

VOIR DIRE

MARK S. MANDELL
MANDELL, SCHWARTZ & BOISCLAIR

The purpose of voir dire is to find out which jurors cannot be objective about your case. You want to find out which jurors have fears or insecurities which will prevent them from acquiring an understanding of, and feel for, your proof.

Several keys to voir dire exist. First and foremost, you want jurors who are psychologically healthy and able to discern reality, that is, jurors who are able to understand what is *really*, as opposed to *apparently*, going on around them. You want jurors who have the capacity to see you as being right and to feel for your client's damages. On the other hand, jurors who are psychologically unhealthy make great defense jurors. They are apt to go off on irrelevant tangents --any one of which can cause you to fail in your satisfaction of the burden of proof.

In one recent automobile products liability case where a question of my client's comparative negligence was raised, a prospective juror stated that she had been in two prior car accidents in which she was injured. She then added that she was at fault in both collisions. At first, I was concerned that having blamed herself she would feel free to blame my client. I decided to keep her on my jury because I realized that anyone who could take such personal responsibility for her own conduct had to be healthy enough to be able to understand and feel for my case and client. She became a very strong juror on by client's behalf.

Asking appropriate questions and, more importantly, listening carefully to each prospective juror's answers can help tell you which jurors can see reality. Clearly, a juror who consistently answers questions not asked cannot tell the difference between what is and what is not. Unfortunately, it is much more difficult to distinguish between good and bad jurors in the gray areas of consciousness in which most people live.

How can you tell if your prospective jurors are in contact with reality and are psychologically healthy? One way to make such a determination is to observe the potential jurors' appearance. Do they smile, appear happy, generally look healthy? Whether or not jurors seem to care how they look (i.e. attire, neatness, cleanliness) is revealing regardless of whether you find their manner of dress attractive or stylish.

A second guideline I use is that if I like the way jurors look, the chances are they will like the way I look. I believe the opposite is also true.

As I mentioned above, whether prospective jurors respond to questions directly or answer questions not asked can be a clear giveaway as to their contact with reality. Again, the most difficult judgment call involves which jurors at the gray area margin of health and awareness are good or bad for your case.

A third tool I use specifically to help make this determination is to ask jurors open-ended questions as to how they feel about a particular issue involved in my case and/or about the kind of case itself. An example in a medical malpractice case would be, "How do you *feel* about medical negligence lawsuits?" or "How do you *feel* about people filing claims against doctors/hospitals for medical negligence?". Most people will not answer how they feel (emotion) but will tell you what their thoughts (cognition) are on the issue. That type of indirect response itself is revealing. Very few people will actually answer the question asked and respond based on their feelings. So long as their response is not antithetical to your position, jurors who can express their feelings are jurors you want.

A fourth guideline I employ is that although the brightness/smartness of prospective jurors is an important criteria, it is of secondary significance to the jurors' psychological health. In other words, it is more important that jurors be psychologically healthy than that they be smart. The two crucial factors of psychological health and brightness interact as follows in terms of preferable combinations in your jurors:

Most preferable are psychologically healthy and smart jurors. They will be healthy enough not to be governed by their insecurities and smart enough to see reality and act on it.

Second choice are jurors who are psychologically healthy and not bright. At the very least, they will be able to feel for your case. The danger is that they can become confused and led by bad jurors.

Third choice are jurors who are psychologically unhealthy and not smart. They are not a threat to dominate a jury against your position.

Your last and worst choice are jurors who are unhealthy and smart. They are ideal defense jurors. They have the strongest psychological defenses which are extremely difficult, if not impossible, to penetrate and they may be smart enough to dominate a jury against your position.

Your success in selecting a jury is directly related to how well you understand people and what motivates them. The more your instincts are like those of the average person, the more you will be able to establish rapport with your prospective jurors and thus understand them and their decision-making process. Instinct is a key because, however prepared you are, you cannot pre-plan every question and its follow up.

Certain additional basic principles follow below:

- a. Generalizations based on nationalities, employment and political party affiliations can be dangerously misleading.
- b. Eye contact - one on one - with prospective jurors is important.

- c. Conditioning, sequential questions are valuable. For example, to educate a juror who may be unfamiliar with the dangers of asbestos the following brief sequence has been used:

“Have you heard of the surgeon general’s report on cigarette smoking?”

“Have you heard of the surgeon general’s report on asbestos?”

“Have you seen or heard of the *60 Minutes* special on asbestos?”

Most everyone knows cigarettes are “dangerous to you health” and that *60 Minutes* seldom has anything good to say about anyone or anything.

- d. Obtain a commitment that the jurors would award a large amount of money if justice so dictates.
- 1) “Is there an arbitrary monetary limit beyond which you will not go even if the plaintiff proves justice requires that amount?”
 - 2) “Would you diminish the money my client may be entitled to simply because it may amount to a large sum of money?”
 - 3) “Would you hesitate, even for a second, to award full justice to my client simply because it may amount to a large amount of money?”

With the above in mind, a sample voir dire in a medical negligence case follows below:

I would like to introduce myself. My name is _____ and I represent the Plaintiffs _____.

This is the stage of trial where the court and attorneys select the jury to hear this case. We will be asking certain questions so that we can learn a little about you. I assure you that neither I nor defense counsel will be asking questions merely to pry or out of personal curiosity. We simply are trying to do our jobs as best we can.

Because I represent the Plaintiff, the person claiming injuries in this action, I go first.

At this point, I would like to tell you a little bit about this case so that you will better understand why we pose some of the questions asked of you. This is an action for medical negligence. My client has filed this suit claiming that he has suffered very severe injuries, some lifetime, as a result of negligence by the Defendant Dr. _____

in performing surgery in September, 19__ , and in failing to provide proper treatment not only during surgery but both before and after surgery.

Defendant _____ is a surgeon. He is represented by Attorney _____ of the law firm of _____.

I would like to introduce the other members of my firm. Do any of these names ring a bell? Do any of you know or have you been represented by any of us? Do any of your family members or close friends know or have they been represented by anyone in our law firm?

I would like to introduce the Plaintiff and his wife. They live in _____. Do any of you know them? Do any of you have family members or close friends who know them?

I would like to introduce the Defendant Dr. _____. Do any of you know him? Have any of you been treated by him? Have any of you had any contact with him? Have members of your family or close friends been treated or had contact with him?

I would like to introduce defense counsel and members of his firm. Do any of you know any of these people? Do any of you have any family members or close friends who know any of these people? Have any of you ever been represented by any of these people?

Individual Questions:

City they live in; marital status; children and their ages; employment of juror and family members.

General Questions:

Are any members of your family physicians? Are any of your close friends physicians? Are any of your relatives physicians?

Do any members of your family, relatives or close friends work in a hospital?

Are any family members, relatives or close friends involved in the health care industry?

If yes to any of the above questions, are they involved in surgery? If so, would what you know and/or have experienced make it so you would be unable to be fair to either party -- either the Plaintiff or the Defendant?

Do you know any of the doctors on the staff of _____ Hospital (where the surgery occurred?)

Have you, any members of your family or close friends been injured by a doctor during the course of treatment or as a result of surgery so that bitter feelings might exist toward the medical profession?

Have any of your family members or close friends been cured by a doctor as a result of treatment so that protective feelings might exist toward doctors?

Do you agree that, if a doctor commits malpractice that causes injury to his patient, it is fair to award damages to compensate that patient for his injuries?

Does anyone think it would be fair to turn away a patient without compensation if his doctor has injured him by treating him in a negligent manner?

You know, one reason our jury system exists is to protect the rights of individuals. One of those rights is the right to be free from injuries caused by the negligence of others. The only way we can protect and enforce that right is by compensating the injured plaintiff with a monetary award. Is each of you prepared to protect that right in this case by awarding money damages to the Plaintiff if you find that he was injured by Dr. _____'s negligence?

You are all aware that this is not a criminal case -- that the question here in his case is not whether the Defendant is guilty of a crime but only whether he failed to properly provide treatment of the Plaintiff. And, if so, how badly was Plaintiff injured as a result of Defendant's negligence? Guilt = criminal case; negligence = civil case. No criminal sanctions or anything of that nature occur as a result of this case.

Keeping in mind that this is nothing more nor less than a suit for professional negligence of a doctor, I would like to ask you these questions:

*Do you have any **feelings** about this kind of case, any reaction to it, positive or negative, about someone who comes into court in a medical negligence case?*

Would you hesitate to apply justice (fairness) and hold Defendant accountable just because he is a doctor?

If you find the Defendant liable, would you feel he should be given a greater break in assessing damages than you or I or any other person simply because he is a doctor?

Does anyone feel doctors can do no wrong? Can never be negligent? Are above the law? Are more likely to tell the truth because they are doctors?

Does anyone feel doctors should not be held accountable even if they have been negligent in treating a patient and severe injuries resulted from that negligence?

Are any of you or your family members presently under a doctor's supervision and treatment? Do you or they see him regularly?

Have you or they ever had surgery? Are you or they scheduled to have it?

Have you or they ever been hospitalized? Where? When? Would what you know and/or have experienced make it so you would be unable to be fair to either party?

The condition which led to the hospitalization where Defendant operated on the Plaintiff is inflammation of the intestines called Crohn's Disease or colitis, which is a painful condition. If the evidence shows that it could have been successfully treated with reasonable care so that Plaintiff's problems would not have happened, can you agree that just because the Plaintiff had a painful problem before he saw the Defendant doesn't mean that the Defendant is not negligent?

Do you have any experience with Crohn's Disease, colitis, ileitis or other disease of the digestive system?

Do you know anything about it? Is there any reason you cannot be fair to both Plaintiff and Defendant?

Have you ever been the party to a lawsuit either as a plaintiff or a defendant? What was the result?

Have you ever sat on a jury before? On a civil or criminal matter? When? The verdict for whom and the amount awarded?

Would a trial which may last two weeks or more create a hardship?

List the medical witnesses who may appear in this case. *Have any of you or members of your family or friends of yours been treated by any of these people? Do you know any of them?*

Now, in this case, Plaintiff, because of the rules of evidence and law, will have to delve into the most delicate of subjects and reveal to you those very private feelings and thoughts concerning the Plaintiff's surgery and how it has affected him. There is just no other way. There is no way to avoid it. Would any of you hold this against him in any way?

Do any of you feel that people suffering injuries such as the Plaintiff should suffer those injuries in silence and not try to fix responsibility on the one who is claimed to have caused the problems?

If evidence establishes that the Defendant was negligent in performing surgery and the Plaintiff was seriously injured as a result, would you be willing to give him one hundred percent justice and fairness even though that meant returning a verdict for a very large sum of money?

In other words, would you reduce the amount of a verdict which gives my client one hundred percent justice and fairness simply because when it is all added up it seems like a lot of money?

Is there anything that I have not asked you that you as prospective jurors feel I might need to know to get as objective a jury as possible?

Finally, I know this is a question probably asked in all cases by all attorneys, but it is an important one -- can you assure the court, the parties, and the attorneys that you will hear this case fairly and impartially and make your decision fairly and impartially based solely on the evidence as it will be introduced to you? I would ask you if you would be able to sit as fairly and impartially as possible --and the key word to me is "objectively" -- and just decide this case as you ultimately feel things unravel and would you be able to do that as objectively as possible?

Conclusion

A full proof can creatively and wisely require opposing counsel to perform one hundred percent mistake-free. Place the burden of perfection on opposing counsel's shoulders by temperately, yet with full force, presenting your proof. Of course, this begins with voir dire.

Uca Dica 2

Double-sp.

VOIR DIRE

MARK S. MANDELL
MANDELL, SCHWARTZ & BOISCLAIR

The purpose of voir dire is to find out which jurors cannot be objective about your case. You want to find out which jurors have fears or insecurities which will prevent them from acquiring an understanding of, and feel for, your proof.

Several keys to voir dire exist. First and foremost, you want jurors who are psychologically healthy and able to discern reality, that is, jurors who are able to understand what is *really*, as opposed to *apparently*, going on around them. You want jurors who have the capacity to see you as being right and to feel for your client's damages. On the other hand, jurors who are psychologically unhealthy make great defense jurors. They are apt to go off on irrelevant tangents --any one of which can cause you to fail in your satisfaction of the burden of proof.

In one recent automobile products liability case where a question of my client's comparative negligence was raised, a prospective juror stated that she had been in two prior car accidents in which she was injured. She then added that she was at fault in both collisions. At first, I was concerned that having blamed herself she would feel free to blame my client. I decided to keep her on my jury because I realized that anyone who could take such personal responsibility for her own conduct had to be healthy enough to be able to understand and feel for my case and client. She became a very strong juror on my client's behalf.

Asking appropriate questions and, more importantly, listening carefully to each prospective juror's answers can help tell you which jurors can see reality. Clearly, a juror