

VOIR DIRE PRIMER IN CASES WHERE RACE OR ETHNICITY ARE SALIENT

The primary goal of jury selection in cases where race is a key issue is not to educate or to change minds; it's to unmask biased jurors, or more precisely, to induce them to unmask themselves. In other words, jury "selection" is a misnomer because the purpose of jury selection is not to select jurors who are receptive to your case. The main goal is "deselection" or identifying those jurors who are less likely to be receptive to your case.

So how do you do that?

It comes to down three steps:

- (1) identifying the values that stand in the way of any juror evaluating your theory of the case based on the evidence and the law;
- (2) framing questions that a juror with those values would want to answer; and
- (3) ask those questions in a completely non-judgmental atmosphere (speak in the language of the jurors you want to strike and convey that you are not judging them).

It's important to note that the deselection approach to voir dire is not rocket science. But it does require a mindset that is distinctly different than other questioning skills in the attorney toolkit. It requires a conversational approach, not an adversarial one. It also requires that attorneys expose the elements of their case that are most likely to trigger biases within the jury pool.

Convey a Non-Judgmental Curiosity About All of the Jurors

- Create a non-judgmental atmosphere. People with strongly held racial views are not going to share their true feelings with you if you make clear from your attitude or the phrasing of your questions that you disapprove of them. Most people don't like the feeling of being judged, and nobody likes being labeled a racist, especially in front of a judge and 70 strangers. What do I know about her/him, and what else am I curious about?

Don't Run From the Bias(es) that Concern You

- If you want to trap a wild animal, wave a steak in front of him. If you want to trap a bigot into sharing his bigoted views, toss him some figurative red meat. Talk about issues he cares about and use buzzwords to get him comfortable and talking. (*Practice pointer: be mindful that if you're representing the United States, you have less leeway in this regard*).
- It may also be useful to think of the bias as bait. If the bias is offered in court [negative experiences with an ethnic/racial group; concerns about the need for a translator in courts in the U.S.; beliefs that some racial/ethnic groups are more prone to crime] then those who hold that bias are likely to bite at the bait, if given the right conditions to admit to their biases.

The Statement of the Case Should Include the Biases that Concern You

- Jurors can't know if they have biases about the case if they don't know about the case. Therefore, your Statement of the Case should include those aspects of the case that are likely to elicit biases. If there are certain drugs (fentanyl, crack, meth) that are at issue in the case, mention those. If there's a neighborhood where the case occurred that people are likely to have opinions about, mention that neighborhood.
- The Statement of the Case should not cross a line to suggest that the Court is passing judgment on either the Defendants, or the strength of the Government's case. Instead, the Statement of the Case should be neutral and factual.

Proxy Questions Are Often Useful to Explore Biases

- Consider designing proxy questions to address indirectly and non-judgmentally the key issues in your case. For example, if you're prosecuting an anti-trans hate crime, don't ask, "*Do you have a problem with trans people?*" Instead, talk about bathroom bills and youth sports bans, and do it in a way that makes clear that you're not taking a side; you're just there to learn more about the juror's views.
- If you're defending a gang case, and the gang members are Latino, you are not likely to get many people to admit, in open court, to having negative attitudes about Latinos. Instead, look for proxy issues, like "*illegal immigration.*" There are some jurors in many venues who assume that some who is of Latinx descent is undocumented. If a defendant does not speak English and needs a translator in court, ask jurors their opinions about people who live in the U.S., rely on the U.S. court system, but do not speak English.

The Language You Use Matters

- When prosecuting the murder of a gender-fluid teenager in a rural, conservative jurisdiction, using PC language and throwing around words like "*gender-fluid,*" was likely going to alienate many jurors. Give careful thought to how you phrase your questions.
- If you have a case where defendants are undocumented, referring to them as undocumented immigrants is likely to discourage people who use the phrase, "*illegal aliens*" from speaking. If the goal is to encourage those people to speak and acknowledge their biases, then you use their language. [Note: *This should of course be done within the bounds of propriety and decency within the venue where the case is being tried.*]

Ask Open-Ended Questions, and Invite Jurors to Answer

- To make it easier for potential jurors to engage with you. Pretend you're a high school teacher for a remedial class on a Friday afternoon. If you just toss out general questions, you're probably not going to get a roomful of raised hands. Which means that you're not getting information, which means you're not doing your job. You have

to force people to answer, so call on people individually. And when you ask them questions, phrase the questions in a way that will elicit an answer. Not “*Do you have strongly held views on X?*”, but “*What are your views on X?*”

Use Jury Instructions about Unconscious Bias

- The Northern District of California has specific jury instructions regarding unconscious bias. Encourage the Court to instruct the jurors on unconscious biases, ideally after the jury has been sworn, and again before deliberations.

Keep Ethical Considerations in Mind

- Prosecutors should be as interested in making sure that jurors are as free from a disqualifying racial or ethnic bias as Judges and Defense attorneys.

Questionnaires are Crucial

- Questionnaires elicit more candid responses on sensitive topics;
- They allow jurors more time to think through questions and give complete answers;
- They encourage shy jurors, who might otherwise not speak up or raise their hands, to share their views;
- They ensure that the venire panel is not tainted by the bias of any single potential juror;
- They expedite voir dire by providing counsel with advance information about each prospective juror—information that could otherwise be obtained only through in-court questioning of each juror;
- They allow for more nuanced questioning than do oral voir dire questions, which must be phrased to elicit yes/no responses;
- They incentivize the parties to pick juries based on information, rather than stereotypes about whether prospective jurors of a particular age, gender, race, class, or education level would be favorable to the prosecution or the defense; and
- They reduce the likelihood, in a racially charged case, that trial will end in a hung jury, or worse: a conviction tainted by a juror’s racial prejudice.

Additional Frameworks for Voir Dire

Regardless of whether the case involves issues re: race or ethnicity, here are three goals to keep in mind:

1) To get information more information about the juror

Most jurors in most cases occupy the middle of the spectrum of experiences and opinions. But gaining as much relevant information about them is important to determine whether the juror is in fact a “neutral” juror.

As you gain more information, you will then need to tailor your questions in response to the juror's statements.

For jurors whose responses are very unfavorable to our case, you will want to pay attention to the second goal:

2) Get the juror dismissed for cause

The questions here will be ones that lead the juror to admit biases that work against our case. For example, *"It sounds to me like you have very strong convictions about a defendant who does not testify in his own defense? ... And it sounds like it would be difficult for you to set those convictions aside if you are asked to be a juror in a case like this one?"* (Questions designed to elicit a cause challenge appear at the end of this memo.)

Occasionally there will be jurors who have biases that favor criminal defendants. In those instances, you will want to pay attention to the third goal:

3) Rehabilitate a favorable juror

These questions lead the juror acknowledge that they can be fair and impartial. For example, *"I understand that you believe that the police planted evidence on your friend, but the question is, will you be able to set aside that experience, and listen to the evidence, and apply the law that the judge will give you to the evidence you hear in court?"*

Make sure that you **PAUSE** between jurors, take the time to collect yourself, and make a real transition from one person to the next. In time-restricted conditions, it is okay to move quickly, as long as jurors are told that you have been given a short amount of time to question them.

As is true for questioning during the trial, timing is as critical while questioning jurors.

Take your time. **Ask your questions slowly**, thoughtfully, and with a conversational tone. Do not speed up because the juror speeds up.

Pause between questions long enough to:

1. Be positive the juror is quite finished.
2. Think a bit about the answer, what is left unanswered, and what your follow up will be, if there should be a follow up.
3. Give the juror a second to relax and catch breath.

NEVER INTERRUPT – (Unless it is clear to everyone in the room that this juror is providing needless details and not answering your question.)

Look at the juror as you ask the question **AND** as they answer.

1. It will help you know when they're done, when they're in trouble, etc.
2. Don't get into a stare-down, but be attentive, polite. Remember, you're not talking to the floor or the lectern.
3. There is no better way to shut someone down and close them up than to ask a question, then look immediately away, as if you don't care what the answer is.

Use your voice and your facial expressions to convey the clear impression that you are very interested in the juror as an individual, and that more than anything in the world, you want to know what they really think and feel about this next question.

Let your voice go up at the end of the sentence for questions that you really want the answer to, and down with closed ended questions during questioning for cause.

TO PIN DOWN FOR CAUSE CRIMINAL DEFENSE

1. Do you think you would probably need less proof than someone else in a case like this one?
2. Is it fair to say that you feel the defendant is probably guilty because the prosecution has gone to the trouble to bring this case to trial?
3. You sound like a person who has very strong convictions about [*the defendant testifying in his own defense; burden of proof is too high for prosecutors*]. It sounds like it may be difficult for you not to imply that the defendant must be guilty if he does not testify, is that correct?
4. You feel strongly about this, don't you?
5. The crime and drug problem has affected you personally, hasn't it? And you feel that, as a result, it would be difficult for you to be a juror in a case like this one?
6. Would you say you are the type of person whose actions are based on their beliefs? So if you feel strongly about something that would likely influence how you might act in a certain situation?
7. Would you say, on this issue, that your reactions, your experiences, your expertise, etc....would be very difficult to put aside?
8. It sounds like you have some strongly-held opinions [*profound experiences, etc.*]. Do you think you can set those beliefs aside, or might they be a factor in how you respond to this case?
9. Please take a moment, and think. Can you say without reservation that, given your beliefs, that the defendant is still presumed innocent?

Useful phrases:

Is what you're saying ...

- That your feelings are such that it would be difficult for you to find for the defendant in a case like this one despite the judge's instructions?
- That the defendant would have an additional burden, because you already feel that if he was arrested, he's probably guilty?
- That your beliefs would not allow you to find for the defendant?
- Do you think you would probably need less proof than someone else?