

CONTINUING LEGAL EDUCATION

SPRING 2017

JUNE 8, 2017

**VOIR DIRE: OLD IDEAS, NEW IDEAS,
AND SOME PRINCIPLES OF PRESENTATION**

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Appellate Division, First Department and the
Assigned Counsel Plan for the First Department

June 8, 2017
ASSIGNED COUNSEL PANEL
NEW YORK

VOIR DIRE: OLD IDEAS, NEW IDEAS AND SOME PRINCIPLES OF
PRESENTATION

by

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A. The Goals of Voir Dire

1. There are really only two broad goals of any voir dire. One is education. Simply put, the education function is the act of bringing to the jury's attention concepts they are not familiar with and problems that can occur in human intercourse which the jurors have not previously thought about in-depth with a view toward having them consider these matters from the defense point of view.
2. The second in information. Getting information from jurors about who they are, how they think, their decision-making processes, their likes, dislikes and prejudices and their sense of fairness or lack thereof are

all data needed to assess whether this juror is acceptable in the sense that they will vote to acquit the client.

3. What matters can or will you touch upon in voir dire?
 - a. Jurors personal backgrounds
 - b. Negative information for a cause challenge
 - c. Information for a peremptory challenge
 - d. Information to make a point crucial to the case
 - e. Theory of the case
 - f. Information which taints the jury pool
 - g. Information which makes the jury only acceptable to the defense
 - h. Weaknesses of the prosecution case
 - i. Weaknesses of the defense case
 - j. Strengths of the prosecution case
 - k. Strengths of the defense case
 - l. Explaining odd facts
 - m. Explaining an odd legal concept
 - n. Addressing good and bad facts

4. YOU CANNOT DO IT ALL

B. Basic Voir Dire Principles

1. The Importance of the First Round
 - a. What to do when the DA is questioning jurors
 1. Deciding who is “smart” and who is not
 2. Who is a leader? Who is not?

3. Who is trouble and who is not
 4. Who DA will challenge (counter intuitive: someone who is a good defense juror can still be utilized for educational purposes)
 5. Which juror has some unique attribute that fits the defense case
2. “CHUNK-IZING” the Jury
 - a. Divide the jury into small groups of two or three
 - b. For example each group can be homogenous or can be diverse consisting of a juror who can educate others, a divisive juror and someone in-between
 - c. Decide who will be the leader of that group
 - d. Decide for each group which jurors can give you information, those who need to be challenged, and, very carefully, those who you want to retain
 - e. Consider who the DA will be challenging
 3. Prioritize subject matter for each round
 - a. One of the most difficult decisions because in the first round you need to get down to business. What is most important?
 - b. Which subjects can wait for a second round? Which subjects can be repeated in each round?
 - c. Introducing a 3D fact
 - (1) What is a 3D fact? It is a real world attribute that the jurors share which is beneficial to your case. In a mistaken ID case for example the complainant’s description made no mention of a

mustache but the booking photo clearly shows such a mustache. The 3D fact is the mustache. All other things being almost equal pick a majority of jurors who have a mustache.

(2) A 3D fact need not be a physical attribute but instead can be a custom or a familiarity with a process. For example, a juror who can take a photo with an iPhone is important in a child sex abuse case where the client snapped a photo of the child at the exact time he is alleged to have been abusing the child. It would be important to have jurors who are familiar with the process and save photos or use photos to record matters on a daily basis.

4. Memorizing names

- a. Adds a nice touch
- b. Helps with the “pace” of voir dire
- c. Distinguishes you from the DA

5. BAD IS GOOD

- a. A “bad answer” is good from the standpoint of a challenge. If juror, for example, states “where there is smoke there is fire” your response is to encourage the juror to expand upon that concept. You should be asking questions that reassure the juror and get him/her to solidify that belief. **Voir Dire is not cross-examination.** Voir dire is not the time to rehabilitate a juror who gives you a “bad answer.” Once you have a “bad answer” have other jurors agree with it particularly those you are already thinking of challenging. The best

response to a juror who offers a “bad answer” is to eventually challenge them for cause but not before you have utilized them to educate other jurors and pave the way for more cause challenges.

6. Forbidden Subjects

a. Race

1. It's always there. Introduce the subject gently by telling the jury what you are about to do. This should not be the first subject you tackle in the first round and, depending upon its importance in the case, it may even have to wait for later in the first round or the beginning of the second round.
2. Are there good race questions? Maybe. Questions which probe the juror's social activities with people of other races can be revealing though not dispositive. An incident involving a person of another race can be helpful. Racial “incidents” that a juror has experienced. What you are seeking is a candid answer as opposed to a defensiveness or a declaration in so many words that “I am not prejudiced.”
3. The idea is not to get a complete picture of the juror based on race views but to see where race fits in the universe of information you collect on a juror in the course of a round of questioning

b. Sex

1. Sexual abuse cases make jurors very uneasy. Not used to talking about sex privately let alone publically let alone in a court room full of strangers is fraught with difficulty. Yet it has to be broached. Again let the jurors know what you are about to do and why with a short intro (CAVEAT: in jury selection if you are talking, then jury is not and that equals no information).
2. One particular concern worth exploring is the ability of jurors to even speak about and hear descriptive language of sexual abuse. It may be necessary to actually ask and describe the details that will be heard in testimony. Some jurors reveal they cannot even listen to such language let alone engage in the decision-making process or evaluation of testimony. It is important with this approach to observe the juror's reactions to the descriptions almost as it is to listen to the substantive response. What you are looking for in such questions is not necessarily the actual answer but HOW the juror responds (easily, uneasily, troubled, forthright, etc.)
3. Asking jurors if they or a relative have had a bad sexual abuse experience can be done, but one should ask the juror if they would discuss the matter at side bar.
4. Once the topic is introduced, however, you must "fan out" and ask as many jurors as possible about this subject even if it in short, burst-like questions. This has the effect of toning down

the shock value of the expected testimony and will cause the jurors to evaluate the credibility of the witness.

c. Specific Legal Problems

1. Sometimes a legal concept in the trial will necessitate a cross-examination as to the element of a crime and as it unfolds the jurors will not fully understand what may appear to be a crude attempt by the defense to harass a witness. An example: in New York a kidnapping statute impose a required element that the victim be restrained beyond 10 hours. If the fact pattern and discovery show the ten hour period was not reached then the crime is downgraded to a lesser charge. The process of zeroing in with a witness the exact begin and end times of a restraint thus can be very important. This must be explained to the jury in voir dire. A few simple questions introduces the topic. For example you could tell a jury that there is a kidnapping charge that has as one of its elements a ten hour requirement and as a result you may be asking questions about that time period. That really is all you need. If you do not introduce this concept in the voir dire then for the first time during cross-examination counsel will be asking detailed time questions which can appear to the jury as meaningless or an attempt to harass the witness.

2. Legal Concepts

- a. Generally to be avoided though there is a debate about this topic. Any time you start to get in to, for example, the presumption of innocence you risk an interruption by the judge and one that has a better than even shot at making you look bad. The only legal concept I ever address is THE LACK OF EVIDENCE component of REASONABLE DOUBT and, even then, I rarely mention the words REASONABLE DOUBT. Getting jurors to focus on the absence of evidence is generally underscored in summation, but it is not altogether wrong to introduce this subject in voir dire particularly if you have a case where lack of evidence may play a major role.

C. THE PROCESS OF VOIR DIRE

1. Set the order of subject matter questions for the first and second rounds. Have a back-up plan in case you need to go to secondary subjects of inquiry.
2. The Art of the Question
 - a. Every question should be a simple interrogatory.
 - b. Every question should have a simple follow-up question.
 - c. The most important question in voir dire is WHY.
 - d. A WHY question forces juror to explain.

- e. Listen to the explanation and either ask for more information or go to another juror and inquire what they think of that response.
- f. PACE. PACE. PACE.
 - 1. Simply stated this is how fast you move from a juror response to you next question. Pace keeps all the jurors awake. Pace allows you to skip around the jury. Pace shows confidence.
- g. Foster group discussions. Nothing engages a jury more than responding to one another's answers. The added advantage of a group discussion is that you can see how people BEHAVE when in a group and how they answer. It is truly a chance to see the juror's decision-making process at work. Once jurors engage in discussion and it flows, do not interrupt. Wait for a logical moment and introduce more jurors into the discussion.
- h. NO QUESTIONS ADDRESSED TO ALL THE JURORS AT ONCE AS A GROUP. "Do all the jurors assure me that that they will follow the judge's instruction?" These questions addressed to everyone get you nowhere. Never has, never will.
- i. The Value of Peripheral Vision
 - 1. Once questioning commences keep your eyes not only on the juror who is responding but also on anyone nodding their head in either agreement or disagreement. To do this you must enter jury selection with an awareness that you will do this. After a few jury selections this will become second nature. People

nodding their head can be a deceptive sign. Assume nothing until you have an opportunity to hear what they have to say. Sometimes you can ignore a nodding juror for a few minutes and then introduce a group discussion which includes them. Sometimes you can even tell the juror you saw them nodding which conveys several messages to the juror and the jury about you the defense counsel, such as “I’m watching you,” “I’m aware of what you are doing and even thinking.”

j. Abandon Ship!!

1. The Troublesome Juror is one determined to submarine the process by expressing views antithetical to our system of justice. Such jurors do not come along often but when they do, let them have their say, no follow-up questions and pick on two other jurors who you know will disagree with this juror getting them to state why they disagree. Then move on.

D. The Punch Line

1. End standing next to your client.
2. Invite the jury, along with you and the judge, to hold the DA accountable
3. Ask groups of jurors whether they are now willing to listen to an alibi defense, another group to a witness’s credibility, etc. Again no group questions to all the jury.