Working the Crowd: Why Defense Attorneys Must Get Jurors Talking in Voir Dire

By Nick Polavin, PhD, Senior Jury Consultant

Picture this: defense counsel sits at the ready, voir dire gameplan in hand—a list of 40+ questions and their follow-ups—to identify the worst jurors and maximize cause challenges. It is a very plaintiff-friendly venue; they expect prospective jurors to raise their hands, talk about their opinions and experiences, and pave the way for cause challenges. But first, it is the plaintiff's turn.

A Tough Room

The plaintiff attorney proceeds to ask a few awkward, imprecise questions. They are not well-received. Very few jurors raise their hands; even fewer are willing to talk. The attorney presents some preconditioning questions, but again there is very little juror participation. After asking about 20 questions to the group, the attorney sits down.

The defense attorney heads to the podium with his list, along with sticky notes for two jurors to rehabilitate and three to follow up on for potential cause issues. Because the judge and plaintiff counsel already asked jurors about basic background information, the defense attorney jumps right into his first issue-specific question: "Who here has a negative opinion of corporations?" He hears crickets.

He then thinks, "Nobody copped to having a negative opinion of corporations, so I may as well skip the rest of these 'anti-corporate attitude' questions." He jumps down to case-related experiences: "Have you or anyone close to you ever been harmed by a product?" This gets a bit more response, but still not as much as expected. The voir dire continues, touching on some high-level issues but skipping swaths of questions along the way.

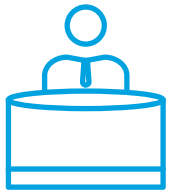
With how silent the jurors are being, the defense attorney eventually feels uncomfortable and turns to his sticky notes for the handful of rehab and cause jurors from the plaintiff's voir dire. He successfully rehabs the two jurors and gets all three cause jurors to admit they cannot be fair to the defense.

He moves to the wrap-up question: "It is every attorney's worst nightmare that we failed to ask the right question, and we miss something important that a juror thought they should have shared. Is there anything that was not asked today that you think we should know about? Anything at all—an opinion or experience, whether related to this case or not?" Not a single hand goes up.

And with that, the defense attorney sits down. Voir dire is over.

A Defeat That Looks Like a Victory

The defense gets three cause challenges granted, and the plaintiff gets none. The jurors in the strike zone (i.e., those who are in the box or can end up there if all strikes are exercised) seem mostly bad, but there is not much information to go on. Regardless, after deciding on their strikes, and with jury selection now over, the defense team feels pretty good. At least they got a few cause challenges.



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What is the problem with this "victory"? The venire was a plaintiff's paradise to begin with. The defense should be getting more cause challenges than the plaintiff. The question is how many more. Three is often not nearly enough to level such an uneven playing field.

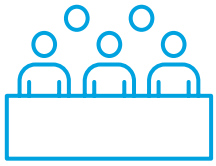
A New Plaintiff Strategy?

Far from a one-off, this situation has become somewhat of a trend. The plaintiff flies through their voir dire, and in doing so, sets the "norms" for jury selection: that the attorney asks questions, and only those with the most extreme opinions speak up; that the attorney does most of the talking, and only a handful of jurors participate. Remember, many potential jurors believe that jurors are selected to sit on the jury. Combine this belief with the plaintiff attorney sapping energy from the room in their questioning, and many jurors could start to think that staying quiet is how they will stay off the jury.

So, when the defense starts its voir dire, counsel may be armed with all the right questions, but the jurors are not willing to raise their hands or speak up. A shy juror might start to raise their hand, look around, see nobody else coming forward, and then decide otherwise (which can easily be missed).

Plaintiff attorneys are strategic in decisions about where to file a lawsuit—we have all seen that. But those decisions also affect the importance of voir dire for each side. In plaintiff-friendly venues, plaintiffs may not need to generate a lot of juror participation, because they may not need many cause challenges. The handful of strong defense jurors are easy to identify, and they strike them. The rest of the questions can be devoted to preconditioning jurors, which does not require much in the way of participation.

It is hard to say whether this apparent plaintiff trend is purposeful or due to a lack of experience and/or comfort. Regardless, in many venues, a plaintiff flop in voir dire will not affect their case. On the other hand, the defense needs to have strong juror participation to get cause challenges granted and identify the "worst" from the merely "bad"—those you must strike versus those you can live with.



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Ways to Work the Crowd

Faced with a cold crowd of jurors, fresh off a plaintiff attorney who let them settle into their silence, what is the defense to do? Several techniques can help warm the room back up:

1. Start your voir dire as though the plaintiff never went.

Give your introduction: why it is so important to speak the truth, that this is the only chance we get to have a conversation, and that we need to hear from everyone, even if they are not sure they should say something. You can go as far as acknowledging that many people falsely believe they will not be picked if they stay quiet. You could even bluntly say, "Those who talk tend to walk,"—or, more subtly, "That's not exactly how juries are picked, so we really need everyone to speak up, especially if you have an experience or opinion that may affect you in this case."

2. Give jurors some softballs to set an inviting tone.

Your softball questions could be as simple as, "Can you tell me about your job? What does a ["fruit rescuer"] do? And what makes you good at your job?" These should break the ice and open the door to jurors sharing more personal details and beliefs.

3. Speak naturally. If you appear uncomfortable asking, jurors will be uncomfortable answering.

Beyond getting plenty of practice, it is worth discussing with your colleagues and/or consultants if there are any questions that do not feel like "you." Although specific word

choices are important considerations when drafting targeted voir dire questions, they can usually be tweaked to obtain the same key information while making you seem more natural.

4. Nod your head as jurors answer—even if they are critical of your client.

Your body language reinforces that giving full and honest feedback is exactly what jurors are supposed to be doing. Especially if a juror is highly critical, inviting them to elaborate through your non-verbal reactions helps encourage them (and others) to share their negative attitudes rather than fear they are saying something wrong or impolite, thus giving you fodder for cause challenges.

5. When someone shares an opinion or experience, thank them and open the floor.

To build on the response momentum, say, "Thank you for sharing that with us. That's exactly the type of information we need to know. Who else [has a negative opinion of corporations]?" And if the experience was something like a severe injury, death in the family, or being discriminated against, be human—empathize with the juror, apologize that they had to go through that, and thank them for being willing to share it in front of the court.

Remember, even if the plaintiff sets the expectation that only jurors with extreme opinions should speak up, those who have opinions but do not consider them "extreme" still need to be identified. In a recent voir dire, when jurors were asked who had a negative opinion of insurance companies, the room was silent until one juror slowly raised her hand and said, "Well, I mean, yeah, I do a bit. But doesn't everyone?" This type of response provides the perfect opportunity to emphasize, "That's exactly what we need to know. We need to hear from everyone who has an opinion, even if you think it isn't strong. Knowing that, who here also has a negative opinion of insurance companies?"

Then, if time permits, follow up with each juror to determine the strength of those opinions. If time is short, ask instead, "Who has that negative opinion based on a personal experience?" and follow up with those jurors. (Personal experiences are more likely to create strong opinions.)

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6. Be prepared to pivot your questioning if you get no responses.

If nobody responds to a question when you expect to see at least a few hands up, try one of these three options:

- **Ask a more specific question that jurors will likely realize they believe.** If asking, "How many of you have a negative opinion of large corporations?" gets you nowhere, then try, "Who believes that corporations put profits over safety?" or "Who believes that corporations are always motivated by greed?" or "Who does not trust corporations to keep consumers safe?"

- **Back it down a level.** For instance, say, "Okay, so nobody has a strong negative opinion of corporations, but does anyone have even a moderately negative opinion?" If there are still no hands, pull back more: "Even a slightly negative opinion of corporations?"

- **Call a spade a spade.** When it is surprising that nobody responded, recognize it: "Really? Nobody here has any negative opinions of corporations?" If needed, call on a few people personally until someone admits they have an unfavorable view. Then, use that opening: "Who feels the same as Juror #4?" (While not an advisable method for every question, this should be done as needed for key questions that can generate cause challenges, such as anti-corporate bias, sympathy for the plaintiff, and distrust of the defendant/the defendant's industry.)

In Conclusion

Headliners appoint opening acts for a number of reasons. Perhaps above all, it is because openers set the tone. They put the audience in the right mood for what is to come, allowing the headliner to pick up that momentum and carry it forward. So, when an opening act bombs, the next performer must work that much harder to shift the mood.

Thankfully, even if the plaintiff attorney ahead of you tanks in voir dire—and even if it was deliberate—a showman with the right techniques can still turn things around for the defense.

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