

# JURY SELECTION: THE MAKE-IT-OR-BREAK-IT PHASE OF A TRIAL

By Dick Semerdjian and Janice Mulligan

**J**ury selection, also known as *voir dire*, is one of the most important jobs facing the trial lawyer. This article gives you some tools to use when facing the daunting job of *voir dire*.

**The basics.** *Challenges for cause.* Challenges for cause occur when an attorney argues that a prospective juror should be dismissed because there is a factual basis to believe that the person cannot be fair or unbiased or is incapable of serving as a juror.

*Peremptory challenges.* Each party also has peremptory challenges, which allow them to object to one or more proposed jurors without providing a reason. Typically, attorneys have very limited time during jury selection to learn who is really predisposed against the client's case. The only solution is to probe the personal beliefs and privacy of the panelists. The attorney must carefully evaluate the risk of offending the panel by invading the jurors' privacy versus failing to discover the identity of jurors who may have a bias against one of the parties.

*Pre-voir dire written juror questionnaires.* Potential jurors may be asked to complete written questionnaires in advance of *voir dire*. Ideally, counsel should offer a list of questions no more than a page or two in length and should seek a stipulation on all questions with opposing counsel before submitting the questions to the court. A 2008 survey found that an overwhelming majority of the judges and attorneys surveyed

concluded that using jury selection questionnaires increased the efficiency of the trial process.

*Researching jurors on social media.* The rules on researching jurors and prospective jurors via the Internet vary. Even within a single jurisdiction, judges' views vary from one courtroom to the next. Therefore, an *in limine* motion is

social media postings where the review is available without an access request and where the juror is unaware of the lawyer's review. Passive review does not violate the ABA's Model Rules of Professional Conduct (Model Rules). Passive identifiable research involves a lawyer's passive review of a juror's information where a social media feature enables the juror to identify the viewing lawyers or their representatives. This research does not violate Model Rule 3.5(b). Active research is a lawyer's active review: The lawyer sends an access request to a juror or a potential juror. This type of research is prohibited under Model Rule 3.5(b) and forbidden under Formal Opinion 466.

*Peremptory challenges: To challenge or not to challenge?* The key for the trial attorney is to avoid aggressive use of peremptory challenges—and, thus, potential alienation of jurors—if the jury will be aware of which party is exercising the challenges.

Even if you elect to use peremptory challenges, do not run out of them before the other side, or you stand the risk of seating dangerous jurors you may not be able to excuse for cause. The most dangerous juror for either party is a potential leader who will seize control during the deliberations and argue unfairly and passionately against your case regardless of the evidence.

*Stereotyping jurors.* Although stereotypes can be a good starting place during *voir dire*, trial lawyers should never depend exclusively on them when considering which jurors would be favorable or unfavorable to the case. The prospective juror's answers and reactions to questions during the *voir dire* process are more revealing. The better practice is for the trial attorney

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recommended to determine the nature and extent of permissible Internet research regarding jurors.

Guidance may be found in the 2014 ABA Standing Committee on Ethics and Professional Responsibility's Formal Opinion 466, "Lawyer Reviewing Jurors' Internet Presence." Formal Opinion 466 addresses three types of data mining—passive anonymous research, passive identifiable research, and active research—and issues varying advice for each one. Passive anonymous research is a lawyer's passive review of a juror's

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to analyze demographics, personality types, attitudes, values, and life experiences. Personality types that should be considered include whether a prospective juror is an authoritarian, a conformist or nonconformist, a liberal or conservative, detail-oriented, calm or rigid, or personable or unfriendly.

*Jury consultants.* The primary purpose of hiring jury consultants is to help uncover hidden biases of potential jurors. During jury selection, the jury consultant often will be present at the counsel table with the trial attorney. The consultant observes the facial expressions and posture of those being considered for the jury. The use of jury consultants allows the trial lawyer to focus on detailed questioning while the jury consultant observes and digests the responses.

*Grounds for objections to improper questions.* In jurisdictions that allow attorneys to directly question a jury, attorneys generally are allowed to conduct a liberal and probing exam reasonably calculated to uncover juror bias or prejudice as it relates to the circumstances of the particular case.

The limits to voir dire generally include counsel asking “improper questions,” which include any question that, as its dominant purpose, attempts to: (1) precondition the prospective jurors on the evidence or ask them to prejudge the evidence; (2) indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law; or (3) question or comment on the personal lives of the parties or their attorneys. Improper voir dire questions do not rise to the level of misconduct if asked in good faith.

**Best practices.** *Be natural and normal.* Be friendly and open-minded and speak in everyday language, not legalese.

## ABA TORT TRIAL AND INSURANCE PRACTICE SECTION

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Make eye contact; call the jurors by their names, if permitted; and be interested in their responses.

*Engage the entire panel.* Voir dire is supposed to be a dialogue, not a monologue. Use open-ended questions, and encourage people to talk. As difficult as it is, it is important to keep track of who has not spoken during the questioning and try to get those people engaged.

*Follow the jurors instead of trying to lead them.* Rather than trying to twist jurors’ words or redirect them to suit your own worldview, try to accept their answers without judgment.

Demonstrating tolerance for other viewpoints serves to benefit your case by humanizing you in the eyes of future jury members. Demonstrating tolerance for other viewpoints also benefits your case by allowing potential jurors to feel comfortable enough to reveal their biases.

*Prepare your questions.* It is a good idea to prepare voir dire questions before voir dire so that you cover all

important matters and do not overlook questions that should be asked. This frees you to study and evaluate the jurors in more detail.

**Worst practices.** Do not lecture. Do not embarrass. Sensitive questions can be embarrassing. Request in advance that the judge ask these questions; and when you follow up during your own line of questioning, gently work your way up with other questions first, and then ask permission of the juror to broach a sensitive area. Do not take notes. Have someone else in the courtroom take notes while interacting with jurors, particularly when they are answering your questions. When preparing for voir dire, reduce the questions to a short list of topics that you want to cover, and prepare the initial open-ended question for each topic. Do not avoid the bad issues and facts. Presenting some of the negative facts of your case will allow you to see how jurors react and will bring you credibility. ■