

JURY SELECTION: A TWELVE STEP PROGRAM

By: Dan L. Stanford*

After 31 years of trial practice, I don't pretend to have figured out how to select the "perfect jury". In fact, about all I have learned is that juries are unpredictable, there is no "perfect juror" and you will have surprises every time you interview jurors at the end of a trial. That's why I *strongly suggest* the use of a reputable jury consultant in every case that warrants such an expert. (The last time I used a jury consultant for a mock jury presentation, we filed a "waiver of jury trial" the next day!)

I have, however, developed some suggested approaches to *voir dire* which, if practiced, could ease the pain and nervousness of jury selection. These are my twelve suggestions.

1. Select the theme of your case.

Long before you stand up to select the jury you must have selected the theme of your case. Any trial lawyer will tell you this is the key to success, especially given the jurors' short attention span, which grows shorter every year. A short, powerful theme of your case is very important. And, your theme – both from the defense or the plaintiff – must be something with which lay people can easily identify.

2. Make sure your questions support and reinforce your theme.

Once you have selected a powerful theme for your case, make sure that your questions to prospective jurors support and reinforce your theme. As an example, if your theme is about "violations of trust", outline questions relating to jurors' experience with placing trust in other people and misplaced trust. If your theme is about people "accepting responsibility for their acts", make sure your *voir dire* questions elicit jurors' experiences with this concept.

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3. List both the strengths *and* weaknesses of your case.

As you begin to think about your *voir dire* questions, make a short list of the strong points in favor of your client and those weaknesses you have identified in your case. Your list of both strengths and weaknesses will ensure that you are aware of both and are prepared to deal with both during the trial.

4. Create questions to bring up both favorable facts and harmful facts.

Ensure that your questions include all of the areas of strengths as well as all of your weaknesses. Don't hide from your weaknesses! In fact, be the first one in the courtroom to bring them out.

5. Remember the purposes of *voir dire*.

As you create your *voir dire* questions, remember your goals in standing up before the prospective jurors. They are: (a) to find out information about bias and prejudices; and (b) to establish *your credibility*; and (c) to convey and reinforce the theme of your case. Make sure your prepared questions meet all three goals.

6. Make it interesting!

There is nothing worse than a dull and boring *voir dire*, except for perhaps a dreadful opening statement. Either one can lose a case for you. Since *voir dire* is your first opportunity to make an impression on the jury, make it interesting. You can make your jury selection interesting by using both group questions and individual questions and using both open-ended and leading questions (designed to get the "yes" or "no" *you want*). Also, don't go in order (i.e. down the rows), but move around the panel with your questions. Starting with juror No. 1 and then going to juror No. 2, and so forth only ensures one thing: Jurors 9 – 12 will either be asleep or focused on projects they have at home or work. Finally, engage each one of the prospective jurors during your *voir dire* even if the Judge uses a group of 18 or 24 prospective jurors.

7. Avoid certain mistakes.

There are some basic things to avoid in any jury selection. Avoid repeating things the jurors have already said about themselves. Doing so only shows that either you are not paying attention or you don't know what you are doing. Don't ask questions like, "Do you think you can be fair?", or "Will you be biased because? ". You will never get people to admit to being "unfair" or "biased". Instead, you must come up with creative questions designed to allow *you* to determine if the prospective juror can be fair or is biased. Avoid making any juror feel uncomfortable: Don't ask intimate or personal questions and don't ask long or complicated questions that make a prospective juror feel stupid. If you try and demonstrate your "superiority", a juror will most likely return the favor at verdict time. Finally, you should obviously avoid using slang and other casual language.

8. Get promises/commitments from the jurors.

As you question the prospective jury panel, you should have some questions designed to obtain promises or commitments from the jurors. This is especially important if you are on the defense side, but a plaintiff's lawyer should consider getting promises on important subjects like damages. On the defense side, you can ask for promises or commitments that they "will base their decision on evidence and not sympathy", that they "will treat both sides, including defendant corporations, the same", and that they "will wait until all the evidence – including the defense evidence – has been presented." Both sides can use promise or commitment questions to establish a bond with the jury.

9. Use all of your senses.

The jury selection of every good trial lawyer starts long before he or she stands up to question the panel. As you walk into Court, or as the panel is called into the courtroom, look around at the prospective jurors and start to make some judgments about them. Use all of your

senses, especially “looking” as well as listening. Is a young prospective juror dressed in a coat and tie like this is the biggest day in his life? Is one juror carrying a professional looking brief case? Is a prospective juror reading a novel and, if so, what type of novel? As you question the prospective jurors, do they look you in the eyes (like a prospective leader) or look down or away when answering questions? If you use all of your senses, you can learn almost as much as by listening to the answers to your questions.

10. Spend time with any juror who will clearly be excused by the other side.

Some lawyers make the mistake of avoiding any *voir dire* of a prospective juror who will obviously be excused by the other side. Instead, I recommend that you spend time with that juror and come up with as many effective questions to enlighten (read: prejudice) the other jurors. If you are the plaintiff’s attorney in an accident case involving horrible injuries, spend time with sensitive questions of any juror who has had a relative or close friend in a similar situation. If your client was cheated or defrauded by the defendants, spend time with any prospective juror who expresses a similar experience in his or her background. Using such questions to get the lay prospective jurors to drive home the theme of your case can be more effective than any “argument” you may make. Real people listen to other real people.

11. Have some effective wrap-up questions.

At the end of your *voir dire*, prepare some effective wrap-up questions designed to conclude your questioning and elicit any information you may have missed. Questions like, “Have I said anything this morning which causes you any pause or concern about acting as a juror in this case?”, or “Have any of the other prospective jurors said anything this afternoon that has caused you to think that you may have an additional comment for us today?”, or “Is there anything you think we should know about you which hasn’t been asked which could affect your ability to serve as a juror in this case?” are all good examples.

12. Consider trying to memorize all of the last names of the jury panel.

Especially if you practice on the defense side, consider memorizing all of the last names of the prospective jurors. You will be surprised, once you try it, how much time you actually have and how easy it is to memorize 18 to 24 names. More important, at the end of the case, you will be pleasantly surprised over the reaction of the jurors. This simple technique, which may seem like a trick, has a lasting effect on the jurors and greatly impresses them about your competence and abilities. In other words, it establishes tremendous credibility from the start. And, after all, establishing that kind of credibility can go a long way toward helping you win your case.