

Why You Need to Fight for Improved Voir Dire Conditions

By Beth Bochnak

Recently I revisited an excellent article by social scientists, Cathy Johnson and Craig Haney,¹ describing a research project designed to investigate arguments by judges and others that voir dire should be conducted by the judge only because trial attorneys waste too much time. The findings of their research can be used in a pre-trial motion for improved voir dire conditions to educate judges about why better voir dire is needed.

Johnson and Haney observed four non-capital felony trials in California, from voir dire to post trial interviews. Specifically, they analyzed the content of the courtroom dialogue that occurs during voir dire to see how the time is allocated among the trial participants. Their findings highlight what criminal trial attorneys already know or suspect. Both good and bad jurors are slipping through the cracks because we are asking the wrong questions or asking the right questions the wrong way.

This is a summary of their results.

Time spent on jury selection: On average, the jury selections took almost 5 hours. The judge spent about 1½ minutes with each juror, the prosecutor spent 2½ minutes, and the defense spent almost 4 minutes. However, the *jurors* did very little talking. Johnson and Haney found that “while each judge and attorney spoke hundreds of sentences per case, individual prospective jurors averaged only 48 sentences per case.” The judge and attorneys accounted for 61% of all the talking.

Need for jury questionnaire: A quarter of the jurors’ talking time was spend providing background information which could have been obtained more easily and efficiently by using a juror questionnaire before the in-court voir dire began.

Juror comprehension: Almost half of the questioning concerned the jurors’ ability to follow their obligations. Only 2% of the dialogue told the jurors **what** those obligations were. The four voir dire combined contained only 20 sentences (one tenth of 1% of the total question content) about the importance of the jury system and the jurors’ role. Although jurors were asked repeatedly if they could fulfill their obligations to be fair and impartial jurors, they were told nothing about what these words meant. This was unfortunate, because in post trial interviews with those jurors, Johnson and Haney found that many were unable to distinguish between “fair” and “impartial” and some didn’t know what “impartial” meant.

Juror bias: In post-trial interviews, Johnson and Haney found seven of the jurors did not believe in the presumption of innocence; three of whom were never questioned about it during voir dire. Nearly half the jurors who sat admitted, post-trial, that they couldn’t set aside their personal opinions and beliefs, even though they had agreed to do so. According to Johnson and Haney, one reason biased jurors remain unidentified is that judges typically insist that a hesitant juror put his or her biases aside for the duration of the trial and view this as solving the bias problem. Johnson and Haney suggest instead that jurors should be asked **if** they can put their biases aside. If they say they can, they should be asked *how*, at this early stage of the trial, they can predict that they will be able to do this.

¹Taken from: “Felony Voir Dire, an exploratory study of its content and effect”, Cathy Johnson and Craig Haney. (1994) *Law and Human Behavior*, 18, pp.487-506.

The results of this study help to explain how it is possible to spend several days conducting voir dire but have no data to help you exercise strikes for cause and to feel at a complete loss as to how to use your peremptory challenges. This research reminds us that although we know what we *want* to know from jurors, they may not understand what we're talking about. A juror's promise to maintain the presumption of innocence throughout the trial, is not meaningful unless s/he also has an understanding of what that means. The only way to know if s/he does is to ask the juror,

“The judge will instruct you on the legal principles, and I don't expect you to give me a 'lawyer's' answer, but could you tell me in your own words, what the presumption of innocence means to you?”

Whatever s/he answers, this is your chance to involve more of the panel, asking others if that's their understanding too. The juror may answer that it means that you have to assume the defendant is innocent **until** the prosecutor prove him/her guilty. This would give you a nice opportunity to point out that the defendant should be presumed innocent **unless** and until the prosecutor can prove s/he is guilty, which allows for a discussion of the burden of proof and what that means.

There are many ways to make sure your voir dire is effective. The best solution to this problem is to fight for improved voir dire conditions - well in advance of trial if possible; or whenever you can if your judge springs a trial date on you. Some suggestions:

- Make a motion for a supplemental juror questionnaire and provide a memorandum of law using your case facts to explain why it is necessary.
- Ask for more voir dire time after explaining why the issues in your case require more than 15 minutes.
- Tell the judge what attitudes you will be trying to uncover.
- Give the judge an unbiased, even-handed summary of the case facts to present to the jury panel.
- Ask for the appointment of a trial consultant.

If you would like help in doing this, or you have a question about voir dire, contact us.

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