
The “Art” Of Jury Selection

by John D. Gilleland, Ph.D.

Much has been made in recent years about the notion of scientific jury selection. Sophisticated polling techniques, the ability to investigate the backgrounds of potential jurors through public and paid databases, and the profiles developed by social scientists – all arm the modern litigator with the “scientific” equipment they need to assist in selecting a jury.

Yet most seasoned litigators (and seasoned consultants) recognize that there will always be an “artful” component to the jury selection process. Although a well-conducted poll may tell you that 70% of older males with moderate contract experience will be strike material, that still means someone has to judge if *this* older white male is in that 70% – or whether he is in the remaining 30% who actually might be willing to listen fairly to your themes.

Although having demographic information and on-the-spot body language is sometimes useful, we have found that it is primarily jurors’ life experiences and attitudes, and how those factors interact with your fact pattern, that will ultimately decide how a juror views your case. This is why, at Kroll Ontrack/TrialGraphix, we focus on understanding the way in which you plan to try the case – so we can better comprehend how you will

be persuasive and what type of person may not be open to your themes.

The bottom line is that it is always important to get to know more about the potential juror, and to try and ascertain how their particular background is going to interact with both the fact pattern being presented and with your specific style of communicating the case. Obviously, this indicates a strong need for attorney-directed voir dire, or at a minimum, attorney follow-up to questions asked by the judge.

VOIR DIRE GOALS

There are any number of objectives to be accomplished during the voir dire process. Some of these are obvious and are frequently enumerated in the literature. Others are a bit more subtle and take considerable practice to master. Over the years, we have identified several fairly simple guidelines that just about anyone can use to be more effective at drawing out needed information from potential jurors.

The first thing to remember is that during this initial questioning of the prospective jurors, a number of competing influences affect their attention and behavior. For example, most are new to the process, they are a bit confused as to

KROLL ONTRACK®

TRIAL GRAPHIX.

the “proper” way to act and respond, and they are uncomfortable with public speaking. They are hoping they *don’t* have to serve, and they are frequently not yet completely attuned to the adversarial nature of the dispute. This is counsel’s first opportunity to meet the panel members and to be of assistance in guiding them through the jury selection process.

1. Try to start off on the right foot.

In our experience, the panel receives its first exposure to the case from the judge. The judge usually introduces the case and includes a generic description of the facts. Unfortunately, the judge may inadvertently frame the facts in a manner prejudicial to your client. We therefore recommend supplying the judge with a case description from which to read or draw on in his comments to the prospective jurors. Making the description evenhanded or “fair” can assure both sides that the other can’t object and that the judge may actually use it as written.

2. Develop a rapport with the jurors.

Although you can’t make someone like you, social psychological research has shown there are a number of things you can do to endear yourself to strangers. Although it seems obvious, many attorneys need to be reminded to be friendly; this is not cross-examination. Smile. If possible, address jurors by name (not number), make eye contact, and, most importantly, *listen to the answers they give*. Show an interest in what they have to say by asking for clarification, by moving to the next easy follow-up question, and then by engaging in a conversation (not a question-and-answer session) about the topic at hand.

Use *personal space* to your advantage. Friendship and intimacy are frequently demonstrated by how one uses “personal space,” both your own and theirs (lawyers in criminal cases are frequently advised to “lay hands” on their client during introductions as a sign of true belief in the defendant’s case). If possible, move closer to the juror you are talking to, but if the juror is at the rail, be careful not to “invade” their space by moving too close. Remember that men are more territorial than women regarding “their space.”

Use *self-disclosure* to your advantage. There is a norm of reciprocity in our society, and when

you share some personal fact(s) with people, they feel obligated to share details of their own lives in return. Note that this obligation can be interpreted as a *burden* if the individual feels “forced” to self-disclose; therefore, it is important to carefully pick and choose your own disclosures and which jurors you confront. When a prospective juror tells you she had training in sales and once worked on a straight-commission job, if applicable you can self-disclose and probe with follow-ups:

“Really? I worked selling vacuum cleaners on commission in college during the summer, but my job was really cold-call sales. I didn’t compete with any other manufacturer. Is that the type of sales you’re referring to? Or were you really submitting a bid that the customer would compare to other vendors? And did you ever have the feeling the decision had already been made, and your bid was not even really being reviewed? Was this a situation where the lowest bidder would always get the job?”

But be careful. Many lawyers try to make *each* juror their “friend” through *inappropriate* self-disclosure. This is transparent, and should be avoided, particularly when you are representing the defendant and you have less opportunity for lengthy follow-up with each juror. In these instances, attempting to befriend everyone will certainly offend some jurors.

3. Begin framing your themes and defenses in your statements and questions.

Voir dire is the perfect opportunity to let jurors know “what this case is really about.” Since the process is fairly informal, you can usually introduce your questions by explaining “why we need to know these things.” For example:

“This case will involve lengthy testimony about the competition between these two companies for the same customers. You’re going to hear about claims from the plaintiff that my client used unfair sales tactics. My client will stand behind its sales practices as being typical of normal good old American competition. So I need to ask about your experiences with submitting bids for work, whether or not you compete with others on a day-to-day basis, and your general views on competition for customers.”

4. Try to expose your strikes and cause challenges without revealing those you want to keep.

Although we believe the more knowledge you have about prospective jurors the better, you do not want to expose those who may be more sympathetic to your position. The goal should be to expose your “strikes” but hide your “keeps.”

This can often be accomplished by asking *unbalanced* questions; that is, questions or statements with which only the most biased individuals will agree. Consider, for example, if you ask the following balanced question of 40 prospective jurors: “Do you think some salespeople would purposefully lie about their competitors to discourage potential clients from dealing with them?”

Perhaps 20 will agree that in fact some salespeople would use unfair tactics, while 20 will not agree with the statement. Contrast this with the unbalanced version, essentially asking the 40 panel members if they have a bias against salespeople in general:

“Do you think *most* salespeople would purposefully lie about their competitors to discourage potential clients from dealing with them?”

Here it is much more likely that with such absolute phrasing, perhaps only five jurors will agree.

5. Elicit public pledges from jurors.

Both psychological research and numerous post-trial interviews have taught us that obtaining public pledges from prospective jurors during voir dire sometimes actually works. Public commitment, or things said in front of other jurors, is much more difficult to “go back on,” and jurors will hold each other to the promises they made to counsel and the court.

An example would be a promise not to let the employment practices at one’s own company interfere with judging the conduct and procedures of the defendant employer:

“Mrs. Jones, I’m not asking you to set aside your knowledge of how your own employer does business. But if you, or any other juror, find yourself comparing the actions of my client to what ‘your company would have done,’ can

you promise me to stop, set that aside, and go back to making a determination for this case – based only on the facts in evidence and the law as given to you by the judge? Can you promise me if someone on the jury inappropriately brings in facts from the practices of other companies or other situations, you will stand up and say ‘stop,’ and refocus the jurors on the task at hand? Can you promise to do that?”

Such pledges are commonly solicited for standing firm against opposing opinions, keeping sympathy out of decisions, and not concerning oneself with issues of insurance coverage.

These represent some of the most common voir dire objectives. Remember that the most important goal is to talk to jurors, not at them – to actually listen to and care about the responses they give you – and to strive to actually be thoughtful and concerned about placing the most open-minded jurors in the box to hear this case that is so important to you and your client.

©2005