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Innovate Your Practice for Success CLE

Mastering Voir Dire and Jury Selection:
Gain an Edge in Questioning and Selecting Your Jury

Speaker:
Jeffrey T. Frederick Ph.D.

Moderator: Alan Olson
Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury

Jeffrey T. Frederick, Ph.D.
Director, Jury Research Services Division
National Legal Research Group
2421 Ivy Road
Charlottesville, Virginia 22901
(434) 951-9114
jfrederick@nlrg.com
About the Speaker:

Dr. Jeffrey T. Frederick, Director, Jury Research Services Division of the National Legal Research Group, Inc. Dr. Frederick has been involved in jury selection and jury research in hundreds of cases since 1975. He received his MS (1979) and Ph.D. (1980) in Social Psychology from North Carolina State University. He has written extensively on the topic of jury trials and trial advocacy, including three key books in the area, Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury, 4th Edition (2018), Mastering Voir Dire and Jury Selection: Supplemental Juror Questionnaires (2018), and The Psychology of the American Jury (1987), as well as numerous articles on the jury-related topics.
I. SETTING THE STAGE FOR SUCCESS IN JURY SELECTION.

A. Understand the Decision Makers.

1. Backgrounds. What backgrounds do jurors have (e.g., their occupations, educational background and training, socio-economic status, media viewing habits, and Internet footprint and usage, among other background characteristics) that may affect their decisions in the case?

2. Experiences. What experiences do jurors bring to the case (e.g., being a victim of a crime or involvement in prior lawsuits) that can affect how they view the case, evidence, witnesses, and parties?
   a. Ask questions that uncover critical experiences.
   b. Assess the impact of the experiences on jurors in terms of the jurors’ opinions and perceptions.

3. Opinions, Beliefs, and Values. The jurors’ opinions, beliefs, and values are the most important information to know about jurors. What opinions, beliefs, and values do jurors have that will serve as the framework or filter through which they will view the case?
   a. General opinions. Jurors’ views on causes of crime, punishment philosophies, lawsuits, and preferences for compensation, among others, are important to know depending on the case at hand.
   b. Case-specific opinions. Jurors’ opinions relevant to the case (e.g., opinions on the guilt or liability of a party, credibility of law enforcement officers, punitive damages, lawsuits against medical personnel, or compensation for various elements of damages) are important indicators of their desirability by the party.


1. Twenty-eight percent of jurors questioned did not answer affirmatively to any questions, with 17.8% of these “silent” jurors later revealing relevant information.
2. In 90% of cases, one to four “silent” jurors later were removed for cause by consensus based on the information they revealed.

II. TIPS FOR VOIR DIRE.

A. **Tip One: Adopt the Proper Orientation.** Approaching your voir dire questioning as a “conversation” not a job interview, being confident, reinforcing juror participation, and listening to jurors is the orientation that will yield the best results.

B. **Tip Two: Set the Stage for Jurors.** Set the stage for success by explaining the process, stressing honesty and candor, and helping jurors acknowledge the filters and biases we all possess.

C. **Tip Three: Get Them Talking.** Successful voir dire requires that jurors talk (and not just listen to the attorneys talk at them). Using techniques such as the initial background summary (where all jurors answer three to five basic background questions) and initial hand raising (having all jurors raise their hands) will increase participation by jurors at the start of voir dire questioning.

D. **Tip Four: Capitalize on Open-Ended Questions.** Open-ended questions (e.g., Why? and “What are your views on . . .?”) provide more information than closed-ended questions (e.g., agree/disagree or yes/no questions).

E. **Tip Five: Avoid the Socially Desirable Response Bias.** Questions that include phrases that trigger the “looking good” response from jurors (e.g., “fair and impartial” or “bias or prejudice”) should be avoided where possible because these phrases inhibit honest and candid answers.

F. **Tip Six: Focus on Difficulty v. Ability.** Jurors are more willing to acknowledge difficulties in doing something than they are their ability to do it. Using questions that focus on difficulties and not abilities gives jurors an opportunity to admit where they would have problems.

G. **Tip Seven: Highlight Undesirable or Prohibited Behavior v. Bias.** Jurors have difficulty in recognizing and admitting their biases. Focusing on the behavioral manifestations of bias (e.g., give less weight or need more evidence) provides an alternate and more useful route for uncovering bias.
H. **Tip Eight: Design Questions With the “Bad” Answer in Mind.**
Negative opinions or viewpoints may not surface during voir dire questioning. If there is reason to believe that some jurors hold certain negative opinions that have not been revealed, be sure to ask about them.

I. **Tip Nine: Contrast Competing Positions.** Ask questions that contrast two opposing viewpoints so that jurors are forced to choose between viewpoints (and between relatively positive or negative positions concerning your client).

J. **Tip Ten: Harness the Power of Reflective v. Nonreflective Questions.**
Using questions that ask jurors to reflect on how might certain factors affect their decisions (reflective questions) are more likely to uncover bias than questions that simply ask if certain factors would affect their decision (nonreflective questions).

K. **Tip Eleven: Keep Jurors Participating.** Use techniques that encourage participation as the questioning process continues. Two useful approaches to revitalizing participation are: (a) interspersing majority response questions and (b) using the springboard method where you ask one juror a question and use the answer to talk with other jurors about the topic.

L. **Tip Twelve: Be Persistent.** Don’t let jurors hide. If some jurors are not participating in voir dire, ask them directly for their views so that you know what they think AND all jurors know that they can’t hide from the questioning.

M. **Tip Thirteen: Be Sure Jurors Can Follow the Law.** Going in to voir dire, you need a list of all potential problem areas concerning the law that affect your client. By the end of voir dire, all of these areas must have been addressed with all jurors (either individually or through group questioning). Failure to do so could allow unfavorable jurors to fly under the radar screen and negatively affect your jury.

III. **BEYOND THE QUESTIONS: PAY ATTENTION TO THE JUROR’S NONVERBAL COMMUNICATION.**

Based on research on nonverbal cues to deception, pay attention to signs of anxiety and general positive or negative affect. *Rule of thumb: look for deviations in the potential juror’s behavior.*
A. **Visual Cues: What We See (Body Cues).**

4. Shrugs. Shrugs indicate less confidence in what the juror is saying.
5. Increase in Emblems. “Slips of gestures.”
6. Eye Contact. Less eye contact indicates greater anxiety. An exception to this rule is hostility.
7. Facial Expressions. Facial expressions can reflect positive and negative emotions or reactions to the interaction.

B. **Auditory Cues: What We Hear (Characteristics of Speech).**

2. Vocal Hesitancy. Pauses in speech patterns indicate greater anxiety.
4. Amount of Speech. Lesser amounts of speech can indicate anxiety.
5. Speed of Speech. Rapid speech can indicate greater anxiety.
6. Tone of Voice. Answering in a cold, condescending tone of voice indicates deception and/or negative feelings toward the speaker.
7. Tense Laughter. Inappropriate laughter indicates anxiety.
8. Word Choice.
   a. Psychological distancing. Putting “distance” between yourself and the person/object at issue indicates anxiety and/or negative feelings.
   b. The use of negation conjunctions. Responses where two statements are connect by the negation conjunction “but” should be carefully scrutinized to make sure that the negation conjunction is not “canceling out” the first phrase, e.g., “I can be fair but I heard that the defendant confessed to the crime.”

C. Effective Use of Nonverbal Communication.
   1. Establish a Baseline. What is the general level of anxiety or nervousness at the beginning of voir dire? Background questions are a good place to start to determine the initial level of anxiety.
   2. Evaluate Changes. Look for changes in behavior as result of who questions the jurors and what topics are considered.
   4. Observe Potential Jurors at All Times. Pay attention to jurors while they are in spectator section.

IV. LEADERSHIP AND GROUP DYNAMICS.

A. Look for Who Will be the Leaders on the Jury. Forepersons tend to be drawn from:
   1. Higher Status Occupations. Those jurors with higher status occupations are more likely to be chosen as forepersons.
   2. Those with Prior Jury Service. Jurors with prior jury service are more likely to be chosen as forepersons.
   3. Those with Relevant Experience. Those jurors with experience relevant to the task, e.g., accounting or bookkeeping backgrounds in cases involving accounting activities or detailed financial information, are more likely to be forepersons or leaders.
4. Those with Leadership Experience. Jurors who have leadership experience in the workplace/occupation, social or religious organizations, or hobby and spare-time activities are more likely to take a leadership position on the jury.

5. Those Who Exhibit Stronger Responses During *Voir Dire*. Jurors who exhibit stronger responses (and more strongly held beliefs) are more likely to express their beliefs and opinions during voir dire and, through this participation, may become leaders on the jury.

6. Those Who Blog or Maintain Online Personal Journals. Jurors who blog or maintain online journals are showing a willingness to expressing their ideas in a potentially very public forum and are likely to continue to do so when placed on the jury.

B. Be Aware of Jurors Who Could “Hang” the Jury.

1. Social Isolates. Those jurors who are social isolates based on their background, jobs, or other activities tend not to rely on mainstream society for their social reinforcement and support. These jurors are less likely to need the “social support” of their fellow jurors and are less likely to succumb to social pressure.

2. Opinionated. Opinionated individuals are less likely to change their positions in response to social pressure from their fellow jurors.

3. Interpersonal Insensitivity. Those jurors who appear interpersonally insensitive (e.g., are rude, interrupt their fellow jurors to provide answers, or otherwise show less regard for their fellow jurors) are less influenced by social pressure from other jurors.

4. Job Characteristics. Jurors with jobs characterized by independence and self-reliance in decision making are less likely to be influenced by other jurors. Also, do jurors move between jobs more so than the economy would dictate? Some job “jumping” is expected. However, if it involves a “downward” trend in job status or is frequent over the years, such movement could be an indicator of an inability to work effectively with others.
V. JUROR AND THE INTERNET.

A. Top Ten Examples of Inappropriate Internet-Related Juror Activities.

10. Tweeting on Upcoming Jury Service. Potential jurors have tweeted about an upcoming case or jury service indicating a preference or orientation against one party or the other.

9. Posting on Message Boards During Jury Selection. Potential jurors have posted messages concerning the case on message boards during the process of jury selection.

8. Visiting Victim Web Page. Some potential jurors have visited Facebook pages and memorial pages associated with victims.

7. “Friending” Trial Participants. Potential jurors have been found to “friend” or to send friend requests on Facebook to the parties, the parties’ attorneys, and witnesses.

6. “Googling” Case and Definitions. One of the more common Internet transgressions is for jurors to conduct searches on Google or seek information from Wikipedia or online reference sites concerning the parties, critical events, legal definitions, and sentencing options.

5. Researching Defendant’s Record During Trial. At least one juror has been found to have searched the defendant’s name on a court record site during the trial and to have shared the results with fellow jurors.

4. Posting During Trial. Jurors have been found to post comments on their social media page concerning the case and court personnel during trials.

3. Blogging About the Case During Trial. Jurors (and potential jurors) who blog or engage in online journaling have posted comments on their jury-related activities, including a jury foreman who blogged about the case and posted pictures of evidence presented at trial.

2. Messaging Defendant During Deliberations. One juror messaged through Facebook an acquitted defendant in a multiple defendant trial while the jury was still considering the other defendants in their deliberations.
1. **Conducting a Poll on the Potential Verdict.** One juror who was unsure about what verdict to render posted details about the case on her Facebook account and asked people what she should do.

B. **Jury Selection and the Internet.** The Internet and its tools provide both sources of information for jurors and sources of information on jurors.

1. **Internet Sources.**
   a. Search engines and reference sites. Jurors can use search engines such as Google and online reference sites (e.g., Wikipedia and Merriam-Webster.com) as sources of information. However, search engines such as Google can be used to find out information on potential jurors as well.
   
   b. Media websites and social networking sites (SNS). Jurors can encounter pretrial publicity online through media “.com” sites and their social media pages. These media sources also can be used to uncover comments posted to media stories and emotional “reactions” (e.g., like and mad) posted to the stories and comments by jurors.
   
   c. Juror SNS/Web pages, including Facebook, LinkedIn, and twitter, among others. A key to researching jurors online is to uncover their social media presence, where jurors oftentimes reveal their views in the comments they post and the “likes” to various entities, causes, products, commentators, politicians, television programs, movies, reading material, and music, among other likes, contained on their social media pages.

2. **Likes/following Relevant Entity Sites.** Juror “likes” and “following” concerning relevant entities, e.g., “Blue Lives Matter” or “Black Lives Matter,” often are publicly displayed by these sites.

3. **Databases.**
   a. Political contributions. Federal and state websites are available that track political contributions.
b. Online petitions and causes. Online petitions are available where individuals can sign up in support of the position advocated by the petition or cause.

c. Civil and criminal records. Civil and criminal record searches are available online.

VI. SUPPLEMENTAL JUROR QUESTIONNAIRES.

A. Why Use Supplemental Juror Questionnaires?

1. What Are Supplemental Juror Questionnaires? Supplemental juror questionnaires gather information on the backgrounds, experiences, and opinions of potential jurors. This information is used to supplement voir dire and enhance the jury selection process.

2. Benefits. Supplemental juror questionnaires encourage juror honesty and candor and, in some cases, speed up the jury selection process by collecting large amounts of information ahead of voir dire, allowing for a more focused and efficient voir dire questioning process.

B. Overview.

1. Options. There are two major options for completing supplemental juror questionnaires. These options are: mail and on-site.

   a. Mail. Supplemental juror questionnaires can be mailed to the potential jurors in advance of trial and the completed questionnaires returned to the court in postage-paid mailers.

   b. Onsite. Jurors can come to a designated location (e.g., courthouse or other location) to complete the questionnaire.

2. Logistics. Two major logistical considerations are: (a) how to distribute the completed questionnaires and (b) how much time should the parties be given to review the completed questionnaires before voir dire begins.

   a. Distribution. A plan must be developed that maximizes the efficiency of the distribution of the completed questionnaires.
to the parties in terms of copying/scanning and product delivery.

b. Time for review. Once the parties receive the completed questionnaires, the parties need sufficient time to meaningfully review the answers. Oftentimes, one to several days or more are needed to accomplish this task.

C. Content.

1. Introduction.
   a. Swear jurors. (Truthful answers)
   b. Brief explanation of case. (Long or short)
   c. Disclose purpose. (Expedite jury selection process and selection of fair jury.)
   d. Explain process. (What will happen for both questionnaire and voir dire process?)
   e. General instructions (e.g., no discussion with others or do not read/watch media reports on the trial).

2. Background Information.
   a. Demographics (e.g., name, occupation, and marital status).
   b. General experiences (e.g., law enforcement training, military service or jury service).
   c. Case-specific experiences (e.g., IRS audit, contributions to environmental groups, exposure to toxic materials, use of products, unsatisfactory experience with law enforcement, and being a crime victim).

3. Knowledge of the Entities Involved in the Case/Trial. Do jurors know any of the parties, attorneys, and witnesses?

4. Knowledge of the Case. Are jurors aware of the case through media coverage or community discussions?
5. **Opinions and perceptions.**

   a. **Opinions on the case.** Have jurors formed opinions (e.g., beliefs in the guilt or innocence of the defendant) as a result of pretrial awareness of the case or related events?

   b. **Impressions of the parties.** What are the jurors’ impressions (positive or negative) of the various parties in the case?

   c. **Impressions of the advocates’ roles.** How do jurors view the roles of the advocates, e.g., views of prosecutors and defense attorneys?

   d. **General opinions and values.** What are the jurors’ views on general opinions and values (e.g., views on the causes of crimes or views on civil lawsuits) relevant to the case?

   e. **Case-specific opinions.** What are the jurors’ views or opinions on case-specific issues (e.g., the guilt or innocence of the defendant or views on compensation for certain elements of damages)?

C. **Recommendations.**

1. **Avoid the “Opponent’s Questionnaire.”** Don’t rely on your opponent to develop the questionnaire since their interests are not the same as yours and the questionnaire will reflect these differences—even if subtly.

2. **Keep Questions Simple.** Prevent juror confusion by keeping your questions simple.

3. **Avoid Combining Questions.** Combining questions for “efficiency” purposes often allows important information to “fall through the cracks.”

4. **Develop Methods for Processing the Information.** Because of the potential for large amounts of information being collected in terms of the content of the questionnaires and the number of completed questionnaires, it is important to develop methods for processing all
of this information through summary sheets, developing databases, or through some other approach.

VII. CLOSING COMMENTS.
VI. References.


