve…." People simply do not think themselves unreasonable, misguided, wrong, or outside the norm, so any verbal or non-verbal suggestion to that effect will elicit resistance, not acquiescence.

However, jurors recognize and accept the notion that people have different perspectives based on their upbringing, training, and life experiences.

Consequently, while jurors may resist the suggestion that they are "biased" or "prejudiced"—they are more open to the notion that everyone has "*filters*" and/or "*frames of reference*" that influence how they process and interpret information.

Vague, Chilling, or Prickly Language	Better Formulation
Who here has a bias against doctors?	Raise your hand if you feel that

Vague, Chilling, or Prickly Language	Better Formulation
	incidences of medical malpractice are actually under-reported.
	Raise your hand if you feel that doctors today run fewer tests because of rising healthcare costs.
	Raise your hand if you feel that a case that makes it all the way to court likely has some merit to it.
Who thinks doctors care more about money than patients?	Some people have had experiences with doctors that have not been satisfying—maybe the doctor seemed rushed, or impatient—raise your hand if you're one of those people. Tell me about that situation.

"Moving On" Too Quickly

Jurors get aggravated when attorneys conducting voir dire do not listen to their answers, or do not acknowledge the importance of the answer before moving on to another question.

This *faux pas* is most glaring when the juror has shared something of a personal nature (e.g., death of a loved one, experience with cancer, etc.), and the attorney moves right along without even acknowledging the disclosure.

This can happen if the attorney feels pressed for time, or is nervous and/or uncomfortable with the intensity of the disclosure. This can also happen if the attorney is relying wholly on other members of the trial team to "keep track" of jurors' responses.

Not Listening/Lack of Interest	Better Formulation
Juror: My grandmother died of this disease. **Attorney:** Could you put that aside to serve as a juror in this case?	**Attorney:** I'm very sorry to hear that. How did that experience affect you? Are you still grieving today? How do you think that experience might affect how you hear the evidence in this case? Can you say with certainty that it won't influence your decision-making in this case?

Using Double Negatives

Attorneys often slip into "legalese" and adopt phrases or sentence structures that are awkward or confusing to the ordinary person. Before answering the question, jurors must decipher the code: Does a "yes" mean yes, or does it mean no?

Double Negatives	Better Formulation
Wouldn't you agree that it is not uncommon to find X, Y and Z in a situation like this?	Would you say that X, Y and Z are common in this type of situation?
Do you have a reasonable doubt in your mind that you could find the doctor not negligent in this case?	Do you have any concerns about your ability to find in favor of the doctor in this case?

Using Compound Questions

Attorneys sometimes roll multiple questions together, such that it can be difficult to differentiate jurors with X versus Y experience. This can be rectified with follow-up, if the judge allows it, but may be confusing for the jurors, as well.

Compound Questions	Better Formulation
Who here has gotten poor medical care or has had a friend or relative get poor medical care?	Raise your hand if you feel that you did not get good medical care when you needed it. Tell me about that.
	Raise your hand if you feel a loved one did not get good medical care. Tell me about that. Who was that and what happened?

Inadvertently Rehabilitating Jurors You Shouldn't

Sometimes attorneys will inadvertently rehabilitate a juror who has expressed some bias by phrasing the ultimate question in the wrong manner.

Rehabilitating When You Shouldn't	Better Formulation
Juror: My grandfather had X problem, and it was devastating to me and my family. **Attorney:** The judge will tell you that you must set aside sympathy in deciding this case. Could you be fair and impartial here?	**Attorney:** You indicated that your grandfather's experience was devastating to you and your family. It sounds like it really left an impression on you. It seems like this case may not be the best fit for you, given this experience.

Juror: Yes, I can be fair.	Do you think that given your experience, you might be better suited for another case? Can you assure us that your experience with your grandfather will not in any way influence your decision-making in this case?

Priming For the Wrong Response

Sometimes attorneys will unwittingly condition jurors to give the politically correct response, and thereby undermine their efforts to establish a cause challenge.

Priming for Wrong Response	Better Formulation
Juror: My sister used this medical device and had some trouble with it, too. **Attorney:** *Now, you haven't heard all the evidence in this case*, but wouldn't you agree with me that this case may hit "too close to home" for you? **Juror:** No, I'm open to hearing all the evidence.	**Attorney:** Tell me about your sister's experience. Did your sister consider filing suit against the manufacturer? What was the outcome of that situation? Were you/she satisfied with the outcome? Now, my client is taking the position that the company has no responsibility for Ms. Jones' injuries in this case, even though she was injured while using this product. Given your prior experiences with your sister, would you agree with me that this case may not be the best fit for you? Can you assure us that you will be able to put that aside? You can't say with certainty that your sister's experience will not come into your mind during deliberations, can you?

False Modesty and Disdain

Attorneys can be unwittingly condescending toward jurors when they take on a falsely self-deprecating manner (e.g., "This is a complicated case, and people a lot smarter than me will be explaining the medicine to you…"). Jurors see through false modesty, and resent being "talked down to" by attorneys.

On the other hand, attorneys sometimes take an arrogant tone or use language that causes jurors to bristle (e.g., "The defendant doesn't have to prove anything in court—does everyone here understand that?"). The pertinent question is whether everyone *accepts* the proposition that the defendant has no obligation to disprove plaintiff's allegations. In voir dire, you want to identify jurors who will "shift the

psychological burden of proof" and expect the defendant to offer evidence to rebut plaintiff's claims (i.e., Who here would expect the defendant to prove he/she was not negligent or did not cause plaintiff's injuries?)

Avoiding the "Hard" Questions

Attorneys often mistakenly avoid asking the really pointed questions, such as to elicit jurors' negative attitudes and experiences with their client, for two principal reasons: (1) fear that a juror's negative response will "poison the panel" and cause others in the venire to adopt negative views of the defendant; and (2) concerns about offending the client by giving voice to adverse opinions in an open forum.

Concerns about "poisoning the panel" are often overblown for a couple of reasons. First, most venires are composed of people who are complete strangers to one another, rather than trusted friends or advisors. So, the likelihood that multiple jurors in the venire will totally modify their opinions of the defendant based on the comments of some random stranger in a large group is minimal; most people are just not *that* malleable.

The exception to this rule is where the trial venue is a very small community with many interconnections between venire members, and/or where present in the venire is someone who is well known, well-liked, and well-respected (e.g., pastor at local church, city council member, etc.). In such cases, one influential juror's thoughts and opinions may carry more weight than they would in a larger community or metropolitan area. Requesting permission to voir dire that individual in chambers outside the presence of the other jurors is prudent and advisable.

But, more importantly, suppose there *are* jurors who are easily influenced to suddenly hate your client by the comments of a complete stranger. You definitely want to know that *before* the trial! Why?

During the course of opening statements and witness testimony, opposing counsel will surely express all the negative company attitudes and experiences that you studiously avoided eliciting in voir dire. Furthermore, the "mouthpiece" for those negative sentiments will be more articulate (i.e., plaintiff counsel), and/or more credible (i.e., witness sworn to tell the truth). Consequently, any negative information about your client will carry more weight and cause *more* damage than it would have when expressed by a random member of the voir dire with ordinary communication skills.

Attorneys accustomed to acting as "the champion" for their client sometimes feel they are being "disloyal" when they elicit negative attitudes and experiences from jurors, *especially* when there are "high-level" company representatives in court.

Attorneys often open voir dire with proclamations of pride and loyalty to the client, e.g., “I’m very proud to be here representing the hard-working people of such-and-such-company….” While there is absolutely nothing wrong with this sentiment, the attorney must ensure that his/her affirmation of the client does not have a chilling effect on jurors’ willingness to express the opposite in voir dire.

Relying on “Stock” Voir Dire Questions

Attorneys often have a “stock” set of questions they typically run through in voir dire, and many do not tailor the list to the facts at hand.

This “one-size-fits-all” approach can leave pertinent aspects of the case untouched, and therefore leave high-risk jurors with whom those experiences resonate on the panel.

Granted, there may be domain areas common to all cases (e.g., bad experiences with healthcare system, etc.).

The question to consider in planning the voir dire is what aspects of THIS plaintiff and facts of THIS case will touch a chord among plaintiff-minded jurors, and find out which jurors in the venire have had similar experiences, which jurors will identify with the plaintiff and his/her family, and which jurors will be unable to set aside their sympathy in reaching a verdict.

In sum, when it comes to voir dire, remember to “finish your dinner before dessert,” or you may have to eat crow.

You can significantly increase the likelihood of winning and/or reducing your exposure by identifying the right objectives in voir dire and taking the right approach to seating an impartial jury.

Identifying your enemies is the “meat and potatoes” portion of your meal—you have to do it in order to: (1) prevail on challenges for cause (or make your record for appeal); and (2) get the most out of your peremptory strikes and exclude the most dangerous jurors in the venire.

Granted, voir dire is the first phase of the trial process; it is counsel’s first chance to talk to jurors, make a good impression, introduce themes, etc.

But remember, introducing themes is like “dessert”—you can do without it if you have to, and it certainly does not substitute for the main course.