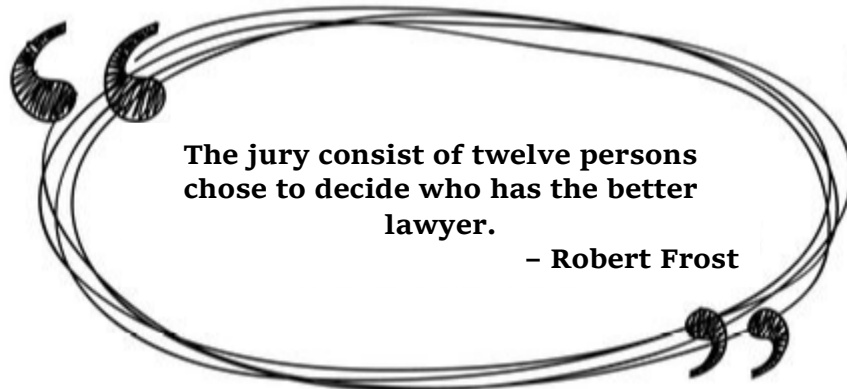


Chapter 3

VOIR DIRE

Voir dire ... not a fan. But if we have to do it, we should do it in a way that does not tank our credibility with the members. Voir dire should not be a competition to see who can ask the most questions, or the “cutest” ones. You are not going to “win” a case in voir dire so relax and let the PrimeCOLE Hippocratic Oath guide your efforts.



Chapter 3 – Voir Dire



Voir dire is terrible. And on the whole we are terrible at it, particularly the “youngs” but also many of us “olds.” But relax, *voir dire* is also not the key to victory. You may have heard this before—mastery of the facts and evidence is the key to victory.

Too often, unfortunately, *voir dire* is the key to crashing counsel’s credibility with the members. Particularly in the military, *voir dire* is awkward. We invite (order) a group of senior military members into an unfamiliar process, make them dress up in their least comfortable uniform, seat them in a tiny box, and then as soon as they first enter the courtroom stare them down like caged animals at the zoo. Awkward.

Then the first time counsel, typically a nervous junior officer, interacts with these senior members he or she starts by probing them, asking them unexpected questions about their background and their beliefs. Also awkward. And then usually that *voir dire* quickly goes off the rails—counsel repeats, with or without minute variation, the judge’s earlier questions; or engages in a seemingly endless series of obvious, yes/no-answer, “would you all agree the sky is blue”-questions in a thinly-veiled, and untimely, effort to argue their case; or calls on a particular member in a painfully awkward and usually unsuccessful attempt to “start a dialogue”; or actually starts a dialogue and once unmoored from their written questions bumbles it so badly that the judge has to interrupt to save counsel from their own bungling to un-pollute the pool. Or more likely, a little bit of all of the above.

That is not just awkward, it all undermines counsel’s credibility for little, if any, gain. The members’ data sheets and the judge’s initial questions to them provide 90 percent of the fodder for either requesting individual *voir dire* or exercising challenges. Never in feedback with



Never in feedback with members has one ever remembered the *voir dire* process for anything good—they either have no recollection of it (most often) or remember some credibility-crushing thing counsel did



members has one ever remembered the *voir dire* process for anything good—they either have no recollection of it (most often) or remember some credibility-crushing thing counsel did (*see* “**staring**” below).

So relax. During *voir dire*, be guided by the PrimeCOLE *Voir Dire* Hippocratic Oath—“first, do no harm.” For the prosecutor, get in and get out as quickly as reasonably possible. This will sound crazy when your colleagues are bragging about the 80+ question *voir dire* they cut-and-pasted together, but for the normal case, the non-murder cases, limit your *voir dire* questions to a no-more-than 15-question, and frankly I prefer, a 10-question limit. And these 10 to 15 questions should be laser focused on drawing out actual bias relevant to the key issues in your case. If you have experts in the case, ask a question related to members’ knowledge and experience in the expert’s field. If interpretation of technical details is important to your case, ask a question related to the members’ scientific backgrounds and familiarity with the subject matter. If there is a victim in the case that went through (allegedly) a traumatic event, ask a question related to the members’ experience, directly or indirectly, with such a traumatic event.



Limit your *voir dire* questions to a no-more-than 15-question, and frankly I prefer, a 10-question limit



Even if the judge allows it, do not attempt at all or at least at length to secure the members’ agreement to your theme and theory (the “Would you all agree the sky is blue” questions). Without context of the

facts of the case, the members are not going to be swayed at this stage of the trial. Nor are they going to feel like they have made a “deal” with you that they can’t later break during deliberations, after being presented with facts that add nuance to their earlier agreement, facts they were not contemplating when they shook their heads up and down answering your obvious-answer question during *voir dire*. Save the “argument,” the theme and theory development, for opening statement when the members start paying attention.

One exception to this rule: You get one theme or theory *voir dire* question to loop back to during closing argument. It is a sign post to the members that offers a tantalizing clue about something coming out in the evidence that you believe they need

to pay attention to. That *voir dire* question thus serves as the foundation for the line in your closing argument that starts, “remember when in *voir dire* we talked about X and you all agreed Y.” Maybe it is something creative that highlights how powerful circumstantial evidence can be, or the importance of direct evidence—seeing or hearing to believe (if you are lucky enough to have audio or video evidence), or one of my favorites, factors which enhance or detract from credibility.

🚒🚒🚒 Or one of my other favorite arguments—the effect of trauma. In closing argument in a sexual-assault case I often take on the potentially “bad” fact that the victim acted “counter-intuitively” during the criminal act, *e.g.* “freezing” and not verbally or physically resisting the attack. During *voir dire*, I will often ask the theory question, the obvious-answer question, “Do you all agree that every person is different, and that individuals can react differently to the same type of traumatic event?” The members all shake their heads up and down in agreement with my obvious-answer question. The members are then on notice that perhaps they should not draw a conclusion about a victim’s reaction during the attack the first time that they hear about that victim “freezing”; perhaps they will actually wait until deliberations, as they



are supposed to, before thinking about what it means that the victim “froze” during the attack. That allows me to persuade them during closing argument with something along the lines of the following, looping back to their agreement during *voir dire*:

“ You get one theme or theory *voir dire* question to loop back to during closing argument ”

We all think we will be heroes when the time for heroic action comes. We all believe that when the opportunity presents itself we will run into that burning building to save the puppy, or single-handedly fight off a dozen insurgents on the battlefield, or beat back the intruder in our home.

But remember when in *voir dire* we talked about how everyone is different and you all agreed that individuals can react differently to the same type of traumatic event. You don’t know until confronted with that burning building, or insurgent on the battlefield, or intruder in your home how you will react. You don’t know whether you will fight, or whether you will take flight. And you don’t know whether you will freeze. And you certainly don’t know how, when a person you trusted, a person you were intimate with, who you loved and respected and

who you thought loved and respected you, who is much stronger physically than you, ignores your “no,” ignores your “stop” and starts to take by force what is not theirs to take. You heard from [victim testimony]. You heard from [expert testimony]. . . . So when confronted by this sexual assault you might expect [Named Victim] to punch and kick and scream and fight until she was bruised and bloody, and we all probably hope we would have, but you can certainly understand in this case, in these circumstance, [Named Victim] did not.

Maybe it works, maybe it does not. Members have told me that it has. But regardless, hopefully it forces the members, who agreed during *voir dire*, that perhaps someone could react to a traumatic event differently than they would have or how they would have expected someone to react, to think about it a little more deeply. Maybe it changes a mind, maybe it starts a discussion in deliberations. If so, you have actually accomplished something in *voir dire*! Congratulations.

For your other nine, or 14 questions, good luck. Lean heavily on the rest of your trial team to bring that laser focus to your questions. If you are lucky enough to have a forensic psychologist on the team, take advantage of their jury-consultant expertise. Remember, your expert is a scientist in the realm of human psychology, you are not. That is one of the reasons you hired them. You might, and I emphasize might, be able to bring some commonsense to the discussion, but your expert brings years of experience and training in this field and is much better positioned to offer questions that will help spot those members who may not be receptive to your theme and theory. But in the end, trust your litigation instincts. Remember, experts advise, counsel decides.

I will leave you with one definite no-no, the number one complaint members have with counsel:

Do 🙅 Not 🙅 Stare 🙅 At 🙅 Them 🙅

They are not animals at a zoo and you are not an expert in body language. You are not gathering anything by staring them down as they enter the courtroom, or while they listen to the judge’s initial instructions, or while they answer the judge’s questions. They hate it. It’s creepy, they notice it and they complain about it all the time because it makes an awkward situation even more awkward. Casual but respectful indifference

is the key to successes where success is defined as not creeping out the members at the very start of trial.

“ **PrimeCOLE *Voir Dire***
Hippocratic Oath:
First, do no harm ”

