

Playing the Other Side's Hand: Strategic Voir Dire Technique

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Voir dire is structured like an important strategy game with moves and counter-moves based on the opposing action. Voir dire plans, however, often fail to take into account the other side's strategy, and their actions based on their thinking. Higher-level strategic thinking used by people like game theorists, professional poker players and military strategists involves thinking from the opponent's point of view and adjusting one's own strategy accordingly.



When seeing the voir dire process in this way, you will soon find that there are many untapped sources of information about the other side's trial strategy, voir dire strategy, and potential juror information that are not usually recognized by attorneys and jury consultants. In addition, you will find that there are more ways to make an impact in the jury selection process based on strategic thinking than are usually noted.

Peeking at the Other Side's Hand:

The Jury Questionnaire as a Guide to the Opposing Side's Strategy

Many jury consultants believe that the supplemental juror questionnaire is the key to being flooded with useful information with which to make informed decisions. What if, however, this finely crafted document actually exposes more information than it uncovers?

I recently worked on the plaintiff side of a medical malpractice case. The other side submitted a proposed twenty-page juror questionnaire. Amid scores of fairly boilerplate questions (including the soul-crushing "What television shows do you enjoy watching?" and "Have you ever served as a juror?") were a variety of more case-specific questions that revealed the opposing side's views of the case.

Although it is likely that the man who wrote these items believed that he was cleverly hiding his side's intent, anyone who has ever written a jury questionnaire could have fairly easily discerned the seemingly overt reasons for asking them, as well as the covert reasons. In showing who they were trying to expose and thus strike, the opposing side was also inadvertently showing the areas that they believed were the weakest points of their case.

By reading what they wanted to expose, I was reading what facts and arguments were troublesome to them. I could thus offer a wealth of information to my clients, and make recommendations for alterations in voir dire strategy and trial strategy.

*When the Other Side Plays Your Hand:
Counter-Strategy to an Inappropriate Batson Challenge*

It could be argued that there is usually no reason to try to understand the other side's voir dire strategy in that there is often no real strategy beyond opposing counsel getting a feel for potential jurors. This is often revealed with the surprise that the other side has failed to strike people who had seemed to be obvious strikes.

On the other hand, we often do not know whether the other side is thinking deeply about voir dire strategy until late in the process. I once had the realization late in the process that I was up against an attorney who was very successfully playing my hand.

I was working for the defense side of an employment case involving charges of racial discrimination of an Hispanic plaintiff. Based on focus group research, we had a clearly defined voir dire strategy. After we had made a number of strikes, we were surprised when opposing counsel made a Batson challenge stating that we had struck people from a variety of non-White racial groups. We were surprised because we had not been making strikes based on race, and because there was no particular racial group that we were being accused of striking. It was at that point that I realized that the opposing counsel's strategy all along had been that he would make a Batson challenge almost regardless of what we had done.

The judge was clearly irritated by this challenge, because she too saw that there was no particular racial group that was ostensibly being targeted. When she questioned our attorney about it, though, he explained his reasoning for his strikes in a somewhat halting manner which apparently made the judge believe that he was making up reasoning on the spot to cover for racially motivated strikes. She placed some of the previously struck jurors back in the panel.

Meanwhile, I reviewed the other side's strikes and whispered to our lead attorney that the opposing counsel had struck only White members of the pool. In response to what we considered to be an inappropriate Batson challenge, we raised our own. The judge ultimately reseated a number of their struck jurors as well.

After the trial and verdict, we learned that one of their reseated jurors had turned the entire jury to a verdict favorable to our side. When I ran into this lawyer a few months later, he looked shaken when he realized who I was, and attributed his loss to our Batson challenge.

*Outplaying with the Hand Dealt:
Using Live Courtroom Social Behavior Strategically*

What do you do when you believe you are in an unfavorable position going into voir dire? When playing a weaker hand, first, try to use more information in the courtroom than the other side uses. There are a lot of social behaviors by potential jurors in a courtroom that are not usually noticed or used by people selecting juries.

For example, many attorneys and consultants try to find out whether jurors will be leaders or followers in deliberations by asking them directly about their views of themselves on a leader-follower continuum. The actual evidence of these types of behaviors, however, is often highly visible and thus immediately accessible during the jury selection process. Many attorneys and jury consultants are more comfortable getting hard data from direct answers to direct questions, but those who are open to making mountains out of molehills can reasonably imagine how small behaviors will play out in deliberation rooms. As a sign of a potential juror's leadership qualities, take note of how hard each person presses the judge to get excused due to hardship, including whether they make repeated

attempts, and how differentially or forcefully they treat the judge. If someone shows less deference to the judge, and is diligent in trying to get sent home, this person is likely to be a leader in the deliberation room. If he or she seems likely to favor your case (even if cranky about not getting sent home), the person can potentially bring other jurors to your side.

Observe how friendly potential jurors are to one another during the whole voir dire process, particularly if one connects two or three others into a conversation. Typically, most potential jurors have little social interaction with others in the room, but social connectors will be highly visible. These are the people with the social skills to build consensus in a deliberation room. If a connector juror seems like someone who will see things in your favor, he or she is highly valuable.

Outplaying From an Unfavorable Jury Pool: Encouraging Targeted Cause Challenges

The second thing you can do when in a less favorable position with an unfavorable jury pool is to make the most use of the limited number of peremptory challenges by encouraging potentially unfavorable jurors to provide quotable reasons for cause challenges. Many attorneys and jury consultants worry that potential jurors will say negative things that will “infect” the others. The concern that a stranger will have a strong effect on others’ decisions seems a bit overblown, however, considering the alternate upside of being able to get this unfavorable juror to say, in so many words, that this negative opinion makes them unable to be fair and impartial. You can clear a lot of ground with targeted cause challenges before even getting to the peremptories.

Outplaying from a Weaker Position: Educating and Persuading with Strategic Questioning

Lastly, outside of the most Spartan of federal voir dire, it is often possible to use voir dire to provide narrative context for the case under the guise of asking questions. This can be done to remedy issues that were revealed in a jury questionnaire, to spin issues that were revealed as weak points in focus group or mock trial research, or just to lay a foundation on which the opening will build. This is done by packing questions with favorable thematic material, usually by preceding the questions with a sentence or two of consensus-building context.

For example, in a case in which counsel is concerned about witness memory, it makes sense to ask a voir dire question that actually educates and spins the potential jurors on this topic by saying something like “Many people believe that when something bad happens to someone, for instance, the person gets attacked or shouted at, the details of that event are more memorable. In fact, though, many scientists have proven that it’s actually harder to remember the details of exactly who did what when the event was very emotional. A lot of people outside this courtroom would find that hard to believe. Who in here would find it surprising that someone might not remember some details about something that happened many years ago even though it was very upsetting?”

The Perception of the Strategist

My experience has been that juries are intrigued by the swirl of strategy and counter-strategy that leads to their selection. One jury that was selected based in large part on individuals’ social behaviors ended up friendly with each other and willing to deliberate for a long time without rancor. When interviewed after their favorable verdict, they asked who had put together “the perfect group of people.”

Opposing attorneys, however, seem to have a different view of being outflanked. I recently entered the courtroom on the day after voir dire only to be greeted by opposing counsel saying “The Forces of Evil are here.”