

Effective Techniques for Trying Media Cases

Voir Dire Tips in a Media Case

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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).

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