

VOIR DIRE AS A SOCIAL PROCESS

By Stephen A. Hnat

Introduction

Trials are often won or lost during voir dire, but many trial attorneys fail to appreciate and effectively utilize the *process* of voir dire. Trials are as much a social process as a legal process and the same social dynamics operate in the courtroom as in any boardroom or classroom. An attorney who is as attentive to the process of voir dire as the content is at a significant advantage during the most decisive phase of a trial. This article will discuss a few techniques that will contribute to a successful voir dire.

Axiom 1: Know what you want to accomplish during voir dire with the primary goal of establishing rapport *before* exploring juror biases.

The first prerequisite to conducting an effective voir dire is to understand the emotional process of a trial and to develop your ability to use this process. Preparing for voir dire involves not simply identifying what the issues are in the case and assessing potential biases on those issues. It must involve exploring your own feelings about those issues and the case, your feelings about the clients, and personal concerns about the success or failure of the trial. Ask yourself: what are you worried about and why? These questions can help you to identify emotions that could spill over into your voir dire non-verbally and can shape how you ask your questions (i.e. tone, affect, non-verbal communication).

An emotionally astute and introspective trial attorney is a successful trial attorney. Have you ever met someone who even though he or she said all the right things, there seemed to be something “off” about the person? Chances are you were picking up some non-verbals that betrayed an emotion of discomfort – maybe they were anxious, maybe emotionally diverted or preoccupied with another issue. We all communicate emotions that are not always in our awareness.

An attorney who is aware of their emotions approaching a trial is in a much better position to use those emotions to an advantage. It allows you to respond spontaneously and genuinely, thereby further enhancing your credibility.

Axiom 2: Use your emotions and self-disclosure to establish rapport and permission to answer honestly.

Approach voir dire first by considering the jurors and their emotions. They are in an unfamiliar situation, in public. They are most likely feeling anxious. It's a bit like going to a party where they don't know a single person, or like the first day in a new school.

Be aware of your tone: it should be reassuring and calming. Explain the process to jurors (when jurors know what to expect, it reduces their anxiety) and begin to call on jurors individually.

You might want to start with a potential juror with no previous jury experience who appears to be nervous, and tell them that you are nervous too. This self-disclosure accomplishes two important tasks. First, the self-disclosure of an uncomfortable feeling models what you want from them: permission to talk openly even about uncomfortable feelings and issues. Secondly, it establishes an emotional identification with them: it increases the likelihood that they will feel like you are one of them.

Use your emotions and self-disclosure to help jurors to not only identify biases, but also to give them some reassurance or comfort expressing the bias. One example of this principle might be while discussing limits on damages or providing pain and suffering damages for a deceased person. You might start out by saying "you know, here I am – a trial lawyer representing people who bring lawsuits – and I have to tell you that sometimes when I read about a big verdict in the media I kinda' scratch my head and wonder what the heck they were thinking... and I have been in trials myself resulting in verdicts that were really fair, but I can imagine someone else would say the same thing. I imagine you have had the same reactions as me sometimes..."

Another example of using self-disclosure to prime an issue is in a criminal trial. Every juror has heard of the presumption of innocence, virtually none believe it, but will believe in the principle. You might start assessing bias with this: "You know, here I am representing people accused of crimes, but I've got to tell you – when I am driving down the road and I see a man spread-eagled on a car being searched by an officer I don't say to myself 'Gosh, I wonder what that guy is presumed innocent of doing!' I think to myself 'I wonder what he did?' I know I have a difficult time with the concept and I imagine you probably do the same as me, right Juror #3?"

Axiom 3: Ask questions that require a conversation.

Conversations involve talking **and** listening – an exchange of ideas. Some voir dire are conducted with lists of questions structured more like an interview than a conversation. The goal is to establish rapport and assess biases, and this can only be accomplished with a conversation. Any questions that only require a "yes" or "no" response, or no response at all, are usually not useful questions. Avoid using legal terms in questions and ask the question like a high school graduate might. For example, instead of asking jurors "does anyone here have any negative feelings about medical malpractice lawsuits or litigation?" you might call on an individual and ask "Ms. X, how do you feel about suing doctors and hospitals?"

Most people like attention and positive feedback. Listening to their responses and responding to what they actually say *and* how they say it is important for several reasons. React to every response a person makes. This lets them know you consider them important enough to listen and acknowledge what they are saying. Not reacting or responding to their answers can come across as dismissive.

What people say is often less important than how they say it. Look for congruity between their response and the emotion expressed while responding. Asking about their response without challenging them lets the juror know you are carefully listening to them and helps them to assess how they really feel. For example, a juror may hesitate in a response to a certain question. Their hesitation is usually a clue that there is some emotion or thought that is being withheld. Instead of responding in a manner that challenges their honesty or openness, ask them to help you understand or clarify what they just said.

Conclusion

These are a few examples of how attending to the social and emotional processes of voir dire can not only facilitate identifying juror biases, it can also create a decisive edge with a jury in establishing your credibility. Recognizing that trials are as much a social process as a legal process will help contribute to a successful voir dire.



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