

VOIR DIRE

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"The conduct of voir dire is an art,
not a science, and there is no
single way to conduct it."

– *People v. Taylor* (1992) 5 Cal. App. 4th 1299,
1313.)

Why is Voir Dire important?

- First impressions . . .
 - First time they meet you...
 - First time they get info about your case...
 - First time some will have contact with the Justice system...
- These are the people who will decide...

Voir Dire Goals

- Impression
- Identification
- Indoctrination

Impression

Their first impression of you is crucial.

- Be punctual.
- Be organized.
- Be professional in appearance & demeanor.
- Be confident.
- Be credible.
- Be humorous if you're a funny person, but be cautious about it.
- Be fair.
- Be yourself.

Identification

- Encourage potential jurors to be open & honest so you can evaluate them. Listen.
- Pay attention to them: dress, reading material, how and with whom they communicate, how they react to the parties and the process.
- Identify those who don't want to be there & those who want to be there too much.
- Identify good, bad & so-so jurors for case.
- Identify those you should challenge for cause, those you should challenge with peremptories, those you should keep.

Indoctrination

- Persuade jurors to trust you & your case.
- Persuade jurors to accept your view (not DEF'S) of the issues in the case.
- Introduce some legal concepts – circumstantial evidence, single witness enough to convict.
- Obtain commitments from jurors.

Consider the case

- Facts?
- Evidence?
- Weaknesses and defenses?
- Jury appeal?

THE LAW ON JURY SELECTION

Right to Examine Jurors (CCP 223)

- Gives parties the RIGHT to examine any or all prospective jurors.
- Judge does the initial examination.
- Judge has discretion to limit questioning by the parties (ex: time limitations.)

The Purpose of VD (CCP 223)

The stated purpose of voir dire is to aid in the exercise of challenges for cause.

Challenge Defined (CCP 225)

Two types of challenges to a prospective juror:

- 1) Challenge for cause
- 2) Peremptory challenge

Reasons for Challenge for Cause (CCP 225)

1) General disqualification (CCP 228, 203)

- Juror is not qualified to serve in the action on trial (exs: non-resident of county, person under 18, felon whose civil rights have not been restored, person with insufficient knowledge of English language)

2) Implied bias (CCP 229)

- Exs: relative or friend of party or witness, attorney who is a member of the trial attorney's firm

Reasons for Challenge for Cause

3) Actual bias

- Exs: "I think that if DEF was arrested then he must be guilty of a crime."
- "I think all police officers are liars and will not believe a police officer's testimony."

Challenges for Cause continued

- You must state to the court your reasons for cause challenges (unlike peremptory challenges.)
- Make sure those reasons are clear on the record.
- Suggestion: If juror is *obviously* biased against DEF, stipulate to removal.

Number of Challenges for Cause

- Parties have an *unlimited* number of challenges for cause against prospective jurors.

Number of Peremptory Challenges (CCP 231)

- Punishable with life in prison:
20 to DDA, 20 to DEF
- Punishable with max of 90 days or less:
6 to DDA, 6 to DEF
 - If co-def trial, see CCP 231(b)
- All other criminal offenses: 10 each side

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Exercising Peremptory Challenges (CCP 231)

- Each side is entitled to have the panel *full* before exercising a peremptory.
- Peremptory challenges are exercised or passed by the sides alternately.
- DDA takes first challenge.
- When each side passes consecutively, the selection process is over and jury is sworn.

Exercising Peremptory Challenges

- If you pass on a peremptory (i.e., "The People accept the jury as presently constituted."),
- and then DEF exercises a peremptory challenge,
- you may continue to exercise peremptory challenges on old or new jurors.

Alternate Jurors selected after Jury is Sworn (CCP 234)

- Same procedure. (Subject to the same qualifications, examination and challenges as the sworn jurors.)
- Each side is entitled to as many peremptory challenges as there are alternate jurors to be selected.

Note for later in trial: Replacing juror with alternate (CCP 234)

- If a juror dies, becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or
- If a juror requests a discharge and the court finds good cause,
- The court may order the juror to be discharged & will select an alternate.

Prohibited Use of Peremptory Challenge (CCP 231.5)

- While no basis must be stated for exercising a peremptory . . .
- A party may *not* use a peremptory to remove a prospective juror on the basis of his race, color, religion, sex, national origin, sexual orientation or similar grounds.

Wheeler/ Batson Motions

- If a party engages in systematic exclusion of prospective jurors from a cognizable group, i.e., persons of a particular race, ethnicity, gender.
- *People v. Wheeler* (1978) 22 Cal 3d. 258, overruled in part by *Johnson v. California* (2005) 545 U.S. 162
- *Batson v. Kentucky* (1986) 476 U.S. 79
- *Snyder v. Louisiana* (2008) 128 S.Ct. 1203
- *People v. Lenix* (2008) 44 Cal.4th 602
- See *Good to Know Johnson in, Wheeler Out* dated May 16, 2006

Wheeler/ Batson Motions: Practice Tips

Some legitimate reasons for challenges:

- Negative experience with, or distrust of, law enforcement;
- Inattentive;
- Inconsistent answers;
- Appearance, demeanor, gestures, body language, lack of eye contact;
- Appeared friendly to DEF;
- Occupation

Wheeler/ Batson Motions: Practice Tips

Take good notes of your neutral
justifications & keep them after trial.

- See *Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692.
LA DDA testified in a remand hearing that she had no
memory of jury selection or her justifications for
challenging the persons in question. She had lost her
notes since the trial. Result = 9th Circuit granted
habeas corpus in an 11-year-old murder case.

Wheeler/ Batson Motions – Bottom line

As a prosecutor you are held to a
high ethical standard and
expected to always follow the law.

Practical Tips for Voir Dire

Pre-Voir Dire conference

Speak to judge re: his or her procedure.

- Time restrictions for questioning jurors?
- Use name or # when questioning jurors?
- How many alternates will be selected?
- Will judge use "6 pack" or not?

"Six pack" v. No "six pack"

Procedure in Court

- Jurors called into courtroom.
 - Clerk does roll call in or outside courtroom.
 - DDA & DEF receive alpha list.
 - Return alpha list to clerk after jury selection.
- Jurors take oath.
- Judge introduces parties. (Make sure to stand and greet the audience.)
- Jurors called into jury box.
- Judge reads Complaint/ Information aloud.

Procedure in Court

- Judge reads Witness Lists aloud or may ask you to read yours aloud.
- Judge questions jury.
 - Basic questions, legal concepts, prior service, hardships
- Judge may ask parties to stipulate to excuse a juror for "language difficulties" or some other quasi-hardship.

Procedure In Court

- DEF questions jurors then passes or makes challenges for cause.
- DDA questions jurors then passes or makes challenges for cause.
 - If no challenge for cause, say "Pass for cause" before you sit down, OR
 - If challenge for cause, ask "May we approach?" Argue challenge for cause outside presence of jury.
- Peremptory Challenges
 - DDA challenges first, then defense. You alternate.
 - "Your honor, I'd ask the Court to please thank and excuse Juror # 7 (or Ms. Jones)".
 - Once you have passed for cause & exercised peremptories, you cannot re-question original jurors.

Documentation – Develop a system

- Alpha list from clerk
- Seating Chart
- Use small-size "post it" notes
- Take copious notes of jurors' answers – any bias, attitude, concerns.
- Note jurors you want to excuse, keep &/or further question.
- Keep track of # of peremptory challenges exercised – yours and DEF's.

Tips for your questioning

- Stand.
- Introduce yourself again.
- Ensure notebooks, files are & appear organized.
- Be professional in appearance & demeanor. (Always punctual.)
- Maintain cool relationship with DEF atty in front of jury.
- Make eye contact with jurors.
- Consider memorizing their names.

Tips for your questioning

- Make jurors comfortable – explain they can speak with parties in private. Encourage them to express true feelings.
- Get every juror to speak with you.
- Be conversational
- Use non-legal language.
- Ask open-ended & follow-up questions – naturally and spontaneously respond.
- Listen attentively to their answers.
- Do not appear judgmental of them or their answers.

Tips for your questioning

- Use hypos to explain legal concepts.
- Keep it interesting.
- Vary your tone – a monotone voice may put them to sleep.
- Act confident at all times.
- Confidence comes from preparation. Prepare your VD. Do not wing it!
 - Have standard set of questions for all cases & add questions to address your specific case and its weaknesses.

Tips for your questioning

- Always question jurors about the case weaknesses, but don't label them as such. (Your list will come in handy for prep.)
- Let them know what's coming. Don't let them be surprised with a "bad" fact.
- Leave them with the impression that you already know *all* the facts – good and bad – and you will not be surprised by any bad facts. DEF is guilty regardless.

Ask the Hard Questions

Be pointed – don't be afraid.

- Do you use corporal punishment?
(child abuse)
- Do you know anyone who has been abused?
(sexual assault or DV)
- If we call a witness and he testifies he has more than one prior felony conviction are you automatically going to disbelieve him?

Ask the Hard Questions

- Is one witness enough for you or do you require more?
- People's witnesses are gang members/ drug users – automatically reject their testimony?
- TV/CSI Effect
 - Do you have an expectation that evidence you see on TV will be what you see here?
 - Do you think that fingerprint, DNA or some other scientific evidence is required to prove a case? Is a confession required?

Correct defense misstatements / false impressions

- Consider whether to object, but use objections sparingly.
 - Ex: DEF misstates the law and asks the juror to commit to his interpretation.
- Respond in your follow-up questioning to the topics DEF raised.

General VD questions - examples

- Common sense
 - Can apply common sense to evidence & law?
- Rsble Doubt (in response to DEF q's.)
 - People's burden = BRD
 - Burden is not "beyond a shadow of a doubt" or "all doubt"
 - Anyone require more proof than what the law requires?
 - Just b/c two sides to a story does not mean RD. You may not believe one side.
 - Doubt based on reason, not speculation.

General VD questions – examples

- Presumption of Innocence
- Follow the law, even if do not agree with law/ Minor crimes
 - Ex: old lady feeding birds outside courthouse (against the law)
 - "Everybody has a job to do; it's your job to determine whether defendant is guilty, but it's the judge's job to sentence. Can you follow the law and have faith that the judge will impose the just punishment?"

General VD questions – examples

- Credibility of Witnesses – look at bias, motive or lack of bias, motive
 - Just because there are discrepancies does not mean a witness is incredible.
 - Understand in some cases a witness' first statement to police might be most credible. (ex: in gang cases, DV cases)
- Direct v. Circumstantial evidence
 - Snow on ground hypo.
 - Circ evidence to prove intent.

General VD questions – examples

- Witnesses/ Victims – don't have to like them
 - If a crime takes place in hell, no angels as witnesses.
 - Believe that the law should protect everyone?
 - Does anyone feel that a prostitute cannot be raped; if she is, is she entitled to less legal protection?
- Can you convict?
 - If convinced BRD, is there any moral, ethical, philosophical reason why cannot convict?
 - If proved BRD, can find D guilty? (Get them to look at D)

General VD questions – examples

- No Speculation
 - Your decision only based on evidence
 - You will not receive police report
 - Expect me to call every witness to the crime?
- Single witness
 - Agree that the testimony of only one witness, whom you believe, is sufficient to prove any fact?
 - Would you require more than one witness before you could convict?
 - ATM robbery hypo.
- No sympathy, prejudice or passion
- Anyone think just b/c a witness takes oath, he is telling the truth?

Case Specific VD questions

- Police Officer Cases
 - Anyone distrust automatically?
 - Anyone give their testimony less weight?
 - Receive a ticket you did not think you deserved?
 - Hold it against all officers?
- Drug Possession Cases
 - Anybody believe that personal possession of drugs should be legalized?
- Gun Possession Cases
 - Anybody a member of the NRA? Anyone feel gun laws in CA are too conservative/ too liberal?

Case Specific VD questions

- Sympathetic DEF &/or non-violent crime
 - Understand I will ask you to conclude that DEF violated the law at a particular time?
 - Not asking you to find DEF a bad person, but that he committed a crime.
- Adult v. Child Witnesses (sex assault)
 - Able to convict on testimony of child?
 - Automatically believe adult over child?

Case specific questions - DUI

- DUI v. Drunk Driving – no requirement to prove D was falling down “drunk”
- Bad driving – not required
- Police officer testimony
- Anyone distrust scientific methods or evidence?
- Anyone feel .08 is too low a standard?
- How many drink socially?
- How many do not drink at all?

Case specific questions - DUI

- Anyone feel it is impossible to tell if a person is under the influence by just observing him?
- What symptoms expect to see in person under the influence?
- Anyone seen person under the influence? How could you tell? Did he take chemical test?
- Everyone agree that person needs his or her full attention and ability to safely drive car?

Philosophies on whom to excuse

- Good: Attached to community, educated, stable professionals, people who will relate to your witnesses/victim. Rational people.
- Bad: Social workers, college professors, psychologists, lawyers of any type, artists, post office employees, dumb people, clergy, people without life experience, people who would relate to DEF, people who admit gullibility, people who are bored, indecisive or too eager to be on jury
- Exceptions to every rule. Go with your gut. When in doubt, kick 'em out!!

Nearing the end . . .

- Avoid using your last peremptory.
- Turn around and take a look at the rest of the panel if you are using many peremptory challenges. See who might be next.

Jury has been selected...

Good luck with your trial!
