

## VOIR DIRE PARAMETERS SET BY THE COURT; FOR COUNSEL, HOW TO APPROACH AND CONQUER

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*"It is the spirit and not the form of law that keeps justice alive."*  
Earl Warren, Chief Justice of the United States Supreme Court,  
1953-1969

There are numerous benefits to having a jury rather than a bench trial. Jurors apply a fresh perspective to the evidence as they approach their decision-making, and have a common purpose of finding some resolution. Although they are forced to suspend their daily routine when they serve, once in the box, they typically give their uninterrupted attention to the trial as the evidence unfolds before them. In the end, they bring a cumulative and disparate collection of wisdom to deliberations.

The risk of exploiting jurors can begin as early as voir dire when the court sets out parameters that seem unreasonable in some way. Each judge has a different style, for which counsel must adapt and conform to courtroom rules pertaining to voir dire. On one extreme, counsel may take advantage of the court's broad voir dire parameters, while on the other extreme, counsel may feel choked by the tight control from the bench. Whatever procedural method is deemed by the court, the jurors are affected in some way. They pay close attention to both the substance and procedure of voir dire because it is the start of trial, their attention is fresh, and they may harbor an agenda too, e.g., "I want to get off!"

This newsletter presents actual incidences of voir dire parameters set by numerous courts taken from this jury consultant's notebook; included is a discussion of how the varying styles may influence jurors' impressions of the trial process, and how the attorneys can effectively pursue voir dire.

### I. The Undisciplined Courtroom.

The judge allows days and days for voir dire, after jurors have provided responses to a lengthy questionnaire. The discipline unravels when the bench permits the attorneys to ask follow-up questions that are not substantive but merely the same question again or completely unfocused and off topic. In effect, the judge puts no bounds on attorneys, some of whom appear to practice tedium rather than law. To compound a toxic situation, the judge makes jurors stay throughout voir dire even if they have a hardship, therefore, they may be staying two or three days without being able to express their difficulty of serving until called into the box. Jurors who need to be excused have been heard to yell out in frustration after two days of sitting in the courtroom.

**Consequence:** Jurors leave this courtroom feeling frustrated and cynical. They express opinions that certain cases "should never go to court, they should be settled." They reason that trials should be heard by a panel of "legal specialists" instead of laypersons. Attorneys who take advantage of this lackadaisical arena risk angering jurors who envision that the trial will be a waste of their time.

### II. The Civic-Minded Courtroom.

The judge will ask that all jurors claiming hardships line up and confess why they cannot serve by having a private audience with the judge. Some judges will accept any explanation and almost an entire panel may be excused, which has commonly occurred in this Great Recession due to job search woes. Ultimately, it takes extra time to round up enough jurors to begin voir dire. Once there are enough people comprising a jury pool, the bench allows a reasonable amount of time for follow-up questions.

**Consequence:** Jurors realize what a cinch it can be showing up for jury duty and serving their time, albeit short, if they have a persuasive excuse. Those jurors who stay on will report later in the post-trial interviews that they felt some people were "gaming the system" by lying to avoid serving. Later, they bluntly question why this was "allowed to happen." In the end, the attorneys are left with a jury pool that respects its civic obligations and has a heightened sense of pragmatism.

### III. The Militaristic Courtroom.

The judge will ask a few basic demographic questions. No juror questionnaire is allowed. During questioning by each attorney, the judge sets a kitchen timer to ring after 30 minutes. The timer is reset for five minutes when potential alternates are questioned.

**Consequence:** Attorneys must have a warm, welcoming personality, and make concise conversation stripped of time wasting lawyer lingo, such as "Let the record reflect a negative response to my question." First, counsel should ask case-specific questions of the group because of the time constraints, with follow-up probing where essential. Thereafter, individual questions should be addressed toward jurors, especially to those who have not offered any response during the group inquiry. When time appropriate, counsel should request a break before peremptory challenges begin in order to assimilate the collected information and confirm the strike plan.

### IV. The Tied Up and Gagged Courtroom.

The judge does not allow a prospective juror questionnaire. No voir dire questioning is allowed with open-ended questions. Only questions seeking a "yes" or "no" response can be set forth by counsel. The judge allows no "indoctrination" questions pertaining to case issues.

**Consequence:** A restrictive arena. Stay within the fact-based parameters of the case. Typically, the bench will request a preview of voir dire questions; for counsel this provides an opportunity to test the judge's leniency, if any exists. Counsel may have to rely more on body language and micro-facial expressions from prospective jurors, although this provides an incomplete assessment. Jurors realize that the attorneys may be unreasonably gagged by the bench, and sometimes try to slip in an explanation to a question.

### V. The Survival Of The Fittest Courtroom.

The judge is so determined to push the case along that a set time schedule of four hours for voir dire is followed no matter what. Thus, it begins at 9:30 a.m. and goes until 1:30 p.m. with no break for counsel and only 15 minutes for prospective jurors. Counsel receives no break because private interviews back in chambers must take place when the case is of a sensitive nature or a prospective juror requests a private conversation. Note: Counsel uses the judge's bathroom.

**Consequence:** An exhausting physical challenge. Counsel must drink reduced amounts of liquids and eat high protein food to survive. Keep finger food snacks in the briefcase and in pockets. This voir dire experience proves draining for jurors too.

### VI. The Judge Takes The Spotlight Courtroom.

The judge conducts the voir dire, as typically done in the federal courts. But here, he sheds the judicial robe and sits in a chair in front of the jury box to ask questions. Counsel submits questions beforehand, whereupon the bench may or may not use some of those suggested inquiries.

**Consequence:** Jurors tend to offer socially appropriate and less controversial responses to a judge. Under this restriction, the attorney can study the dynamic of the pool by paying close attention to the jurors during voir dire, noticing those who are attentive to others' responses, and nod to certain questions and comments. The trial team and client should appear interested and concerned and resist paperwork organizing, editing, or other multi-tasking as the judge interviews the group.

### VII. The Functional, Not Dysfunctional, Courtroom.

#### A. The Six Pack Method Without Juror Questionnaires As Reference.

Eighteen jurors are called into the box and interviewed by the judge, followed by the attorneys who are given a fair and reasonable amount of time to question. Replacements will be called from the audience pool when jurors from seats 13-18 have moved into seats 1 to 12 after challenges to those prospective jurors.

**Consequence:** Focused follow-up questions probe jurors' life experiences. Counsel must explore their occupational experience for insight into issues of identity and self esteem; management experience for indication of a juror who would persuasively "manage" deliberations; educational achievement; life goals and ambitions; other occupations in the family for outside knowledge and influences; and their source of news and current events for sophistication level and indication of ideological and political leanings.

#### B. The Six Pack Method With Juror Questionnaires As Reference.

Jurors have completed either short or long versions of a questionnaire. Depending on the topic and type of questions posed, often jurors who write long narrative responses, known as "the chatty jurors," tend to be more plaintiff-oriented in their voting.

**Consequence:** Regardless of questionnaire length, counsel needs to ask follow-up questions to seek clarification and to engage each juror. Prospective jurors spent time completing the questionnaire, therefore, counsel should return the courtesy by addressing each person, even if briefly. At the minimum, this gives counsel some indication of a prospective juror's receptivity to the case, counsel, and client. If a juror writes unfavorable responses on the questionnaire, counsel should address these specific attitudes to probe the other prospective jurors' level of agreement. Counsel should not hesitate to flush out the negative opinions due to concerns that these opinions might "poison" the pool. In actuality, the goal of jury selection is juror deselection.

### Conclusion and Recommendations.

Voir dire can provide a bounty of information about the jurors. After questioning concludes, counsel's notes should be organized and charted for reference during trial. Moreover, the information about jurors attained from voir dire should be fashioned into analogies for closing argument. Indeed, sometimes a prospective juror will provide a response on a questionnaire or in oral voir dire that more succinctly captures counsel's intended theme. Whether the courtroom atmosphere attests to be confining or expansive, counsel's ability to maintain a cool temperament under the restrictions, or, on the other hand, not exploit the bench's leniency will gain the respect of the jury, and potentially direct the case to victory.

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