HOW TO PICK AND TALK TO A JURY:

Plaintiff Perspective

By Robert A. Clifford

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Jury selection is a very serious matter, one of the most critical parts of the trial process. What makes it particularly a challenge is that most in the venire appear as if they would rather be anywhere else and try to avoid the process through fabricated stories or feigned biases. How many times as an attorney have you been asked: "What do I say to get out of jury duty?" My response: "Serve. It will be an experience of a lifetime that you will never forget, and you will appreciate your rights and the American justice system a whole lot more than before."

Although the vast majority of cases settle, jury trials still usurp most of a trial lawyer's time and energy because every case must be prepared as if it were heading to trial. Even if the case settles on the courthouse steps before you begin opening statements, you maximize what is due your client by preparing as if you will be waiting for that verdict.

ROLE OF THE JURY

The role of the jury as the *sine qua non* of a society's justice system has been observed as far back as the fifth century BCE. At that time the Greek dramatist Aeschylus' *Oresteia* was first presented on an Athenian stage detailing a series of bloody vengeance killings to illustrate, in part, the prime role of the jury in law-based society. I have had the opportunity in the past year to "try" Socrates and Orestes in mock trials, and it is most interesting to compare the role of the juror then and today.

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Fast-forward to today and the critical function of juries is on display every day, in the courthouse and in the news. And while the jury's function as fact finder remains the same, the procedures employed to select and communicate with jurors has undergone much change.

The purpose of voir dire is to ensure the selection of an impartial panel of jurors free from bias or prejudice. This purpose is achieved by allowing attorneys to gather enough information to adequately address challenges for cause and peremptory strikes.

The scope and time allowed for examination rest within the sound discretion of the trial court. Moreover, the trial court possesses great latitude in deciding what questions the court and the attorneys may ask during voir dire. In Illinois, the standard on review for finding an abuse of the court's discretion in limiting the scope or time for voir dire is very high and is found only where the record reveals the trial court's conduct "thwarted the selection of a fair and impartial jury" (*People v. Terrell*, 185 Ill. 2d 467, 484 (1998)).

It has been said that you will not win a case in voir dire, but you can lose one there. For the plaintiff's attorney, voir dire's main function is to collect information. Properly gathering information reduces the chance of a biased jury as you have worked to reveal jurors' attitudes and perspectives on relevant themes or facts. This is done through verbal questions and written questionnaires. Voir dire should also be used to introduce the potential jurors to the facts and themes of the case, as well as provide information about their role in the process.

"DE-SELECTION" OF JURORS

I have long said that the "jury selection" is a misnomer for what goes on during voir dire. It is really "jury de-selection." You are trying to get rid of the most obviously "bad" people who cannot identify with your client, with your case, or with you. The time and questioning are limited, so it takes practice and a certain sixth sense, and you cannot always be right. People can present themselves differently in the beginning than they wind up being at the end, but you have to trust your gut.

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INFORMATION COLLECTION

First, your jury should reflect your plaintiff. In order to evaluate jurors, it is helpful to create your ideal juror based on the specific facts of your case and then seek them out during voir dire. If the case warrants it, hire a jury consultant to provide some guidance.

The greatest change in jury selection since I began practicing, and certainly in the last decade, has been the evolution of the Internet. Jurors and potential jurors have long been told not to read newspapers or watch television in a high-profile case. Now people want to know everything from the web: the latest news, medical advice, how to cook a turkey, maybe even a search on one of the parties or the incident involved in your case. Ensuring that jurors are staying away from the Internet and remaining fair is a challenge of the 21st century, thereby enhancing the need to educate jurors that their verdict relies on evidence that is vetted in the courtroom, not on misinformation or misconceptions they may find elsewhere.

Perhaps the most recent change has been the ABA Standing Committee on Ethics and Professional Responsibility's Formal Opinion 466, which allows lawyers to scour jurors' social media sites to see if they are posting anything themselves while they are involved in a trial. Perhaps it may even be considered a responsibility of the attorney to monitor each juror's Facebook, Twitter, LinkedIn, blogging, and other social media accounts to ensure that opinions aren't being formed before all the evidence is in. If a person in voir dire or on a jury makes a comment on the veracity of a witness, on the status of the proceedings, or on the likeability of a lawyer, it immediately needs to be brought to the attention of the judge as possible misconduct on the part of the juror. Finding it afterward and taking the issue up on appeal may lead to undesirable results, not to mention lengthening the process. Still, this doesn't mean that a lawyer or someone at the firm should "friend" or "follow" jurors or potential jurors. That is crossing the line.

JUROR QUESTIONNAIRES

Juror questionnaires help attorneys faced with limited time during voir dire to elicit background information for potential jurors. The use of juror questionnaires also allows the plaintiff's attorney to identify bias before the beginning of oral questioning. Questionnaires get the process started; they help jurors become more engaged in the voir dire process, and the questions coax answers from the jurors through a mechanism that is more cognizant of the sensitivity inherent in some of the personal questions they pose. Furthermore, attorneys do not have to spend any time asking questions about jurors' backgrounds and general interests; these questions are more appropriate for a written response.

In my experience, questionnaires are typically one to two pages long and query the jurors' background (age,

employment, race, education, marital status, children), experiences (hobbies, source of news, membership to organizations), opinions (the willingness of the jurors to return a verdict awarding substantial damages), and some specific case-related issues (unsatisfactory experiences with relevant entities, prior lawsuits). The trial of former Illinois Governor George Ryan was appealed, in part, on two jurors' neglecting to mention previous arrest records on their questionnaires. After ten days of deliberations, both were tossed from the jury; U.S. District Judge Rebecca Pallmeyer replaced them with alternates and told the reconstituted jury to start deliberations over on all charges of racketeering and fraud. The former governor was convicted and sentenced to prison for six and a half years.

On the civil side, the issue of jury selection brings to mind a month-long trial that I conducted in what was considered the most highly publicized civil case out of Chicago's courts; it involved an internationally acclaimed violinist whose violin and other bags were caught in train doors. She was dragged for nearly 300 feet by the commuter train that ran her over. She survived. After a $29.6 million verdict, the defense attorneys raised the issue of an elderly juror who failed to mention a personal injury lawsuit that had been filed by her lawyer on her behalf just a few months before jury selection; the juror said she was unaware of this minor case because of the death of her long-time husband and her struggle with English, which was her second language. The judge in my case called this juror and the foreperson into chambers for a discussion. On appeal, it was found that she was no more vocal than any other juror, that she never raised the issue of her accident during deliberations, and that it did not impact the jury or the verdict. The verdict was upheld.

Most judges allow questionnaires, and this certainly is preferable because you can elicit a great deal more information from those who are reticent to convey their opinions or private information to the public. If a judge initially refuses to allow a questionnaire, the lawyer should explicitly request of the judge that one be allowed. In many instances in federal court, judges themselves may conduct quite a bit of the voir dire, but they generally leave a great deal of room for supplemental questioning either through sidebars or other methods so that a full and fair questioning takes place. In another case of mine, a state trial judge limited juror questioning to 20 minutes per side, and on appeal the case was reversed because this simply wasn't sufficient time to get all the information needed to determine if each juror could be fair and impartial.

Get potential jurors talking. Build a rapport. Learn how they process information.

Open-ended questions are particularly useful for providing more information. ("How do you feel about individuals being held responsible for their conduct?" "Is there anything else you feel the parties should know about you?" "What do you do at work?") Learn their social activities, experiences, and opinions. Even body language can be telling. Get them talking. Build a rapport. Learn how they process information.

Lawyers can't ask about religion, and a recent Ninth Circuit opinion found that sexual orientation cannot be the sole basis to exclude a potential juror (*SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014)). This opinion extended the 1986 ruling in *Batson v. Kentucky* (476 U.S. 79 (1986)) that held that lawyers can't strike potential jurors solely because of their race; the ruling already had been extended to gender in 1994. Judge Stephen Reinhardt for the Ninth Circuit wrote, "Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals." The Ninth Circuit case involved an antitrust trial involving pricing for an HIV medication. After only five questions, a lawyer used a preemptory challenge to remove a potential juror who spoke of his male partner and "failed to question him meaningfully about his impartiality or potential biases." The case conflicts with a 2005 Eighth Circuit case that said, "we doubt *Batson* and its progeny extend constitutional protection to the sexual orientations of venire persons . . ." (*U.S. v. Blaylock*, 421 F.3d 758 (8th Cir. 2005)). This conflict between the circuits now sets up a ripe challenge for the U.S. Supreme Court to make a final determination on this matter.

DISRESPECT OF THE JURY SYSTEM

Several cases have been in the news in recent months that continue to raise concern about how the public does not take jury selection seriously. A young couple from northeastern Pennsylvania learned the hard way. Tina Keller apparently was running late to work one day and asked her fiancé to fill out a jury summons of about 40 questions that she had received. Drayke Jacobs-Van-Tol decided to be "humorous" in his approach and responded to questions such as "How many children do you have" with answers like "none survived the abortions" and another question about where she had lived in the last decade with "The NSA knows everything. Ask them." The questionnaire was filled with profanity, racial slurs, and other crude language.

The 25-year-old woman and her 23-year-old fiancé apologized when they received a contempt citation and were called into court for an appearance on February 19, 2014, in Lackawanna County. Judge Vito Geroulo in Scranton called the form the most "intentionally disrespectful" he had ever seen and told them he could have them jailed. Before they left, Keller filled out a jury summons appropriately.

QUESTIONING OF VENIRE DEPENDS ON THE JUDGE

Questionnaires are of no use when the judge will not allow them, so be sure to do your homework on the judge. Try to get copies of any blank questionnaire allowed by the judge in past trials. Confer with opposing counsel regarding the questionnaire and try to reach agreement about all proposed questions. Be sure to have the jurors complete the questionnaire before being orally questioned on voir dire. Do not forget to ask the judge how much time will be permitted for review of the completed questionnaires. This time, in my experience, is usually quite limited, so it is mandatory that you have co-counsel review the information with you. Remember that the jurors' answers are merely the beginning point of your information gathering relative to each individual. You must expand on their answers with additional questions to confirm or dispel the perception you have of them based on their written answers.

These questionnaires hold their value throughout trial. After you have selected a jury, build profiles of each juror based on his or her questionnaire, paying attention to topics and values that could connect your client with each juror. This may also be a good time to introduce the standard required and explain in simple language what "preponderance of the evidence" means or "beyond a reasonable doubt," which may not be as clear-cut as it appears on *CSI* shows.

By contrast, gathering of self-authored data points describing each juror is not the only goal of voir dire. This time is an opportunity for you to begin interacting with and educating the jury while observing their dynamic physical and verbal responses coupled naturally. Oftentimes, the body language and delivery of a juror's answer to a question are just as revealing as the message's content. Similarly, rapport building is vital at this point in a trial. Use this time to talk to the jury and become familiar with one another.

ACTING ON INFORMATION

It is critical that the plaintiff's attorney probe the attitudes and perceptions of the potential jurors relative to the issues and parties in the case as these have a direct influence on verdicts and awards. Methodical use of challenges, peremptory and for cause, is the plaintiff attorney's most useful tool for purging biases from the venire during voir dire.

Voir dire is where you make your first impression with the jury, and credibility is key.

Although jurisdictions vary, in Illinois each party is entitled to up to five peremptory challenges where an attorney can strike a juror without cause and with certain additional peremptory challenges being allocated in the event there is more than one party on any side, per statute (735 ILCS 5/2-1106). In the federal system, each party is entitled to three peremptory challenges (28 U.S.C. §1870).

Practically speaking, use your peremptory challenges sparingly, trying not to run out before the other side and saving them for dangerous jurors. The most dangerous jurors are those you believe would be unfair to your case while also having the potential to assume a leadership role in deliberations. Rather than using a challenge of your own, seek first to establish that the juror should be excused for cause.

BUILDING RAPPORT WITH THE JURY FROM THE START

Voir dire is where you make your first impression with the jury, and credibility is key. Coming across as professional and prepared goes a long way toward establishing your credibility. This means your command of the process has a direct impact on your impression. To this end, have a full understanding of how your judge conducts voir dire. Ask around, use local bar associations and your local trial lawyers association to develop that understanding. And it is always a good idea to acknowledge the jury's time and service on the case. I mention it briefly at the beginning, but I always do so in my closing arguments. Although some lawyers may view it as pandering, I always acknowledge that members of the jury are taking time out of their lives and commend them for it. Jobs, kids at home, sick loved ones to take care of, lots of important personal issues are going on in their lives, but they take the time to fulfill the most vital role in the justice system serving as jurors, and they deserve thanks.

ETHICS IN VOIR DIRE

Above all, your handling of voir dire must strictly adhere to the ethical canons of our profession. ABA Model Rule 3.5, Impartiality and Decorum of the Tribunal, prohibits a lawyer from seeking "to influence . . . a juror [or] prospective juror . . . by means prohibited by law" (§§ (a)). Also implicated is ABA Model Rule 8.4, Misconduct, prohibiting lawyers from engaging "in conduct that is prejudicial to the administration of justice" (§§ (d)). ABA Rule 8.3(a), Reporting Professional Misconduct, requires reporting where a "lawyer . . . knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty. . . ." (§§(a)). With that in mind you ought not, but may still, be tempted to introduce tangentially the issues or themes of your case during voir dire because of its utility in exposing bias, but any argumentation is sure to draw the attention of counsel, or worse, an objection. This could easily stain the jury's impression of you at the beginning of the trial by eroding your credibility. ■

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