

4. Jury Selection

“Jury Selection”

WELCOME TO THE REVOLUTION

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In today’s climate of deep biases which often outweigh fact and law, attorneys must be expert at jury voir dire. Yet nowhere else in trial are attorneys likely to be as unskilled [true, is there another word that is softer and still conveys this?] and counterproductive.

There is no magic way to do jury selection. But there are solid techniques to gather the information you need for intelligently exercising challenges, rather than relying on anecdote-based superstition, dangerous group generalizations, or guesswork. The first technique is to focus on what jury voir dire is and what it is not. Keep your eye on the ball; don’t undermine yourself by pursuing the deceptively tempting things jury selection is not. Remember Captain Hook’s poisoned green cake. [Eh? I don’t remember Captain Hook’s green cake poisoned or otherwise.]

The main purpose of jury selection is to gather the information you need to identify the *individual jurors who can hurt you*. You cannot de-select groups. Individuals only. There are other purposes of jury selection, but don’t even think about them until you master the main purpose: gathering information about each individual. Don’t “educate” prospective jurors, don’t condition them, don’t do anything but ask the right questions in the right way. You need to hear all of the answers on every topic, not just the answers you want to hear or the answers jurors think you want to hear to get the information you need. Everything else, however tempting it may be, impedes the process.

You learn whom to challenge solely by getting to know the characteristics and attitudes of prospective jurors *individually*. Jurors are not magically exempt from the basics and vagaries of individual human nature. Demographics and other groupings do not show an individual’s likely decision-making. When a lawyer says something like, “I never seat a teacher on my juries,” that lawyer has left her understanding of human nature back in law school. The assumption that everyone in a group is similar based on the same faulty thinking as racism. This shortcut “thinking” is the source of disastrous foreign policy, a lot of doomed marriages, and an endless number of needlessly lost cases. Only people outside any particular group think everyone in the group is similar. Consider, for example, the outside world’s near-uniform

opinion of lawyers, as opposed to the contradictory variety that exists within the universe of lawyers you know. Even when you can relate a demographic or other kind of group to a shared life experience that might shape an attitude (people who have been hurt on the highway), you must still explore the matter with each individual juror to verify whether and how deeply it applies to that juror. Not all physicians are tort “reformers.” Not all people in severe pain give large verdicts (in fact, few do). Not all young people are unsympathetic to others. Gen-Xers (whatever that term still means) share no common characteristics, no matter what your limited observations or sociology professors have made you think. Not all liberals give big verdicts. Not all poor communities give small verdicts. Not all of any group does any one thing. The world is full of every kind of person. So is almost every demographic or other kind of group you can name.

Remember: Jury selection is to learn about each prospective juror as an individual, not as a member of some group.

Jury selection is not about changing or shaping jurors’ minds about anything.

When you try, some jurors may nod and smile and agree with you – but inside they will resent and even start to mistrust you. They know they are the ones to make decisions, not you.

Jury selection is not the time to elicit promises from jurors. Most will promise anything you want. But in closing when you call that promise in, many will feel you tricked them into making the promise before they knew anything about the case. The consequent resentment and mistrust can cost you the case.

Jury selection is not about ingratiating yourself with the jury. When lawyers try to ingratiate, it is usually pathetic to watch and almost always makes jurors suspicious. 1950s kids used the crude term “brown noser” to describe ingratiators. If you know its fundamental literal meaning, you will understand how noxious a brown-noser is considered. Yet some attorneys brown-nose in a misguided effort at rapport. In voir dire, the best way to create rapport is to shut up and listen to the jurors with great interest (see next item).

Jury selection is not about you talking. It is about you listening. Justice Marshall said, “To listen well is as powerful a means of communication and influence as to talk well.” Talking is easy. Children do it all the time. Gorillas and whales nearly do it. So there’s no need to demonstrate that you can do it. Just shut up and listen. This is the most fundamental rule of information-gathering.

With a few significant exceptions, everything you say in voir dire – other than to ask questions – works against you.

How much can you talk in voir dire? Let jurors do 90 percent. You get not a word more than 10 percent. Five percent is better.

And listen well. No matter what a juror says, listen with interest and enjoyment. Learn to relish the opportunity to probe the minds and hearts of prospective jurors. This mind-set optimizes your information-gathering abilities. And as mentioned above, it is the best way to create rapport. We love people who listen to us with interest. When you listen a lot and talk just a little, you develop trust, rapport, and even fondness. Talking does exactly the opposite, no matter what you say.

Your talking in voir dire should almost exclusively be non-leading, non-manipulative, and open-ended (cannot be answered in a word or two) questions. This may required you to drop ingrained habits.

Show the jurors that while a juror is talking, you are interested in that juror, not busy thinking about the next thing for you to say. This shows that you care about the speaker, which in turn gets the juror to care about you and your case. As the Greek rhetorician Anonymocles wisely taught, “He who does not listen does not deserve to talk.”

Listening carefully to a juror – without jumping in to talk – makes the juror feel that you find him important. There is no better way to get him on your side.

Further, never interrupt a juror.

And *never* reword a juror’s answer – as in, “So, you are saying that _____, right?” This common blunder is insulting. And jurors will say “Yes, sure, okay, that’s what I mean” just to get you off their backs – even when your rewording is wrong. So you’ll have both insulted the juror and you’ll get faulty information about him.

Virtually every great trial advocate is a great listener. People say Gerry Spence has the gift of gab, but actually he has the gift of ear. At the other end of the scale, ineffective trial advocates barely listen at all.

If listening is not easy for you, practice it long term. Practice listening without talking. At the office. At home. (Children, spouses, and colleagues may send thank-you gifts to us at any time.) Only boors think people want them to talk a lot. So be honest with yourself. You

almost certainly talk a lot. So before your next jury selection, develop the solid habit of keeping your mouth shut, at least during jury selection. Think Clint Eastwood, not Daffy Duck.

Voir dire is *not* about conditioning jurors. When you try to persuade jurors of anything before they know all about your case, they become suspicious of your case and you. That suspicion persists throughout the trial. Some jurors will justifiably resent your trying to shove your assertions down their throats before they have any basis on which to accept or reject them. Here's a statistic: Only one in 213 lawyers has the kind of personality capable of persuading or conditioning jurors in jury selection without alienating them. So it's 213 to one against you. And you're the last person in the world who can tell if you're that one. In fact, if you think you're the one in 213, you almost certainly are not.

Conditioning used to work before juror biases against lawyers skyrocketed. Now it confirms their biases against you and annoys them enough to act on those biases.

Jury selection is not about control. Voir dire is not your media center remote control. You might switch some juror from bad answers to good answers, but you cannot change their actual opinions – not about you, your case, any issues, any attitude or opinion, the McDonald's coffee case, or anything else. Think of the last time your teenager rolled his eyes as you tried to convince the little monster of something you thought was obvious. His scorn and resistance was a fraction of what you'll get back from jurors, because jurors are not dependent on you for the car keys. Jurors might not roll their eyes, but that night when you describe you at dinner, they certainly will.

In voir dire, you are asking questions because you don't know the answers. So don't try to manipulate or control. It doesn't work, it creates resentment, and it impedes your information-gathering ability.

Voir dire is *not* about poison. No matter how bad a juror's answers are for your side, encourage the juror to talk more. Jurors in voir dire do not poison each other... That happens only in deliberations, when their poison is disguised as opinions about the case. You have to get all the poison on the table in voir dire, while you can still do something about it.

Every ugly little lump of stinky stuff a juror says is, for you, a golden nugget that shows you how low to rate that juror in comparison to others.

Years ago, law professors taught that when a juror in voir dire said something harmful to one side, other jurors would automatically believe it. This is based on the monkey-see-monkey-

do theory of behavior, which does not apply even to monkeys. Jurors do not poison each other's attitudes and opinions. No juror ever says, "Thank God for juror number seven! All my life I've believed corporations are bad, but now – thanks to juror number seven – I've seen the light!" Never happens. So don't be afraid to elicit bad stuff from jurors. You want all those stinky little nuggets on the table so you can decide what to do about them. Otherwise, in deliberations they will create a dispositive stink.

Jury selection is not about acting a "lawyer." You see this in your colleagues all the time. But they might see it in you even though you think you do not do it. We all do things without realizing it. Attorneys act like lawyers even when they think they don't. It sends a terrible message. It's as if you're saying, "I'm a lawyer and you're not!" This undermines your information-gathering abilities in voir dire, and undermines your chances of winning the case.

Lawyers these days are in deep disrepute. A third or more of every jury pool hates and fears lawyers. Bluntly, you disgust them. In the eyes of such jurors, your personal warmth, your charm, even your credibility do you no good. Jurors say, "Credibility is a trick lawyers learn in law school!" These jurors are not radical loonies. They are a third (and in places far more) of the population. Coast to coast.

For example: Many attorneys put on an air of "importance" like they put on a suit of clothes. This makes the alienated jurors start wanting you to lose even before you say a word. Even jurors who are not alienated are put off when a lawyer acts important. Displaying self-importance as a method of gaining respect stopped working decades ago, when it became counter-productive and comic. So unless you enjoy being scorned and laughed at behind your back, be careful at all times – especially in voir dire – not to flaunt that you're a lawyer and that the lowly jurors are not.

How do lawyers act this way without realizing it? In many ways. Do not rely on your own self-evaluation; instead, ask people who know your work in trial how many of the following you are guilty of:

_____ Formal (or "very important manner") speaking. Americans no longer respect or trust formality – not in our professors, ministers, movie and theater stars, politicians, or anyone else. Least of all in our lawyers. We take formal and important tones as a reliable sign that the speaker is arrogant and faking.

_____ Language sprinkled with legalese. Aside from the fact that jurors don't understand legalese, it confirms to the alienated jurors that you are the embodiment of all bad things they think about lawyers. Americans think that people – especially politicians and lawyers – who cannot talk straight and simple are almost certainly trying to fool us. Worse, legalese indelibly reveals your feelings of superiority over the jurors: “I’m a lawyer and you’re not, nyah.” It’s one of the things that would make jurors slap you, if the judge would let them.

_____ Movement and body positions befitting a cartoon of a lawyer instead of a human being. Arms folded arrogantly in front of your chest. A John Wayne power-stride across the courtroom like a bad 19th-century action behind the footlights. “Power” posturing. Relax. All the pretense just shows how insecure you are. Not that there’s anything inherently wrong with being insecure, but why advertise it and undermine juror confidence in you?

_____ Behavior that implies you are in any way special. Clubbiness, seeming like an insider dealing with outsiders (jurors), anything that emits “I-am-and-you’re-not” vibes.

_____ As mentioned above: Repeating a juror’s voir dire answer as if the juror is too stupid to say what he means and needs your help.

_____ Dressing like a lawyer. If people hate clowns, don’t wear a clown suit. When a third of the people hate lawyers, get rid of your lawyer uniform, particularly in jury selection. Blue and black suits don’t command respect; they remind the alienated jurors that you are exactly what they fear and hate. Further, blue and black are power colors, and few prospective jurors are fully forthcoming when someone “powerful” questions them.

_____ Taking notes in voir while jurors are talking to you. The only people who take notes while we talk are people trying to get us into trouble or reject us. So we turn guarded about what we say – exactly the opposite of the way you want jurors to be in voir dire. So have someone at your table take notes. Your job is solely to get jurors talking as much as possible. And few jurors talk much when some lawyer is writing down their answers. It makes jurors subconsciously wary of you as well as talking to you. So your hands should be empty. No pen to fiddle with. No notepad. Keep your list of questions nearby but don’t hold them. Allow yourself no distractions from being 100% riveted on what jurors are saying.

_____ Using podiums or lecterns – or any other furniture – one whit more than the judge requires. That kind of junk barricades you from the jurors. When a politician wants to look distant and formal and presidential s/he stands behind a podium. When s/he wants a campaign

contribution, there's not a podium in sight. The only thing behind a podium is a talking head, and talking heads don't win cases.

If your judge or venue thinks justice is somehow threatened when you are not safely ensconced behind a table or a podium, at least try to come around a corner so it is not directly between you and the jurors.

In summary: When conducting voir dire, avoid the following:

- _____ Formal or important manner of speaking.
- _____ Language sprinkled with legalese.
- _____ "Power" movement befitting a cartoon of a lawyer.
- _____ Behavior that reflects that you are in any way special or in a separate group from the jurors.
- _____ Repeating a juror's answer.
- _____ Dressing like a lawyer.
- _____ Taking notes.
- _____ Podiums and lecterns.

Jury selection is about being prepared, thorough, and quietly confident that these jurors are ready to work for you. We trust prepared people; we are leery when counsel seems to have thrown his voir dire together at the last minute. We trust people who are confident without being arrogant; we are leery when a lawyer seems nervous at doing her own job. It is not endearing or cute or funny; it is pathetic. No one wants a pilot's shaking voice telling us that we have reached cruising altitude of 37,000 feet, and then saying, "Gee folks, excuse me being nervous; I've never done this before."

To seem prepared and confident, *be* prepared and confident. The best way to be prepared and confident is to rehearse in advance. Well before trial, bring eight or ten strangers of various backgrounds and ages into your office and practice your voir dire on them. Do it again with different people the night before trial. This will enable you to start your real voir dire being and seeming more comfortable and confident – so you'll seem more trustworthy, a leader to be followed rather than an amateur making us squirm. And of course you will do the voir dire a lot better. If you practiced the night before, when you begin for real in trial the next day, you'll feel and look as confident and comfortable as if it were the second day.

But remember: Coming across as prepared and confident does not mean being slick or arrogant.

Further: Get rid of that speech lawyers love to give at the start of the voir dire. At most, say, “Good morning. This is where I’m supposed to ask questions, so let’s get started.” And then start asking questions. Easy questions: “Please tell me about yourself,” and family and job, etc. Then listen carefully to the answers. Nervousness – which is stage fright – comes from having to talk, not having to listen. So until you are calm and comfortable, just ask questions; otherwise don’t talk. Nothing makes people more uncomfortable than watching someone else be uncomfortable, so don’t start your relationship with jurors by making them uncomfortable. **Shut up and listen, and pretty soon you will be cool as a cucumber.**

A third way to relax is to convince yourself – in advance – that you enjoy voir dire. One of America’s premiere trial consultants, the National Jury Project’s Diane Wiley (Minneapolis), teaches that until you learn to enjoy voir dire, you will not do it well. She is right. And if you enjoy it, you will relish doing it, rather than letting it make you nervous and uncomfortable. Think of it this way: It is a privilege to be able to ask other people who they are, what experiences they have had, and how they feel about things. Every answer they give expands your understanding of human beings, makes you a better advocate in every case, and helps you win this one. How can you not enjoy such work?

Jury selection is *not* about finding out what your judge will allow you to do in jury selection. Don’t wait until jury selection to find out how much time the judge will allow, what kinds of questions she will allow, or on what basis she will grant cause challenges. This information is almost always available in advance, so you can use it when planning your voir dire.

Jury selection is *not* about figuring out the law. For every case, a responsible lawyer prepares a thorough memorandum of law about jury selection. Judges have a wide latitude in voir dire, but rarely as wide as they think. A good memorandum of law can help a judge see that you should be able to ask at least a little more of what you need to ask, that a juror who cannot provide a fair playing field should be removed for cause (*Wainwright v. Witt*, 469 US 412, 1985, finding #1), that certain topics are central to finding relevant biases, and that in some situations a little more voir dire is needed.

Jury selection is *not* about being a judge-coward. Many lawyers are scared to death of the judge. “Oh my, oh my, oh my, what if I ask for something the judge won’t like?” Lawyers often tell us, “You don’t know our judges around here!” But we do. Most judges will at least consider a carefully crafted motion for better jury selection privileges without getting mad at you.

Two excellent books will help you with this: *Jury Work*¹ and *Blue’s Guide to Jury Selection*². They will help you craft motions for voir dire improvements – which even the narrowest of judges often grant. Also see *Jury Trial Innovations*³; it is written by a group of attorneys and judges, so can carry persuasive weight with your judge.

In a limited voir dire situation, it is an abrogation of your duty not to request improvements: expanded questioning, expanded time, written juror questionnaire, proper basis for granting cause challenges and so on. Nothing gets better unless you try to make it better. Sometimes you succeed. That is enough to require that you try every single time.

VOIR DIRE TECHNIQUES:

Get them talking. Before asking jurors anything about attitudes and life experiences that could impact their decision-making, get them talking by asking open-ended questions about things they can easily and comfortably tell you.

“Tell us about yourself.”

“What’s your workday like?”

“What makes you good at your job?”

“What kind of work would you like to be doing in ten years?”

Ask about family, interests, activities outside work, backgrounds. Follow up every answer with what is always your most important question: “Tell me about that.” (See below.)

Do not grill prospective jurors. Voir dire is the opposite of cross-examination. That means no leading or closed-ended questions (closed-ended questions are those that can be answered in a word or two or three, such as “Do you think X?” which is answered by “Yes,” or “No;” or “What do you do for a living?” which can be answered in one word: “Teacher.”). Closed-ended questions reveal a lawyer afraid to give up control, and scared of getting real

¹ Clark, Callaghan, and Boardman.

² West Publishing.

³ ABAB and National Center for State Courts.

information. Instead, you should get jurors talking by asking open-ended questions. So, “Tell me about your work” is better than “What’s your job?” And instead of “Do you have any feelings about X that might affect you as a juror?” ask, “Please tell me your feelings about X.” The former is yes-or-no (usually no if the real answer is yes); the latter gets people talking. You do not lead a foundation for a specific question. Just say, “Tell me your feelings about X.” You need not precede it with, “Do you have any feelings about X?” This is voir dire, not testimony.

Follow up. Though brief, this is the most important point in this article: Jury selection is the art of following up. You learn little of value in response to your first question on any topic. Only by the second or third follow-up question do you start getting information you can use. “Who here has ever been in a car wreck?” is the necessary first question, but whether or not someone has been in a car wreck tells you nothing useful. You have to follow up to get information that might help you evaluate the prospective juror.

Ask only the *All-Purpose Follow-Up Question*. Your follow-up question should always be either, “Please tell me about that” or, “Please tell me more about that.”

When a prospective juror says, for example, she has been in a wreck, do not ask a topic-limiting question such as, “Was anyone hurt?” or worse, “did you file a lawsuit?” Just say, “Please tell me about that.”

When a juror says she thinks corporations can be greedy, do not ask a self-topic-limiting question such as, “which ones?” Instead, say, “Please tell me about that.”

And as Michigan consultant Eric Oliver wisely teaches, do not ask “Why?” until after you know everything the juror thinks about the topic. Asking “why?” stops the ongoing flow of new information. It is also somewhat confrontational. When someone says she was in a wreck, or that corporations are greedy, or that he’s a teacher, or that he has been badly injured, or has been sued, or was born on Jupiter, the follow-up question to ask is the wide-open “Please tell me about that.” And after they do, ask, “Please tell me more about that.”

Aside from getting jurors to talk a lot more, it also shows you what the juror, not you, considers the most important information. Here’s why this is necessary: If you say, for example, “Was anyone hurt?” a juror might say, “Yeah, grandma got a broken leg.” But if you don’t lead the juror to talk about a particular topic (injuries), and instead you just say, “Tell me about that,” you won’t miss what’s important to the juror – such as, “Well, they blamed it on me

and I had to pay even though I did nothing wrong. It was the other guy's fault." That's information you don't want to miss. You'd miss it if you limit the topic by asking anything as specific as, "Who was hurt?" You can always ask that later if the juror does not bring it up on his own.

So you need only that one follow-up question: "Tell me about that." Well, maybe two: "Tell me *more* about that." That takes you – without even asking – right to what the juror considers most important. You need to know that.

Lower the barrier to bad answers. When you ask, for example, "Will you have a *really hard time* giving us a level playing field?" you are inviting a deceptive answer: "No" – meaning not a *very* hard time. But what about a "somewhat" hard time? Maybe yes – and you missed it.

Even if you ask, "Will you have any problems giving us a level playing field," you will still miss some problems. This is because you are asking the juror to say yes or no – black or white response. That is more than some jurors can or will do on some topics. So make it easier.

You can do this by using the "some people/other people" question. "Some people think X, other people think Y; which are you a little closer to?" And no matter how they answer – even if they say they're in the middle – follow up with "Tell me about that."

So you might ask, "Some people feel that the civil justice system needs some changes; other people feel that things are pretty much okay as they are. Which are you a little closer to?" And follow up.

The "some people/other people" format – for every topic – gives jurors the impression that either answer is okay, that you're not looking for a "right" or "wrong" answers. You can tell jurors there are no right or wrong answers until you're blue in the face, but they almost always feel there are. That makes them reluctant to give you what they think you consider the "wrong" one.

Without when you ask, "Since you're had good experiences with your doctor, will you have any trouble giving us a level playing field in this case against a doctor?" you will almost always get a "no" answer because everyone wants to be seen as fair. But if you give jurors permission to give you the bad answer by letting them know that lots of people think that way, they are more likely to tell you they think that way, if they do. So ask, "Some people think doctors are only human, and their work is complex, so they should be given leeway when they

accidentally hurt someone. Other people feel doctors should be held fully responsible when they accidentally hurt someone. Which do you feel a little closer to?” That lets them comfortably answer either way. They can easily say, “I guess I’m in the middle.” Just follow that up two or three times (“Tell me about that”) and you’ll get all the information you need.

When you question jurors this way, you will often hear them thinking out loud right in front of you. There is no better window into what they are like. And you get there without grilling them or leading them or even talking to them very much. They, not you, are the talkers. That’s an A+ for you, counselor!

Honor the jurors’ opinions and attitudes. Don’t argue. Don’t try to “educate” them. Take what jurors say as fact: their own personal reality, which is as real and valid to them as yours is to you. If you try to show a juror s/he is wrong about something, you will never win the argument (though many jurors will pretend to agree just to get you off their backs). And by arguing or “educating”, you will discourage other jurors from saying anything they think you might not like. So instead of arguing, *reward* jurors who say things you disagree with. Praise them for saying bad things (“Thank you for making that so clear”) and encourage them to say even more (“Tell me more about that.”) And when they have said more, encourage them to say even more (“Tell me more about that.”) That’s how you can often get rid of such jurors without having to waste a strike.⁴

Your goal is to provide a comfortable setting – a safe place – in which prospective jurors can say bad things.

Speaking of arguing: Plaintiff’s attorneys still sometimes fall into the lethal trap of re-arguing the McDonald’s coffee case when jurors bring it up. Don’t. Jurors will *pretend* to be convinced because they don’t want you to keep arguing with them. But you cannot change their minds – not a one of them – about what is by now an American icon. Instead they will despise you for saying you agree with what they consider so outrageous a case outcome.

GROUP COMPOSITION. If you have a burden, or if your opponent has the burden and a hung jury is not good enough for you, you need a group of people who are likely to comfortably coalesce and agree with each other. But if you want to prevent a dispositive verdict – if a hung jury is enough – try to put together a group of the least compatible jurors you can

⁴ But please do not say, “Thank you for your candor.” First, most jurors don’t know what “candor” means. And to those who do know, your use of it means that whatever the juror said was something most people would not have said. Result: Other jurors who feel the same way are likely to hide it.

find. This means evaluating each prospective juror with an eye to how well s/he is likely to interact with the other jurors.

LEADERS. Never gamble on a leader who may lean against you. A leader is anyone with the *perceived* [David, important point is whether the juror *thinks* he has the skills, standing, knowledge, experience, etc., and are capable of convincing other jurors.] skills or standing or experience or charisma or other personal qualities that enable her to draw other jurors to her side. When evaluating jurors, remember that a leader even moderately against you is a greater risk than a non-leader heavily against you. The former is likely to kill your case. This is because leaders lead; they do not follow. Thus, they will get other jurors to agree with them, but will not let other jurors persuade them to change their minds. Other than your opponent's mother, a leader against you is the worst possible thing on a jury.

The foreperson is not always a leader. And not every leader becomes foreperson. In fact, many leaders exercise greater control when they are not the foreperson.

So during voir dire, when you spot a leader, you need to be very confident that they will help you. Otherwise get rid of her, even if she's not as bad as some of the non-leaders you might have to keep in her place.

HOW TO SELECT. Most of the above is about how to get jurors to reveal the information you need to hear. You still need to think about what to do with that information.

This is a topic as vast as human nature, but here are a few basics:

First, figure out attitudes and feelings – and the life experiences that can lead to those attitudes and feelings – that can lead jurors to lean against your case. If you are prosecuting OJ Simpson and you know the primary defense is police misconduct, you *probably* want people whose life experiences have been close to, not remote from, instances of police misconduct. If you are the defense you *probably* want the opposite. (This is one reason O.J. Simpson is playing golf.)

We emphasize “probably” because no matter a person's experiences, every individual processes and reacts to them differently. So you always need to ask what each individual prospective juror thinks about any topic. To do this, simply say, “Tell me more,” and then use the “some people-other people” structure: “Some people believe the police are often guilty of misconduct. Other people believe this is rare. Which are you a little closer to?” And then no matter they say, follow up with, “Please tell me about that.” And then, say again: “Please tell me

more about that.” This kind of questioning, without your diverting it with leading questions or shutting it down with closed-ended cross-exam questions, will give you a thorough idea of this juror’s thinking about police misconduct (or whatever the topic), so you’ll know whether she’s good or bad for your case on that topic, and just how good or bad she might be.

STRENGTH OF ATTITUDE. Knowing a juror’s attitude about something is never enough. You also need to know how strong an attitude it is. A shallowly held attitude will have little effect on decision-making. A deeply one will.

The best way to find out is to get the juror talking about the attitude as much as you can – by asking, as many times as are necessary, “Tell me more about that.”

Your repeated use of that follow-up will eventually become a little shared joke between you and the jury. Keep it in good humor and it helps you establish some valuable rapport.

Follow this advice when questioning each juror’s life experiences, attitudes, and feeling that might impact decision making. Attitudes about tort-“reform,” doctors, corporations, inadvertent harm, criminals, personal safety, personal responsibility, giving verdict money for pain & etc., religion with respect to lawsuits, the kind of people your clients will seem to be in trial, the experiences jurors have had with any of these things, and a myriad of other factors can shape verdicts as much as the evidence can. Figure out which are most likely to, and ask about them.

Other than doing your own analysis of which attitudes and life experiences are likely to impact juror decision making, you might want to enlist the help of an experienced trial consultant for an hour or two. A good consultant (at least 20% are good) can provide effective advice.

You should also do focus groups. For smaller cases you can do them inexpensively on your own, as long as you do them well.⁵ For more significant cases, use a good trial consultant. Either way, it is foolhardy and some say negligent for you to venture to trial without the guidance of focus group research. This is particularly true with respect to learning what kind of dangerous jurors attributes you need to look for to in voir dire.

FINALLY. Never allow yourself to get so busy that you don’t have time to prepare thoroughly for jury selection. Assemble your questions in advance with care. Know what you are looking for. Practice, as suggested above, more than once. Do not skimp. Jury selection can determine your case.

⁵ See *How To Do Your Own Focus Groups* by David Ball. National Institute for Trial Advocacy, 2001.