

Top Five Voir STRAT

By || **LISA BLUE BARON AND ROBERT B. HIRSCHHORN**

For many lawyers, jury selection is the most difficult component of a jury trial. By their nature, trial lawyers love to maintain control, and they do so in prepared and scripted opening statements, closing arguments, and direct examination. The same is true of cross-examination, when a witness may be impeached with prior inconsistent testimony from a deposition. But jury selection is completely different. The lawyer can prepare and script the questions, but there is no telling what course and direction a prospective juror's answers will take.

The beauty of voir dire is that lawyers give up control but still have a voice in the process—even when the time allowed is severely restricted (as it is in most federal courts). When lawyers are allowed to participate in voir dire, the goal should be to use the time efficiently. The strategies that follow can facilitate that objective.

1 PREPARE A QUESTIONNAIRE. You will always learn more about a juror from a one-page questionnaire than you will from a one-hour voir dire. Why? Because most jurors feel more comfortable writing their answers than publicly answering questions. This is especially true if your case involves sensitive, private, or divisive issues. If your case is important enough to take, it should be important enough to prepare a thoughtful juror questionnaire. This tool is only effective if you make every question count: Think about and include the key liability and damages questions, and ensure that you include questions proper and relevant to exercising challenges for cause or peremptory challenges.

Jury selection can be long on twists and turns, but short on time. Follow these steps to efficiently assess potential jurors' core values.

Dire

VOIR DIRE

To pass the scrutiny of your opposing counsel and the judge, the questionnaire also must be fair to both sides, so be willing to edit, add, and delete questions if that is what it takes to have all parties agree to use the questionnaire. The final hurdle is convincing the judge. Many judges encourage the use of questionnaires because it saves time and often identifies potential hardship and cause challenges. Judges who disfavor questionnaires often complain that they slow the process because of the time required to have the questionnaire filled out, collected, copied, and reviewed by the lawyers. This is a valid concern with lengthy questionnaires, but the time requirements are minimal for a

one-page triplicate carbonless questionnaire that eliminates the need for copying. The bailiff simply collects the questionnaires after all the jurors have completed it; the original is given to the judge, and one copy goes to each counsel. Once distributed, the court may give the jurors and lawyers a short recess so the answers can be reviewed. Or, although it is less desirable, the court may allow the lawyers to review the answers as the court conducts its voir dire.

2 KNOW THE LAW. Every trial lawyer needs to know a handful of important jury selection cases—be ready to recite them.¹ Prepare a notebook with jury selection cases (with copies for the

judge and defense counsel), and, most important, learn the key words or specific phrases prospective jurors need to use or affirm to justify challenges for cause. In many states, a panel member who states that he or she has a bias or prejudice can be stricken for cause.

3 ASK CORE VALUE QUESTIONS. In every civil jury trial, there are a few core voir dire questions you should always ask. Whether the time for your voir dire is limited or unlimited, here are three questions you should unfailingly ask the panel in the juror questionnaire or in jury selection:

- If a loved one of yours were severely injured or killed due to the



negligence of another, would you sue?

- Tell me the names of three people (living or dead) you admire or respect the most and three people (living or dead) you respect the least.
- On a scale of zero to 10, with zero being strongly agree and 10 being strongly disagree, what number would best reflect your view of the following statement: If a defendant’s actions or inactions harmed another, the defendant should be held responsible and accountable.

The purpose of these questions is to reveal the potential juror’s core values, which give lawyers a sense of what is important to the juror. For example, if a juror writes that the person he or she admires most is a family member, such as the juror’s father, you might consider putting the client’s father on the witness stand during the trial. Or if potential jurors say the person they admire the most is their boss, try to get the plaintiff’s employer to testify. Conversely, if a seated juror says that the person he or she admires the least is his or her boss, you should not put the client’s employer on the witness stand.

4 USE POWERPOINT PRESENTATIONS. The vast majority of jurors are visual learners. You can appeal to this kind of juror by preparing a PowerPoint presentation for your voir dire. Many courts will permit this, but if a judge resists, you should argue that if you can “say it,” you should be able to “show it.” Alternatively, you may persuade the judge by arguing that the use of PowerPoint will streamline the process, allowing more efficient use of your time in jury selection.

Your slides need to be easy to understand, free of typographical errors, and in a font large enough to permit every juror to read them. Jurors get frustrated when there is something on a screen that they cannot see or read. Bring a large screen for the presentation, or use the

courtroom screen, but ensure that everyone on the jury panel can see your slides.

The number of slides you use will be governed by the time the judge has allotted for jury selection. If you have 30 minutes to conduct voir dire, five or six slides should be appropriate. If you have an hour or more, you have sufficient time to cover eight to 10 slides. At a minimum, your PowerPoint presentation should contain slides that identify the parties, the issues in the case, and key legal concepts, as well as several scaled questions.

When the court has placed time limits on jury selection, scaled questions are the single best device for obtaining information from every juror and identifying potential challenges for cause. Here are two examples:

Scaled Questions

If a worker gets sick from working conditions, it is the worker’s own fault.

0 1 2 3 4 5 6 7 8 9 10

.....

Strongly Disagree Strongly Agree

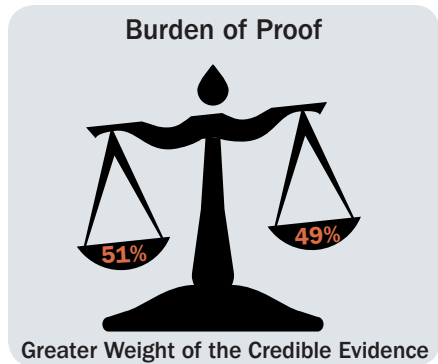
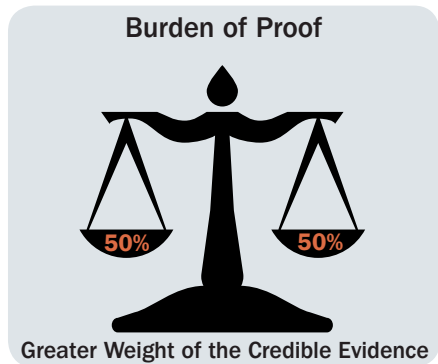
I would require the plaintiff to prove their case by more than a preponderance of the evidence.

0 1 2 3 4 5 6 7 8 9 10

.....

Strongly Disagree Strongly Agree

If a juror answers the burden of proof question by giving a number demonstrating a bias for the plaintiff's position, that answer does not constitute a challenge for cause. Instead, you need to identify all the jurors on the panel who fall into this category, and educate the panel on the case law and the definition of preponderance of evidence:



Follow up with questions that will determine whether the juror is unable to apply the law and therefore subject to a challenge for cause.

5 MAXIMIZE CHALLENGES FOR CAUSE. These three principles can guide you in maximizing challenges for cause:

- Let the jury panel know it is normal and human nature to have opinions—even strong opinions—about certain topics.
- If a juror has such an opinion, advise the juror that he or she will be doing the honorable and right

thing by letting the court and both lawyers know.

- When a juror expresses an opinion, do not challenge him or her for cause at that point, but instead praise the juror's honesty. Next, inquire whether anyone else on

the jury panel feels the same way. This is a form of looping, so that prospective jurors feel they are not alone in their thoughts and feelings. Once you have identified all the jurors who share the same opinion or belief, go back to the initial juror and box that person in: Make

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it hard for him or her to retract a prior statement. Why? Because in some states a lawyer may try to get a panel member to change his or her mind even after indicating a bias. When you ask your “for cause” questions, frame them in a way that makes the juror feel comfortable agreeing with you, as in this example:

Q: Mr. Smith, you told us that you do not believe in awarding damages for mental anguish, and a number of jurors felt the same way you did. I have the sense that you felt strongly about this, is that right?

A: That’s right. [Lawyer slowly nods head to reinforce a “yes” response.]

Q: Would you agree with me that it is human nature that when we feel

strongly about something, we rarely change our mind or set that view aside?

A: Yes.

Q: What I hear you telling me is that even if supported by the facts and evidence, you do not think it is right to award money for mental anguish?

A: That’s right.

Q: So, on this issue, what you are telling us and the judge is that you are starting out with a leaning or prejudice, or what the law calls a bias or prejudice—is that fair to say?

A: I think that’s fair. [Lawyer nods head to encourage the panel member to talk.]

Q: Would you agree that if the lawyer



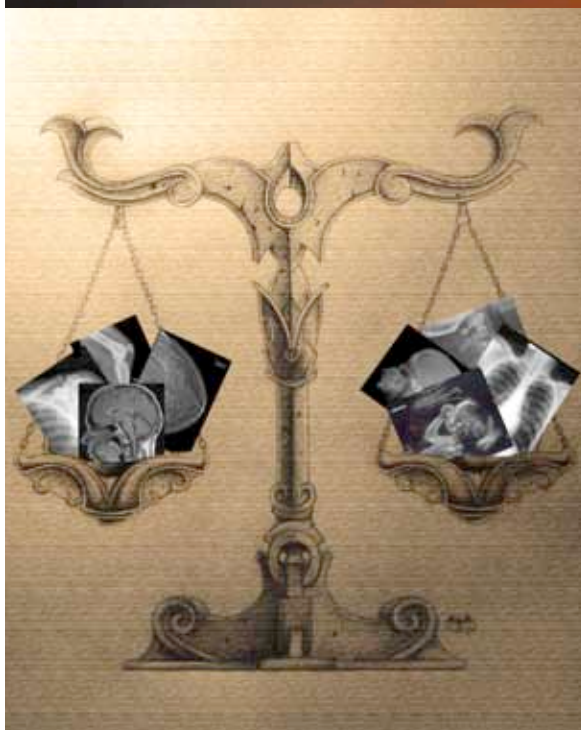
for the corporation or even the judge asked you these questions, you would answer the same way?

A: Yes, I would.

[Lawyer addresses another member of the panel.]

Q: Ms. Reece, you also raised your hand. Would you agree that you would answer the questions the same way as Mr. Smith?

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A: Yes, I would.

Q: The rules require me to ask these specific questions, and that is why I'm having to repeat myself. I need you to answer this question with either a yes or a no. What you are telling the judge is that you are starting out with a bias or prejudice or, as some folks say, a leaning, and that your answers would be the same whether the lawyer for the defendant or even the judge asked you these questions? Your answers would definitely be the same, correct?

A: Yes, my answers would be the same.

Given these answers, you should move to strike this juror for cause. If the judge denies your challenge, preserve the issue for appeal by

following the required steps in your jurisdiction.

Apply these five voir dire strategies in your next trial, and you will learn more about your panel, engage every juror, better identify grounds for challenges for cause and peremptory strikes, and end up with a better jury—increasing the likelihood of a just verdict. 



Lisa Blue Baron is a partner with Baron & Blue in Dallas. She can be reached at lblue@baronandblue.com. **Robert B.**



Hirschhorn is an associate with Cathy Bennett & Associates in Lewisville, Texas. He can be reached at rbh@cebjury.com.

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Blue's Guide to Jury Selection by Lisa Blue Baron & Robert B. Hirschhorn (AAJ Press/Thomson Reuters)
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NOTE

1. In Texas, for example, the key jury selection cases are *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005) and *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743 (Tex. 2006).

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