

# Effective Techniques for Trying Media Cases

## Voir Dire Tips in a Media Case

MARJORIE S. FARGO

Leave your stereotypes at home when you go to court for jury selection. Just because you have had one good or bad experience with a certain demographic type of juror, such as single, childless, self-employed, or mystery reader, does not mean all people in this category will have the same views. Your personal experience with one or two jurors is not a statistically reliable sample.

Studies have shown that demographics such as age, race, gender, marital status, occupation, and education are poor predictors of jury verdicts, especially in civil cases. What is really critical and predictive are jurors' life experiences and opinions. Types and amounts of media consumed and beliefs and opinions about the specific media issues involved in your case are what really matters.

Voir dire is important for selecting those jurors who will optimize chances for the verdict you desire. In media cases, as in any jury trial, there are three main goals for voir dire: asking carefully thought-out and well-constructed questions that will elicit jurors' beliefs and life experiences, persuading and establishing key themes, and building trust.

### Ask the Right Questions

The first goal of voir dire is to get the jurors to talk honestly about how they feel about the issues that are important in your case. To do so, ask questions that will elicit from prospective jurors the type of information that will identify juror beliefs and prejudices about the case issues.

Begin your voir dire preparations by making a list of the positive and the negative evidence, issues, and themes in your case and that of your opponent. Prepare to diffuse the negative parts of your case by addressing them in voir dire rather than ignoring or running away from them. Your honesty and courage in addressing the negative aspects

of your case will build credibility in the eyes of the jury.

You can't ask questions on everything so rank order these lists and choose three to five issues that are critical to address. Focus most of your voir dire questions on these topics. Have some backup questions on collateral issues in case voir dire goes faster than you think.

The best question format to elicit information is the open-ended question, one that cannot be answered with a yes or no response. Most open-ended voir dire questions begin with the words *what, when, how, or why*:

- What is your major source of news and information?
- How often do you watch the television news?
- What is your opinion of the news media?
- How much trust and confidence do you have in the mass media to report the news fully, accurately, and fairly?

Open-ended questions allow the jurors to voice their true experiences and opinions rather than suggesting the answer that the lawyer or judge would like to hear. "Would you agree that freedom of the press is crucial to the American way of life?" is not an open-ended question. Almost all prospective jurors would answer yes, whether they truly feel that way or not, in order to appear politically correct to their peers and the court. This question does not provide any real insight into how the juror really feels. A better format question is the following: "When you hear or read the term *freedom of the press*, what does it mean to you?" This question format allows jurors to say exactly what they feel, even if the response is, "I have no idea!"

Of course, many judges (especially in federal court) oppose the use of open-ended questions. A compromise is to use a question that gives jurors a choice of answers and asks jurors to choose the response that best fits their views. For example, "How important is freedom of the press to your own sense

of democratic freedom? Would you say it is crucial, very important, somewhat important, or not important at all?" Regardless of the juror's choice, follow up by saying, "Tell me more about why you feel this way."

### Establish Key Themes

The second goal of voir dire is to educate jurors about your case themes, issues, and defenses while you are eliciting their opinions on the case topics. For example, in a libel case, an attorney may ask the following question: "Some people believe the courts should make it easier for people to win libel suits against the news media. Others think this will prevent the news media from reporting stories that may be in the public interest. Which comes closest to your view?"

Follow this question with an example from your case and then a general question such as the following: "Do you think there should be any limits on the type of background information an investigative reporter is allowed to publish about people who are the subject of a criminal or political investigation?"

Regardless of the juror's answer, follow up with another case example: "For example, do you think it would be wrong for an investigative news reporter to report that a lead scientist who was a suspect in the unsolved anthrax attacks had falsified his educational background?" If the juror says yes, additional follow-ups could lead to a successful challenge for cause. If the juror says no, follow-up questions to this juror could further educate the rest of the panel about the defendant's themes and defenses.

### Build Trust

The third goal of voir dire is to establish good rapport with the jurors. Voir dire is the only opportunity an attorney ever has to speak directly with a prospective juror. Use this opportunity to put yourself and your client in the best light possible. Always begin by introducing yourself and your client even if you have already been introduced by

the court. After stating your name, say, "It is my privilege today to represent A, who is a reporter for XYZ newspaper."

Remember that voir dire and jury selection put the jurors and their lives under close examination, which is a very intimidating and uncomfortable experience for many jurors. Acknowledge their discomfort and briefly disclose something of your own nervousness as you begin your voir dire examination.

Always make eye contact with jurors when you are questioning them. Do not look away, talk with colleagues, or shuffle papers when the juror is trying to answer your (or your opponent's) voir dire questions. To do so may make you appear rude, uninterested, unprepared, or arrogant not only to that individual juror but also to the entire prospective jury panel. Remember that from the jurors' point of view, they are paid a pittance for their service, are missing deadlines at work, and are asked to provide their life story in open court while you, as defense attorney, are paid a boatload of money just to show up.

Always be polite and thank the jurors for their response, even if the juror has just said something excruciatingly negative about your client or your case. Even if a juror has just said that he believes news media are the lowest scum on the planet, respond by saying, "Thank you, Mr. Xenophobia; it's just that kind of totally honest answer we are looking for here in the voir dire process. How many other jurors on this panel feel the same way Mr. X does? Does anyone feel differently? If so, how?"

### Final Thoughts

Do not close voir dire until you have asked each juror on the panel a question. If at the end of voir dire there are a couple of jurors who still haven't said anything, ask them about that fact: "Ms. Silent, I have noticed that you have not responded to any of the questions that have been addressed to the panel today. Can you tell me something about that?" You may find that those jurors are hard of hearing, have been sleeping, or have some impediment that would disqualify them from jury service.

Don't sit down at the end of voir dire until you have asked the entire panel, "Is there anything else that you feel the parties, the lawyers, or the court should know about you before you are selected

to serve on this case?" No attorney or judge can think of every relevant question for each juror. Such an open-ended invitation can reveal unanticipated information that may disqualify a juror or help you decide on which jurors you'll use your peremptory strikes.

Finally, be optimistic. Despite the popular notion that an overwhelming majority of the American public distrusts the media, recent Gallup poll data indicates that the public has, in general, a distinctly positive view. For example, in a Gallup Poll Social Series on Governance involving a random sample of 921 adults surveyed in September 2005, 50 percent of those polled reported "a great deal" or a "fair amount" of confidence in the mass media, such as newspapers, TV, and radio, to report news fully, accurately, and fairly (see [www.brain.gallup.com](http://www.brain.gallup.com)).

---

*Marjorie S. Fargo, M.A. ([mfargo@juryservicesinc.com](mailto:mfargo@juryservicesinc.com)) is president of Jury Services, Inc., of the National Capitol Area in Alexandria, Virginia.*

---

## Psychology of an Iceberg

JASON BLOOM

Jury selection is a misnomer. There is no such thing. It is actually jury deselection: you cannot choose your jury; you can only choose who is not on your jury. We all know that but tend to forget it. Thus, the starting point for voir dire preparation is to determine who would likely be a dangerous juror or who is least likely to accept your client's positions. If you find jurors with whom you connect or who are sponsoring attitudes that may indicate they are acceptable, you cannot forget that you have also exposed dangerous jurors for your opponent to strike.

Prospective jurors are like icebergs. There is the apparent and obvious on the surface, and then there are the underlying life experiences and predispositions to certain beliefs that impact decision making, which are hidden below. The goal of voir dire is to illuminate the entire picture and to learn as much as possible about the venire prior to deselection. Demographics, or what

can be seen above water, are not predictive of verdict disposition because when jurors deliberate, they incorporate those life experiences and predispositions into the decision-making process. In fact, this is the natural course for making decisions. So this begs the question: Wouldn't you rather learn in voir dire, as opposed to in posttrial interviews, about these hidden biases that may inhibit a prospective juror's ability to accept your themes and theories?

One of the most controversial topics in voir dire is the issue of "poisoning the pool." Many attorneys want to shut down a prospective juror who begins saying something adverse to their positions in the belief that it may taint the rest of the venire. This is simply not true. Prospective jurors are a group of strangers, and it is very unlikely that a stranger in a voir dire situation will actually program or persuade the others in the group. We believe whom we trust, and we are persuaded by people we trust, not strangers.

In fact, the expression of adverse attitudes or opinions by a prospective juror presents a golden opportunity for the attorney. It presents the opportunity to ask everyone else the following follow-up question: "Who here agrees with what number twenty-one just said?" Suddenly, six jurors raise their hands, and you have easily and painlessly learned that those six prospective jurors are as dangerous as the one you wanted to strike. Plus, if that prospective juror had, in fact, poisoned the pool, then those who had been poisoned would raise their hands in answer to the follow-up question.

Media cases present unique dynamics because people's predispositions toward the media vary so significantly, and different people rely on and trust different sources of news. But there is more to prospective jurors than which news stations they watch or the newspapers they read: there are the life experiences that parallel libel and defamation.

It is very unlikely that a prospective juror has been defamed in the news media. However, it is highly likely that a prospective juror has been the subject of a rumor in the workplace or has been misunderstood by others to a detrimental degree. And these life experiences produce predispositions that are relevant to your deselection. The same feelings that those instances create for the

victim are identical to those professed by a plaintiff in a libel case. Any juror who can say, "I have seen this movie before, and I know how the plaintiff feels," is very dangerous for a defendant. Thus, you have to think outside the box and inquire about life experiences that would produce the same emotional response as the one professed by the plaintiff because, more than anything else, such experiences would be highly predictive of a dangerous juror.

Think of your voir dire questioning of jurors as the opportunity to go diving and explore the underwater component of the iceberg.

---

*Jason Bloom, M.A. (jbloom@bloomstrategy.com), is a jury consultant with Bloom Strategic Consulting, Inc., in Dallas.*

---

## Spotting the Stealth Juror

JO-ELLAN DIMITRIUS

The case that generates a large amount of publicity prior to trial is bound to attract the stealth juror. The stealth juror is the person who is lying in wait to either convict or acquit your client in a criminal case. Similarly, this same type of individual may be lurking in the jury pool waiting to pounce on the high-profile corporate client in a civil case. Obviously, it is imperative that you identify the stealth jurors and strike them from your panel.

In a high-profile case, it is crucial to propose a written juror questionnaire as a first step in identifying potential bias. Although the judge has discretion over whether to grant such requests, it is

becoming the norm in high-profile cases. You should always take the lead in drafting the prospective juror questionnaire and ask these questions:

- Have you followed any cases similar to this case (mention a case or two)?
- What did you think about the outcome of that (those) case(s)?
- Have you had any conversations about this case?

Stealth jurors will, oftentimes, have strong attitudes about similar high-publicity cases but when asked about the current case will say something like, "While I'm aware of the case, I haven't formed any opinions." Your antennae should immediately shoot up with this type of response. A potential challenge for cause could also be developed around this type of contradictory response.

I agree with Richard Goehler's suggestions in the previous edition of *Communications Lawyer* regarding his strategy in asking jurors about their experiences with the media. However, I would add the following questions aimed at finding out how active this potential stealth juror has been with past issues:

- Have you ever written a letter to the editor of a newspaper or magazine? If so, what was the subject of that letter?
- Have you ever called into a talk radio show? If so, what was the subject of that call? What radio station and show?
- Do you use the Internet? If so, have you ever participated in a blog? If so, what was the subject of the blog?
- Have you ever participated in

a city council meeting? If so, did you speak at the meeting, and what was the subject of your speech?

With increasing numbers of people using the Internet, it has been fascinating learning about potential jurors' blogging habits. During jury selection, it's a good idea to Google each of your potential jurors. It's amazing to see what a Google search can unearth with regard to information that a potential juror might not volunteer.

Have someone in the courtroom (co-counsel, a paralegal, or a consultant) serve as your eyes and ears during the voir dire process. Because voir dire is an interview of sorts, it is important that your time with each prospective juror be uninterrupted. Don't write down jurors' responses to your voir dire questions; have someone else do it. Your job is to be a good listener and follow up with any confusing responses that the juror may provide. Finally, it is critical to train your courtroom assistant to note the facial expressions and demeanor of the prospective juror. I've seen many trials in which lawyers haven't seen a particular glance, sneer, or tear from a juror being questioned because they were writing a note. Leave the writing process to your assistant so that appropriate arguments can be made for challenges for cause, hardship, etc. Judges have often granted a potential challenge for cause when attorneys supplement their arguments with notes regarding the stealth juror's demeanor. 

---

*Jo-Ellan Dimitrius, Ph.D. (jed@dimita.com) is president and founder of Dimitrius & Associates, LLC, in Pasadena, California.*