

# Voir Dire: Setting the Tone for Trial Success

BY COURTNEY A. BERLIN

## Introduction

It is often said that you cannot win a case in *voir dire*, but you can lose one there. The first moments you spend with a jury panel set the tone for the entire trial. This is your opportunity to make a first impression, not just for your client's case, but for your own credibility as an advocate.

Acknowledging the jurors' role is essential. Serving on a jury is not only a civic duty, but it is a right. It is a right that many people fought for, just like the right to vote. For some, jury service and the right to vote came together. For others, it did not. In Illinois women were granted the right to vote in 1920, but they could not serve on juries until years later. Minorities were also excluded from juries in many places long after they had the legal right to vote. Recognizing this history emphasizes the significance of their service and the value our justice system places on citizen participation.

In civil trials, *voir dire* serves three main purposes: (1) gather information; (2) elicit bias; and (3) protect your favorable jurors. While each of these goals overlaps, keeping them in mind helps you make the most of your limited time with the panel.

## Gathering information

The first task in *voir dire* is to learn about the people who may decide your case. You want to ask open-ended questions to learn how jurors process information. Open-ended questions invite jurors to share more than a "yes" or "no," giving you valuable insight into their experiences, attitudes, and beliefs. That information will help you assess whether a juror may be biased against your client or your case.

Many trial lawyers describe a "sixth sense" in *voir dire*, the instinct you develop after hearing enough answers, watching body language, and noticing patterns. But instinct works best when supported by concrete information.

## Eliciting bias

The heart of *voir dire* is drawing out the biases that may affect a juror's ability to decide the case fairly. This requires going beyond "Will you be fair?" and asking questions that reveal *how* jurors view the world.

Start broadly: *What is your occupation? What is your educational background? What do you enjoy doing in your free time?*

Then move toward questions that touch on key case issues: *If this is a race, knowing only what you know from the statement of the case does anyone start out ahead? What are your thoughts on large jury awards?*

In many cases, you will need to explore attitudes about the burden of proof. In a civil case, the standard is "more likely true than not," a much lower threshold than "beyond a reasonable doubt." Asking, *What would you say to a fellow juror who insisted on 100% certainty?* can quickly reveal who may struggle to apply the correct standard.

You should also pay attention to group dynamics. Questions like, *How do you make group decisions?* or *If you were the foreperson, how would you handle disagreements?* can reveal whether someone is likely to be a consensus builder in deliberations.

## Protecting your favorable jurors

Identifying and removing unfavorable jurors is only half the battle. The other half is keeping the jurors who may be favorable to your case. In Illinois, each party is entitled to up to five peremptory challenges where an attorney can strike a juror without cause.<sup>1</sup> In the federal system, each party is entitled to three peremptory challenges.<sup>2</sup> If there are multiple parties on one side, additional peremptory challenges may be granted.

These strikes should be used with care. Whenever possible, secure a juror's removal for cause rather than using a peremptory challenge. If a juror you want to keep gives an answer that could open the door for opposing counsel to challenge them for cause, your role shifts to rehabilitation. Through follow-up questions, get the juror to affirm they can set aside personal views, follow the law, and decide the case only after hearing all the evidence.

Remember, attorneys cannot exclude jurors based solely on race,<sup>3</sup> gender,<sup>4</sup> or sexual orientation.<sup>5</sup>

## Conclusion

Your job is not to manipulate the jury, it is to ensure a fair and impartial panel. By gathering information, uncovering bias, and protecting favorable jurors, you can help secure the fairest forum possible for your client's case. ■

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1. 735 ILCS 5/2-1106.
2. 28 U.S.C. § 1870.
3. *Batson v. Kentucky*, 476 U.S. 79 (1986).
4. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).
5. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014).