Mastering Voir Dire

Carolyn S. Koch

Most trial lawyers see preparation as the hallmark of competence. No good lawyer would dream of entering the courtroom without being prepared for trial. Nor would any good lawyer give up the right to voir dire and yet, jury selection is the single most neglected part of trial preparation. Rather than employ a systematic approach with clear goals, many lawyers instead rely on gut instincts and stereotypical assumptions (i.e., "youth are callous," "women are sympathetic," etc.).

It is hard to know exactly why "seat-of-the-pants" strategies proliferate during voir dire. Part of the reason is that lawyers are never taught effective strategies for jury selection. Without knowing how to prepare, many lawyers just throw up their hands and conclude that they will never understand how jurors make decisions. But it doesn't have to be this way. Lawyers don't need to be clairvoyant or even intuitive. Instead, all they have to do is learn some basic strategies and they can greatly increase their ability to assess jurors accurately and expose critical biases.

Debunking the myths. The most prevalent and least effective strategies are attempts to indoctrinate, sell the theme, and bond with the jury. These three tactics completely interfere with the lawyer's goal to learn about jurors in the effort to expose harmful biases.

Attempts to indoctrinate. Lawyers are frequently taught that voir dire is their first opportunity to try to tell jurors what to think, rather than learn what a juror thinks. The problem with this approach is that no matter how persuasive the lawyer, no juror is going to abandon long-held personal beliefs based on anything said by lawyers during jury selection.

Indoctrination is not a good teaching tool. Lawyers ask indoctrinating questions because they want jurors to remember a few key important principles. That's the theory but in practice, indoctrination takes up too much valuable time and inhibits jurors from freely sharing their real opinions and pre-existing ideas. For example, in a medical malpractice case a defense lawyer might start his substantive questioning with something like:

> "Would you agree with me that doctors have a really tough job and can't always cure their patients?
> Or,
> "The plaintiff has the entire burden to prove his case. My client has no burden to prove anything at all and has every right to defend himself. Can you promise me that you will hold the plaintiff to his burden?"

There are two problems with the above questions. First is the question of timing. If a lawyer starts his voir dire with indoctrinating questions, he signals to jurors that voir dire really isn't about what jurors think but about lawyers telling jurors what to think. Indoctrinating questions set the wrong tone, which is: "I don't expect you to disagree with me." Once this tone is set, it's even more difficult to get jurors to freely share their relevant opinions, biases, and experiences.

The second problem relates to time—how much time a lawyer has in which to achieve his voir dire goals. If a lawyer feels he absolutely must indoctrinate jurors, he or she should only do so after all critical bias questions have been asked. By saving indoctrinating questions for last (or disposing of them entirely), the lawyer can be assured that his time will be used wisely, with the bulk of it devoted to learning substantive information about who jurors are and what they believe. Only then can a lawyer properly assess a juror's biases for a particular case and then intelligently exercise peremptory challenges.

Both of the above questions make it clear that the defense lawyer expects agreement from the juror but frankly, it's hard to imagine that anyone could disagree. In the typically polite exchanges that occur between jurors and lawyers during voir dire, it's hard to imagine a juror who will say: "Doctors

Carolyn S. Koch is a trial consultant and the principal of *Jury Solutions LLC*, in Fairfax, Virginia. An attorney admitted to the Connecticut and D.C. Bars, Carolyn has 13 years experience assisting both plaintiff and defense lawyers prepare for trial and for jury selections in numerous jurisdictions across the country, in both civil and criminal cases. She can be reached at ckoch@jurysolutions.com

have an easy job and should always be able to cure their patients!" Or, "plaintiffs shouldn't have to prove their case; defendants should hand over the money based on unproven allegations!"

Therefore, a good rule of thumb is for the lawyer to put himself in the juror's shoes or even better, test his questions out in advance on lay persons and see how they react. If it is obvious that no reasonable juror is likely to disagree with or even be surprised by the indoctrinating statement, then the "question" (which is not at all a question) should not be asked.

Indoctrination can be confusing to jurors. Example: The civil defendant's lawyer says to the juror, "The jury decides the facts and the judge tells the jury about the law. You must follow the judge's instructions even if they go against your personal beliefs. For example, you might disagree with what the judge has said, but you still must follow the law. Do you think you could do that?"

Most jurors answer "yes" without much contemplation, understanding that this is a pro forma question asked of everyone. But some jurors really think about the question's meaning and become confused because it's very conceptual. If they have never been jurors before, they have no idea what to expect. If they are also nervous, this question can sometimes cause alarm, as if the attorney is saying, "You might find yourself in a moral quagmire, caught between your conscience and your duty as a juror. Do you think you can handle this?!" This isn't an effective way to gauge a juror's ability to follow the law. The real question is if the juror can accept the basic legal principles involved in the case.

For example, in a sexual harassment case, the defense lawyer could say, "Some people think it makes sense for employers to be held strictly responsible for sexual harassment. In other words, if one employee harasses the other, the employer is at fault and should be made to pay, no matter what the employer did to prevent or correct the problem. What do you think about that?"

If the juror indicates his belief that it is fair to hold employers 100% responsible for all employee misconduct, the attorney can ask more questions to uncover the depth and strength of the juror's opinion. For example:

> So I can be sure to understand where you are coming from, can you give me an example of what you are thinking? Are you thinking of a specific example from your own experience or just in general?
>
> How long have you held this opinion – have you always felt this way, or have you come to this conclusion more recently, due to something you read or experienced?
>
> Can you think of any scenario where it might be unfair to hold an employer 100% responsible for an employee who harasses another?
>
> What are your general expectations of employers when it comes to their efforts to prevent sexual harassment in the workplace?

The juror's answers would give the lawyer an idea of the reasonableness of the juror's expectations and whether or not these expectations are consistent with the law. If the juror's beliefs are clearly inconsistent with the law and the employer's conduct is likely to fall short of his stated expectations, it is wishful thinking to believe that the judge's instructions will have any impact on such a juror. If the presiding judge does not eliminate such a juror, he or she would be a good candidate for a peremptory challenge.

Indoctrination leads to unnecessary challenges for cause. Because indoctrination doesn't allow a juror to articulate his beliefs, it can cause a lawyer to prematurely decide that a juror is "bad" for his case. In jurisdictions where attorneys ask questions directly, this often leads to a series of tricky questions in the effort to get the juror to agree with "illegal" propositions, such as not following the judge's instructions or believing in damage caps. Opposing counsel or the judge will then attempt to "rehabilitate" the juror. The back and forth process is extremely confusing for the juror who is made to feel like he did something wrong.

At this point, there is no happy ending unless the juror says the "magic words" that he can't be fair and gets excused. More often at this point, the juror feels defensive and insists that he could be fair. If this occurs, the attorney who started the whole process usually feels forced to exercise a peremptory challenge, even though both attorneys may know very little about the juror's actual beliefs on the topic that led them to the judge's chambers. All of this could be handled more efficiently (and both attorneys might have been satisfied with the juror) had the juror been able to explain his opinions without being forced to agree or disagree with indoctrinating legalese.

Selling themes. Most jurors do not instantly trust lawyers and they ap-

proach their responsibility with a strong desire to "hear both sides of the story," regardless of the burden of proof. When lawyers start pitching themes during the jury selection, jurors tend to tune it out because they haven't received the facts of the case.

A better alternative involves testing *out themes.* This enables the lawyer to assess the degree to which a juror is inclined to accept or reject the concept.

Example: In a medical malpractice case where the plaintiff died of a heart attack but was grossly overweight and smoked two packs of cigarettes a day, the defense lawyer might want to emphasize the patient's responsibility for his poor health. To gauge jurors' reactions she might ask, "We can probably all agree that doctors have a responsibility to treat their patients. How about the patient? Does a patient with a heart condition have any responsibility to try to improve his condition?" Most jurors will say "yes," but the inquiry shouldn't end there. After stating "yes" or "no," the attorney can ask, "Why do you feel that way?" It's the "why" answer that reveals the strength of each jurors' opinion, demonstrating the degree to which the juror is likely to accept or reject the theme of "patient responsibility."

Bonding with the jury. Lawyers put a great deal of pressure on themselves personally to connect with prospective jurors. Additionally, many decide to either keep or dismiss a juror based on an amorphous sense of personal connection. In other words, lawyers place a high value on their gut instincts, but often rely on their gut before they've gotten adequate input about a prospective juror. That is why the most important question facing the attorney isn't, "Does this juror bond with ME," but "will this juror bond with the case I'm presenting?" The only way to answer that question is to get a sense of that juror's attitudes, values, beliefs and relevant experiences. To learn this information, the attorney must build rapport with the juror and do it as naturally as possible. The best way to build rapport is to treat jurors as equals, with respect for their time and opinions.

Once a prospective juror feels that his opinions matter and are respected no matter what they are, the bulk of the attorney's work has been done. When the attorney has asked thoughtful questions, listened carefully to responses, treated the juror with respect and the attorney's "gut instinct alarm bells" are still going off, then it's time to factor in those gut instincts, taking into account your personal score card of how frequently your gut is right (or wrong).