The Primary Purpose of Voir Dire

Jury Connection, Not Jury Selection

By David W. Hood and Michael J. Barnett

Use your one and only chance to have a bilateral conversation with jurors wisely by making it as enjoyable for them as the circumstances will allow.

There may not be two more famous trial lawyers in American legal history than the antagonists in the Scopes Monkey Trial. The defense attorney, Clarence Darrow, famously remarked years after the trial that we should "never forget, almost every case has been won or lost when the jury is sworn." That sounds serious. Of course this is the same fellow who told the Scopes jury in his final argument: "We cannot even explain to you that we think you should return a verdict of not guilty. We do not see how you could. We do not ask it." So by the end he was not trying to win anyway.

Darrow's counterpart on the prosecution side, William Jennings Bryan, had a more interesting thing to say about determining what type of juror you want for your case:

> Never accept a juror whose occupation begins with a P. This includes pimps, prostitutes, preachers, plumbers, procurers, psychologists, physicians, psychiatrists, printers, painters, philosophers, professors, phoneys, parachutists, pipe-smokers, or part-time anythings.

Perhaps the lesson here is that we should not look for advice from the early twentieth century in conducting voir dire. So let's fast forward to the present day.

Our home district in Catawba County, North Carolina, has two resident state superior court judges, the Honorable Tim Kincaid and the Honorable Nathan Poovey. Judge Kincaid and Judge Poovey are both well respected and very capable judges who have presided over hundreds of jury trials, from chiro cases in civil court proceedings to death penalty cases in criminal proceedings. They both have more experience than most judges, and, in addition, they each have a great deal of common sense.

Yet Judge Poovey thinks that jury selection is absolutely critical to the outcome of most cases and believes lawyers should use nearly all their peremptory challenges in virtually every case to help shape a jury verdict. And Judge Kincaid believes that jury selection is largely irrelevant in most non-death penalty cases and believes lawyers should usually take the first 12 in the box and move on to opening statements and evidence.

How could two judges with similar strengths and abilities from the same part

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of North Carolina hold such diametrically opposed views? To a certain extent judges, and all other lawyers, have differing opinions on many, if not most, trial practice questions, but it seems none so much as jury selection. This is largely the result of the anecdotal nature of trial practice issues. While studies have been done on the effect of certain trial tactics on the outcomes of trials, there are simply too many variables to view the results from these studies as persuasive. You can search the Internet and find experts who believe that jury selection determines outcomes in 85 percent of civil cases, and other experts who found voir dire decisive in only 15 percent of cases. William Jennings Bryan might say it depends on how many pimps and prostitutes you have in your jury pool.

In light of the above, does voir dire even matter at all? Yes, but generally not for the actual selection of a juror or jury per se. While there are ways to lose a civil case by leaving the wrong people on the jury, meaning those with obvious bias problems, it is rarely true that jurors come to serve so predisposed to one side or the other that trial practice just boils down to making sure that you have more red than blue jurors on your panel, or the opposite. There certainly are differences in juror attitudes from one locale to another, but that is something that jury selection can do little to change. There also are marginal benefits to having one juror over another, which in close cases could possibly prove decisive. Generally, however, it is unlikely that the clues that you uncover by brilliant voir dire will translate into a greatly different jury panel in relation to the county's or district's overall jury pool.

Voir dire matters mostly because it provides an opportunity for a lawyer to connect with jurors and a jury. This connection, if done the right way, will almost certainly have more of an impact on a trial and the verdict than selecting any particular juror.

Before we discuss jury *connection*, let us first look at the aspects of jury *selection* that can make a difference during a trial.

Jury Selection and the Importance of a Juror Profile

The most important part of "selecting" a juror takes place before you enter the courtroom: identifying your preferred juror profile. Numerous studies have been conducted to determine whether factors such as occupation, gender, income, religion, or age have consistent effects in the outcomes of cases across the spectrum. Most have found little scientific basis to support the notion that identification of a personality type or combination of traits can predict juror outcomes. Many attorneys believe that this is because jurors do a pretty good job of evaluating cases based on the evidence presented. Others believe this is because the jury system itself is so inherently random that it defies prediction. Nevertheless, most trial attorneys agree that a juror's background can be important to a lawyer's presentation of evidence and arguments designed to persuade that juror in a certain direction.

There are legal limitations on the juror characteristics that an attorney can consider in his or her jury selection decisions. Gender is off the table. *JEB v. Alabama*, 511 U.S. 127 (1994).Race has been verboten since *Batson v. Kentucky*, 476 U.S. 79 (1986).

What about factors that are not prohibited? As Bryan's quote shows, lawyers have traditionally believed that occupation is one of the most important considerations, if not the most important. In America, at least, what we do is so intimately connected to who we are that it dwarfs most other influences. People who run businesses really do often favor defendants. People who work in "soft" sciences or industries, from health care to social service to government really do often favor plaintiffs. As with everything about juror profile characteristics, these are gross generalizations and must be supplemented by the manner and appearance of a juror, your ability to connect with that juror during your conversations, and other factors.

A factor that many think is critical is somewhat related to occupation: socioeconomic status. This is a tricky one, though. Conventional wisdom dictates that the more well-off the juror the better for the defendant in most cases, personal injury or otherwise. This generalization is perhaps subject to exceptions more so than the others. During the trial of a death claim several years ago, by far the worst-dressed juror, with a beard that went down to his waist and who may not have even had indoor plumbing, made the most pro-defense comments you can have in a case like that: "money won't change nothin'," and "I didn't get no money when my mama died," among others. On the other hand, the most professional and likely richest jurors were local college professors, from who knows where, who probably would not have been good defense jurors given the values that such cases have in some states up north or on the West Coast.

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This brings us to geography. Depending on the type of case, where a juror lives or has lived can also be important. For example, in personal injury cases, whether a juror is from the suburban or the rural part of the county or district could matter. Also, if a case involves a well-known local party on one side and a person or entity from outside the county or district on the other, whether the juror has lived in the county or district his or her entire life or just moved to the county or district from a different part of the country might well make a difference. Get to know a jurisdiction very well before jury selection. In some counties there is something akin to open warfare between two cities or towns, or two sections of the county. That kind of bias can be at least as powerful as more general or national trends or controversies. A Hatfield will hate a McCoy even if they do the same job, grow up in the same county, and vote for the same candidates.

While you may not want to be quite as restrictive as the distinguished Bryan, the rule of thumb in personal injury cases is that a plaintiff wants economically disadvantaged and touchy-feely folks whereas a defendant wants business-oriented and less touchy-feely citizens. In contract cases the one who believes his or her interpretation of the writings to be more easily accepted will want more educated jurors than the

side who wants notions of basic fairness to win out instead. These canards, though, are full of exceptions and qualifications, and many lawyers believe that they are too simplistic to be of value.

Voir Dire and Jury "Selection" Questions

After you have identified your preferred juror profile, the majority of your *selection* work is done. During voir dire you will need to ask only a handful of "selection" questions that correspond with the juror profile that you have identified such as occupation, what part of the county or district someone lives and where he or she came from originally. You will also need to ask the "bias" questions that are applicable to your case. For example, if it is a personal injury case, it is important to ask about previous accidents, as well as previous injury claims made of any type. For every "selection" question that you ask a juror, make sure that you include events that may have happened to close family and friends as well. Lastly, you will want to ask jurors if they know the potential witnesses and if they are familiar with the entities or people mentioned in important exhibits. This seems obvious but you would be surprised at how many otherwise good trial lawyers forget to ask those questions.

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And there you have all of the questions that are critical to ask in most civil cases for *selection* purposes. That is not to say that these are all the questions that you should ask. There are others, to be sure. But the point of those other questions is to give you something to talk about with a juror, to help establish a *connection* with the potential juror.

Jury Connection

Voir dire is mostly important, in our opinion, because it allows an attorney to connect with a juror or a jury. This interaction between jurors and the attorneys lays the foundation for the jury-lawyer relationship throughout the rest of a trial. Accordingly, everything in voir dire should be viewed through the prism of *juror connection*, rather than *juror selection*. Lawyers who ask questions that they know might put them in a negative light with some jurors, and justify it with the "duty to my client" rationale, are shooting themselves in the foot. Point that gun of yours in another direction.

Juror Connection Questions

The *connection* questions that we recommend asking in most trials cover the following topics: past jury service, experience in law or medicine, prior testimony in court, other legal disputes, family details, leisure activities, prior relationship with or knowledge of anyone else on the jury or any member of the courtroom staff, childcare obligations, home ownership, and driver's license ownership. It is possible, though not likely, that these answers could matter in your jury selection analysis. But more important, these are topics that jurors want to talk about, which means that you can ask follow up questions that show that you listened to jurors and cared about their answers. In other words, these are questions that allow you to have a conversation. Conversations, after all, are how we establish connections of all kinds, including connections to jurors.

As you connect with a jury make sure to avoid objectionable questions. There are two types of objectionable questions that lawyers ask in jury selection: legally objectionable and tactically objectionable. First, let us look at the legally objectionable questions. We have worked on cases during which the plaintiff's attorney asks the jury pool if they or anyone in their family works for a particular insurance company. Um, not only objection sustained, but mistrial. Then there are the questions such as, "Will you agree to award substantial damages if I prove such-and-such?" An objection to this will usually be sustained as improper staking out of a jury, though some version might not be objectionable: "If we prove substantial damages were caused, would you award what the law provides regardless of the amount?" This is really just a "will you follow the law" question.

A favorite topic of conversation with a jury, usually favored by plaintiffs' attorneys, is to talk about the criminal versus civil burden of proof. This is more of a connection question than a selection question, and thus is pretty innocuous. However, if it strays into asking the jurors what they know about the law, the question will usually result in a sustained objection. You should limit your law questions to things that make it appear that you are just asking a jury to follow whatever the judge tells them the law is. This can be done persuasively to begin your opening statement before it actually begins. But we suggest that you choose your language carefully. You want a jury to forget that this is an adversarial proceeding while you are establishing rapport. If a judge interrupts you with sustained objections it may not seem that you just want a juror to talk to you informally.

How about tactically objectionable questions? Let's talk about politics and religion, shall we? The things that polite people do not discuss. Should they matter in jury selection? Probably. Should we ask about them? Hell no! Remember our prism: connection, not selection. Jurors who tend to vote one particular way in elections are likely to lean one way or the other in tort cases largely because the issue of tort reform has become so politically polarized. There is a reason that the last Republican-run North Carolina General Assembly passed certain tort reform bills, which would not have passed as out of hand when the Democrats controlled the assembly. Similarly, if you don't think that a member of the United Church of Christ likely is biased in a different direction than a member of the Church of God, you are not paying close enough attention to your denominations.

We have heard lawyers ask about these things, directly or indirectly. We have also seen how jurors almost always flare their nostrils when attorneys ask such questions. Although we are not human behavioral experts, flared nostrils do not seem like the reaction that an attorney should elicit. If the information comes out sideways, that is fine: I know witness such-and-such from church, or I know that lawyer because we have worked together on political campaigns. But most people just do not like to talk about their own political affil-

iations or opinions or religious beliefs in front of a room full of strangers. Jurors *are* people after all.

You should also stay away from asking jurors in civil cases about their connections to criminal law, even if you think it highly relevant. We have defended police or other folks in trials when it probably would have helped to know about a juror's past brushes with the law. If a juror wants to tell you about that sort of thing, though, you can elicit it with questions such as, "Anything in your life experience that would tend to make you think the police are probably in the wrong here, before you hear any evidence?" rather than by asking about criminal history directly.

Another set of questions that you should not ask are questions that sound as if they came out of a can. Plaintiffs' attorneys, for instance, often use tort reform questions, and they usually leave jurors shaking their heads, literally. Some questions also have so many big words in them that we urge you to take them out and shoot them. If jurors believe that you are not being straight with them, or that you are not a genuine person, you are in big trouble.

Using Jury Connection to Elicit Jury Testimony

You can and should use your time connecting with a juror to elicit what some experts refer to as "juror testimony." If you have been in a trial when a juror goes off on the tort crisis, talks about how big business is destroying American jobs, or complains about the government either doing too little or too much about particular topics, you know what we mean by juror testimony. How might those attitudes and values affect the ultimate verdict? No one knows for sure, but we sure have secretly winced or woo-hoo'ed, depending on whose ox the juror was goring when this happened.

When connecting with a juror you should look for ways to elicit jury testimony that is favorable to you. If a juror answers a question that sounds as if he or she has some good opinions in your favor, think about whether you can bring that out in more detail in some way by asking follow-up, soft-ball questions. Some trial experts believe that this is a mistake because by encouraging that juror to talk you may end up having the juror challenged by the other side. But our view is that a lawyer on the other side either (1) wishes that he or she had struck the juror but has already accepted him or her, or (2) probably already planned to strike the juror based on the earlier answer. So before that juror exits the stage, we say give him or her a chance to perform a soliloquy in your favor before he or she goes. Again, this might be a little tricky since the person could go off on tangents that are not helpful. Hey, if you want a risk-free life, then go live in a bubble, or become a transactional lawyer.

Conversely, you should, of course, try to limit the possibility of a juror offering jury testimony that works against you and polluting the rest of the jury pool with obviously erroneous opinions. The best way to do that is to remember the old adage from law school about cross-examination: never ask the "question too far." If a plaintiff's attorney detects a tort reformer on your panel based on a previous answer, you certainly wouldn't expect him or her to follow up with another question to disclose the bias more fully. But we have heard opposing lawyers do this many times, and thanked them for it. If it's already known that you will strike someone with tort reformer tendencies, why let him or her speak again for any reason? We actually think that the tort reform-type questions usually yield a net negative for plaintiffs anyway. You start people thinking that, by God, this is the same thing, a personal injury case, that was involved in that McDonald's coffee case. They may never have made the connection without your question. We know the risk on the other side is that you then have kept your closeted tort reformer on the jury. It's a judgment call. But again, we think that your *connection* potential with a jury is better as a whole if you don't bring up essentially political issues during jury *selection*.

Jury Connection in Practice

Even though many judges instruct a jury that voir dire is not the time for lawyers to persuade jurors to vote their way, the undeniable truth of jury trials is that persuasion begins the first time that potential jurors see you get out of your car in the courthouse parking lot. Yes, it is improper to argue your positions in a case overtly to a jury during voir dire, and it will tick off a judge. But everything you do, say, and wear communicates something to the folks around you. If you want to persuade a jury that you are a very successful lawyer who knows what he or she is talking about, drive a flashy car to the courthouse, park it in a conspicuous place, and wear expensive court attire with plenty of jewelry. If you want to tell the jury that you are not a rich lawyer, and thus maybe your client is not rich either, then drive an old car to the courthouse and wear less expensive suits.

Most people just do not like to talk about their own political affiliations or opinions or religious beliefs in front of a room full of strangers.

Once inside the courthouse, remember your manners and open the door for folks. Further, do not skip them in the metal detector line. People hate when lawyers do that, and jurors are actual people, as we said earlier. In a courtroom, when and after a jury pool walks in, do not slouch, wear a smile, act like a reasonable person, and do not whisper too much with your client except at the appropriate times in the jury selection process when making decisions. Make it clear by facial expression or otherwise that you are comfortable in the courtroom, but do not use inside jokes or other things that make it appear that you are a little too cozy with a judge or the courtroom personnel. When having juror conversations, by all means make direct eye contact, even if that involves moving your body or your chair so that you can see and interact with all of the jurors.

Something that you should not do as you are attempting to connect with the jury is cross-examine a potential juror. This seems like an obvious point but it happens more than you might think and more than it should. Some attorneys think that it is the only way to get necessary and truthful information from a potential juror.

This is particularly true when the attorney wants to challenge for cause. Regardless of the rationale, in our experience, it almost always backfires. Even if you excuse the potential juror who you just finished humiliating (and, for obvious reasons, you should) some of the jurors who are selected will no doubt keep the experience in mind throughout the trial and even as they deliberate. Obviously, there are varying degrees of juror cross-examination and some moderate form may be marginally beneficial with relatively minimal risk. In our opinion, however, it is best to stay away from any type of cross-examination whatsoever. If you do not you are interfering with your opportunity to connect with the jury.

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After all, what you want to portray in voir dire is that you are cordial, respectful, good-natured, friendly to everyone, including opposing counsel, and you have a sense of humor. This last point can be very tricky, but if you can laugh once or twice during jury selection it will help make your connections to the jury more genuine. People like that sort of thing. Do not apologize for "prying" into personal affairs because that makes jurors think that you actually are prying, but instead ask the questions that you need to ask with candor and genuine interest. Perhaps most importantly, listen to the answers that you receive from jurors and follow up when appropriate.

Jury Connection and Active Listening

One important aspect of jury connection is active listening. This essentially means listening with the idea of reinforcing a speaker's thoughts and following up with relevant questions and comments to show that you really did pay attention and cared about the answers that you received. This is important to establishing connection, to be sure. But before we discuss this, let's discuss a more basic issue.

You should *actually* listen before worrying about whether you *actively* listen! We cannot tell you how many times this does not happen during voir dire or a trial. Lawyers ask questions to which they should already know the answers because someone has already given them. Sometimes they assume that an answer was x when it was y, just because they did not really listen. Or heaven help the questioner who is just ticking off a list of questions like a grocery checklist rather than actually listening to the answers, which also happens more frequently than it should. This is an obvious point, but it is really hard to establish rapport with a jury if they believe that you do not care what they say.

Regarding active listening, you have several techniques to show a speaker that you care about him or her and his or her responses. One is to repeat certain answers to show that you have listened and to underline an answer for other jurors who need to hear a favorable answer but may not have listened as intently. Another is to ask follow-up questions about, for example, something that happened to someone's aunt or uncle—not because it really matters for selection purposes but to help with your connection to that juror. Look for opportunities to permit a juror to talk about issues that he or she actually will want to talk about, which you can sometimes identify by body language or just with common sense.

Using Your Juror Strikes to Connect with a Jury

Another opportunity to connect with a jury as a whole takes place when you excuse a juror. When it is time to announce your strikes, do not under any circumstances refer to the jurors that you strike as "number 2" or "seat 5" or anything similar. Humans prefer having others refer to them by name instead of by number. More importantly, the other humans whom you will leave on a jury will appreciate that you think of them as people instead of as numbers. This enhances your connection with the remaining jurors. If you have to add the seat number for clarification, fine, but say something similar to "I would like to thank, but excuse, Mrs. Hood, juror number 3."You should mix it up a little, too, so that you do not sound like a robot: "With our thanks, we believe Mrs. Hood may be more appropriate for a different case than this one. We respectfully excuse her from this particular case."

You should also take the opportunity to excuse a juror who you would otherwise want to keep because common sense and decency dictate that it is the right thing to do. For example, if a juror makes it clear that he or she really needs to be at home for a good reason, such as caring for a sick relative, but he or she did not go through the proper procedure to be excused by the judge, you should excuse that person. The excused juror will express gratitude, and the jurors who will remain and with whom you hope to connect will think that you are a nice person. Contrary to what many litigators seem to think, it is a good thing for a jury to think that you are a nice person.

One issue that can come up, particularly in your home county or district, is that you or other attorneys in your firm may indeed have a professional or close personal relationship with a prospective juror but the other lawyer failed to ask his or her questions in such a way to elicit that information. Should you "volunteer the bias" and get that juror out of there? Yes, for the same reason that you should do all of the things that we have discussed: it helps you connect with the jury. It will make the jury think that you are fair and honest, and those are also good things for a jury to think about you when they deliberate in the jury room. In addition, some judges will not like it if you do not volunteer the information. Connecting with a judge is pretty important, too, obviously.

Conclusion

Jury selection is the one and only time that you will have a bilateral conversation with a juror, at least until after a trial is over. Use it wisely by crafting that conversation so that a juror finds it as enjoyable as the circumstances will allow. This will enable you to connect with the juror, which is, or at least should be, the primary purpose of voir dire. If you also can find out useful information for selection purposes, then bully for you. FD