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[LETTER to a young trial lawyer]

VOIR DIRE: LET GO FOR MAXIMUM CONTROL

by GRANT DORFMAN and DAVID BISSINGER

Each side begins voir dire with even odds. Each side receives an equal opportunity to question potential jurors, to argue challenges for cause to the judge and to exercise an equivalent number of peremptory strikes. The goal of the skillful trial attorney should be to improve those odds as much as possible.

The best way to do that is by developing information to maximize challenges for cause. That is because the number of those challenges varies. A poor voir dire may lead to no challenges, but an effective voir dire might result in five or more. Voir dire involves other goals, such as building rapport with the panel and advocating key issues, but by focusing on for-cause challenges, the other goals will follow.

MAXIMIZING CHALLENGES FOR CAUSE REQUIRES A GOOD LAWYER TO YIELD CONTROL TO THE PANEL AND TO ENCOURAGE THE PANEL TO SHARE CONCERNS ABOUT THE CASE THAT THE LAWYER HAS WORKED SO HARD TO ASSEMBLE.

Maximizing challenges for cause, however, requires a good lawyer to yield control to the panel and to encourage the panel to share concerns about the case that the lawyer has worked so hard to assemble. The problem arises in part from modern litigation culture that emphasizes control, not letting go. But a good trial lawyer must give up the kind of control that she exerts during most phases of litigation. As Gerry Spence puts it in his book, "Win Your Case": "A successful voir dire begins with being in the moment. . . . [The lawyer] listen[s] to the other and [focuses] on what is happening, and the feelings that abound — both ours and theirs."

If that seems touchy-feely, then you get the point. Many lawyers dread asking a jury panel the hard questions. As Lisa Blue and Robert Hirschhorn observe in "Blue's Guide to Jury Selection," these lawyers fear "poisoning" the panel — that a panelist will "say something negative and the other jurors will adopt that belief."

But Blue and Hirschhorn's research reveals that these fears have little basis in fact. Panelists rarely change each others' minds. As a result, the trial lawyer should — and must — ask the hard questions. Only then will the lawyer most effectively achieve what U.S. Supreme Court Justice William J. Brennan Jr. described in *Nebraska Press Association v. Stuart* (1976) as the core purpose of voir dire: "root[ing] out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause."

In fact, the good lawyer begins her preparation for voir dire early in the case by asking herself and her client the hard questions. As Judge Randy Wilson of the 157th District Court in Harris County observed in his article, "The Ten Hardest Questions" in the summer 2007 edition of *The State Bar Litigation Section Report*, "[e]very case has warts and problems," and the lawyer has a duty to identify them and help the client deal with them. If the client can answer those questions persuasively, the lawyer should have confidence that at least some of the jury panelists will see things the same way.

Extra Steps

Translating that pretrial work into an effective voir dire, however, takes additional steps. A good voir dire examination

(using open-ended questions to elicit juror discussion on the hard questions) will often create a lively panel that may devour the whole 30 or 60 minutes of voir dire on one issue. Even worse, a few panelists may dominate while others remain silent — until deliberations, at which point neither the parties nor the court can intervene.

At least three techniques will minimize these problems. First, and in keeping with the paramount goal of maximizing for-cause challenges, the lawyer should focus the questioning on whether the panelist has fixed and predetermined opinions or feelings about the key issues in the case. That will allow the lawyer to build a record to support those challenges. Specifically, the lawyer can use what Blue and Hirschhorn call "looping": using one panelist's negative comments to ask whether anyone else on the panel agrees. "Looping" will help divide the panel, positive against negative, to identify likely challenges and strikes.

Second, looping also gives the lawyer a polite way to limit vocal panelists. ("I appreciate your openness with us, Mr. Bissinger. I'd like to ask Mr. Dorfman a few questions about that.")

Third, the lawyer should have several colleagues to help spot quiet panelists and to monitor reactions from the panelists, which can later inform decisions about for-cause and peremptory challenges. Few lawyers can direct a free-wheeling discussion yet still keep track of the panel as a whole.

These techniques can help the lawyer conduct an open dialogue while also maximizing for-cause challenges — again, controlling the time but letting go of the content. When panelists debate each other, the lawyer sees what the jurors' eventual deliberations might look like, who will be her supporters and who will be leaders on either side. This debate sharpens the advocate's ability to maximize for-cause challenges because the advocate can spot — and document on the record — those panelists who have the firmest beliefs.

Again, these for-cause challenges represent the lawyer's single best opportunity to improve her client's odds. Moreover, as the lawyer works to maximize her for-cause challenges, she also will enhance her analysis of the panel to make the most intelligent use of her peremptory strikes. Finally, in approaching the voir dire in this way, the lawyer will show the panel that the lawyer has enough confidence in her case to relinquish control and let the jurors decide for themselves that the lawyer's client should prevail. TNL

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