CHAPTER 1

The Voir Dire and Jury Selection Setting

Objectives

- To understand the goals of voir dire and jury selection.
- To understand the differences between jury selection procedures and their impact on the effectiveness of jury selection.

On February 15, 2006, in a federal courthouse in Alexandria, Virginia, jury selection began in the conspiracy trial of Zacarias Moussaoui. Moussaoui was the first defendant tried for a role in the tragic events surrounding the 9/11 airline hijackings and attacks. He was charged with conspiracy to commit acts of terrorism, aircraft piracy, destruction of aircraft, using weapons of mass destruction, murdering United States employees, and destruction of United States government property. The defendant eventually pleaded guilty to the charges, but a jury trial was held to determine whether he should receive life imprisonment without the possibility of parole or the death penalty. This case garnered international publicity and was one of the most publicized trials in recent history.

The court started the jury selection process by issuing 1,000 jury summons.[1] From these summons, approximately one-third of the jurors were eliminated from consideration because of summons delivery failure or hardship requests on the part of potential jurors. The remaining approximately 500–600 potential jurors reported to the courthouse on February 6, 2006, in four batches of approximately 125 jurors. While giving instructions to the jury during the first batch, the defendant interrupted the judge, making statements such as, "They are not my lawyer. I don't want them to represent me. I'm al Qaeda; they are American; they are my enemies. They have nothing to do with these people. This trial is a circus."[2] In order to treat all potential jurors in the same manner, the judge secured a copy of the transcript for the first batch and read from it for each subsequent batch and, in an unusual turn

of events, allowed the defendant to make a similar outburst at the beginning of each session before being led out of court.

The jury selection lasted approximately eight days with questioning being conducted solely by the trial judge, with the parties being allowed to submit follow-up questions to the court. After seventy jurors were qualified, jurors were asked to report on March 6, 2006, for the final jury selection. The resulting selection process yielded a jury of twelve jurors and six alternates. Despite the unusual nature of this case, the basic task of jury selection remained the same: to identify potential jurors who should be removed and seat a jury that was not biased against the client.

Goals of Jury Selection and Voir Dire

In theory, the goal of jury selection is to select an impartial jury. The attainment of this goal is placed in the hands of the adversary process. The parties attempt to prevent from sitting on the jury potential jurors who they suspect may harbor some bias or prejudice against their respective clients. In essence, jury selection is a filtering or "deselection" process resulting in a jury composed of individuals whom the parties and the court fail to remove. A potential juror can be prevented from sitting on the jury through the exercise of one of two types of challenges: challenges for cause and peremptory challenges.

Challenges for cause center on the failure of the potential juror to meet specific statutory qualifications, e.g., residence requirements or the presence of bias or prejudice. Bias or prejudice on the part of potential jurors can be inferred or actual. Inferred bias refers to the presumption of bias, usually defined by statute, as a result of a relationship between a potential juror and features of the case, e.g., a blood relationship between the potential juror and one of the parties or a financial interest in the outcome of the case. Actual bias is imputed to potential jurors as a result of statements reflecting prejudice or bias made during the questioning process or actual admissions of bias. In the Moussaoui trial, for example, those jurors who would not impose the death penalty under any circumstances or who would automatically impose the death penalty or who would not give the defendant, who was not a citizen of the United States, the same rights and considerations as U.S. citizens were removed for cause. As we shall see in Chapter 11, challenges for cause are limited in scope, unlimited in number, and within the discretion of the trial judge.

Lawyers can prevent potential jurors from sitting on the jury through a second method, the exercise of peremptory challenges. Peremptory challenges are those limited challenges whose number is set by statute and varies with the nature of the crime or litigation at issue. Lawyers generally have the freedom to exercise these challenges as they see fit; as we shall see in Chapter 11, however, the peremptory challenge must be exercised in a nondiscriminatory manner in terms of the juror's race, gender, or national origin, with some jurisdictions extending this prohibition to religious affiliation and/or sexual orientation.[3]

The four major goals of voir dire:

- *Information gathering:* to elicit critical information from jurors in order to make meaningful use of peremptory challenges and challenges for cause.
- *Rapport:* to establish a positive relationship between the lawyer and jurors that results in more effective voir dire and subsequent persuasion.
- *Education:* to promote jurors' understanding and willingness to adhere to legal principles, juror roles, and the law.
- *Persuasion:* to influence jurors to adopt perspectives on the case beneficial to the lawyer.

The foundation for the exercise of challenges for cause and peremptory challenges is the voir dire, the process of questioning jurors. Voir dire has four major goals: (1) information gathering, (2) rapport, (3) education, and (4) persuasion. We will examine these goals briefly here, returning to them again in Chapter 4.

Information Gathering

The most important goal of voir dire is to gather from potential jurors the information necessary (e.g., backgrounds, experiences, opinions, biases, and values) to enable lawyers to intelligently exercise their peremptory challenges and pursue any challenges for cause. Not only is information gathering the most important goal of voir dire, but it is also perhaps the only goal of voir dire uniformly recognized as appropriate by the courts. To achieve this goal, lawyers must carefully consider exactly what information is needed, skillfully ask questions that uncover the critical information, and employ techniques that promote juror candor and honesty. Unfortunately, the manner in which voir dire is conducted in many jurisdictions impedes effective information gathering.

Rapport

The second goal of voir dire is to build a positive relationship between the lawyer and jurors. Lawyers establish rapport by treating jurors with respect, showing an interest in the jurors as individuals, making the jurors feel comfortable, and sharing the personal side of themselves. Good rapport with jurors facilitates (1) openness and candor by potential jurors, (2) positive feelings toward the lawyer, which increases the persuasiveness of the lawyer,

and (3) perceptions of lawyer objectivity, leading to greater trust, which is crucial to the effectiveness of the lawyer's arguments. These benefits lay the groundwork for more effective voir dire and subsequent persuasion at trial.

Education

The third goal of voir dire is education. Jurors arriving for jury service generally are unfamiliar with their new roles and duties and with what will occur at trial. They are also likely to be unfamiliar with legal terminology. Such phrases as "proximate cause" and "preponderance of the evidence" are not commonly used outside of courthouses. In addition, many jurors hold opinions contrary to legal principles or standards. For example, opinion polls have repeatedly shown that substantial minorities of the general population (and jury-qualified individuals) tend to presume defendants are guilty and believe that criminal defendants should prove their innocence,[4] and that jurors would disregard the judge's instructions regarding inadmissible evidence.[5]

The need to educate potential jurors is underscored by the fact that failure to provide such education can lead to the jurors' inability to follow the instructions given to the them by the judge at the end of the trial.

Two basic considerations highlight the need for the education of jurors before they are impaneled on the jury. First, lawyers must determine whether any opinions held by jurors that are contrary to legal principles or the law simply represent misconceptions or misunderstandings of the law or reflect deeply held biases. Misconceptions and misunderstandings may be corrected by education; biases may give rise to a challenge for cause or may necessitate the use of a peremptory challenge. Second, jurors process information as the trial unfolds. This processing of information occurs in light of jurors' expectations and beliefs regarding their roles and duties, and the law in the case. If jurors have misconceptions concerning relevant legal principles or the law, their processing of the trial information and their subsequent decisions will reflect these misconceptions.

Timing is a key issue in the education process. Educating jurors as to the law (i.e., judicial instructions) after the evidence is presented can lead jurors to treat the case differently than if they were aware of the relevant law before hearing the evidence.[6] Thus, the appropriate time to acquaint (and educate) jurors with the relevant legal concepts and terminology, decision criteria, trial procedures, and their role as impartial decision makers is during voir dire.[7] Lawyers and judges foster this educational process by using terms and explanations that jurors can understand, avoiding the often complex and confusing formal legal definitions, where possible.

Persuasion

The final—and most controversial—goal of voir dire is persuasion. While uniformly condemned by the courts, persuasion during voir dire has not escaped the attention of lawyers. The importance of persuasion during voir

dire arises from the nature of the jury selection process itself. Jurors know that the lawyers eventually will be trying to persuade them to adopt their client's position in the case, but they expect these persuasive attempts to be made once the trial "starts," not during the jury selection process. Like the old adage "forewarned is forearmed," jurors are better able to resist persuasive attempts when they know these attempts are coming. By not expecting a persuasive attempt during voir dire, jurors are susceptible to persuasion. It is for this reason, while perhaps not consciously recognized by lawyers, that persuasion can be effective during voir dire.

The primary goal of persuasion during voir dire is to influence potential jurors to adopt the perspective of the case that the lawyer advocates. By doing so early in the trial process, jurors filter the evidence and arguments made at trial through the lens of the lawyer's viewpoint. This filtering process subsequently makes the opposing lawyer's job that much more difficult.

Voir Dire and Jury Selection Procedures

Achieving the various goals of voir dire and jury selection is no simple task. Success depends on the skills of the lawyers, the local practice and laws of the trial jurisdiction, and the latitude of questioning granted by and/or pursued by the judge.[8] All three of these factors vary across jurisdictions. Voir dire skills vary widely among lawyers. Judges participate and control the voir dire process to differing degrees. And there is considerable variation in the manner in which voir dire and jury selection is conducted from one jurisdiction to the next, with attendant consequences for the process itself. It is to this factor that we now turn.[9] The differences in voir dire appear in both the style with which voir dire is conducted and in the method in which peremptory challenges are exercised.

Voir Dire Style

The style of conducting voir dire varies in terms of who asks the questions and how questions are addressed to potential jurors.

Who asks the questions. Potential jurors are questioned in one of several ways, either solely by the judge (or magistrate), solely by the lawyers, or by a combination of judge/lawyer questioning. In federal courts, a large majority of the judges in criminal and civil trials conduct voir dire examination without oral participation by lawyers. In state courts, the situation is just the opposite, with lawyer- or judge/lawyer-conducted voir dire examination being prevalent.[10]

Who examines the potential jurors is not unimportant. Judges are accorded high status and, as a result, voir dire examination conducted by the judge is less likely to yield candid and honest answers by jurors than lawyer- or judge/lawyer-conducted voir dire.[11] Jurors simply are more reluctant to reveal personal, sensitive, or socially unacceptable information or opinions to judges than to lawyers, whom they perceive as closer in social status.

Impact of voir dire styles:

- *Questioner.* Lawyer or judge/lawyer questioning yields greater juror candor and disclosure than questioning conducted exclusively by the judge.
- *Method of questioning.* The individual method yields more information from jurors than either the combined or the group method, with the group method being the least informative.

In addition, lawyers' participation in the voir dire process (either through lawyer-conducted or judge/lawyer-conducted voir dire) influences the process in several ways. First, being more knowledgeable about the issues in their cases, lawyers can develop initial and follow-up questions that elicit more valuable information from jurors. Second, questioning by lawyers is more likely to yield the kinds of nonverbal behavior that reflect the jurors' true opinions and feelings. When jurors feel hostile toward or are uncomfortable with a litigant or a lawyer, they are more likely to reveal these feelings nonverbally in response to questioning by the relevant lawyer than to questioning by the judge. Third, the advocacy role of lawyers makes them less likely to accept at face value jurors' assurances that they can be fair and impartial. In fact, research has shown that judges place great reliance on jurors' verbal assurances of fairness, more so than is empirically justified.[12]

How questions are asked. There are three methods in which questions are addressed to potential jurors: the individual method, the group method, and the combined method. In the *individual method*, questioning occurs with one juror at a time, generally without other jurors present. The *group method* questions jurors as a collective body, the size of the group ranging from just a few jurors, to a panel equal to the size of the trial jury, and in some jurisdictions, the entire venire. Questions are addressed to the entire group, and, depending on the jurors' answers, the judge may or may not permit individual follow-up questioning.

The *combined method*, as the name implies, incorporates the above two methods. Potential jurors are questioned in a group where both individual and group questioning occurs. Questioning of individual jurors may not be contingent on the responses made to group-oriented questions and may be pursued at appropriate times.

As with the matter of who conducts the examination, the method of questioning also has an impact on the effectiveness of the voir dire process. The individual method is superior to both the group and the combined methods.[13] The opportunity to tailor questions to each potential juror and his or her responses and the lessened social pressure present when other potential jurors are not in the room all lead to a more informative voir dire. In