

***DEVELOPING THE THEORY OF THE CASE IN  
VOIR DIRE AND OPENING STATEMENT***

Presented by

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## I. PRE-TRIAL STRATEGY

### **A. THINK ABOUT VOIR DIRE EARLY AND OFTEN**

The initial interview is the one time during the case when the attorney will be in the same shoes as the potential jurors. An attorney's perception of the case and the issues may be very similar to what the jurors may be thinking and feeling. As the client is telling you about the case for the first time, ask yourself these questions:

1. What are the jury issues in this case?
2. What questions do I have about the facts of this case?
3. What are the facts, issues or problems in this case that cast the client in an unfavorable light?

When jurors first hear about the case in voir dire, they will conduct a similar analysis and evaluation.

As the case unfolds during discovery, subsequent meetings with the client or witnesses and hearings on pre-trial motions, jury issues are constantly being developed. Start framing these issues in the form of voir dire questions. Concentrate on questions that help your case, as well as those questions that must be asked to defuse potential problems. For example in a case involving a drive-by shooting, assume the Defendant has a previous association with a gang. From the Prosecution's perspective, this will be viewed as a helpful fact. From a Defense perspective, this is a potentially serious problem that must be discussed and diffused during voir dire.

By using this develop-voir-dire-as-the-case-unfolds approach, the attorney is frequently identifying issues, writing a few voir dire questions at a time, and putting them in the voir dire file or trial notebook. When all pre-trial motions are resolved and counsel is preparing for trial, the attorney is in a position to go through the voir dire questions he/she has accumulated and can begin the process of prioritizing the issues that need to be covered and the voir dire questions that will accomplish that goal.

### **B. MOTION TO SUBMIT A JURY QUESTIONNAIRE**

The number of judges who will allow a juror questionnaire is increasing. If the Judges in your jurisdiction do not use questionnaires, a Motion for a Juror Questionnaire (see Appendix A of this article) should be filed in an effort to persuade the court to try something new. There are three keys to persuading a judge to use a questionnaire:

1. Questionnaires are granted in the vast majority of cases where the parties jointly move and agree upon the questionnaire's content;
2. All logistical problems associated with a questionnaire must be removed from the over-worked and under-paid court staff. That is, the attorney must be prepared to take responsibility for the preparation, administration, copying, and dissemination of the completed questionnaires. This means bringing a sufficient number of questionnaires, black in pens<sup>1</sup> and clip boards; and,
3. Keep the questionnaire as short as possible, to the point and fair to both sides. In a typical case, the questionnaire should not exceed three to five pages. In more complex cases, the goal should be no more than seven to ten pages. Rarely should a questionnaire exceed ten pages. However, in a case which there has been extensive pre-trial publicity, complex and multi-faceted issues or in a capital murder case, it may be necessary that a more thorough questionnaire be prepared and submitted to the court. A sample questionnaire is attached to this article as Appendix B.

If the Judge has used questionnaires in other cases, obtain copies of them to get a sense of the type and length of questionnaire the Judge has found acceptable. Furthermore, just because a judge has never used a questionnaire in the past, do not assume that the Judge will not allow one to be used. For a more thorough discussion on questionnaires, we call the reader's attention to *Bennett's Guide to Jury Selection and Trial Dynamics in Civil and Criminal Litigation*, West Publishing Company 1993 (Updated 1995.)

**C. REQUEST THAT CHALLENGE FOR CAUSE QUESTIONING BE TAKEN UP AT THE CONCLUSION OF VOIR DIRE**

Challenges for cause can consume a great deal of time in any voir dire. If an attorney has one or two jurors who give answers that suggest further questioning is necessary to determine if a challenge for cause is appropriate, the questioning process can exhaust precious time. Therefore, we encourage lawyers to ask the Judge if further challenge for cause questioning can be taken up at the end of the entire voir dire. We are finding that many judges throughout the State of Texas employ this method.

1. It allows for the maximum use of the attorney's time during voir dire and does not interrupt his/her flow;
2. If the attorney has a talkative juror who is the subject to a challenge for cause on one issue and the juror wants to assert his/her view on another issue, the attorney can be polite and

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<sup>1</sup> Black ink increases the quality and readability of the questionnaires.

not offend the juror by saying, “[Juror’s Name], I know I am cutting you off, but we will be talking with the Judge a little later.”; and

3. By doing the challenges for cause at the end, the attorney knows, *and more importantly, the Judge knows*, exactly how many jurors are being challenged, how many unchallenged jurors are left, and which of the challenged jurors are most likely to be excused for cause.

There are many inherent problems with the challenge-for-cause-as-you-go approach. For example, fully developing the challenges for cause as they arise is not time efficient, other jurors may get bored, qualified jurors may learn how to disqualify themselves, and some cases get reversed because the Judge doesn’t grant an early challenge for cause for fear there will not be enough jurors left. Therefore, counsel would be well-served to ask the Court to allow the additional challenge for cause questioning to occur at the end of *voir dire*.

## **II. TRIAL STRATEGY**

### **A. LEARN, DON’T TEACH**

It is human nature for an attorney who has spent months preparing a case to want to convince everyone in the courtroom that his or her position is the correct one, and that the client is deserving of a favorable verdict. Potential jurors come to the courtroom with a mind set that has developed over the span of many years, and seldom (if ever) will an attorney change a juror’s mind. In fact, it is rare to change a person’s mind and futile to try to change a person’s heart. We suggest that valuable time not be wasted trying to convince anyone to change. Attempting to convince jurors to change will only alienate them, shut down any possible dialogue, and encourage arguments, one-upmanship or lying. It is the wise and skillful attorney who listens to the jurors and learns from them.

The attorney who asks jurors questions with an I-want-to-learn-from-you attitude will find that jurors are more willing to share their feelings or opinions when there is no threat of a challenge or criticism. These jurors will provide the information with which counsel can make meaningful challenges for cause and intelligently exercise peremptory strikes, while encouraging the other panel members to share their opinions or feelings because it is safe to do so.

### **B. NEVER BE JUDGMENTAL OF THE JURORS**

In any meaningful relationship, it is important to trust and not be judgmental of the other person. This is especially true when it comes to jury selection. Too many times lawyers will alienate potential jurors by saying things like, “Do you understand the law says...” or, “Are you telling me that you cannot follow the law?”. When an attorney makes statements like these, the potential juror instinctively feels defensive or put on the spot. Even more damaging is the fact that the other potential jurors will feel empathy for the juror and

animus towards the attorney. A better approach and one that will foster open communication is when the attorney has the courage to commend a juror who has given a painfully honest, yet negative answer. In our view, there is no such thing as a bad answer. The reason for this is because bad answers will open the door to challenges for cause or peremptory strikes. For example, imaging a situation where a juror has said that a person on trial should testify. Instead of responding with, "Do you understand that ever citizen has the right to not testify, and that the State bears the burden of proving a defendant guilty?", say to the juror:

"Miss Smith, I appreciate your honest and candid answer. The beauty of our system is that everyone is entitled to their own opinion. You have had the courage to express yours. Is it okay with you if a little bit later we visit (some attorneys would feel more comfortable saying *talk*) with the Judge about this?"

This non-judgmental approach will be appreciated by the questioned juror and will create a setting that will encourage the other jurors to be honest with the attorney as well.

### C. CONCENTRATE ON THE FIRST THIRTY-TWO JURORS

With *voir dire* time strictly limited, it is important not to use valuable time talking to jurors who will never sit on the panel. Limit questions to the first thirty-two jurors.<sup>2</sup> If some of the first thirty-two jurors will be subject to a challenge for cause, talk to a sufficient number of jurors past juror number thirty-two. For example, if you feel that four jurors may be excused for hardship or subject to a challenge for cause as a result of the prosecutor's *voir dire* or answers contained in the jury questionnaire, then talk to jurors through number thirty-six. The exception to this rule is if there is an expert who can educate the panel on a very important point and whose number is beyond thirty-two. Otherwise, there is no benefit talking with jurors who will not serve, and valuable *voir dire* time that could be used getting to know potential jurors will be wasted.

### D. ORDERING TOPICS

Carefully consider the order in which topics are to be presented during *voir dire*. We encourage attorneys to plan the order of their *voir dire* to be consistent with the primacy/recency theory: jurors will remember the first and last thing they are told. By following this approach, the attorney is emphasizing the strongest aspects fo the case first and last, and diffusing issues and concerns in the middle.

We would recommend that the attorney divide the *voir dire* as follows:

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<sup>2</sup> The number of thirty-two was determined under Texas law as follows: a) twelve person jury; b) the Prosecution is entitled to ten peremptory strikes; and, c) the Defendant is entitled to ten peremptory strikes. If the numbers are adjusted (i.e., misdemeanor, capital murder, multiple defendants, additional peremptory strikes granted, alternates used or probable hardship or challenges for cause are developed during the Prosecutor's *voir dire*), one should adjust the number of jurors whom the attorney questions.

1. Introduction
2. Overview of the Case
3. Strong Topic
4. Areas of Concern
5. Strongest Topic(s)
6. Conclusion

Following this format and employing the techniques contained in this article (looping, closure question, etc.), an attorney can generate a reasonable amount of information on the jurors.

#### E. **STARTING YOUR VOIR DIRE**

We call the very first part of the voir dire process the *Introductory Phase*. The purpose of the Introductory Phase of voir dire is to set the tone and mood for the trial. Properly setting the tone for a case is critical if an attorney wants to conduct an effective voir dire. Remember our fundamental rule of voir dire: **LEARN, DON'T TEACH**. By allowing the prospective jurors to verbalize their opinions, attitudes and feelings, the other jurors are more likely to give candid answers and the attorney will be able to intelligently exercise challenges for cause and peremptory strikes. The key is getting the jurors to open up, and that is accomplished by properly setting the tone.

Let's examine the way many lawyers start their voir dire. It often begins something like this:

**"Good morning ladies and gentlemen. My name is Robert Smith, and I am the attorney who represents the Defendant in this case. This is the voir dire phase of the trial. The words, voir dire, are French and mean, *to speak the truth*. During this process, I will be asking you questions so we can find twelve fair and impartial jurors."**

This is a typical introduction. These words, or words very similar to them, can be heard every Monday morning in courtrooms throughout the state. The only effective portion of this typical introduction is the first sentence, "Good morning ladies and gentlemen." The rest is wholly ineffective and counter-productive. Let's analyze the problems:

1. **"My name is Robert Smith, and I am the attorney who represents the Defendant in this case."** This entire sentence is flawed. The Judge just introduced Mr. Smith, the jurors know he is an attorney and the client has been dehumanized by being referred to as an object "... the Defendant." Right off the bat, many jurors feel the lawyer is wasting time or talking in a condescending manner. Why would a lawyer want the jurors to remember his name, yet not even say his client's name? Instead, the first sentence out of a lawyer's mouth should grip the jury with the importance of the case.

2. **"This is the *voir dire* phase of the trial."** The concept is correct, but the delivery is not effective. The jurors know, either by prior jury experience, television or talking with other jurors in the jury assembly room, that the first part of any trial is jury selection. Lawyers must resist the temptation to begin jury selection with words or phrases with which jurors are unfamiliar (i.e., cause of action, *voir dire*, etc.)
3. **"The words *voir dire*, are French and mean, to speak the truth."** Who cares? Have you ever been at a cocktail party and been asked, "I've been wondering what do the words *voir dire* mean?" No, instead people at cocktail parties want to know, "How can you represent someone who is guilty?" "Why do defendants have more rights than victims?" "How in the world could a jury acquit O.J. Simpson?" These are more substantive, probing and problematic areas that require our attention. Therefore, resist the teaching mode ("... *voir dire* means ..."), and focus on identifying the critical areas of inquiry and formulating open-ended questions that will probe the juror's opinion, attitudes and feelings about the central issues.
4. **"During this process I will be asking you questions so we can find twelve fair and impartial jurors."** In our opinion, this is the single most damaging and destructive sentence of the entire introduction because it will condition jurors to give responses that are perceived as *fair and impartial*. Lawyer Smith is sending the jury a mixed message. On one hand, he has told the jury to speak the truth and, on the other hand, he is saying the only good juror is the one who appears to be fair and impartial. Such a statement provokes the jurors to give responses that create the *impression* of fairness and impartiality, and are not necessarily truthful. Therefore, in the typical *voir dire* the lawyer has conditioned the jurors to give appropriate, but not necessarily honest, responses to the questions asked. Our goal is to obtain honest, albeit at times painful, responses.

With these thoughts in mind, we encourage lawyers to set the tone in the following way:

"Good morning ladies and gentlemen. I am proud to stand here with [Client's Name] and have twelve of you decide this very important case. In this part of the trial, we<sup>3</sup> need to find out your feelings, impressions or opinions about the issues in this case. I want you to know that there are no right or wrong answers. We will be honest with you, and we ask that you be as honest as you can with us."

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<sup>3</sup> In the introduction, there is a constant reference to *we*. The *we* includes the lawyer(s), as well as the client. It is important to refer to *we* early and often. Hopefully, by the end of the case the *we* will encompass the lawyer, the client and the jury.

This introduction is substantively the same, but it sets a much more honest and open tone. There is a lot more a lawyer can say at this point.<sup>4</sup>

## F. OVERVIEW OF THE CASE

An attorney has the right to give a brief overview of the case to the jurors. In *Powers v. Ohio*, 499 U.S. 400, 114 L.Ed.2d 660, 111 S.Ct. 1364 (1991), the United States Supreme Court held, "...the *voir dire* phase of the trial is the juror's first introduction to the substantive factual and legal issues in a case." *Id* at p. 1371.

In many instances, the *brief overview* has often turned into the entire *voir dire*, with a few ineffective closed-ended *voir dire* questions thrown in during the process. The danger of the *brief overview* consuming the entire *voir dire*. Unfortunately, the typical *voir dire* is essentially a Pre-Opening Statement, is not persuasive, elicits little or no information upon which to base challenges for cause or peremptory strikes, and, in our opinion, is the primary reason many judges now impose time limits. During *voir dire*, an attorney must vigilantly resist the temptation to take charge and do all the talking. Remember our message: **Listen, don't teach; Learn, don't lecture; Colloquy not soliloquy.** Therefore, limit the overview to three to five minutes and then go directly into a questioning mode.

## G. THREE TO FIVE TOPICS

Pick the most important areas of the case and fully discussing these topics with as many jurors as possible. The more time the attorney spends asking questions, the jurors are more likely to open up and respond with his/her true opinions or feelings. By touching on a few meaningful areas, the chances are increased that jurors will want to expound on their answers.

## H. TALK TO EIGHT JURORS PER TOPIC

Limiting the number of topics presented to potential jurors increases the number of jurors with whom the lawyer can talk about each subject. It is important to talk to as many jurors as possible in order to flush out unfavorable jurors and to have the favorable jurors educate the rest of the panel. By allowing as many as eight jurors to talk on a topic, the attorney will have established a rapport with at least the first thirty-two jurors, and have provided the panel with the views of many of their fellow jurors on a variety of subjects. Additionally, talking to as many as eight jurors per topic allows the jurors to do the talking which, in turn, may actually encourage the Court to extend the *voir dire* time.

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<sup>4</sup> One point worth mentioning is that if there are any sensitive or potentially embarrassing issues which the jurors will be asked to discuss, the attorney may want to say, "Before I begin asking questions, I want to tell you that some of the questions are in areas we would consider to be private, sensitive or embarrassing. If you would feel more comfortable answering any question in private, please let us know and we're sure Judge Goodperson will let us talk privately. If I were sitting where you are, I'd want to answer some of the questions privately." This type of self-disclosure is an excellent way to get jurors to open up.

## I. ASK A JUROR NO MORE THAN THREE QUESTIONS AT A TIME

It is important to remember that while encouraging the jurors to talk, a lawyer does not spend too much time with the same juror. We recommend asking the same juror no more than three questions at one time. Asking the same juror too many questions may make the other prospective jurors feel slighted or ignored. The attorney also faces the danger of asking one questions too many and making a juror feel like he or she is being cross-examined or put on trial, thus causing the juror to become defensive or embarrassed. Too many questions may encourage a juror to react negatively or show off and speak out just to get attention. Remember, ask a juror three questions and move on to other jurors. If needed, it is always possible to come back to the topic and ask the juror another question or two.

## J. LOOPING

One of the most powerful and effective *voir dire* techniques is called *looping*. Looping is a technique whereby an attorney asks one potential juror a specific questions and the juror responds. The lawyer then uses the juror's name, repeats the juror's exact words, and then asks another juror for a reaction to what the first juror said. A third juror is then asked to respond to the answers given by the first two jurors<sup>5</sup>, with the attorney repeating their answers exactly and always using the juror's name.

This communication technique has many benefits. The jurors are educating each other rather than the panel hearing the propaganda of the lawyers. By repeating the juror's exact words, any juror who disagrees is, essentially, disagreeing with another panel member and not the attorney. Using the jurors' names compliments the jurors who have spent all day being treated as nameless and faceless entities, and the attorney becomes the one person who has recognized the jurors as people. The jurors will feel that they are held in positive regard and that their answers are valued. This technique makes the jurors more likely to share honest feelings and opinions, and is the single greatest tool in encouraging a roomful of strangers to talk about their honest opinions or feelings.

Looping is also an effective way to deal with unfavorable answers. Following an unfavorable answer, a lawyer should thank and praise the juror for the answer. The attorney should explain to the juror and the entire panel that the purpose of *voir dire* is to learn what people's opinions and feelings about certain subjects are, that the beauty of our system is that everyone is entitled to their opinions, and that there are no right or wrong answers, just honest ones. The attorney can then determine how many jurors agree or disagree with the view expressed by that particular juror. Jurors who share a similar opinion or feeling can be identified. Once the attorney has determined this group of potentially unfavorable jurors, he or she can then focus on jurors who are favorable on this issue, i.e., they disagree with the previous (and unfavorable) answer. Opposing viewpoints can then be expressed by the other jurors. By handling an unfavorable answer in this manner, the lawyer has identified potential problem jurors, maintained or increased credibility,

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<sup>5</sup> We have referred to this as the *double loop*.

encouraged further candor from the jurors, and has once again segued back to positive ground by having the good jurors educate the panel.

## K. THE THREE "E's"

As explained earlier, far too many attorneys begin the jury selection process by explaining to the panel that *voir dire* is derived from a French term meaning, *to speak the truth*. We suggest that *voir dire* is more than this. *Voir dire* is an invaluable time during which lawyers should concentrate on what we refer to as the three "E's": 1) Eliciting information; 2) Establishing rapport; and, 3) Educating by having the jurors teach each other.

To elicit information from potential jurors, lawyers must first make it easy for the jurors to open up and share important and personal information. Therefore, we suggest to attorneys that they open lines of communication by briefly sharing important and personal information about themselves. We call this self-disclosure. If an attorney wants jurors to share personal information, then that attorney must be ready, willing and able to do the same and do it first.

*Rapport* means harmony, understanding and camaraderie. Rapport is established between an attorney and a jury by asking meaningful questions and not being judgmental of the juror or their answers. Establishing rapport with the jurors is another powerful tool of an effective *voir dire*. After all is said and done, in a close case the jury usually listens to, remembers, and ultimately sides with the lawyer with whom they have formed a bond. As with any relationship, the foundation of the relationship built between an attorney and his/her jurors begins with the honesty and trust developed during *voir dire*. The jurors will feel that if the lawyer is honest and trusting enough to share the case with them (warts and all), the lawyer will be truthful throughout the presentation of the case. For the attorney, the first reward for this veracity comes when the jurors respond honestly and candidly.

Educating the panel is a critical aspect of an effective *voir dire* and should be done by other members of the panel rather than the lawyer. A lawyer should use open-ended questions so that a juror will reveal an experience or opinion in an area that is helpful to your case. The panel will more likely believe and remember information and knowledge shared with them by one of their peers, than they will if that same information comes from the attorney. Examples of questions that will allow the jurors to educate each other will include the following.

1. What are some reasons why an innocent person would not testify?
2. Would you please share with us any negative experience that you or a family member has had with a police officer?
3. What was your reaction when Detective Mark Furhman took the Fifth Amendment in the O.J. Simpson case?

4. What was your reaction when the F.B.I. falsely accused Richard Jewell of the Olympic Park bombing?
5. What was your reaction when you learned a woman falsely accused Michael Irvin of the Dallas Cowboys of sexual assault?
6. Under what circumstances should a person be allowed to use deadly force to protect themselves or their family?

#### L. CLOSURE QUESTION

As a general rule, we do not advocate asking general questions to the entire venire. Many times, when a probing and meaningful question is asked in a group setting, jurors are reluctant to answer. For example, in this day and age most potential jurors have opinions and feelings on laws, crimes and punishment. Too many times we have heard a lawyer say to the jury panel, "Will any member of the jury panel hold it against the Defendant if he/she does not testify?" We know that many jurors have strong feelings and negative opinions on this topic and will usually share this information when properly asked on an individual basis (i.e., "What would your reaction be if a person on trial did not testify on his own behalf?" or, "What are some reasons why an innocent person would not testify?"). What often happens in a group setting is that no one will raise their hand. General questions to the panel will only encourage the most outspoken jurors to participate. These jurors are just looking for the opportunity to speak their minds. Our goal is to get the other jurors to talk. Therefore, we recommend that an attorney ask specific jurors specific questions until such time as the attorney is ready to bring the topic to a conclusion. That is the time to ask the entire venire the closure questions, "We have heard quite a few of your fellow jurors say they feel that there are valid reasons why an innocent person would not testify. Are there any members of the jury panel who feel differently or disagree? There is nothing wrong with disagreeing, but we need to know, so please raise your hand." Conversely, if the prior jurors said that a person accused of a crime should testify, the attorney should ask a series of questions in the following manner:

Before we leave this topic, I need to ask you as a group, how many of you agree and disagree with Mr. Gray and Ms. Dodson. First, how many jurors agree that a person should testify? Please raise your hands.

After recording the names and numbers of the jurors who agree, ask:

How many jurors disagree with Mr. Gray and Ms. Dodson that there are valid reasons why a person would not want to testify?

Again, record the jurors' names and numbers. This time go back and ask several of the jurors why they disagree. This will reinforce the third prong (self-education) of our *Three E's* theory.

Finally, some jurors will not raise their hands at all. Pick two or three jurors and say:

[Juror's Name], I noticed that you didn't raise your hand. What is your feeling or opinion about an innocent person on trial not testifying?

Flushing out that information brings closure to the topic. It is time to segue into the next area by saying to the panel, "Now I want to ask you some questions about [new topic]."

**M. THREE VOIR DIRE PROBLEMS - "MOST JURORS DON'T TALK; A FEW TALK TOO MUCH; SOME DON'T TELL THE TRUTH!"**

There are three fundamental problems with voir dire:

1. MOST JURORS DON'T TALK;
2. A FEW JURORS TALK TOO MUCH; and
3. SOME JURORS DON'T TELL THE TRUTH!

The best trial lawyers have come to the conclusion that the most effective voir dire occurs when it is the jurors who do most of the talking. Most of the commentators and pundits assert that voir dire is an opportunity for the lawyers to persuade the jurors. In our view, an effective voir dire is an opportunity for the jurors to persuade each other on the issues associated with the case.

A key ingredient in solving the first problem (most jurors don't talk) is to properly set the tone<sup>6</sup>, and then direct specific questions to specific jurors. The second problem (some jurors talk too much) is minimized when an attorney uses this interactive approach to voir dire. There are three options available for handling a juror who constantly raises his/her hand and volunteers information.

1. If the information is helpful, let the juror talk and then use the information by looping;<sup>7</sup>
2. If the information identifies the juror as a potential challenge for cause, say to the juror, "[Juror's Name], I appreciate your answer. If it is okay with you, we would like to talk to you later in more detail with the Judge." This way, when the juror subsequently raises his/her hand, the answer can be cut off by saying, "[Juror's Name], we'll talk to you about this as well," then move on to another juror; and

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<sup>6</sup> The tone is set in the Introductory Phase of voir dire. (See the heading entitled, "Starting your Voir Dire.") Our method is to tell the jurors that there are no right or wrong answers, only honest ones and that the lawyer will ask questions and not give speeches or lecture to the jury.

<sup>7</sup> For more information on this concept, see the heading entitled, "Looping."

3. If the juror is a potential strike and is deep in the panel and may not be reached say, “[Juror’s Name], as you can tell, the Judge has brought in more jurors than we will need. What I am saying is that we will probably not get to you. However, I appreciate your raising your hand, and if we think we may reach you, I will come back to you.” The attorney is then free to go on to another juror, has eliminated the problem, and has not alienated the juror (or any other of the other jurors) in the process.

The third problem (jurors who don’t tell the truth) requires an understanding of why the juror is not being candid. Some of the reasons why this occurs are because:

1. The juror is afraid of being stigmatized;
2. The juror’s feelings conflict with his/her self-perception;
3. The juror has an agenda; or,
4. The juror would rather avoid the issue than confront it.

Being a good listener and carefully observing the juror’s non-verbal communication will help the lawyer identify those jurors who are not being candid. The attorney (or the consultant) must try and identify why the juror is reluctant to be honest. An empathetic approach may flush out the answer. The lawyer should consider asking such questions as:

1. I sense some hesitation in your answer. It is absolutely okay to have some hesitations or reservations; I just need to know;
2. How would you feel if you were chosen to be on this jury?;
3. Have you ever held a different view on this issue and what changed your mind?; or,
4. What is another view that some other jurors might have on this issue?

The reality is that every jury panel has at least one juror who is not being honest. Since time is limited, make some attempt at determining why the juror is not being candid. Ask questions in an empathetic (not confrontational) manner. Many times we have heard jurors say, “Well, to be honest with you...” Those very words can open the juror up to a challenge for cause and save a precious peremptory strike.

#### **N. TOP 10 QUESTIONS AND PHRASES ATTORNEYS SHOULD NEVER USE**

Most of this article is devoted to the techniques or methodology an attorney should use during a thirty minute voir dire. After participating in many trial and reading dozens of voir dire transcripts, we have assembled a Top 10 Questions and Phrases Attorneys Should Never Use in Voir Dire:

10. Do you understand that the law says ...?
9. I take it from your silence that no one disagrees with the proposition that ...?

8. Does anyone have a problem with ...?
7. Will you keep an open mind and not decide this case until you have heard all the evidence?
6. Can you set aside your bias and decide the case on the facts?
5. Has anyone formed an opinion about ...?
4. Can every one of you be a fair and impartial juror in a case like this?
3. Will you promise me that ...?
2. I trust you will agree ...?

And the Number One Question attorneys should absolutely *NEVER* ask as a *voir dire* to the entire panel is:

1. Do any members of the panel have any feelings about ...?

Just remember, regardless of a person's gender, age, race, education, income, occupation, or national origin, everyone has feelings. Some jurors are more willing to express their feelings, while others have a harder time doing so. The question to ask is, "What feelings do you have [Juror's Name] about ...?"

### **III. CASE SPECIFIC QUESTIONS FOR A SEXUAL ASSAULT OF A CHILD PROSECUTION**

#### **A. DEALING WITH THIS TYPE OF CASE**

Attorneys should be hyper-sensitive to the fact that all jurors have very strong feelings about allegations involving molestation or abuse of children. This is certainly a fact that the jurors will be thinking about and talking about during deliberations. Attorneys should deal with this matter head on at the beginning of *voir dire*. The attorney should self-disclose his/her understanding that all of us have very strong feelings about these types of cases and should admit that the attorney also has strong feelings. By self-disclosing your feelings, you are more likely to have jurors tell you about their feelings. Some sample questions that can be used to get the jurors talking are as follows:

1. **When I hear of an allegation that a child has been sexually molested or abused, I can't help but think about my daughter and what feelings I would have if something like that ever happened to her. Many people have strong feelings about these types of**

**allegations. What are yours, Mrs. Brown?** (Attorneys should then loop to several other jurors.)

2. **Given your strong feelings, wouldn't [Client's Name] start out with one strike against him?**
3. **Many people will say that they can set strong feelings aside and judge a case strictly on the evidence. Please help us by sharing with us what process you would go through to keep your strong feelings regarding these issues from influencing your verdict.**

## **B. MAKE A FEAR LIST**

Attorneys should identify everything that scares them about their case and make an exhaustive list of questions that deal with the issues that will come out during the trial. This list should include questions relating to the following:

1. What facts are you most afraid of the jury hearing about?
2. What are you most afraid of the jurors thinking when they hear the evidence?
3. What are you most afraid that the jurors will talk about when they begin their deliberations.

Attorneys should get the jurors to talk about the issues on their fear list during *voir dire* because you can be assured that they will be thinking about them and talking about them during their deliberations. You should get into the fear list questions as early as possible during the *voir dire*. The attorney should admit to the jurors that he/she is afraid of these issues and give the reasons why you are fearful. Be sure and ask open-ended questions to allow the jurors to express their true feelings regarding these sensitive issues.

## **C. COMMUNICATE THE THEORY OF THE CASE WITH OPEN-ENDED QUESTIONS**

During this phase of the *voir dire*, the attorney is allowing the jurors to educate themselves as to their life experiences that are consistent with the theory of the case. For example, if your theory is that a child mis-interpreted the actions of an adult and overreacted to it, you might want to ask these type of questions:

1. **Mr. Williams, have you ever done something that was mis-interpreted by someone else? Tell us about it.**
2. **Ms. Adams, have you ever misinterpreted something that was done or said to you? Tell us about that.**
3. **Mr. Smith, have you ever had anyone misinterpreted something you have said or done and had that person overreact to it? Please tell us about it.**

4. Ms. Jackson, if a child overreacts and causes the police to be called, and an adult is arrested, do you think it would be easy or difficult for the child to later say "I overreacted"? Why or why not? (Loop to several other jurors.)
5. Has anyone ever known someone who overreacted to a situation and got in too far to back out? I need your help on this. Can anyone think of an example where this has happened?
6. Mr. Wynn, how might a twelve or thirteen year old girl confuse attention or affection as a sexual advance? Please give us your thoughts.

**D. MAKE THE JURORS AWARE OF FALSE ALLEGATIONS**

One of the most important things an attorney can do during *voir dire* is to make the jurors aware of false allegations. Some questions that can be used to get the jurors thinking and talking about false allegations are as follows:

1. Has anyone ever been accused of something that they did not do? Do you remember how you felt?
2. Has anyone ever been punished for something they did not do? Do you remember how that made you feel?
3. Has anyone ever accused someone of doing something, and you later found out that they did not do it? How did that make you feel?
4. Did anyone accuse someone of doing something and then punish them, only to find out later that they did not do it? Do you remember how that made you feel?
5. Would it be easy or difficult for a child to convince a parent that she was touched improperly? Why?
6. Would it be easy or difficult for a child to convince a police officer that she was touched improperly? Why?
7. Would it be easy or difficult for a child to convince a doctor that she was touched improperly? Why?
8. Some people believe that there has been an increase of false reports by children regarding sexual molestation. How do you feel about that, Ms. Reagan?

9. Mr. Bush, do you feel that every allegation of sexual molestation should be considered true? Why or why not? What would happen if every claim was automatically considered true?
10. What would you do if a child falsely accused you of sexual molestation? How would you go about proving that you did not do it? Do you think it would be easy or difficult to prove that something did not happen?
11. Has anyone ever promised their child that if they claimed a person did something bad to them, you would believe them no matter what? Should this be extended to other children, even children that you do not know?
12. Has anyone ever known a child to fib or lie about something important? Tell us about that. Why would a child do that?
13. Mr. Clinton, what are some reasons you could think of that a child would not tell the truth?
14. Mr. Gore, do you think a child could make up a story about being sexually molested and fool everyone? Why?
15. If a child tells a false story over and over to a number of different people, what effect would it have on the child? Why? If an adult praises the child for reporting the incident and reinforces what the child says, what effect would that have on the child? Why?
16. Have you ever volunteered to work with children in the past? Given the number of false allegations, how do you feel about working with children now? Why?
17. Have you ever truly believed something that your child told you, and it later turned out to be false? Please tell us about that. Were you absolutely convinced that your child was telling the truth? How did it make you feel when you found out that your child had lied to you?