Copy of written materials provided at training. TG

JURY SELECTION

The "Prosecution" Jury:

1. Have a Stake in the Community
2. Can Work Together
3. Are Mature Individuals
4. Respect the System

Strategies:

1. Tie to a Theme/Theory for the case
2. Ask Open Ended Questions ("How do you feel about....")
3. LISTEN

Objective:

Get a group of fair jurors who will base their decision (verdict) on the facts and the law.

Watch the jurors

Body language - "GO WITH YOUR GUT!"

Mention the case weaknesses & Anticipate Defense Arguments - Defuse them!

Prepare your jurors for the weaknesses which you know exist in your case.

Examples: DV case - Victim's behavior after crime
Evewitnesses/ credibility issues (bar-fight, immunity, drunk, etc)
Single witness case
Circumstantial Evidence Case
Anticipate Defense Arguments (mental defense, self-defense, etc)

Make jurors aware of their role in the process – Get them comfortable with their duty.

First impressions are crucial – Credibility as the prosecutor.

Educate the jury as to legal principles.

JURY SELECTION

Intro

Duties of jurors:

1. Determine the facts
2. Apply the Facts to the Law
3. Reach a verdict.

YOU are the judges of the FACTS (individually and collectively) and his Honor is the Judge of the Law.

Bound to follow the law as it is given to you – this isn't the proper forum to express some kind of dissatisfaction with a particular law through the verdict you render. That's why we have legislators up in Sacramento – to change the laws.

One of your chief duties as a juror: Determine the credibility of witnesses

"TILT" - pinball machine example

BURDEN OF PROOF – requires the DA prove the case just beyond a reasonable doubt, not beyond any and all doubt whatsoever, but just BRD.

Burden only goes to certain things in the trial:

1. The elements of the crime charged, and
2. The identity of the perpetrator.

There may be other "side issues" that crop up during the trial that really don't have to be resolved or proven beyond a reasonable doubt – (eg, # of trees on a street or what someone had for breakfast that morning)

If , after the presentation of all the evidence, after arguments, jury instructions and deliberations, if after all that you are convinced beyond a reasonable doubt of Def's GUILT, would you be reluctant or hesitant in any way to return a verdict of guilty against him?

Any religious, ethical, or moral reason why you feel like you just can't sit in judgment of the actions of another person? NOW is the time to mention if you do.

PRESUMPTION OF INNOCENCE – Defense can just sit on their hands so to speak and not present any evidence at all. DA has the burden. BUT, at that point after the DA puts on his case, and "rests", the defense, if they so choose, based on what the DA has put on as evidence, can also just say "The DA hasn't proven it beyond a reasonable doubt. His case is so weak, we really don't need to put on any defense. The Defense rests too." They can do that. And we would then just proceed to arguments.

But, on the other hand, when we get to that point in the case when the People rest, the Defense in evaluating the case may choose to put up some type of defense. Would you look at, and listen to, that defense evidence and evaluate it with the same level of scrutiny with which you evaluated the People's evidence? That is to say, you wouldn't give the defense wits some added credibility just because of who they are?

OR, the Defendant, (recognizing he has a constitutional right not to testify, to remain silent, and to not incriminate himself) if he were to choose to testify and get up there and tell you what happened that night, would you give him any added credibility simply because of who he is?

You must be the neutral, objective fact-finders. As the defendant sits here in court right now, you don't feel any bias or prejudice against him in any way do you? On the other hand, you don't feel any sympathy towards him in any way do you?

CONFLICT as to the facts – otherwise we wouldn't be here for the jury trial.
Resolve conflicting witnesses: some say the walls are white, others may come in and say the walls are black. You look at the totality of the circumstances to determine how much weight if any to give to each wit.

DIRECT and CIRCUMSTANTIAL Evidence
"Cherry Pie" example
Both are acceptable as a means of proof
Neither is entitled to any greater weight than the other.

CIRCUMSTANTIAL Evidence used to prove Def's state of mind – we don't have the ability to open up Def's head at the time of the crime and pull out a tickertape piece of paper saying "this is what I am thinking at this time" CAN'T do that – We've got to look at the surrounding circs, behavior, other known facts, etc.

EXPERTS – You can flat out reject their testimony, if you so chose or give it whatever weight you think it deserves.
Would you just automatically accept whatever came out of the mouth of an expert as being true and accurate simply because of status as an expert?
Look at the basis for opinion, possible bias if any to testify a certain way

PERRY MASON / COLUMBO example from TV - not real life!
First five minutes of the show you see the crime being committed, who did it and how, the rest of the show you have stumbling bumbling Det. Columbo figuring it all out. At the end of the hour of TV you know everything – beyond all doubt, you saw everything, who, how and why etc All wrapped up nicely in a nice neat little package That makes for good TV. This isn't Hollywood.
You wouldn't hold me to some higher "Columbo-type standard? You not expecting a videotape of the crime occurring are you?

MOTIVE: Can be simple – anger, jealousy, revenge. It doesn't have to be sophisticated.

AID & ABET - Bank 211 driver is good for it.

Not a contest between attorneys – Don't sit over there tallying scores on objections sustained, etc.

SINGLE WITNESS is sufficient to establish facts. EG. Stolen rake from your garage.
No need to parade witness after witness to the stand to establish a fact.
Sometimes crimes are committed without any eyewitnesses. CIRC evidence case.
"No body" cases.

Graphic Language, violent acts, behavior – you wouldn't hold that against me, if I have to do draw that testimony out here in open court. Just doing my job.

SELF –DEFENSE:
Would you automatically vote for NOT GUILTY just because you hear that victim had been aggressive/ violent in the past?
Look at the circs to determine if self-defense is appropriate?
Some cases it may apply, others it may not, depending upon your factual findings

"Different Lifestyles"- bars, drinking lots of alcohol, sexual behavior, etc

ANY OF YOU, your family members or close friends ever arrested for or charged with a similar type of crime?

Any of you have a preconceived notion as to what a murderer/ wife beater etc should look like?
Or how a murder should be committed, or preconceived notion as to how a victim should behave before the killing?

We don't "pick and choose" our victims and witnesses.

YOU MAY HAVE UNANSWERED QUESTIONS - or, conflicting evidence
That alone shouldn't make you automatically/necessarily say = Reasonable Doubt
Logical extension otherwise = acquittals across the land!

Look at the NATURE and QUALITY of the Defense

JURY not to consider PUNISHMENT in any way. When we get to that point in the proceedings you will not need to worry about that at all. That's for the Judge to decide. This isn't a capital murder case with a decision by the jury as to the death penalty.

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10 Steps to Help Ensure An Effective Voir Dire

By Drew G. Engel

The veteran trial lawyer and jurist will tell you that a well-performed voir dire examination can often make or break your case.

Voir dire is the first opportunity to introduce yourself and your winning case to the jury. A bad first impression of you, your confidence level or your command of the case facts or the law is like a bad first impression of meeting another person — it's nearly impossible to change. To make effective use of the process, the practitioner should keep in mind these 10 basic rules:

■ **Prepare in advance.** Even the most skilled and experienced trial lawyers will tell you that advance preparation is key to a successful voir dire. Preparation consists of several different components.

First, make a list of pertinent questions — including, at the very least, questions about bias, about the need to listen to the judge's instructions and about your case facts.

The best voir dires usually involve some amount of rehearsal. A lengthy oral narration may not be necessary, but prior exposure to the material usually improves delivery. Nearly every lackluster voir dire the author has observed was caused in part by a lack of familiarity with the attorney's own material. This includes the time when an attorney looked down at his own notes and remarked, "I can't seem to read my own writing."

Carefully review the trial court's local rules regarding the exercise of challenges for cause and peremptory challenges, as well as the number of challenges available. The author is chagrined to admit it, but once, caught up in the fury of trial in a serious felony case, he forgot how many peremptory challenges he had left.

Consistently, the 'showmen' lawyers lose to the dignified practitioners.

Finally, review the prospective jury questionnaires, which will give you some idea of who you'll be questioning first and who's next to be called. Reading preparation needs to be done no later than the night before trial. If you read the forms immediately before trial, you are bound to miss something important. Time and again, counsel for the defense miss the opportunity to question jurors about their friendships with police, prior jury service or whether they were ever the victim of a crime. Likewise, prosecutors fail to query jurors about prior criminal jury service and whether the jurors have a criminal record.

■ **Ask short, concise questions.** Potential jurors are frequently annoyed about having to come to court to begin with, since jury service removes them from their normal work, family and social lives. You make a huge mistake if you further antagonize them by asking long or repetitive questions. Ask short questions, listen, and use questions and material from opposing counsel to build your own case.

■ **Play conservatively.** You are more likely to lose jurors' attention if you dress flashy, fidget around or act outrageously or flamboyantly than if you dress conservatively, act with deference and sit quietly. Consistently, the "showmen" lawyers lose to the dignified practitioner. Most "showmen" would probably better use their time preparing the voir dire than picking out a flashy tie.

■ **Treat everyone equally.** Talking down to jurors is one of the most common mistakes

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10 Steps to Help Ensure an Effective Voir Dire

Continued from Page 1

practitioners make. Put simply, it turns jurors off. It seldom impresses jurors that you use big words, graduated from law school or passed the bar. What does impress jurors is candor, simplicity and equality; these are the same things to which we all respond positively. Treat jurors the way you'd like to be treated. In the same vein, trial lawyers often use long, sophisticated words when simple ones will do. Drop the legalese and use the common person's words.

■ **Explain yourself and explain the process.** Many jurors do not like being asked personal questions about their potential service. If you explain that you mean no judgment about them or their beliefs, and if you explain that your questions are not designed to embarrass or harass them, then you can ask nearly any question without risk of offending anyone, and you will actually ingratiate yourself to the jury.

This strategy has never failed; the reason for its success is relatively simple. If you question people about their beliefs and experiences as a stranger *without* explaining the process, then the reaction is: "Who are you to be asking me this question and judging me?" Conversely, if you take the time to explain the process and make it clear that you are just asking questions to get the fairest jury, who can fault you for that? No one can, and no one ever does.

■ **Address bias and prejudice.** Many practitioners, as well as jurors, are squeamish about discussing this subject. Attorneys often skirt, skim or engage in some word-association game regarding the issue; and jurors lie, fail to disclose everything or resent the interrogating lawyer. Your job is to root out those potential jurors with adverse biases. If you fail, you might as well send your client to court without counsel.

Though there are various ways to approach the subject, one successful method has been to come right out and ask: "Given the charge (allegation) and given your own background and experiences, can you be fair and listen to all the evidence and determine the facts and apply the law despite whatever your personal beliefs might be?"

Also used is the really direct approach: "As we sit here right now, who thinks my client [is guilty] or [is liable]?"

These straightforward methods have seldom failed. The author prefers to use the following folksy angle:

"This area is somewhat touchy, but I have to discuss it. It's called bias. We all have it. I have some biases. 'My mom's the best cook in the entire world. That's a bias. She makes the best burger around.' That's a bias. You've all seen courtrooms before — on TV, in your personal lives and in the papers. You've developed perceptions about court, lawyers, prosecutors, defendants. Today you have to lay all that aside if you're a juror. You judge this case by determining the facts and applying the law as the judge gives it to you. You'll be tasting this court's hamburger and judging it on its own. Can you do that?"

■ **Subtly argue your case.** Most practitioners accept that, with few exceptions, your trial is won or lost by the time voir dire is over.

Some argue this is because of the so-called primacy factor: You remember best what you hear first. Jurors want to know what happened, and they want to solve the puzzle. The lawyer who provides the most information, with the greatest intrigue, and the best answer *first* usually wins.

Voir dire is your quickest opportunity to tell the jury the story. You should stress some of your highest and hottest points in evidence and the law. (Don't wait until opening statement to do your work.)

One successful technique used in getting your case across is to entice or "bait" the prospective juror into wanting more. By way of example, the author's best voir dire was as a former assistant prosecuting attorney using the "bait" technique in a rape case:

"This case is about rape. A 14-year-old girl was raped. The evidence will show that she was a virgin. She was on her period. There are blood stains on her clothing and on the defendant's pants where he wiped his hand. The testimony will be graphic regarding her rape. There are scientific samples of semen taken from the victim and the defendant that match. The perpetrator, the evidence will show, was three times her age; he smelled; he was dirty; he had missing teeth — all at the time of this rape. Can you sit there and listen to that kind of evidence?"

By the time the author concluded, there wasn't a potential juror who'd willingly leave that jury box without hearing the evidence. Several dismissed jurors even stayed to hear the whole case.

■ **Allow for excuses.** If jurors can't hear, smell, touch, see or sit for fairly long periods of time, or if they have a personal reason not to hear the case (e.g., job commitment, no babysitter, vacation time), then thank them for their participation and excuse them. The last thing you want is a juror who is physically or mentally incapable of hearing your case, or one who is eyeing the clock to get home, or one who is distracted by some personal commitment. You want each juror to listen to you, your side and your witnesses. You want each juror to think "Hey, this lawyer and his side are winners." This is, of course, most important when it comes to criminal defense work — since all it takes is one person to hang a jury.

■ **Ask the basics.** Although it seems pretty simple, many attorneys routinely forget to ask about witnesses, acquaintances, news articles and the like. A juror's prior familiarity with a case or a participant can be extremely harmful to your case.

■ **Be courteous.** Stand and introduce yourself and your client to the jury; be deferential to the court; be respectful of opposing counsel — while still being firm in your position. A cautionary note here: The attorney who bends too far over backward in the courtesy department may appear phony. Don't act sickeningly sweet to curry favor with the jurors; they will not like it.

An additional, somewhat more uncommon, voir dire technique: Object if necessary. Normally, voir dire is not the time to object to court happenings, because it's disruptive to the flow of procedure, and because potential jurors may get a wrong first impression of you, namely that you are overly argumentative. On the other hand, the practitioner makes a grave mistake by letting the opposition argue its case or allowing the opposition to instruct the jury on the law. The author, regretfully, recalls one instance when he allowed defense counsel to go on during voir dire about the lack of scientific evidence in a rape case. The jury, after deliberating three hours, found the defendant not guilty because of this early argument by the defense.

The above is not an exhaustive list of rules for voir dire, but it should assist some litigators in the effective use of the process and in winning jury cases in general. Voir dire is your first chance to make a lasting impression on the jury; if you follow these rules and use your common sense, you should come out a winner.

REMINDERS:

Be Aware of your non-verbal "Body Language"

Jurors don't know the truth until they see it --
DDA's Job: Open their eyes

Any prosecutor can "sweep a jury off its feet"
if you've got "the right broom"

You can't use what you don't have (Learn the trial skills/ tools)

Voir Dire: Listen and Respond

Avoid the "deer-in-the-headlights" look
(Act confident and in control, even if you're not)

"HITCH"