

Dos and Don'ts of Voir Dire

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Voir dire, no matter how you pronounce it, is a critical part of the jury trial process. Even more so, in criminal matters, where identifying and eliminating jurors with bias and prejudice is essential to the outcome of your case. Admittedly, you are looking for jurors that favor your position, but without an impartial jury our system doesn't function.

1. REQUEST A SUPPLEMENTAL JUROR QUESTIONNAIRE

Do – If your case needs it, request a supplemental jury questionnaire. Tailor the supplemental questions to address specific issues in your case. The standard questionnaires do not contain much useful information.

Don't – Expect the Court will allow supplemental questionnaires. Create arguments and be prepared early in the case to request the supplemental.

2. KNOW YOUR JURORS

Do – Research the prospective jurors. You will have some basic information, which should be enough to get any information that is available on “the Google”. Check social media sites like Facebook, Instagram and Twitter. Share the names with those in your office. Knowing a little about your prospective panel will give you the ability to develop rapport with jurors quickly.

Don't – Expect jurors to tell you the truth, or ALL the truth. They do not know you and they are not going to trust you. Don't walk in to the Courtroom expecting to learn about the jurors in the short time you have for voir dire, you need to do your homework.

3. HAVE SOME TYPE OF TRACKING CHART

Do – Have some type of chart. It doesn't have to be fancy. You can create something on a sheet of paper when you start, you can come with sticky notes and a file folder prepared, you can invest in a jury selection application. At the minimum have the last name of the juror on your chart. Use something simple, perhaps a “+” or “-” to identify concerns or assets for each of the jurors. Courtrooms are all different and the prospective panel will be seated in different configurations. Check with the Clerk of Bailiff ahead of time to get an idea of the courtroom setup for voir dire. Check with the Court ahead of voir dire about how the Court will replace excused jurors (filling the seat or as the last juror). Make sure to track the alternate jurors if they are going to be used. Let your client participate. You can't see everything. A second or third pair of eyes on juror response and body language can be a life saver.

Don't – Get overwhelmed or distracted with your chart, notes or other materials. Don't spend so much time tracking that you miss what is going on in the jury box. It may be helpful to have another person with you in the courtroom to help track the jurors on a duplicate chart. Just don't do it alone if you can help it. A staff member, an investigator, or better yet, co-counsel can be immeasurably helpful, even if they are only there for voir dire.

4. **INTRODUCE YOUR CLIENT AND YOURSELF**

Do – Introduce yourself and your client. Engage with your client, put a hand on your client's shoulder when talking about them. Be aware of your body language with and around your client. Refer to your client by their first name. You don't have to like your client, but the jurors cannot know that from your actions or words. Share with the jurors a positive thing or two about your client and then ask them if they know him. The jury isn't going to identify with your client if you don't make the effort.

Don't - Convict your client through your actions, body language or words. Don't shy away from your client. Don't argue with your client.

5. **HAVE A CONVERSATION**

Do – Have a conversation with the jurors. Ask open ended question. “Tell me more about that.” “How do you feel about that answer?” “Can you imagine a situation where (insert your theory of defense) might happen?”. Asking jurors to raise their hand if they are agreeing with can be effective, but remember if you are only asking to get people to agree with you it isn't going to work. Ask other jurors how they feel about what the last juror just said, “do you agree? Why, why not?”. Ask the same question in different ways. Ask the jurors if they think there is something you should have asked them. Ask them why they think they would be a good juror. Ask “If there is something we haven't talked about, if there's something I haven't asked that in your mind tell you that shouldn't be a juror today...”. Slow down and make sure the panel can understand you. Figure out what works for you and let loose, this is just another day with friends you just met.

Don't – Be afraid of a conversation, or the jurors talking amongst themselves. Don't keep coming back to the jurors you want to keep. Engage everyone and talk to the ones that have been quiet. Don't let the juror that needs to be excused run away from you, you don't have to let them keep talking, but you do have to be mindful of not seeming afraid of what they are saying. Don't dictate or read principals of law to the panel the entire time. You are not going to be able to teach Law 101 to the jurors during voir dire. Don't waste time, you may have as little as 30 minutes (less than a minute a juror?). But, don't speed through topics and try to avoid cutting people off when they are talking. You don't have to memorize the juror's names, but you do need to assist the

record by identifying them by name. Some courtrooms only have audio recording, and no transcriptionist, so keep that in mind as you interact with the jurors and establish a record. A good court reporter is a luxury, it is up to you to create a great record if the court reporter is missing.

6. **ACTIVELY LISTEN**

Do - Listen to the answers the prospective juror is giving you. Restate the answers you receive with positive information to emphasize what has just been shared. Remember to use active body language: hand gestures, nodding your head, leaning in to the juror. Do have topics. Prepare some questions ahead of time. Let the prospective jurors drive the conversation. Attempt to connect with every juror. You are trying to learn more about the individual jurors and how they interact with each other.

Don't – Read a script; you don't have to cover everything you have written down. Don't preach. It isn't about you. If you are talking more than the jurors, you are doing it wrong. Don't expect to learn everything about the jurors during voir dire. And, remember you aren't ever going to get the whole truth. People do not want to be seen in a poor light, do not want to be seen as having prejudices or ethics and morals that some may not approve.

7. **EMBRACE THE WEAKNESSES IN YOUR CASE**

Do – Identify the weakness or weaknesses in your case and talk to the jury about them. Some subscribe to the theory that you can do an entire voir dire on what worries you most about the case. You want to know how the jurors feel about what you see as the soft spot in your case. If you don't do this and you miss a juror that should be struck, you have already lost.

Don't – Avoid issues that concern you, or shy away from the hard stuff. It is going to be presented in some form during trial and it is better coming from you than the other side. Remember you are not going to be able to teach the principals of law during voir dire.

8. **LET THE PROSECUTOR DO SOME WORK FOR YOU**

Do – Play off the prosecutor's questions. Prosecutors often try to make the point that you can't tell a (insert criminal offense here) just by looking at the defendant. Come back and ask the jury what an innocent person looks like? How does an innocent person act? Follow up on questions the prosecutor let hang. Show the jurors you aren't afraid of the hard stuff.

Don't – Let the prosecutor carry all the power in the courtroom.

9. KNOW HOW TO CHALLENGE A JUROR FOR CAUSE AND USE THE CHALLENGE

Do – Know the steps to for cause challenges and make them count. Remember you need to switch your questioning to closed ended questions. Mirror the jurors response or restate the objectionable issue. Reinforce the view by getting the juror to agree with you that it is part of their belief system. “Someone can’t make you think differently just because they say so, can they?” Remember people don’t want to be seen in a poor light, gently take the juror down the road they are trying to skirt. The appeals court seems sensitive to the superficial rehabilitation that many prosecutors attempt (“Do you think you can be fair and impartial even after you _____?”). You may even consider not objecting or trying to remove for cause if it could be too damaging. If you have already identified the damaging prospective juror, use a preempt if you don’t think you can get them for cause. Be fair! If a prospective juror indicates to the prosecutor they can’t be fair don’t argue they shouldn’t be excused for cause, this is your credibility.

Don’t – Let the juror get away with should, could, might.... they need to answer yes or no. If they can be impartial, they stay. If they can’t they go. If they give you the right answer, but you aren’t convinced, its ok, you still have preemptory challenge. Don’t try to change a juror’s mind. You can’t. You will lose and you may spend 10 minutes on something that doesn’t help your client in any way. Identify the juror and find a way to challenge for cause or use a preemptory challenge (there are at least six preempts in a felony case and at least three in a misdemeanor case, depending on alternative juror numbers).

10. CARRY VOIR DIRE OVER TO CLOSING ARGUMENTS

Do – Listen for closing materials. You can mold your arguments to some of the beliefs expressed by jurors and even those that were excused. Be subtle, you want to embrace what they said and not lecture. Remember, you can bring a horse to water, but you can’t make it drink.

Don’t – Forget that the jurors are watching you. They are watching your client. Make sure your client understands that from the second you walk in the courtroom and sit down. The prospective jurors are watching how you are treating your client, the court, the court staff, the bailiff, and how you are acting. If the Judge doesn’t tell them, let the jurors know can’t talk to them outside of the voir dire process. Your closing argument begins the second you walk in the courtroom.

Most of all, remember to be calm and as prepared as possible. Don your poker face, even if things aren’t going your way. Try to enjoy your time, the jury will know if you don’t want to be there, because they don’t.