# Making The Most Of Oral Voir Dire

**Richard G. Stuhan**

**Time is precious during voir dire. Make the most of it.**

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**EVERY SERIOUS FAN** of NFL Football knows that "managing the clock" is one of the keys to success. The team receiving the ball with six minutes to play in a tied game can be expected to adopt a strategy designed to take advantage of the limited time available. Running plays will typically outnumber passing plays and, when passes are thrown, receivers will avoid going out of bounds in order to keep the clock moving. Running the clock is not, however, enough. Unless you score, you face sudden death overtime. Ideally, the team with the ball will move it downfield and score as time is expiring.

Effective time management is no less important in voir dire than it is in the NFL. Here, as well, time is precious. In federal court, if the lawyers are allowed to conduct any voir dire at all, the time allotted is likely to be short. Although state court judges are typically more generous, they generally expect voir dire to be completed in a day. Even in jurisdictions where the judge allows the parties to do whatever they want—leaving supervision of jury selection to a law clerk or perhaps not supervising voir dire at all—there are constraints on the time they can spend on voir dire because lawyers risk alienating the jury if their questioning is not focused. Thus, even in those jurisdictions, the time available for voir dire is constrained by the jury's patience.

The limited time available for voir dire is a problem because there is much that should and can be done during this phase of the trial. Reasonable minds can differ on how voir dire ought to be conducted, but most lawyers agree that the process has three overarching objectives. First, it affords counsel an opportunity to preview her case themes. Second, it gives counsel a chance to build rapport with the jurors. Third, it provides counsel an opportunity to learn more about the men and women who will be deciding the case.

Dan Wolfe, a senior trial consultant with TrialGraphix/Kroll Ontrack, has coined the term "The Four Ins" to describe the objectives of voir dire. The Four "Ins" are Indoctrination, Ingratiation, Information, and Inoculation. Dan's first three "Ins" correspond to the objectives of voir dire that I have identified. The fourth "In," Inoculation, is the flip side of Indoctrination. According to Dan, a lawyer conducting voir dire can not only articulate his own case themes, but take steps to counter the other side's theme-building.

In an ideal world, counsel would have an opportunity during voir dire to accomplish all three objectives. But in the real world, that is frequently not possible. Something has to give. The question becomes, given limited time, which objective should be preferred. My experiences suggest that—barring exceptional circumstances—using the available time to learn about jurors should take precedence over the other objectives of voir dire.

In this article, I explore how oral voir dire can be used to accomplish each of its objectives. I then explain why information gathering should take precedence over the other objectives of voir dire. The views expressed in this article are based not so much on picking juries for my own cases as they are on my experiences assisting other lawyers select a jury—a task I have undertaken dozens of times for my firm. Thus, the conclusions set forth in this article reflect not just my experiences, but observations of many other attorneys.

**PREVIEWING CASE THEMES** • Courts vary tremendously in the extent to which they will permit counsel to articulate her case themes during voir dire. Some judges shut down lawyers who try to preview case themes during voir dire. In other jurisdictions, the governing rules expressly allow lawyers to make a mini-opening statement at the outset of voir dire. Most judges fall somewhere between those extremes.

Many judges allow lawyers to preview case themes as part of their introductory remarks. Counsel begins by introducing her client and then proceeds to tell the jurors "a little bit about the case." Using voir dire to preview case themes works best when approached in the same way as a newspaper article. You begin by highlighting the key facts and issues, and you then double back to provide more details. At some point, the judge will tell you that this has gone on long enough, and you know that it is time to start asking questions.

An additional and more subtle way to use voir dire to preview case themes is by embedding them in the questions you ask the panel. Like questions posed in "push polls" conducted by candidates for political office, the objective is not to gather information about a prospective juror, but, rather, to make a point. If, for example, you were defending a failure-to-warn claim in a products liability action, you might refer to the infamous McDonald's coffee case and then ask, "How many of you believe that a manufacturer has a duty to warn of obvious dangers?" You don't really expect anyone to answer "yes" to that question. The objective is to drive home the point that it is silly to require manufacturers to warn of dangers that are readily apparent. If, contrary to your expectations, someone on the panel answers the question affirmatively, you have gotten the incidental benefit of identifying a juror that you will probably want to strike, but that is not your objective.

There can be no doubt that previewing case themes is valuable. Several studies suggest that ju-

rors make their decisions early in the case. If that is true, articulating case themes early and often is likely to be advantageous. The technique is even more effective if you can get the jurors to commit to your position in the course of voir dire. For example, you could modify the question discussed above by asking, "How many of you agree with me that manufacturers should not be required to warn of obvious risks?" and then look for a show of hands. Whether and to what extent the court will allow such questioning—particularly if opposing counsel objects—varies from one venue to the next.

Although there is value in using voir dire to preview case themes, I believe that that objective must give way to learning about the jurors if there is not sufficient time to do both. I have come to this conclusion principally because there will be other opportunities in the course of the trial to articulate case themes. Immediately after a jury is seated, the lawyers will make their opening statements. In addition, counsel will have an opportunity to articulate case themes when she presents her evidence and in the cross-examination of the opposing party's witnesses. Thus, if you do not preview case themes or if you pay them relatively little attention during voir dire, you have not completely forgone the opportunity to tell the jurors about your side of the case. Conversely, voir dire is the *only* opportunity that you will have to learn about the experiences and attitudes of the individuals who will decide whether you win or lose.

**BUILDING RAPPORT** • Many experienced trial lawyers attribute their success to their ability to charm jurors. Much as the purists would like us to believe that cases are decided entirely on the evidence, the reality is that personality matters, and sometimes it matters a lot. Dozens of post-verdict interviews confirm that jurors evaluate the lawyers, as well as the evidence they present. Sometimes, the messenger is as important as, if not more important than, the message.

Much already has been written on how lawyers can relate to jurors, and it is beyond the scope of this article to review that literature. My own debriefing experiences suggest, however, that it is worthwhile to ingratiate yourself with the jurors. Building rapport with the jurors has at least two components. First, you want the jurors to like you. If you see 12 sour expressions in the box whenever you rise to speak, you need to reexamine your tactics. Second, and even more important, you want to establish that you are *trustworthy*. Your chances of persuading the jurors to vote for your client are greatly diminished if they do not see you as a credible source of information.

What does it take to establish rapport with a jury? Some of it is surely innate. Years ago, I worked closely at another firm with that firm's best known trial lawyer. Although he was not extraordinarily intelligent, he was certainly not a hard worker, and he was only slightly above average in appearance, jurors invariably loved him. When we traveled, the flight attendants fawned over him and virtually ignored me. (Do I sound just a tad envious?) So, to some extent, you either have it or you don't.

But even if you are not innately charming, there are steps you can take to ingratiate yourself with prospective jurors. Post-verdict debriefing reveals that jurors prefer to be called by name, rather than by number (although this will not be an option in courts which insist that jurors identify themselves by number). Looking organized will also create a favorable impression. Fairly or not, many jurors conclude that disorganization reflects lack of preparation which, in turn, reflects a lack of confidence in the case. Maintaining eye contact with the jurors as you question them earns points; conversely, burying your head in notes is a turn-off. If the lawyer is from out of town, she would be well advised to show familiarity with the venue—particularly when the opposing party is represented

by home-town counsel, who almost always finds a way of revealing that his adversary is a carpetbagger. References to one of the local sports teams, a highly-publicized crime, or a political feud are usually good for that purpose. Counsel must be careful, however, not to overdo it. Although jurors appreciate an out-of-town lawyer's efforts to learn about the local scene, they recoil whenever they think that counsel is pandering to them.

Although ingratiating oneself with prospective jurors is certainly important, this objective, too, must surrender to gathering information when time is short. The explanation is the same here as it was for subordinating the goal of previewing case themes to information gathering. Although first impressions matter, counsel will have many opportunities in the course of the trial to impress the jurors. But voir dire is the only opportunity counsel will have to learn of the experiences and attitudes that will shape the jurors' assessment of the evidence. Accordingly, if the time available for voir dire does not permit vigorous pursuit of all objectives, learning about the jurors should take precedence over befriending them.

**LEARNING ABOUT THE JURORS** • It seems that using voir dire to gather information about jurors is so obvious that the topic is not even worth discussing. Time and again, however, I have observed that lawyers fail to take full advantage of the opportunity to learn about prospective jurors that voir dire affords. Typically, lawyers fail to utilize this weapon fully because they have chosen to use the limited time available to them for one of the other two purposes discussed above—previewing case themes or building rapport with the panel.

But there are other explanations. For example, in cases where a supplemental juror questionnaire is used (*see Written Juror Questionnaires in Civil Cases*, http://druganddevicelaw.blogspot.com/2008/01/written-juror-questionnaires-in-civil.html), counsel frequently ignore jurors whose written responses suggest that they are fit to serve and redirect their energies to jurors whose responses on paper suggest that they are either hostile or questionable. (I will have more to say on this point later.) Other times, lawyers truncate their voir dire out of concern that they will offend jurors by asking "personal" questions or for fear that a thorough examination of the panel will try the jurors' patience—particularly after they have been subjected to a lengthy interrogation by opposing counsel. Failing to use all available time for these or other reasons is a mistake.

Input from post-verdict debriefings suggests that it is not so much the length of voir dire as its relevance that matters to jurors. Most jurors understand the need for questioning to ensure that those selected to serve are free of bias. This holds true even if the questions are highly personal— e.g., whether the juror or a close relative developed the condition for which plaintiff is seeking to recover. But jurors draw the line at questions they perceive as not relevant to the matters at issue. Particularly challenging for counsel are questions that she knows are predictive of verdict orientation, but are not clearly relevant on their face. For example, counsel in a contract dispute may want to inquire about the jurors' reading habits because pre-trial research has shown that jurors who read The New York Times are more likely to side with the opposition, but the jurors will not understand what such questions have to do with this case. The trick for counsel is to weave such inquires into a sequence of clearly relevant questions.

Post-verdict debriefings have revealed that cases can be won or lost in jury selection. The attitudes and experiences the jurors bring with them to the courtroom are sometimes more important than any evidence they hear. At a minimum, the jurors' attitudes and experiences become a prism through which they view the evidence. Any lawyer who fails to determine the jurors' relevant attitudes and experiences does so at her peril.

**How A Supplemental Juror Questionnaire Affects The Analysis**

Does the use of a supplemental juror questionnaire change the analysis? Stated otherwise, if counsel is able to persuade the court to administer a thorough written questionnaire, can she afford to spend more time previewing case themes or building rapport with the jurors and correspondingly less time worrying about information gathering? The answer to that question is emphatically "no." Indeed, I would submit that anyone who argues that the use of a supplemental questionnaire obviates the need to use oral voir dire to gather information about jurors is not using written questionnaires in an appropriate manner.

Written questionnaires should not be used as a substitute for oral voir dire. Rather, counsel should use them to conduct a more thorough and, therefore, more meaningful oral voir dire. Responses to the written questionnaire provide basic information about the jurors' attitudes and experiences. Those responses should then serve as a springboard for follow-up questioning during oral voir dire. Stated otherwise, the written responses should be a starting point, not an ending point, for discerning relevant attitudes and experiences.

Follow-up questioning is particularly important when prospective jurors' answers to the written questionnaire raise concerns. If, for example, the written questionnaire in a products liability case reveals that a juror's close relative had developed the same illness as the plaintiff, defense counsel almost certainly will want to explore whether the juror attributed that illness to the use of the product at issue. Follow-up questioning of disturbing written answers also gives counsel an opportunity to establish that the juror's troublesome views are so strongly held that they affect his impartiality—thereby opening the door to a for-cause challenge of that juror.

None of this is meant to dissuade lawyers from using written questionnaires. Indeed, the value of written questionnaires is beyond peradventure, and I am on record as firmly advocating their use. But making decisions solely on the basis of written questionnaires is risky. How reliable a written questionnaire is in predicting a juror's verdict-orientation depends on how good the questionnaire is. In virtually all of the cases in which I have used written questionnaires, they were preceded by extensive pre-trial research of the predictive value of questions—alone and in combination. Even under those circumstances, I have found that the questionnaires accurately predicted a juror's verdict-orientation only 85 percent of the time. Stated otherwise, even well-designed questionnaires have about a 15 percent error rate. Thus, for roughly one of every seven jurors, the rating after oral voir dire will differ materially from the rating assigned to him on the basis of his written questionnaire responses.

Because written questionnaires do not always accurately capture a juror's verdict orientation, it is important to get every juror talking at some point in the process. Sometimes, written answers do not accurately reflect the jurors' views because the jurors misunderstand the question. Some people are just not good writers and need an opportunity to express their views orally. In other cases, jurors will not express their feelings—or the intensity of their feelings—unless pressed to do so. Some jurors just plain lie, and it takes something akin to cross-examination to force them to admit that their written responses were not truthful or accurate. For these reasons, counsel needs to *hear* from all the prospective jurors—both those who look good on paper and those who do not.

Some lawyers are reluctant to devote time during oral voir dire to jurors who appear on paper to be leaning in their direction. This reluctance is grounded in a variety of concerns. In some instances, counsel fear that oral questioning of a juror who looks good on paper might identify someone who otherwise would escape the attention of opposing

counsel. In other instances, counsel worry that a favorable juror will embellish his views in open court to such an extent that he will provide ammunition for the other side to strike him for cause. Then, of course, there are lawyers who heed this article's advice about time management and conclude that it would be a mistake to waste precious time on jurors who do not appear to be a problem. While these concerns are not unfounded, the risk that a hostile juror will sneak through the cracks demands that counsel have a dialogue during oral voir dire even with jurors whose written responses appear favorable.

Jurors whose written responses raise concerns are, of course, also a challenge. Although jurors who look bad on paper sometimes look better after oral voir dire, there are more "false positives" (jurors who turn out to be not as good as their written responses suggest) than "false negatives" (jurors who turn out to be better than their written responses suggest). The principal objective during oral voir dire for jurors whose written responses are disturbing is to convince them that their views are so strongly held that they cannot be fair—i.e., to lay the groundwork for a challenge for cause. Even if a juror does not admit bias, you can always use a peremptory challenge to remove him from the panel. Remember, however, that preemptory challenges are limited, while for-cause challenges are not.

**Securing Admissions Of Bias**

How to get jurors to admit disqualifying biases deserves its own article. Suffice it to say that you are not likely to secure an admission of bias by asking a juror directly if he can be fair. Experience teaches that many people are constitutionally incapable of admitting that they cannot be fair. Others are simply unwilling to admit that they are prejudiced. Lawyers conducting voir dire are no more likely to succeed at eliciting an admission of bias than they would be in asking a juror to admit that he is a lousy driver, does not have a good sense of humor, or is bad in bed.

John Grisham's bestselling novel, *The Runaway Jury,* spurred discussion of the "stealth juror." A stealth juror is someone who provides false information in an effort to be seated on a jury so that he can engineer a verdict for one side. A juror might take such a course for personal gain (because he was bribed or because a verdict would enhance his investment in a company in which he owns stock), to promote a cause (e.g., to punish a polluter), or to seek revenge for something one of the parties did to him. It is not stealth jurors that I have in mind when I say that many jurors cannot or will not admit bias. Stealth jurors know that they are biased and seek to capitalize on their bias. I do not believe that, in all my years of practice, I have encountered anyone I seriously suspected of being a stealth juror. I have encountered dozens of jurors, however, who honestly believed that they could be fair, even though my instincts and experiences told me that they could not set aside their prejudices. Counsel can only hope that she has enough peremptories to excuse such jurors because they are not likely to provide ammunition to strike them for cause.

Since you are not likely to get the admission by asking the question directly, it behooves counsel to provide the juror a graceful way to acknowledge that he is biased. This could be accomplished by asking the juror if he would be uncomfortable having a person like himself sit on the jury if he were one of the lawyers trying the case. Alternatively, counsel might ask if there might not be a better case on which the juror could serve.

Whether and to what extent the judge will allow such questioning varies. Many judges are reluctant to excuse jurors for cause. Some judges even undertake on their own to rehabilitate jurors who intimate that they cannot be fair. This is usually accomplished by having the judge lean over the bench in the juror's direction and ask something like the following: "If the Court instructs you to put aside

your prejudices and decide the case solely on the evidence, will you be able to do so?" A few judges are even more aggressive, turning to the juror and asking, "You can be fair, can't you?" The propriety of such a tactic is open to question. Few jurors, I would submit, have the resolve to say "no." They do not want to appear to be bad people.

**Assessing Leadership**

Whether the juror looks good or bad on paper, there is yet another reason for questioning the juror orally even if the court has allowed a written questionnaire. In ranking jurors, lawyers should pay attention not only to a juror's attitudes and experiences, but also to his leadership potential. Leadership determines a juror's ability to persuade other jurors to vote as he does. Competent counsel might pass on a juror whose views appear to be unfavorable, but who is shy and reserved. Few counsel, however, would take a chance on a juror who not only has hostile views, but is well-spoken.

Written questionnaires are less reliable at predicting leadership than they are at capturing experiences and attitudes. Assessing leadership potential from a written questionnaire requires counsel to draw conclusions from the positions the juror has held at work and/or in the community. Leadership on a jury does not necessarily correlate with leadership in the outside world. Generally speaking, one would expect more leadership from a corporate executive who serves on the board of directors of a charitable organization in his spare time than from a janitor. We all know, however, that some corporate executives are shy and retiring, while some janitors are well-informed and articulate (think of Matt Damon's character in *Good Will Hunting*). The challenge for trial counsel is to identify jurors who will become opinion leaders in deliberations. It is particularly important to identify jurors who might become self-appointed experts—i.e., a person who by virtue of having had an experience similar to that at issue in the case believes that he has something unique to contribute, and convinces the other jurors that they should defer to him. For example, a juror who used the product at issue and had no trouble following the instructions is likely to have more sway with his fellow jurors than a testifying warnings expert.

The best way to take the measure of a juror's leadership potential is to get him talking in open court. After all, a juror who is confident and well-spoken in front of the entire venire is likely to be confident and well-spoken in a jury room in front of a much smaller audience.

**Why Lawyers Sometimes Fall Short Of Knowing Their Panels**

Given the importance of jury selection to the outcome of the litigation, one might wonder why lawyers ever fail to learn as much as possible about prospective jurors. For some lawyers, I believe, the answer is inertia. They have always conducted jury selection in a particular way; they have generally been successful; and they see no reason to mess with success. For other lawyers, the explanation lies in an ill-advised reliance on demographics in picking jurors.

Although the use of "profiling" as a law enforcement tool has been subjected to criticism and debate, its effectiveness as a tool for selecting jurors has gone largely unquestioned (except when based on constitutionally-impermissible criteria, such as race). Many lawyers never get beyond demographics—age, gender, education, occupation, marital status, etc.—in selecting a jury. Some lawyers have developed demographic profiles that they use in every case. Conventional wisdom holds that the "ideal" juror for the plaintiff is a young unmarried female of modest means and a limited education; for defendants, the juror of choice is an older married male who is well educated and earns a substantial income. If juries can be reliably picked on the basis of stereotypes, there is no need to spend a lot of time gathering information about

jurors during oral voir dire. Everything you need to know is discernible from either observation or from the questionnaire that most courts ask jurors to complete when they report for service (not to be confused with the case-specific supplemental juror questionnaire discussed above).

Relying on demographics in making selection decisions is a mistake. It has been my consistent experience that demographics are not reliable predictors of verdict orientation. In those instances when demographics appear to be predictive, further investigation reveals that they are a marker for some underlying experience or attitude. Thus, lawyers who rely on demographics in picking a jury do so at their peril. Extensive research and courtroom experience consistently demonstrate that experiences and attitudes are more reliable than demographics in assessing a juror's verdict-orientation.

**CONCLUSION** • If the court allows attorney-conducted voir dire, counsel can almost always afford to spend some time previewing case themes and ingratiating herself with the jurors. Pursuing those objectives can contribute to a successful outcome. But the most important objective in conducting voir dire is gathering information about the men and women who will decide the case. In planning her voir dire strategy, counsel must allow sufficient time to collect as much information as possible about prospective jurors.

The most effective voir dire will be one in which counsel has an opportunity to gather information from both a supplemental written questionnaire and through oral voir dire. Responses obtained on the written questionnaire become the basis for follow-up questions during oral voir dire. At each stage of the process, counsel should be prepared to revise her evaluation of the juror to take account of new information received—either about a juror's experiences and attitudes or about his leadership ability.

The ultimate objective of voir dire should be the identification of jurors who cannot or will not give your client a fair shake. It is generally accepted among trial consultants that voir dire is more of a process of deselection than it is a process of selection. The lawyer should have enough confidence in her case to believe that she can persuade a collection of truly neutral jurors on the correctness of her position or the rightness of her cause. If in the course of eliminating jurors who are biased against her client a lawyer manages to seat one or more jurors who lean her way, that is serendipitous. But a strategy that exalts finding good jurors at the expense of weeding out bad jurors runs a high risk of failure.

## PRACTICE CHECKLIST FOR
## Making The Most Of Oral Voir Dire

Even if you have the opportunity to conduct voir dire, your time will be limited. The process has three overarching objectives: providing a preview of case themes, building a rapport with the jurors, and learning more about the men and women who will be deciding the case.

- Dan Wolfe, a senior trial consultant with TrialGraphix/Kroll Ontrack, has coined the term "The Four Ins" to describe the objectives of voir dire. "The Four Ins" are Indoctrination, Ingratiation, Information, and Inoculation. Dan's first three "Ins" correspond to the objectives of voir dire noted above and the fourth "In"—Inoculation—is the flip side of Indoctrination.

- Using voir dire to preview case themes works best when approached in the same way as a newspaper article. You begin by highlighting the key facts and issues, and you then double back to provide more details. At some point, the judge will tell you that this has gone on long enough, and you know that it is time to start asking questions.

- Building rapport with the jurors has at least two components. First, you want the jurors to like you. If you see 12 sour expressions in the box whenever you rise to speak, you need to reexamine your tactics. Second, and even more important, you want to establish that you are trustworthy:

__Jurors prefer to be called by name, rather than by number (although this will not be an option in courts which insist that jurors identify themselves by number);
__ Looking organized will also create a favorable impression;
__ Maintaining eye contact with the jurors as you question them earns points;
__ If the lawyer is from out of town, she would be well advised to show familiarity with the venue—references to one of the local sports teams, a highly-publicized crime, or a political feud are usually good for that purpose.

- Use your time to learn about the jurors:

__ Written questionnaires should not be used as a substitute for oral voir dire. Responses to the written questionnaire provide basic information about the jurors' attitudes and experiences. Those responses should then serve as a springboard for follow-up questioning during oral voir dire;
__ You are not likely to get an admission of bias by asking the question directly. It behooves counsel to provide the juror a graceful way to acknowledge that he is biased. This could be accomplished by asking the juror if he would be uncomfortable having a person like himself sit on the jury if he were one of the lawyers trying the case. Alternatively, counsel might ask if there might not be a better case on which he could serve;
__ Pay attention not only to a juror's attitudes and experiences, but also to his leadership potential. Leadership determines a juror's ability to persuade other jurors to vote as he does. Competent counsel might pass on a juror whose views appear to be unfavorable, but who is shy and reserved. Few counsel, however, would take a chance on a juror who not only has hostile views, but is well-spoken.