

Twenty-Five Common Mistakes Attorneys Make in Voir Dire

Melissa Pigott

What's the best approach to voir dire? Decide what you must know, what you would like to know if time permits, and what you will let opposing counsel ask.

OVER THE PAST two decades, I have had the unique experience of working with some of the best attorneys in the United States during the jury selection phase of trials. I long ago lost count of the number of cases on which I have worked as a jury consultant, but I continue to be amazed at the way in which each attorney's individual style impacts the jury selection process. Some attorneys seize control of the courtroom during voir dire, while others ap-

proach the jury selection process with obvious trepidation.

The following outline details the 25 most common voir dire mistakes I observe on a regular basis. It was prepared to provide a framework for me to help my clients guard against the traps that can turn a promising voir dire into a fiasco. Learning to recognize these common pitfalls is the first step toward a more successful voir dire.

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Mistake

1. Doing most of the talking.
2. Asking closed-ended questions.
3. Re-wording thought-provoking questions into "attorney" questions.
4. Reluctance in asking case-specific and personality questions.
5. Failing to ask follow-up questions.
6. Failing to acknowledge someone who wants to speak.
7. Asking the same question of every individual juror.
8. Not knowing when to call it quits.
9. Trying to rehabilitate "bad" jurors.
10. Fear of contaminating the pool.
11. Asking conditioning questions when not permitted by judge.

Why it's a Mistake

Voir dire is the time to listen to what jurors have to say.

Closed-ended questions do not provide insight into jurors' attitudes, values, beliefs, or personality.

Questions written by consultants are designed for maximum impact; questions re-worded by attorneys often lose impact.

Case-specific and personality questions are the best indicators of jurors' predispositions.

Often, the lead question is just a "warm up"; important information is elicited with the second question in a series (for example, "why?").

Prospective jurors are alienated when ignored. In addition, the attorney is missing valuable input from the juror who is ignored.

Jurors, as well as the judge, are easily bored with this process. In addition, jurors become programmed to say what the attorney wants to hear as the process goes on.

There is no truth to the assumption that attorneys should ask questions of a prospective juror until he or she agrees with *something*; jurors are alienated, not conditioned, with this approach.

There is no such thing as rehabilitation; attitudes, values, beliefs, and personalities do not change as a result of voir dire questions.

A bad juror's attitudes do not "rub off" onto other jurors.

Jurors will recognize this technique as a grandstanding ploy.

12. Failing to inquire about judge's expectations ahead of time. Judge will have no prearranged agreement with attorney; everyone will be surprised at judge's decisions concerning time limits, back striking, and so on.
13. Not mentioning *Neil* challenges. If the other side cannot think of neutral reason for a strike, the judge will not permit a strike to be made; often, good jurors will remain on the jury.
14. Stopping short in setting up challenges for cause. Fear of alienating a juror one intends to remove from panel for cause (or by using strike) is a nonissue; attorney should be more focused on ridding panel of bad juror than appeasing judge.
15. Failing to use all strikes. This precludes appeal based on jury composition.
16. Failing to talk to every juror. Some jurors will be offended if you ignore them; and they could end up on the jury.
17. Failing to address jurors by name. Using a juror's name is a courtesy and tells the juror you care enough about him or her to make that extra effort. As the jurors' initial contact with you, this is your only chance to make a good first impression.
18. Failing to thank a juror who gives an unfavorable response to a question. Remember that voir dire is primarily a *de-selection* rather than *selection* process. Thus, you want to encourage jurors to reveal information about themselves that will enable you to use your peremptory and cause challenges wisely.
19. Failure to rehearse questions. The attorney will not know the style and format of questions nor will he or she know what answer is indicative of a "good" or "bad" juror.
20. Not following the recommendations of the jury consultant. Jury consultants' recommendations should be based on scientific findings; attorneys' intuitions are often wrong.

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| 21. Not using a supplemental juror questionnaire when one is warranted. | Supplemental juror questionnaires lead to more honest answers than oral questioning, especially when sensitive issues are involved. |
| 22. Relying on a "bank" of questions in every case. | There is no set of general questions that reveal jurors' attitudes in every case. |
| 23. Using stereotypes: "Always strike X," "never keep Y," "rule of thumb." | Relying on stereotypes leads to over-simplifications and generalizations; and these lead to mistakes. |
| 24. Trying to appear too casual or too sophisticated. | Your credibility depends upon jurors perceiving you as being sincere and if you try to be something you are not, you will probably lose your credibility with the jurors. |
| 25. Not being familiar with the law on jury selection. | You will be uncertain and hesitant when confronted with legal issues pertaining to the effectiveness of your jury selection. |

CONCLUSION • Every expert on jury behavior has his or her opinions about the factors that make voir dire a success, with winning the case the most measurable sign that a favorable voir dire must have taken place. The main point on which I advise attorneys when they inquire about voir dire is to ask only those questions which measure potential jurors' attitudes and beliefs related to key case issues. Decide what

you must know, what you would like to know if time permits, and what you will let opposing counsel ask. Use the key case issues as your guide to voir dire and structure questions to elicit the most information in the least amount of time. In this way, you will both avoid common voir dire mistakes and make your voir dire efficient and informative.