

**OFFICE OF THE DEFENDER GENERAL
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The Inn at Essex
70 Essex Way
Essex Jct., VT 05452

MINI TRIAL SCHOOL

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PREPARING EFFECTIVE VOIR DIRE

- Analyze the major themes and issues in the case that will stand out for jurors
- Identify the main attitudes, personality traits, beliefs, and cultural stereotypes that will influence jurors' responses to those themes
- Where possible, do pretrial research on juror attitudes
- Formulate specific voir dire questions and follow-up probes
- Develop rating criteria for evaluating prospective jurors and a rating chart to use during voir dire
- Identify your jury selection team and plan your decision process
- Ask for a pretrial conference, to get voir dire and jury selection procedures clear in advance. Use the checklist as a guide
- File a motion for improved voir dire conditions
 - Supplemental juror questionnaire
 - Attorney-conducted voir dire
 - A "struck" system
 - Open exercises of peremptory challenges
 - Small-group questioning

Avoiding Common Errors During Voir Dire

- Use voir dire to get information about prospective jurors
- Start with a clear idea of the 4-5 attitudes and biases you are most concerned about
- Get the prospective jurors to talk
- Get the bad news about panelists' attitudes. Ask about attitudes that will hurt your client if jurors hold them

(Adapted from an article written by Beth Bochnak, National Jury Project/East, for *The Mouthpiece*, New York State Association of Criminal Defense Lawyers)

Three Common Mistakes in Voir Dire

Mistake #1. Stereotyping jurors.

We often use stereotypes as a shorthand way of categorizing people in our every day life. However, jury selection is not the place for stereotypes, because stereotypes lead to assumptions, and in jury selection you should *never assume* anything about a juror. The whole point of voir dire is to *find out* about jurors, not to make guesses about them. If you are wrong, you'll be embarrassed and you will jeopardize your case.

Badly dressed African American juror: "My son works in the courthouse."

Lawyer: "Is he part of the custodial staff?"

Juror: "He's a court officer." *Now the juror thinks you're a racist and the court officers won't like you either.*

Attorney: "As a white person, what are your feelings about people of color?"

Juror: (proudly) "I'm not white, I'm Hispanic."

Lawyer (to well dressed white male): "Where did you go to college?"

Juror: (hesitantly) "I have my GED."

A female partner in a high power law firm, dressed down for jury service: "I'm an attorney." Lawyer assumes she's too low level to worry about and never inquires where she works. *If there's a high powered attorney on the jury, you'd better know about it.*

Solution: Never assume you know anything about the jurors, not from their name, their color, their age, their clothes, their neighborhood or anything else.

Mistake #2. Failure to follow up.

Sometimes when you have your voir dire all planned out, it's hard to switch gears. Maybe you're thinking about your next question. Maybe you're tired. The juror drops a goldmine - or a landmine - in your lap and you miss it.

Juror: "I had a boyfriend and we used to get into arguments."

Lawyer (representing a man charged with assaulting his girlfriend): "Would you believe the testimony of a police officer more than a civilian?"

Chances are you'll be sorry if you don't know more about those arguments. Remember, even if *you* don't find out, the other jurors are likely to during deliberations, and if they don't, the experience will affect the one juror's view of your case. What do you mean by arguments? What happened? Was there

ever physical violence? Were the police ever called? Was she ever injured? How badly? Did she go to the hospital? Was there verbal abuse? What kind? What did she do about it? When was the break up, and why? How does she feel about the experience? Does she know what the boyfriend is doing now? Once you feel you've learned all you need to know from this juror, *open it up to the rest of the group*. Raise *your* hand and say, "Is there anybody else familiar with a similar situation? Anyone who's had a similar experience?"

Solution: Listen to what the juror is saying. Stop for a second after each answer to give yourself a chance to process the juror's response. Ask yourself, "should I follow up?" before proceeding to next question on your list.

Mistake #3. Disregarding Painful Admissions

Twice lately we've heard a juror relate a traumatic experience during voir dire, such as a death in the family, and twice we've seen these experiences ignored. Once by a judge: When a juror said his mother had been murdered by his father; the judge simply moved on to the next juror. In the other example, a juror's family member had died violently and the attorney, without skipping a beat, asked the juror what she liked to do in her spare time.

In any other context, if you were told of such a tragedy, you would express your condolences. The same is appropriate in the courtroom, say, "I'm so sorry." Then ask the juror if s/he feels comfortable talking about this in public, and if not, offer her privacy. If there is a violent crime in your case, there's a good chance that a juror who has lost someone close to them through violence is not the right juror for your case. You can suggest that the trial might bring back memories of what happened and be emotionally difficult; perhaps this juror would be better for another type of case.

If the juror wants to stay, you need to find out what happened. When was this, how old were you at the time, what happened, how close were you with this person, did you comfort him/her, did they find the person who did it, was that person prosecuted, what happened, and so on. In the case of the juror whose father was responsible, you would want to know what contact the juror has, if any, with his father: where is your father now, do you see him? *If yes, find out about prison visits, what s/he may have learned about prison life*. Do you have brothers and sisters? How have they reacted? Are you or any of them involved in victim organizations?

Solution: In many jurisdictions it is quite likely that there will be jurors who have had someone murdered or who have recently lost a family member or close friend. Even when the death is nonviolent, the juror will have feelings about it. Express sorrow and find out as much as you can.

**Always ask open ended
questions**

**Never assume you know
what the juror will say**

Ask follow up questions

Closed ended:

Since your brother was in therapy, you probably have an opinion about psychologists or psychiatrists, right?

Your brother's experience probably makes it hard for you to be fair?

Open ended:

Your brother was in therapy, what was your reaction to his experience?

How has that experience affected you?

How do you think that experience is going to affect your ability to be fair and impartial?

PROBES

Tell me about it.

Please tell me more about that.

Can you explain that for me?

Explain what you mean for me.

I'm not sure I quite understand, can you explain a bit more?

Can you give me an example?

What was your reaction?

Why do you think you feel that way?

That's interesting; why do you feel that way?

What would make someone biased?

Was close to someone who committed suicide

Has been threatened/attacked/harassed

Has strong negative/positive attitude about therapy/therapists

Child had trouble in school with a bully

Prejudiced against whites/blacks

Has or is close to someone with physical disfigurement/disability

II. THE TEN SCARIEST JURY ISSUES IN A CRIMINAL CASE

The advent of Court TV and in court television means that your jurors are more educated than ever before about the criminal justice system. As we know from the hazards of eyewitness testimony, a group of people can all witness the same thing and come away with very different views. So it is with the media watching public. Most of the panel will have a great fear of crime (despite the fact that crime statistics are down, the latest brutal murder is beamed instantly into our living room). Some will mistrust the government and its ability to catch and prosecute the right person. Some will believe that juries can't be trusted. All will believe that they, personally, can be trusted to do the right thing. The good news is that the average American citizen still wants to do what is fair and right. Those citizens want the system to work correctly and believe their presence on the jury will make that happen. In talking with them about the things that concern them, you need to be looking for people who have no pre-set agenda but can be fair.

Here are the top ten areas you may need to talk to them about:

1) Fear of Crime/Victim Rage

We are all afraid of crime. On every jury panel you will find that the majority of jurors or their family members have been victims of some kind of crime, whether burglary, sexual assault or even homicide. No one wants to be soft on crime or to be perceived by their neighbors as being soft on crime. How do you help people set that aside so they can fairly hear the case before them. You must match the fear of crime with something that should be a greater fear – the fear of wrongfully convicting an innocent accused.

If you have time, first find out what each jurors experience is with being a crime victim. How did they feel after the crime? Did they catch the person who did it? What happened to that person? How did they feel about how the criminal justice system handled the case? Then explore some of the things you are most concerned about.

- Q: How many of you think that criminals have too many rights or that the courts have made it too difficult to prosecute and convict criminals?
- Q: What kind of rights do you think we should give to criminals? Should we change the criminal justice system to make it easier to convict people? How should we change it?
- Q: Now let me change the question a little bit. Rather than use the word "criminal," let me ask how many of you think that American citizens, including those who might be accused of a crime, have too many rights?

- Q: What rights would you want if you were falsely accused of a crime?
- Q: How many of you at any time in your life, including your childhood, have ever been falsely accused of something you didn't do?
- Q: What happened when you were falsely accused?
- Q: Did people believe you, just on your word when you said you didn't do it?
- Q: Were you able to prove that you didn't do it?
- Q: How did you go about proving you were innocent?
- Q: Were you able to prove your innocence? Are there still people who don't believe you?
- Q: You think there would have been a fairer result if your accusers had to prove you were guilty, rather than you proving you didn't do it?
- Q: When you hear that a guilty person went free or an innocent person was convicted, which seems worse to you? Why?
- Q: Have you thought about what kind of proof you are going to require before you convict a person? What things will be important to you in making that decision?
- Q: You have probably heard the phrase "proof beyond a reasonable doubt" in criminal cases. What do you think about the state having that burden?
- Q: What would you do if you thought the accused person was probably guilty, but the state had not convinced you of his/her guilt beyond a reasonable doubt?

2) The Accused's Previous Record

- Q: What do you think about someone who has admitted breaking the law in the past?
- Q: Once a person has admitted breaking the law, can they ever be trusted again?
- Q: How many of you have ever known someone that made a mistake in the past and then straightened out his/her life?

Q: Tell me about that person. How do you feel about him/her now? Would you trust him/her?

Q: If something turned up missing at your house and that person was there, would you suspect him/her? Why or why not?

Q: The reason I'm asking you about these things, is because (client's name) is someone who made a mistake (or some mistakes) in the past. When he/she was younger, he/she stole some money, was caught, admitted his/her guilt and went to prison. Since then he/she has worked very hard to overcome that mistake. That past mistake is one of the reasons the police suspected him/her in this case...but he/she did not commit this crime. I am concerned that because of that past mistake, you may not listen to what he/she has to say. How do you think this past mistake will affect you in listening to the evidence in this case?

Q: Have you ever heard of an innocent person being picked up and falsely accused by the police because of a past criminal record? Why do you think that happens?

Q: How are you going to keep the kind of biases the police have against ex-felons from affecting your decision in this case?

3) Race

Q: How many of you have ever had family, friends or have yourself ever been discriminated against or witnessed discrimination against another person?

Q: Tell me about your experience. How did it make you feel when it happened? What did you do when it happened?

Q: What do you think about affirmative action programs in the workplace or for college admission? Have you ever felt discriminated against because of those programs? What did you do about it? Who do you blame for that discrimination?

Q: Have you ever felt that any minority groups have been getting ahead too quickly in the last ten years?

Q: How do you feel about inter-racial dating? How about in your own family?

- Q: Would you say this is a good place or a bad place for a (Hispanic, African-American, Asian, etc.) to stand trial? (***This question courtesy of Michael Stout, who always accuses me of stealing his best stuff without giving him credit. Why? (**I'm sure Michael would come up with that "Why" question too).*)
- Q: I've heard some stereotypes about (African-Americans, Hispanics, Asians, etc.). *Give some examples.* What kind of stereotypical comments have you heard? What do you think about those comments? How should you deal with those kinds of comments in the jury room?
- Q: What effect should the race of Mr./Ms. _____ have on your decision in this case?
- Q: How would you feel if you were on trial in a foreign country and the judge, all the lawyers, the bailiff and all the jurors were (African-American, Hispanic, Asian, etc.)? What concerns would you have under those circumstances about getting a fair trial?
- Q: Since Mr./Ms. _____ is in that exact situation, how can he/she get a fair trial?

4) Eyewitness Identification

- Q: Have you ever thought you saw someone you knew and then realized you were mistaken? Tell me about that experience.
- Q: Why do you think you were mistaken?
- Q: What kinds of things can make a person believe they saw someone or something they didn't really see? [*Bounce off several panel members to elicit all of the elements that may be in your case*]
- Bad lighting
 - Distance
 - People look alike
 - Bad vision/no glasses
 - Expecting to see a particular person there
 - Similar clothing
 - Corner of your eye
 - Only a short time to see them
 - Stress of the moment
 - Someone suggests it is them

Q: Have you ever heard of people who are eyewitnesses to a crime being mistaken about the identity of the person there? Have you ever heard of an innocent person being convicted and sent to prison based on mistaken eyewitness testimony? What did you hear?

Q: How can that happen?

Q: What things will be important to you in deciding whether the eyewitnesses may be mistaken in this case?

5) Accused May Not Testify

Q: How many of you are aware of the constitutional right that says an accused person can never be called as a witness against himself or herself at trial?

What do you think of that rule? Why do you think that rule exists?

Q: If someone were falsely accused of a crime, can you think of a situation where he/she might not want to testify at the trial? [*Again, bounce off as many jurors as possible to flesh out this answer.*]

–Not a very good witness

–Not very smart or educated

–Easily misled by the prosecutor

–Fear

–Too much pressure

–Embarrassed about his/her past

–The state hasn't proven its case

When you get the inevitable answer, "Because he/she is guilty," try the following response:

Q: You know, that may be the reason in some cases and that is the very thing I'm concerned you may think in this case if I make the decision that Mr./Ms. _____ should not testify. Unfortunately, if I decide he/she should not testify, the law does not allow us to tell you why that decision has been made. That means you won't get to know if it was because he/she was afraid, or wouldn't make a very good witness or any other reason. How will you feel if you can't know the reason I've decided he/she shouldn't testify?

Q: What will you think about Mr./Ms. _____ if I make the decision he/she shouldn't take the stand?

Q: Since the law doesn't let me tell you the reason, how will you deal with your curiosity about that?

Q: Would it be fair to guess or speculate about the reason I've decided he/she shouldn't testify, if you are not allowed to know?

6) War on Drugs

Q: Have you had any personal experiences, either yourself or with your family members or friends regarding the abuse of alcohol or drugs? Tell me about your experiences.

Q: How was the person's drug or alcohol abuse problem handled?

Q: Was the person ever arrested or put in jail? How did that affect his/her problem?

Q: Did he/she ever receive any treatment or counseling? How did that work?

Q: How do you think we should deal with the drug problem? What is most effective?

Q: What do you think about the government's War on Drugs? Are we winning or losing? Why?

Q: Have you ever heard of any government abuses that have occurred in the name of the War on Drugs? Please tell me about them.

7) Police Misconduct

I usually discuss the police in the context of my previous credibility questions, i.e., should you believe or dis-believe a person just because of their occupation? Why or why not?

Probably the best discussions about police misconduct come from those who are on the police force or who know people on the police force. Identify those people and explore how well they know the police officer, whether they have ever discussed cases, crime and the criminal justice system, then ask them the following:

Q: From your own experience or your discussions with your friend/relative on the police force, have you ever heard about bad cops who are willing to lie or plant evidence? Tell me about that.

Q: Why would a police officer ever do such a thing? [*You may wish to explore this with several jurors*]

- To make a case
- To get a criminal they have not be able to catch
- For a promotion
- For revenge
- To make a quota

Q: Have you ever heard of a police officer who did not deliberately lie, but who may have been mistaken - either about the evidence or about arresting the wrong person? Tell me about your experience. How can that happen?

- In a hurry
- Gets bad info from the witnesses
- A snitch lies
- Bad or incomplete investigation

Q: What things will be important to you in deciding whether the police officers who may testify in this case are lying or mistaken?

Q: Is there anyone who thinks there has been too much criticism of the police recently? Why? Are there ever any circumstances in which the police should be criticized? Tell me about those circumstances.

8) Fragile Witness - Child/Crying

If you are going to have to cross-examine a fragile witness during the course of the case, don't wait until they are on the stand to tell the jury about him/her. You must bring it up in jury selection. Again, the most effective way to do that is during your discussion of how the jury should determine credibility.

(a) The Child Witness

Q: In judging the credibility of a person, should you use a person's age to determine whether or not they are telling the truth? Why or why not?

Q: Have you ever known children to tell lies? Perhaps I should ask the opposite question -- have you ever known a child who has never told a lie?

- Q: Why do children lie? *[Use several jurors for this answer].*
- To keep from getting in trouble
 - To get someone else in trouble
 - For attention
 - For a reward
 - To get even
 - To keep from having to do something they don't want to do
 - Because they are led to lie
 - Because the adults around them ask them to
 - To please a parent
 - To protect someone else

- Q: What will be important to you in determining whether the child in this case is telling the truth, is lying or is mistaken?

(b) The Crying Witness

- Q: In judging the credibility of a witness, should you consider whether or not the witness cries or shows emotion when he/she testifies? Why or why not?
- Q: Are there other reasons a person might cry when they tell you a story, other than that they are telling you the truth? What reasons are those?
- Acting
 - Upset about being in court
 - Covering up their own wrongdoing
 - Fear
- Q: Have you ever been fooled by someone who cried when they told you a false story?
- Q: How many of you saw Susan Smith crying on television before she was arrested for the drowning deaths of her two sons? How many of you believed that her sons had been kidnaped before the real story came out?
- Q: I am asking you these questions because, even though this event occurred over one year ago, I expect one government witness will come in and cry for you as she testifies. We intend to show you that she is lying, but I am concerned about how her crying may affect you. How many of you think you may be affected in your decision about credibility based on someone's tears?