

Selecting the Best Jury in a Hostile Environment

John F. Renzulli

Renzulli Law Firm, LLP

81 Main Street, Suite 508
White Plains, New York 10601
(914) 285-0700
(914) 285-1213 [fax]
jrenzulli@renzullilaw.com

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JOHN RENZULLI is the founding partner of the Renzulli Law Firm in White Plains, New York. He concentrates his practice in industry wide liability and products liability. Mr. Renzulli frequently serves as lead trial counsel in the defense of major products liability cases and complex civil lawsuits nationwide. He counsels clients concerning product manuals, upgrades, recalls and retrofits. Mr. Renzulli is a member of the New York and Pennsylvania bars, the Westchester Bar Association and DRI.

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I. Introduction

Bob Bradford sat at the defense counsel table one morning in March of 1995 watching as his adversary, Jere Beasley, addressed potential jurors in a case involving alleged violations of Alabama lending laws. Beasley had served two terms as Lieutenant Governor of Alabama and enjoyed a successful career as a quarterback at a local high school. Beasley was also renowned for obtaining some of the largest verdicts in an area of Alabama referred to as the “Beasley Triangle.” The judge presiding over the case, Beasley’s former partner, described him as a little league “hero we looked up to.” After Beasley concluded his *voir dire*, Bradford rose from the table and inquired whether Beasley’s stature would cause jurors to “lean a little bit toward him.” Gregory Jaynes, *Where the Torts Blossom*, Time Magazine, Mar. 20, 1995, <http://www.time.com/time/printout/0,8816,982699,00.html>.

National litigation defense counsel frequently defend cases in jurisdictions far from their home and their client’s principal place of business. Oftentimes the deck is already stacked against them. The plaintiff and his counsel are members of the local community. The plaintiff has been severely, if not gravely, injured. The defendant is a foreign corporation that may be stereotyped as placing profits before safety and defense counsel himself typically hails from out of state. At times, counsel assigned to protect the interests of a corporation must tread in waters similar to those described above and select a jury in a hostile court before an adversary that is held in high regard in the community. This manuscript and the attending presentation discuss the author’s experiences with jury selection in such a climate and attempt to provide defense counsel with advice on how to select the best jury in foreign and hostile environments.

II. Legal Rules Governing *Voir dire*

Voir dire can be conducted in vastly different ways depending upon the court and the jurisdiction in which the case is pending. In federal court, *voir dire* is conducted almost entirely by the judge and is typically confined to a limited number of questions that cut directly to fundamental issues for which a potential juror could be disqualified for such as relationships with the parties and whether they can be “fair” to them. See, *Reynolds v. U.S.*, 98 U.S. 145, 157, 25 L. Ed. 244 (1878); *Geagan v. Gavin*, 292 F.2d 244, 246 (1st Cir. 1964); *Hopkins v. Cnty. Of Laramie*, 730 F.2d 603, 605 (10th Cir. 1984). California takes a similar approach but allows for attorney participation in the *voir dire* process at the discretion of the court. Cal. Civ. Proc. Code §222.5. In states such as New York and Texas *voir dire* is conducted entirely by attorneys. N.Y.C.P.L.R. §4107; *King v. State*, 17 S.W.3d 7, 22 (Tex. Crim. App. 2000). Connecticut allows for extensive individual *voir dire* of prospective jurors. Florida allows attorneys to conduct expansive *voir dire*. Fla. R. Civ. Pro. Rule 1.431(b). Similarly, Illinois allows for both the attorneys and the court to conduct *voir dire*. Ill. S. Ct. Rule 234; *Grossman v. Gebarowski*, 732 N.E.2d 1100, 1105 (Ill. Ct. App. 2000). It is crucially important for defense counsel to become familiar with the manner in which *voir dire* will be conducted in the particular jurisdiction, the number of peremptory challenges and challenges for cause allotted to them, as well as more specific details such as the procedures employed by the presiding judge and local customs.

III. General Principles for a Successful *Voir dire*

Jury consultants and attorneys generally agree upon the goals of *voir dire* and the manner in which it should be conducted. *Voir dire* is rightfully viewed as the only opportunity that counsel has to personally interact with potential jurors on an individual basis and to become familiar with their feelings and experiences by

interposing questions directly to them and studying to their responses. As such, it is vital that counsel establish a positive relationship with jurors during the *voir dire* process. Commentators agree that defense counsel should use *voir dire* as an opportunity to identify problematic jurors that are sympathetic to the plaintiff and those that can potentially award a high amount of damages. *Evolving Juror Attitudes and Strategies for Uncovering Bias: Strategies for Minimizing Damages in High Damages Cases*, [http://www.trialbehavior.com/articles/Strategies percent20for percent20Minimizing percent20Damages.htm](http://www.trialbehavior.com/articles/Strategies%20for%20Minimizing%20Damages.htm); Matthew J. Milano, *Evaluating Damages & Liability: Jury Selection*, DRI Annual Meeting, March 1999 at p. 53. It has been suggested that, in smaller communities where almost everyone in the jury pool has some relationship with the plaintiff, defense counsel should ask questions that impress upon jurors the potential implications that a defense verdict would have on their relationships with the plaintiff. *Trial Behavior Consulting, Strategies for Minimizing Damages*. According to one commentator, juror's life experiences, as opposed to their attitudes, are the most important factors in terms of determining how they will vote. Cynthia R. Cohen, *Effective Defense Voir dire: The Jury Consultant Speaks*, DRI Products Liability December 2000. Defense counsel assigned to represent the interests of a corporate defendant should humanize their client and obtain information as to their perceptions of corporations. Some of these commentators argue that counsel should use *voir dire* as a forum to present case specific themes while others feel that this should be reserved for trial. Gary Moran, Brian Cutler & Anthony DeLisa, *Attitudes Toward Tort Reform, Scientific Jury Selection & Juror Bias: Verdict Inclination in Criminal and Civil Trials*, 18 Law & Psych. Rev. 309 (1994); David Landin *et al.*, *Improving Jury Trial Results with Effective Voir dire*, For the Defense, December 2006 at p. 30. Others contend that weaknesses in your case should be brought out during *voir dire* to prevent or mitigate the sting they may have when plaintiff's counsel addresses these weaknesses during *voir dire* or at trial. Paul Jepsen, *Revealing the Hearts and Minds of the Jury: Six Best Practices for Improving Voir dire Results*, http://www.decisionquest.com/litigation_library.php?NewsID=206; Landen, *et al. supra* at p. 33.

In terms of the manner in which defense counsel should conduct *voir dire*, it has been suggested that counsel should use open ended, direct examination type questions to facilitate fuller and more informative answers. Landen *et al.*, *supra* at p. 33; Kathy Middendorf & James Luginbuhl, *Value of a Non-Directive Voir dire Style in Jury Selection*, 22 Crim. Justice & Behavior 129 (1995). Counsel should also take on a very pleasant demeanor to allow prospective jurors to relax so that they may provide more responsive answers. In this regard, it has been suggested that counsel should reciprocate with potential jurors by sharing information about themselves to facilitate more candid responses and establish a relationship with them. Close ended questions that are typically used on cross-examination which require only a yes or no response are more suited for eliciting information that could potentially be used as the basis for a cause challenge and should not be relied upon to obtain a wide range of information as they often imply an appropriate or acceptable response. Middendorf & Luginbuhl. Both attorneys and jury consultants advocate for the use of juror questionnaires that they view as a superior and more efficient way to obtain candid information regarding the attitudes and experiences of potential jurors. Landen *et al.*, *supra* at p. 31. But see, *Evolving Juror Attitudes, supra* (Arguing that juror questionnaires in "highly prejudicial plaintiff venues" should not be used because they reveal the relatively few jurors that defense counsel would keep allowing plaintiff's counsel to focus his cause challenges.) Demographic information and conclusions formed on the basis of group generalizations have been viewed as having a somewhat limited value. This kind of information, however, should serve as the basis for further inquiry geared toward determining whether the generalization is warranted and the potential juror conforms to commonly held assumptions. Landen *et al.*, *supra* at p. 34. Finally, counsel should evaluate the leadership and communication skills potential jurors display during *voir dire* to determine whether they may be influential in the deliberation process. *Id.* at p. 81.

The most analogous situation to the topic of this presentation discussed in literature on *voir dire* is that of litigation which has received substantial pretrial media coverage. Jury consultants have offered various

pieces of advice on how to effectively conduct *voir dire* before a jury pool that has already been significantly exposed to the facts of the case and the parties through the lens of the news media. Specifically, commentators state that the prior knowledge potential jurors derive from media coverage can lead to preconceived notions and dislike or distrust of one of the parties. Shari Seidman-Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 *Judicature* 178 (1990). Counsel should determine the juror's perceptions of the media coverage they have observed and their attitudes about the events underlying this coverage during *voir dire*. Cynthia R. Cohen, *Effective Defense Voir dire: The Jury Consultant Speaks*, DRI Products Liability December 2000. Providing potential jurors with additional facts regarding the subject of the media coverage may change perceptions. *Id.* Defense counsel charged with selecting a jury before a hostile court and an adversary who enjoys a larger than life reputation must incorporate some of the principles described above into their *voir dire*. Indeed, national litigation defense counsel representing a corporate defendant in personal injury actions is faced with all of the issues that commonly arise during *voir dire*. The deck is already stacked against them as the plaintiff is a member of the local community, has been severely, if not gravely, injured, and defense counsel hails from out of state.

IV. Some Specific Examples of Selecting a Jury in a Hostile Court with an Adversary Who Has a Larger than Life Reputation in that Courthouse and Tips on How to Conduct *Voir dire* in this Climate

This presentation is the product of different experiences that the presenter has had with jury selection in an environment such as the one described above. During the late 1990s I represented a firearms manufacturer in a wrongful death products liability action in Florida state court. Plaintiff was a teacher that was shot and killed by a student who had stolen a family member's pistol. The young man who shot plaintiff was upset with him and sneaked into school after the day had ended. He confronted plaintiff holding the pistol in his face for several seconds before ultimately pulled the trigger. Plaintiff's counsel was the first attorney to obtain a substantial verdict in the recent wave of tobacco litigation and was described by local attorneys as "the Big Daddy of all trial lawyers." Plaintiff's counsel was also well known within the local arts community. He contributed millions of dollars to support the arts, founded a local arts center, was influential in establishing another, and founded a cancer research fund.

Another experience resulted from a products liability action that was brought against a firearms manufacturer in Ohio state court. Plaintiff was shot and lost his leg when his revolver allegedly drop fired. Plaintiff was represented by counsel whose father had a national reputation for being a skilled and successful trial advocate and founded a school to teach others the craft. Plaintiff's counsel's father had won more multi-million dollar verdicts without an intervening loss than any other lawyer in the United States. Both plaintiff's counsel and his father successfully represented high profile individuals in criminal cases. His father also frequently appeared as a NBC legal consultant during the O.J. Simpson trial. Plaintiff's counsel himself also earned several multi-million dollar settlements and verdicts in a variety of personal injury cases throughout the country.

The principles governing *voir dire* in highly publicized cases discussed above do not necessarily translate to selecting a jury in a hostile court before an iconic adversary. The nature of the knowledge that jurors in highly publicized cases have about the case and the parties is similar yet distinct from the knowledge that they possess in cases that will be tried before an attorney who enjoys a substantial degree of notoriety. Prospective jurors in the former class of cases may not have any knowledge of the parties or the incident made the basis of the litigation. Rather, their knowledge pertains to the reputation of the plaintiff's attorney. Given this, a *voir dire* strategy that seeks to mitigate or remove preconceived notions about the facts of the case or

one of the parties by providing potential jurors with additional facts that may cause them to re-evaluate these notions may not ensure that unbiased jurors are impaneled. Knowledge of reputation is not exclusively derived from media accounts of a specific event but is built upon information received from a variety of formal and informal sources on various different topics such as previous victories, philanthropic activities, and personal background. To provide prospective jurors with additional facts that may cast doubt upon the reputation that plaintiff's counsel enjoys would be perceived as a personal attack and would only further alienate out of state defense counsel from the local community. The hostile court would almost certainly frown upon these attempts as well. Thus, conventional *voir dire* techniques for highly publicized cases should be modified when selecting a jury if your adversary is endeared within the community as they speak to related but distinct issues.

At the same time, defense counsel simply cannot ignore the fact that potential jurors may already be leaning toward a local plaintiff and an attorney with a successful reputation. Some of the general *voir dire* techniques discussed above, however, may be modified to successfully select a jury in a hostile court with an adversary held in high repute. For example, by sharing personal information about themselves with the pool, defense counsel can further several purposes that *voir dire* is designed to serve. This information can assuage stereotypes that local community members may have about individuals who hail from the state or region of the country that defense counsel calls home. See, G.W. Allport, *The Nature of Prejudice*, Addison-Wesley 1954 (The more information people have about members of different groups, the less likely they are to rely on stereotypes to form social judgments about them). By volunteering certain personal information defense counsel can also form connections with potential jurors. In venues where a relatively large portion of the population is comprised of individuals who have moved from the state or region of the country where defense counsel hails from, it can be useful to volunteer information and experiences that these prospective jurors may have in common with defense counsel. Defense counsel may also want to incorporate personal information in a question that distinguishes them from their iconic adversary while directly addressing potential bias toward them. For example, Mr. Bradford from the vignette in the introduction could have briefly discussed a modest and unsuccessful political or athletic career he may have had and inquired as to whether jurors would hold that against him. This tactic can also undermine plaintiff's counsel's attempts to use his reputation as a means to sway the pool in his favor and potentially expose these efforts as arrogant.

Poignant questions that seek to elicit potential bias in favor of the reputable plaintiff's attorney may also be useful. For example, if a potential juror were to work for an art gallery that received substantial funding from plaintiff's counsel, defense counsel might ask whether they would feel comfortable sitting next to him at a fundraiser or asking for financial support if the evidence demonstrated that his client was not entitled to recover. *Evolving Juror Attitudes supra*. Defense counsel could also identify the members of the pool who have experienced some form of injustice, whether in the employment setting or the legal setting as a part to a lawsuit, or those who are not comfortable with authority figures. These individuals might see through the hostile court's attitude toward plaintiff's counsel and be motivated to vote for a defense verdict.

V. Conclusion

These are some examples of techniques that can be used when selecting a jury in a hostile venue before an adversary that enjoys a larger than life presentation. Additional techniques will be discussed during the presentation.

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